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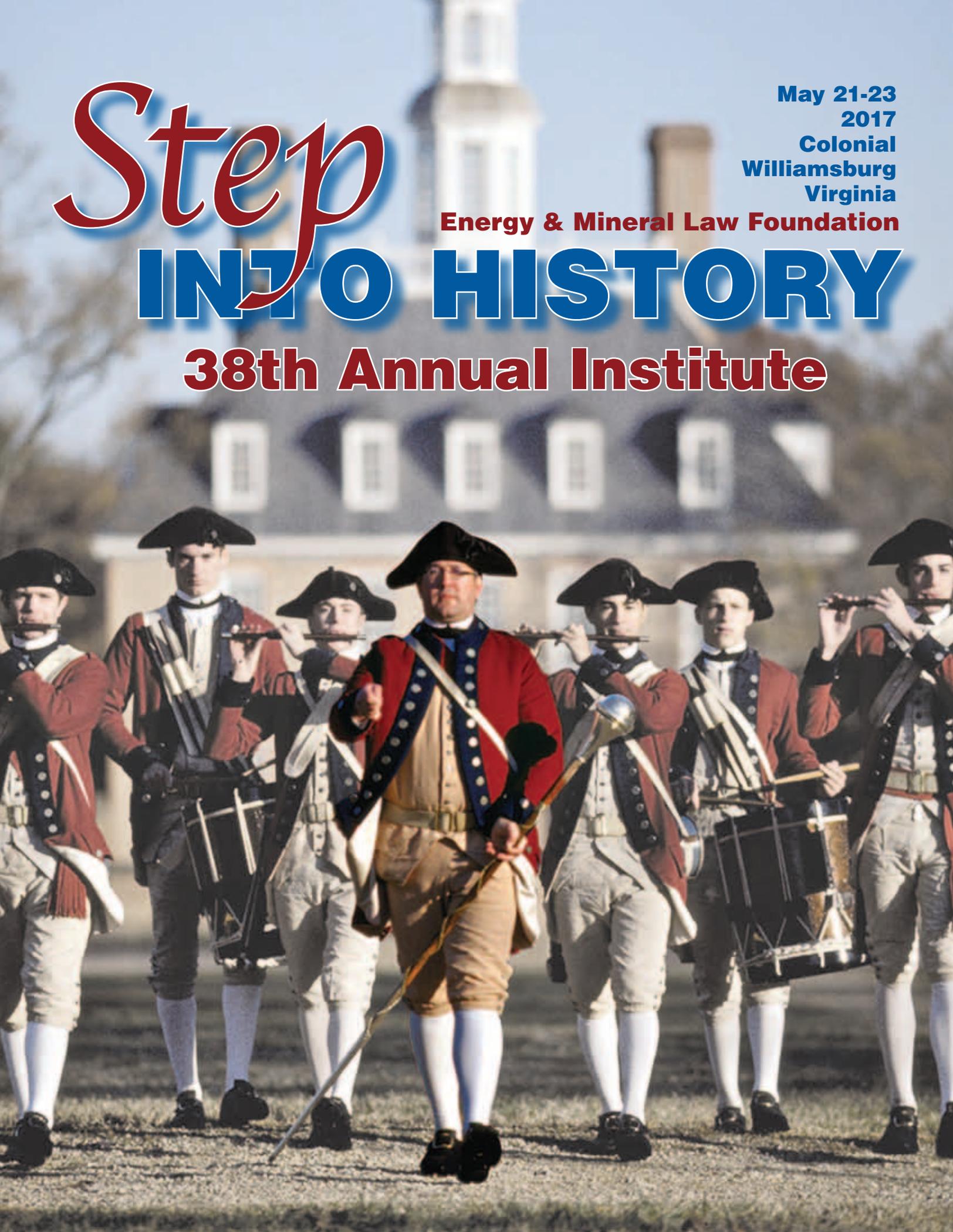
INTO HISTORY

38th Annual Institute

May 21-23
2017

Colonial
Williamsburg
Virginia

Energy & Mineral Law Foundation





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Program Schedule

Sunday, May 21

- 1:00 – 3:00 p.m. **Executive Committee Meeting**
- 3:00 – 5:00 p.m. **Board of Trustees Meeting**
- 3:00 – 7:00 p.m. **Registration Open**
- 5:00 – 7:00 p.m. **Hosted Welcome Reception**

Monday, May 22

7:30 – 8:30 a.m. **Continental Breakfast**

- 8:45 – 9:00 a.m. **Welcome and Introductions**
 - Daniel W. Wolff, EMLF President, *Crowell & Moring LLP*, Washington, DC
 - Kevin L. Colosimo, Annual Institute Chair, *Frost Brown Todd LLC*, Pittsburgh, PA

- 9:00 – 9:50 a.m. **Keynote Address**
Energy Policy in a Brave New World
 - Christopher Guith, Senior Vice President for Policy, Institute for 21st Century Energy, *U.S. Chamber of Commerce*, Washington, DC

- 9:50 – 10:40 a.m. **Congressional Review Act**
This presentation will review the historical background, passage, provisions and use of the Congressional Review Act prior to 2017 and its use under President Trump, and the potential implications to natural resource extractive industries.
 - Armando F. Benincasa, *Steptoe & Johnson PLLC*, Charleston, WV

10:40 – 11:00 a.m. **Break**

11:00 a.m. – 12:30 p.m. **Regulatory Roundtable – A View from Industry in DC on the Road Ahead in the Trump Administration**

The arrival of the Trump Administration in Washington is having ground-shifting effects across the regulatory landscape, as White House officials have committed themselves and the Cabinet to the “deconstruction of the administrative state.” What does this mean for the myriad regulatory schemes that govern the energy and mineral industries? What opportunities and potential pitfalls may lie ahead? A roundtable of senior-level industry trade association representatives will address these questions and the overall regulatory environment of the Trump Administration for the energy and mineral industries.

Moderator

- Kirsten L. Nathanson, *Crowell & Moring LLP*, Washington, DC

Panelists

- Susan W. Ginsberg, Vice President of Crude Oil and Natural Gas Regulatory Affairs, *Independent Petroleum Association of America*, Washington, DC
- Richard S. Moskowitz, General Counsel, *American Fuel & Petrochemical Manufacturers*, Washington, DC
- Katie Sweeney, General Counsel, *National Mining Association*, Washington, DC
- Sharon Theodore, Director of Regulatory Affairs, *Electric Power Supply Association*, Washington, DC

12:30 – 1:45 p.m. **Hosted Luncheon and Program**



WOLFF



COLOSIMO



GUITH



BENINCASA



NATHANSON



GINSBERG



MOSKOWITZ



SWEENEY



THEODORE

Sessions Resume

1:45 – 2:30 p.m.

Coastal Flooding and Sea Level Rise for Energy and Mineral Facilities: Ripple Effects or Sea Change?

This interactive presentation will explore how recurrent coastal flooding and projected sea level rise are expected to impact energy and mineral facilities, operations, financing, long-term planning, and legal liability, as well as risk management and opportunities for business growth, drawing on Virginia's experience and legal framework for context.

■ Henry R. "Speaker" Pollard, V, *Williams Mullen*, Richmond, VA



POLLARD

2:30 – 3:15 p.m.

Drones in the Energy Business

A growing number of energy companies have recently received Federal Aviation Administration (FAA) approval to use drones. Energy companies are discovering that drones allow them to monitor pipelines, roads, storage tanks, buildings, bridges, and power lines and also provide a critical role in emergency response. Despite the potential benefits, many business leaders have chosen a "wait and see" attitude, as the risks associated with the improper or illegal use of drones can be significant. James Mackler, a former military pilot, will address the overlapping state and federal laws governing the commercial use of drones and the rapidly evolving issues surrounding privacy, trespass, and civil liability stemming from drone use.

■ James E. Mackler, *Frost Brown Todd LLC*, Nashville, TN



MACKLER

3:15 – 3:30 p.m.

Break

3:30 – 4:15 p.m.

The Clean Power Plan – Where Are We Now?

President Trump and EPA Administrator Pruitt promise a change in direction on climate regulation, including a revisit of President Obama's Clean Power Plan, which regulated emissions of greenhouse gases from existing fossil fuel-fired power plants. Tom Lorenzen, who argued a portion of the challenge to the rule before the D.C. Circuit sitting en banc last September, will discuss options for and potential obstacles to rolling back or revising the Clean Power Plan.

■ Thomas A. Lorenzen, *Crowell & Moring LLP*, Washington, DC



LORENZEN

4:15 – 5:15 p.m.

Hot Topics in Legal Ethics

This interactive session will explore high profile ethics issues that attorneys are facing today. Using hypotheticals, it will cover competence, confidentiality, e-mail, marketing, social media and more.

■ David G. Ries, *Clark Hill PLC*, Pittsburgh, PA



RIES

5:15 – 6:30 p.m.

Hosted Reception

Tuesday, May 23

7:00 – 8:00 a.m.

Continental Breakfast

Breakout Session A – Oil & Gas

8:00 – 8:45 a.m.

Fracking Fingerprints: Chemistry and Statistics in Environmental Litigation

Allegations of environmental contamination often give rise to considerable finger pointing. Was the contamination caused by a company, its contractor, or a negligent landowner? Courts must often sort out what the evidence does, and does not, prove. The use of chemical fingerprints and other environmental forensic techniques can be important in cases involving alleged contamination. Such techniques can allow plaintiffs, defendants, and the courts to sort out environmental liability in complex cases. This presentation introduces attendees to the concept of chemical fingerprinting and discusses its use, limitations, and evidentiary value in the context of environmental litigation.

■ Roger G. Hanshaw, Special Counsel, *Bowles Rice LLP*, Charleston, WV



HANSHAW

8:45 – 9:30 a.m.

Evaluation of Industrial Noise in the Oil and Gas Industry – All You Ever Wanted to Know About Legal, Technical, and Epidemiological Implications

This session will define "noise" and its distinction from sound, how noise is quantified, the federal, state, and local regulations, including the Noise Control Act of 1972 and the Quiet Communities Act of 1978, the FERC's noise standard for natural gas compressor stations, industry standards for compressor stations, noise mitigation strategies, and the adverse health consequences of noise.

■ Donald C. Sinclair II, *Steptoe & Johnson PLLC*, Wheeling, WV



SINCLAIR

9:30 – 10:15 a.m.

Oil & Gas Litigation Update

The annual update on significant cases impacting the oil and gas industry.

- Callie E. Waers, *Babst Calland*, Charleston, WV

10:15 – 10:30 a.m.

Break

10:30 – 11:15 a.m.

Statutes of Limitations and Equity: Emerging Defenses to Lease Busting Claims Based on Ancient Gaps in Production

Typically, an oil and gas lease terminates at the end of its primary term unless some activity – such as production in paying quantities – holds the lease. Can a lessor successfully establish that the lease terminated due to gaps in production if the lessor waits years or even decades before pressing its claim? A recent Ohio appellate court decision (*Potts v. Unglaciated Indus.*) held that claims to terminate leases based on ancient gaps in production may be barred by the applicable statute of limitations. However, this decision cuts against another recent Ohio appellate decision (*Schultheiss v. Heinrich. Enters.*) which suggested that nothing could revive a previously terminated oil and gas lease, regardless of the age of the claim. In early May, the Supreme Court of Ohio will hear *Schultheiss* on the issue of whether estoppel bars a lessor's claim. Claims for lease termination based on stale gaps in production may also be informed by the Supreme Court of Texas' decision in *Natural Gas Pipeline Co. v. Am. v. Pool*, which applied a statute of limitations for adverse possession claims where the parties continued under the original lease for 14 years after an alleged lapse in production. Pete Lusenhop, Ilya Batikov and Jessica Cunning will discuss lease termination claims based on ancient gaps in production, the reasoning of the cases, and potential resolutions by states in the Appalachian Basin.

- Peter A. Lusenhop, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- Ilya Batikov, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- Jessica Knopp Cunning, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH

11:15 a.m. – 12:15 p.m.

Ethics Presentation – Breaking With Tradition: Exercising Professional Judgment When Drafting Oil and Gas Documents

This presentation qualifies as an ethics presentation with the primary focus on Model Rule of Professional Conduct Rule 2.1. The theme is that legal drafting, like other lawyering skills, requires the exercise of professional judgment to prepare the most appropriate and most serviceable document to meet a client's needs. The basic message is that too often the drafting process is dominated by use of the familiar and often perpetuated form documents, instead of engaging in the research, analysis, and original thought required for the task. After setting out the ethical obligations and industry practices, Professor Pierce demonstrates his thesis by deconstructing commonly used oil and gas documents and redrafting them employing the drafting technique dictated by Model Rule 2.1.

- Professor David E. Pierce, *Washburn University School of Law*, Topeka, KS

12:15 – 1:30 p.m.

Lunch on your own

Breakout Session B

8:00 – 8:45 a.m.

Louisiana Wetlands and Coastal Issues

Louisiana wetland cases have garnered the full attention of the energy industry as actions which were once legal and even encouraged by Louisiana state and local government are now being litigated in state court. In 2015, Louisiana coastal parishes and the state government sued energy companies alleging extraction activities in the 20th century caused environmental harm. The speakers will discuss state and local governments' use of state-level litigation as a mechanism for re-regulating past "deficiencies" in environmental regulation. Their presentation will highlight how these cases violate the principle of no ex-post-facto changes in law and regulation; the significant costs such cases can impose on energy and other allegedly "polluting" companies; and the challenges defendants face and their need for expert witness development.

- Samuel L. Tarry Jr., *McGuireWoods LLP*, Richmond, VA
- Jonathon A. Wolfson, *McGuireWoods LLP*, Richmond, VA



WAERS



LUSENHOP



BATIKOV



CUNNING



PIERCE



TARRY



WOLFSON

8:45 – 9:30 a.m.

Blockchain: The Technology Revolution You Haven't Heard Of – Yet

Blockchain technology has the potential to materially impact the American energy sector, including the acceleration of a U.S. transition toward localized clean energy solutions. Blockchain technologies can be understood conceptually as a chronological record of transactions that are compiled, processed and verified by a decentralized network of computers using distributed ledger and cryptographic mechanisms. Our focus will include case studies for the technology and an analysis of how adequate existing regulatory frameworks are to enable adoption and integration of blockchain-based systems into the energy sector.

- Cameron Prell, Crowell & Moring LLP, Washington, DC
- Matthew B. Welling, Crowell & Moring LLP, Washington, DC



PRELL



WELLING

9:30 – 10:15 a.m.

Are ALJs an Endangered Species?

The Administrative Law Judge (ALJ) system is central to the resolution of disputes involving regulatory enforcement by administrative agencies, but a recent Tenth Circuit decision in *Bandimere v. SEC*, held that the SEC's use of ALJs violated the Constitution's Appointments Clause, and therefore ALJs must be appointed by the President and approved by the Senate, not "hired" through a standardized selection process. This decision stands in contrast to the D.C. Circuit's *Raymond J. Lucia Companies, Inc. v. SEC*, where the SEC's ALJs were found to be "employees" not subject to the Appointments Clause. The split is ripe for Supreme Court review, which has the potential to profoundly alter the ALJ system and litigation of regulatory disputes. This presentation will review the ALJ system and the cases that have presented the conflict, and consider the potential impact of a Supreme Court resolution on a number of agencies' ALJs, including the EPA, Department of Labor, Federal Mine Safety & Health Review Commission and Occupational Safety & Health Review Commission.

- Arthur Wolfson, *Jackson Kelly PLLC*, Pittsburgh, PA



WOLFSON



LYONS

10:15 – 10:30 a.m.

Break

10:30 – 11:15 a.m.

Recent Developments in the Regulation of Pipelines

This session addresses a broad range of recent regulatory developments that affect pipelines, including the new administration's executive orders specifically addressing Keystone XL and Dakota Access; recent Pipeline and Hazardous Materials Safety Administration regulations, particularly in light of the new administration; and an update on condemnation issues including the recent West Virginia Supreme Court decision regarding right to survey prior to condemnation.

- Ramonda C. Lyons, *Lewis, Glasser, Casey & Rollins PLLC*, Charleston, WV



BELLEVILLE

11:15 a.m. – 12:15 p.m.

The Use of Programmatic Environmental Impact Statements Under NEPA to Set Energy Policy

A Programmatic Environmental Impact Statement (PEIS) is in many ways the only way to consider climate change impacts, as a single permit for a particular project really can't do any kind of attribution analysis. The Army Corps has rejected calls to do a programmatic Environmental Impact Statement with respect to coal export terminals. The Bureau of Land Management/Department of Interior (BLM/DOI) has stalled mining on public lands while doing a PEIS on our overall leasing program. There were calls for the Federal Energy Regulatory Commission (FERC) to do a PEIS while deciding whether to grant certificates for the 10 or so proposed natural gas pipelines on the east coast. The Council of Environmental Quality (CEQ) came out with new guidance both on making better use of the PEIS and considering climate change when doing an Environmental Impact Statement (EIS). It seems we are entering a stage where, at least depending on the administration, the National Environmental Policy Act (NEPA) may start having more than just procedural force, and where the programmatic EIS is the only way to really take account of the climate change effects of a particular policy or permit.

- Professor Mark L. "Buzz" Belleville, *Appalachian School of Law*, Grundy, VA

12:15 – 1:30 p.m.

Lunch on your own

Mineral Titles Track

1:30 – 2:15 p.m.

Comparative Analysis of Unique Title Matters

Through the use of real-life examples, Jay Carr and Mike Vennum will examine and compare the laws of various states within the Appalachian Basin with respect to unique title matters, including: (1) ownership of real property titled in defunct entities and unincorporated associations; (2) procedure for forfeiting expired oil and gas leases; (3) proper use of corrective deeds; (4) validity of reservations made in favor of strangers to title/deed; and (5) ownership of minerals lying beneath the Ohio River. This presentation will also discuss new curative statutes enacted by legislatures within the Appalachian Basin.

- James “Jay” A. Carr II, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- Michael K. Vennum, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH

2:15 – 3:00 p.m.

Liability of Abstractors and Attorneys for Title Claims

This session covers 1) trespass claims resulting from title failure, including liability of the attorney for erroneous interpretation of deed language or erroneous review of the abstract – missing title chain, gap in title chain, etc. Liability of the abstractor includes failure to include deeds or other instruments that should have been located in the course of the title search, or erroneous reliance on deed recitals; 2) insurance coverage – professional liability insurance for attorneys and errors and omissions insurance coverage for abstractors; 3) trespass claims resulting from title errors; 4) defenses to claims by a client; and 5) reliance on abstract or title opinion rendered to predecessor in title.

- Sean Cassidy, *Sean Cassidy and Associates, P.C.*, Greensburg, PA

3:00 – 3:45 p.m.

Recent Decisions in the Law of Mineral Ownership in Virginia: Resolution or an Open Door?

The Virginia Supreme Court decisions in *Swords Creek Land Partnership v. Blecher* and *Dye v. CNX Gas, LLC* have in some ways altered and in other ways solidified the Commonwealth’s stance on the decade-long saga of coalbed methane ownership. The *Swords Creek* decision left owners of coal with a somewhat expanded, but incomplete resolution of the issues first decided in *Harrison Wyatt v. Ratliff* in 2004. The *CNX* case reaffirmed for mineral owners the long-standing rule in Virginia that gas is in fact a mineral, but also left open a small door for surface owners to take yet another bite at the golden apple, where, despite recent legislation, many millions of dollars still remain in escrow under the provisions of the Virginia Gas and Oil Act. This presentation analyzes the impact of the two cases on mineral title in Virginia and considers where the state of the law is unresolved and open to further interpretation by the Virginia Supreme Court.

- Mason E. Heidt, Associate Dean for Academic Affairs and Assistant Professor of Law, *Appalachian School of Law*, Grundy, VA

3:45 – 4:30 p.m.

Railroads and Rights-of-Way

This presentation looks at the most frequent issues that arise when dealing with railroads, whether it be new crossings, renewing permits, relocations and/or correlative rights. Discussion will be provided regarding the title review analysis to undertake prior to approaching railroads to determine pecking order, and negotiation tips for use during negotiations.

- Beth L. Minear, *Contract Land Staff, LLC*, Ripley, WV

4:30 p.m.

Annual Institute adjourns



CARR



VENNUM



CASSIDY



HEIDT



MINEAR

Annual Institute Planning Committee

- Program Chair, Kevin L. Colosimo, *Frost Brown Todd LLC*, Pittsburgh, PA
- John T. Boyd II, *John T. Boyd Company*, Canonsburg, PA
- Karen J. Greenwell, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY
- Kurt L. Krieger, *Steptoe & Johnson PLLC*, Charleston, WV
- Kirsten L. Nathanson, *Crowell & Moring LLP*, Washington, DC





Yes, I want to attend the 38th Annual Institute.

Registration fee includes all sessions and meeting materials in electronic format, reception Sunday evening, lunch and reception Monday, continental breakfasts and refreshment breaks. All registrants will receive a copy of Volume 38 of the *Energy & Mineral Law Institute* publication in electronic format in early 2018. Guest registration fee covers hosted receptions on Sunday and Monday.

<i>Registration fees</i>	<i>Early Bird by May 1</i>	<i>After May 1</i>
Non-member Registration Fee	\$800	\$900
EMLF Member	\$600	\$700
Young Lawyer (3 years or less), EMLF Landman, Full-Time Law Faculty and Government Attorneys		
	\$375	\$475
Speaker Registration Fee	\$200	\$200
Law Student Registration Fee	\$120	\$120
Guest Registration Fee	\$80	\$ 80
Additional lunch tickets	\$45	\$ 45

First Name _____ M.I. ____ Last Name _____ Badge name _____

Organization/Firm _____ Title _____

Address _____

City, State, Zip _____

Daytime Phone _____ Fax # _____

Email Address _____ Guest _____

State(s) for CLE Credits? _____ Do you need AAPL Credit? _____

Fees:

Conference registration \$ _____

Guest registration \$ _____

Add'l lunch ticket \$ _____

Total \$ _____

Conference accreditation is pending from states with mandatory Continuing Legal Education and with the AAPL. Please indicate on your registration form where you are seeking credit. Application will be made for 755 minutes of continuing education, including 120 minutes of ethics. In states which calculate 50 minutes as a CLE hour, this will be 15 hours of CLE. In states which calculate 60 minutes for a CLE hour, this will be 12.5 hours of CLE credit. Complete information for reporting your credits will be available at the conference. Additional fees may be required for certain states/organizations.

You may pay by _____ check or _____ credit card. EMLF accepts MasterCard, VISA or American Express.

Card # _____ Expiration date _____

Signature _____ CVV code (security code) _____

Cancellation policy

Cancellations received by May 10 will receive a full refund less a \$75 administrative fee. No refunds for cancellations after May 10, but course materials will be sent after the conference. Substitutions can be made at any time at no charge. EMLF members who cancel after May 10 receive a \$200 credit toward a future program, plus meeting materials.

Three ways to register

- If registering online, go to www.emlf.org
- If registering by fax, call 859.226.0485
- If registering by mail, send form and payment to EMLF, 340 South Broadway, Suite 101, Lexington, KY 40508

Energy & Mineral Law Foundation
340 South Broadway, Suite 101
Lexington, KY 40508



38th Annual Institute

May 21-23, 2017

Williamsburg Lodge
Colonial Williamsburg
Virginia

Conference Accommodations

The host hotel for the Annual Institute is the Williamsburg Lodge, 310 South England Street, Colonial Williamsburg, located in the heart of the Revolutionary City. Just steps from the action, the lodge boasts a world-class restaurant and convenient access to spa and golf recreation amenities. It is one of the Autograph Collection Hotels, Marriott International's distinctive portfolio of over 100 independent, one-of-a-kind hotels

For reservations, call toll free 800.261.9530 (8:30 a.m.-5 p.m. EST) or 757.229.1000 x5000 or go to www.emlf.org to make an online reservation. Attendees must identify themselves as registrants for the Energy & Mineral Law Foundation or by the title of the meeting which is 38th Annual Institute. The superior rooms (one queen bed) will be \$187 plus taxes. The deluxe rooms (2 queens or 1 king bed) will be \$219 and a suite will be \$259. The EMLF room block is released April 18.