

# BALTIMORE

34th  
Annual Institute

June 16-18, 2013

Renaissance Baltimore Harborplace Hotel  
Baltimore, Maryland

Energy & Mineral Law Foundation





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# Program Schedule

## Sunday, June 16, 2013

5:00 p.m.

**Registration Opens**

6:00 – 8:00 p.m.

**Welcome Reception — Baltimore Ballroom**

## Monday, June 17, 2013

7:00 a.m. – 5:00 p.m.

**Registration**

### *General Sessions— Baltimore Ballroom*

8:00 a.m.

**Welcome and Introductions**

- Timothy M. Miller, Foundation President, *Robinson & McElwee PLLC*, Charleston, WV
- Timothy W. Gresham, Program Chairman, *Penn Stuart & Eskridge*, Abingdon, VA
- Timothy J. Hagerty, Coal Chair, *Frost Brown Todd LLC*, Louisville, KY
- Natalie N. Jefferis, Oil and Gas Chair, *EQT Midstream*, Pittsburgh, PA

8:10 – 9:00 a.m.

**Environmental Regulatory Pressures on Coal-Fired Electric Generation**

The environmental regulatory pressures faced by coal producers have been well documented in recent years. Equally, if not more significant, are the environmental pressures faced by the largest end-users of coal – electric generating facilities. A host of air, waste, and water regulations threaten to limit the ability of utilities to burn coal for electric generation. This presentation will provide an update on the status of these significant rules under the Clean Air Act, the Resource Conservation and Recovery Act, and the Clean Water Act. Topics will include changes to emission limits, revisions to national ambient air quality standards and how the revisions affect electricity generators, greenhouse gas emission regulations, efforts to change how coal combustion residuals are regulated, effluent limit guidelines, and cooling water intake structure rules.

- Monica Derbes Gibson, *Venable LLP*, Washington, DC

9:00 – 9:50 a.m.

**What's Happening at FERC re Aligning Electric Companies and Pipeline Capacity?**

Natural gas is being used much more heavily in electricity generation, and this trend is likely to accelerate as coal-powered generation is retired, renewable energy resources require more backup by natural gas plants, and low natural gas prices encourage more use of gas. Are sufficient resources being allocated to planning for the increased use of natural gas to generate electricity?

- Michael Goldenberg, Senior Attorney, Office of General Counsel, *Federal Energy Regulatory Commission*, Arlington, VA

9:50 – 10:10 a.m.

**Break**

10:10 – 11:00 a.m.

**Regulatory Takings and Other Constitutional Protection for Mineral Rights**

Mineral developers and oil and gas producers must invest large sums in property acquisition and development work to bring mining or drilling projects to fruition. They must do this in a shifting political and cultural environment, where burgeoning public concern about environmental and safety issues may generate demands for legislative or regulatory restrictions or prohibitions. Where new rules thwart development, are there any Constitutional protections for the developer's property rights? The doctrine of "regulatory takings," which allows developers to recover compensation from government in some extreme cases, and the modern interpretation of "laws impairing the obligation of contracts" as imposing some limits on the freedom of state and local authorities to disavow their own contracts, may provide some hope. This presentation explores the development and status of these doctrines.

- David K. Brooks, Assistant General Counsel, *Energy, Minerals and Natural Resources Department*, State of New Mexico, Santa Fe, NM



MILLER



GRESHAM



HAGERTY



JEFFERIS



GIBSON



GOLDENBERG

11:00 a.m. – Noon **Evidentiary Privileges Applicable to Title Opinions of Counsel**

In claims involving ownership of mineral interests, title opinions prepared by counsel will usually be sought in discovery. A defendant will normally attempt to protect title opinions from discovery under a claim of attorney client and work product privilege. The protections afforded mineral title examinations from discovery should be broad: unlike title opinions prepared for residential real estate, opinions given in the course of mineral title examinations customarily are afforded significant protection from disclosure by the company that secures it. Nevertheless, the privilege accorded mineral transactions is not absolute, and like most evidentiary privileges it can be waived if the owner of the opinion takes some action that qualifies it. The presentation will suggest some measures that can be undertaken to minimize the risk so that the privilege that should adhere to title opinions is not waived.

■ Blair M. Gardner, *Jackson Kelly PLLC*, Charleston, WV



GARDNER

Noon – 2:15 p.m. **Lunch break – on your own**

12:15 – 2:15 p.m. **EMLF Board of Trustees Luncheon and Meeting**

2:20 – 2:30 p.m. **Announcements – Election Results**

2:30 – 3:30 p.m. and 3:45 – 4:45 p.m. **Hot Topics in Professional Ethics: Competence, Confidentiality, Conflicts, and Candor**

As the practice of law evolves over time, lawyers face both novel ethics challenges and recurring ethics issues in new contexts. This session will use hypothetical fact patterns to explore selected current issues, based on experience, recent case law and ethics opinions, and new amendments to the ABA Model Rules of Professional Conduct. It will explore technology and confidentiality, ethics in litigation, emerging areas of practice, lawyer mobility, and more.

■ John T. Leathers, *Buchanan, Ingersoll & Rooney*, Pittsburgh, PA

■ David G. Ries, *Thorp Reed & Armstrong*, Pittsburgh, PA

■ A.J. Singleton, *Stoll Keenon Ogden, PLLC*, Lexington, KY



LEATHERS



RIES



SINGLETON

4:45 p.m. **Adjourn**

6:30 – 7:30 p.m. **Hosted Reception**



AYER

## Tuesday, June 18, 2013

### Oil & Gas Track

8:00 – 8:50 a.m. **Oil and Gas Bankruptcy Issues**

This presentation touches on important issues at the intersection of oil and gas law and bankruptcy law which are not intuitive. Topics include simple things to do to get paid and protect lien rights, whether operating agreements are “executory” contracts that can be assumed in a bankruptcy case, maximizing an oil and gas seller’s reclamation rights, the priority of royalty claims, unrecorded assignments of oil and gas interests, “safe harbors,” when liens can be filed after bankruptcy, and whether an oil and gas lease is considered a “lease” that can be rejected in bankruptcy.

■ Mitchell E. Ayer, *Thompson & Knight LLP*, Houston, TX



CURRY

8:50 – 9:40 a.m. **State and Federal Pipeline Safety Regulation**

The U.S. Department of Transportation and the States administer a national pipeline safety inspection and enforcement program that covers gas and hazardous liquids pipelines. This presentation will survey the basics of the pipeline safety regulatory framework, potential expansions of its reach, and how existing and future requirements may affect oil and gas development.

■ James B. Curry, *Van Ness Feldman*, Washington, DC



STONE

9:40 – 10:00 a.m. **Break**

10:00 – 10:50 a.m. **Old Rights of Way – New Pipe**

You have a right of way and an old pipeline; can you replace it with a new pipeline? Can you install new valves and meters on the old pipeline? What about a pig launcher? Find out what your right of way really says. This presentation will review the substantive case law in Appalachia with regards to the interpretation of rights of way and easements and how broadly (or narrowly) they should be construed for on-going maintenance and upgrade projects.

■ Robert Stone, *Sean Cassidy and Associates, P.C.*, Greensburg, PA

10:50 – 11:40 a.m. **Legislative Oil and Gas Update**

This session will examine recent oil and gas related activities in the New York, Ohio, West Virginia and Pennsylvania state legislatures. The panel will recap the status of Act 13 in Pennsylvania, New York's draft oil and gas regulations, the recently passed Horizontal Well Act in West Virginia, and provide updates on other noteworthy bills pending in the state legislatures. Moderated by Natalie N. Jefferis, EQT Midstream, Pittsburgh, PA

- Joseph Dawley, Director of Government Affairs, *EQT Corporation, Inc.*, Pittsburgh, PA
- Amber Hodgdon, Staff Attorney, *EnerVest Operating, LLC*, Charleston, WV
- Thomas S. West, *The West Firm, PLLC*, Albany, NY

11:40 a.m. – 1:00 p.m. **Lunch break – on your own**

1:00 – 1:50 p.m. **The Role of Citizen Suits in the Shale Revolution**

Many federal health, environmental, and safety statutes contain citizen suit provisions that allow a person to bring a civil action in federal court to enjoin alleged statutory and regulatory violations. In most cases, a citizen suit can only proceed if certain procedural requirements are met; e.g., the citizen plaintiff must provide prior notice of the violation to the alleged violator and to the agency responsible for enforcing the statute or regulation. Moreover, a citizen suit cannot proceed if the agency or another law enforcement authority has begun and diligently is pursuing an administrative or judicial proceeding for the violation. The rapid expansion of energy infrastructure to transport oil and gas from the nation's shale plays and proposed reductions in the federal funding for administrative agencies will make the filing of citizen suits more likely in the coming years. This presentation will focus on the substantive and procedural requirements that apply in citizen suit cases, particularly in the context of the regulation of oil and gas production and pipelines.

- Keith J. Coyle and David E. Northrop, *Babst Calland*, Pittsburgh, PA

1:50 – 2:40 p.m. **Quiet Title Actions**

The panel will explore and compare basic elements required to conduct effective quiet title actions in Ohio, Pennsylvania and West Virginia. The points covered are intended to guide both those seeking to cure title defects utilizing quiet title actions and those evaluating the effectiveness of completed quiet title actions as part of due diligence or title review.

- Moderator: Joel E. Symonds, Of Counsel, *Steptoe & Johnson PLLC*, Charleston, WV
- Ohio Law: Timothy M. McKeen, *Steptoe & Johnson PLLC*, Wheeling, WV
- Pennsylvania Law: Nathaniel I. Holland, *Steptoe & Johnson PLLC*, Meadville, PA
- West Virginia Law: Robert J. Andre, III, *Steptoe & Johnson PLLC*, Bridgeport, WV

2:45 p.m. **Adjourn**

## Tuesday, June 18, 2013

### Coal Track Breakout

8:00 – 8:50 a.m. **The Perfect Storm: EPA Pressure and Citizen Suits in the Mining Industry**

Despite the primary responsibility the Clean Water Act gives states for establishing and implementing water quality standards, EPA has become increasingly involved in this process, often second-guessing the states' determinations. This presentation will examine this changing regulatory environment and the resulting onslaught of environmental group citizen suits. Emerging scientific data on selenium has combined with this regulatory uncertainty to create the "perfect storm" for environmental groups to aggressively pursue citizen suits to enforce selenium effluent limits in mining permits. Equally troubling is the campaign these groups are waging to expand the scope of a "point source" under the Clean Water Act by sending citizen suit notices to owners of reclaimed mining operations and former pre-law mining sites. The increased focus on selenium discharges from current and former mining operations is not expected to abate soon, and will likely contribute to continued tension between the industry, state regulators, EPA, and environmental groups over how to balance the promotion of our domestic energy industry with protection of the environment.

- Emily C. McKinney, *Frost Brown Todd LLP*, Louisville, KY

8:50 – 9:40 a.m. **Recent SMCRA Developments and Litigation Update**

The Surface Mining Control and Reclamation Act (SMCRA) was enacted almost thirty-six years ago, but many unsettled issues still surround the Act's system of cooperative federalism and the Office of Surface Mining's (OSM) enforcement authority. This presentation will examine recent SMCRA litigation and regulatory developments, including OSM's expanded 10-day notice enforcement policy and litigation challenging the agency's authority to second-guess state permitting decisions, the revived ENGO (Environmental Non-Governmental Organizations) challenge to the 2008 Stream Buffer Zone Rule and OSM's ongoing efforts to enact the Stream Protection Rule, the pending Ninth Circuit appeal challenging the District of Montana's decision adopting the sovereign immunity holdings of *Bragg* and *Pennsylvania Federation of Sportsmen's Clubs* and dismissing the ENGO hydrology-based challenges to state SMCRA permits, and OSM's ongoing review of the adequacy of state bonding programs that prompted reclamation bond changes (actual and contemplated) in Kentucky and West Virginia. This presentation also will address the outlook for prospective SMCRA developments, including the need for rulemaking or litigation to reform the maze of arguably out-dated and overly restrictive state ownership-and-control rules.

- Thomas C. Means and Sherrie A. Armstrong, *Crowell & Moring LLP*, Washington, DC



DAWLEY



HODGDON



WEST



COYLE



NORTHROP



SYMONDS



MCKEEN



HOLLAND



ANDRE



MCKINNEY

9:40 – 10:00 a.m. Break

10:00 – 10:50 a.m. **Distressed Asset Disposition: Selling Encumbered Mineral Properties**

To improve liquidity in a depressed market, coal producers may need to sell mineral properties. The existence of statutory liens and other encumbrances may hinder their ability to do so, particularly if the underlying amounts cannot be repaid in full. This presentation examines traditional encumbrances such as mortgages, fixture filings, tax liens, and judgment liens. Of particular focus will be a variety of applicable statutory liens existing in coal producing states within the Appalachian and Illinois Basins. Additionally, the presentation will discuss strategies and procedures for asset disposition despite the existence of statutory liens and other encumbrances. Was the statutory lien validly created? Could a prospective buyer purchase the underlying debt and foreclose upon the encumbrance to extinguish the rights of junior creditors? Can you bond off the statutory lien?

■ Kimberly H. Bryant and R. Clay Larkin, *Bingham Greenebaum Doll LLP*, Lexington, KY

10:50 – 11:40 a.m. **Reopening Pandora's Box: Market Price Reopeners in Volatile and Uncertain Times**

Persistent volatility in the energy markets has led coal buyers and sellers to reconsider the wisdom and practicality of the typical long-term coal supply agreement. Contract terms are getting shorter, but protection from pricing swings is still a primary concern. Parties increasingly rely on contractual price reopeners, but boilerplate reopener provisions may not adequately protect the client's interests and expectations. If you are a negotiator, administrator, or litigator of coal supply agreements, don't miss this informative discussion of how you can diminish the inherent uncertainty, risk, and potential for dispute in the price reopener process.

■ Justin W. Ross, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY

11:40 – 1:00 p.m. **Lunch break – on your own**

1:00 – 1:50 p.m. **Surf's Up: The Tidal Wave of Changes in Mine Safety Law**

The last few years have seen the Mine Safety and Health Administration (MSHA) challenge long established interpretations of safety laws, regulations and principles. Those challenges have morphed into regulatory changes, increased use of traditional criminal law, and use of regulatory enforcement changes and challenges. This session provides an overview not only of how the law has changed, but will discuss the tools used to change it, and what challenges remain for mining companies. This presentation also will address MSHA's regulatory agenda on proximity devices, pattern of violation (POV) procedures, and new dust regulations; expansion of the use of 105(c) discrimination complaints; numerous criminal law prosecutions based on the use of traditional criminal law theories outside the Mine Act; and advanced notice of mine inspections.

■ Mark E. Heath, *Spilman Thomas & Battle, PLLC*, Charleston, WV

1:50 – 2:40 p.m. **Welcome to Our World: MSHA Vulnerability to Suit Under Federal Tort Claims Act for Negligent Inspection**

After a mine fire caused the deaths of two miners, their widows brought suit not only against the company, but also against the Mine Safety and Health Administration under the Federal Tort Claims Act for failing to adequately inspect the mine and require corrections which would have averted the tragedy. The Supreme Court of Appeals of West Virginia found such a claim viable in *Bragg v. United States*. The court held that "a private inspector who inspects a work premises for the purpose of furthering the safety of employees who work on said premises owes a duty of care to those employees to conduct inspections with ordinary skill, care, and diligence commensurate with that rendered by members of his or her profession." This presentation will examine the broad ramifications of this decision, both for governmental entities charged with inspections, as well as for regulated companies who might expect more aggressive enforcement by MSHA.

■ Gretchen Callas, *Jackson Kelly PLLC*, Charleston, WV

2:45 p.m. **Annual Institute Adjourns**



MEANS



ARMSTRONG



BRYANT



LARKIN



ROSS



HEATH



CALLAS

*Upcoming Program . . .*

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*The Cone Wing at The Baltimore Museum of Art, home to the world's largest collection of works by Henri Matisse. Henri Matisse's Interior with Dog. 1934. © 2006 Succession H. Matisse, Paris/Artists Rights Society (ARS) New York. Photo by Howard Korn.*

### Annual Institute Accommodations

Located at 202 E. Pratt Street, this four-star, four-diamond, family-friendly hotel with wonderful harbor views is only eight miles from the Baltimore/Washington International Thurgood Marshall Airport.

Renaissance Baltimore Harborplace is a luxury hotel in downtown Baltimore, poised overlooking Baltimore's famous Inner Harbor. You'll find the hotel staffed with knowledgeable hotel Navigators ready to help you discover the rich character of their hometown.

Referred to as Charm City, Baltimore offers a diverse pallet of exploration. Baltimore's character is a result of its rich history, once the second largest port of entry for immigrants to the US, it remains a city of neighborhoods.

One of the most popular areas, Downtown Baltimore, is the city's main commercial district, home to Camden Yards, Baltimore Convention Center, the National Aquarium, and host to the annual Baltimore Grand Prix races.

The Renaissance Baltimore Harborplace Hotel is near all major points of interest, including popular Inner Harbor attractions, restaurants and shopping. Enjoy the hotel's award-winning restaurant — seafood is a specialty.

Check in time is 4 p.m.; check out is noon. Call 410.547.1200 or 800.468.3571 for reservations and ask for the EMLF room block, or register online through [www.emlf.org](http://www.emlf.org). Rates are \$169 per night for a standard room or \$209 per night for a harbor view room.

*Photo courtesy of [baltimore.org](http://baltimore.org)*

## Visit Charm City

One of the major seaports in the United States since the 1770s, Baltimore's Inner Harbor started blossoming into a cultural center in the 1970s. It has been described as "the model for post-industrial waterfront redevelopment around the world."

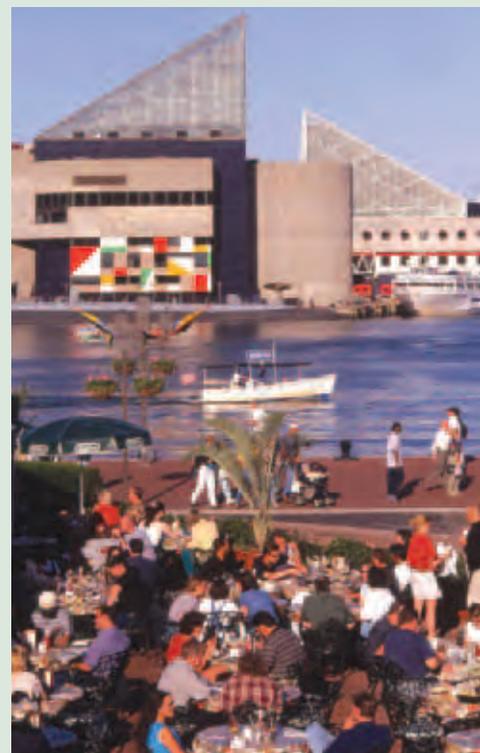
Locals and visitors alike enjoy the Inner Harbor and surrounding neighborhoods that offer a variety of fine dining, cultural experiences and nightlife. From the breathtaking view of the skyline from the Observation Level of the World Trade Center to the street performers at the waterfront, the Inner Harbor offers much to see. Right on Pratt Street (location of the conference hotel) is Harborplace and The Gallery which offer unique shopping, dining and entertainment, all right on the waterfront.

Cruise the Inner Harbor and beyond on the 65 foot Big Red Boat or take the newly renovated Spirit of Baltimore which offers year round lunch and dinner cruises. For the perfect way to get about the Inner Harbor, try the water taxi located on Lancaster Street.

Fort McHenry is just a water taxi ride away where you can learn about the Battle of Baltimore and the nation's history. There is also a Maritime Museum close by where you can tour the USS Torsk, the USCGC Taney, the Lightship Chesapeake and more. The USS Constellation, the only Civil War ship still afloat, is there as well.

And if museums and like attractions interest you, there are several sports-oriented museums at Camden Yards, including the birthplace of Babe Ruth, Maryland Science Center and Planetarium, the Baltimore Museum of Art, or the National Aquarium.

And while you are out and about, sample some of the food of Baltimore which has undergone a gastronomic renaissance. Of course, no visit to Baltimore would be complete without enjoying some delicious Maryland crab cakes.



Plan on extending your stay in Baltimore — begin planning your visit with the Baltimore Visitor Guide which contains details about What's Hot, What's Cool, and What's New in Baltimore. To learn more, simply call 410.659.7300 to request a free guide, or go to the website, [www.baltimore.org](http://www.baltimore.org)



## Yes, I want to attend the 34th Annual Institute June 16-18 at the Renaissance Baltimore Harborplace Hotel

Registration fee includes all sessions and meeting materials on CD, receptions on Sunday and Monday evenings, continental breakfasts and refreshment breaks. All registrants will receive a copy of Volume 34 of the Energy & Mineral Law Institute publication in CD format in early 2014. Guest registration covers Sunday and Monday receptions.

<i>Registration fees</i>	<i>Early Bird by May 17</i>	<i>After May 17</i>
Non-member Registration Fee .....	\$875 .....	\$975 .....
EMLF Member .....	\$675 .....	\$775 .....
Young Lawyer (3 years or less), EMLF Landman, Full-Time Law Faculty and Government Attorneys .....	\$475 .....	\$575 .....
Full-Time Law Student .....	\$130 .....	\$130 .....
June 17 Board of Trustees luncheon .....	\$70 .....	\$70 .....
Guest Registration Fee .....	\$155 .....	\$155 .....

First Name \_\_\_\_\_ M.I. \_\_\_\_ Last Name \_\_\_\_\_ Badge name \_\_\_\_\_

Organization/Firm \_\_\_\_\_ Title \_\_\_\_\_

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Daytime Phone \_\_\_\_\_ Fax # \_\_\_\_\_

Email Address \_\_\_\_\_ Guest \_\_\_\_\_

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

### Fees:

Conference registration	\$ _____
Guest registration	\$ _____
Board luncheon	\$ _____
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. The program contains 630 minutes of CLE, including 120 minutes of ethics. This is equal to 10.5 CLE hours including 2.00 hours of ethics in 60-minute states and 12.6 hours including 2.4 hours of ethics in 50-minute states. 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 June 5 will receive a full refund less a \$75 administrative fee. No refunds for cancellations after June 5, but CD and course materials will be sent after the conference. Substitutions can be made at any time at no charge. EMLF members who cancel after June 5 receive a \$200 credit towards a future program, plus meeting materials.

### Three ways to register

- If registering online, go to [www.emlf.org](http://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  
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Lexington, KY 40508

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# 34th Annual Institute

June 16-18, 2013

**Renaissance Baltimore  
Harborplace Hotel  
Baltimore  
Maryland**

## 34th Annual Institute Program Committee

The 34th Annual Institute program planning began with a solicitation to all members for legal issues they would like to see researched and addressed at the Annual Institute, to be followed by a scholarly paper published in the *Energy & Mineral Law Institute*. The Foundation gratefully acknowledges the following Members for their participation:

- Timothy M. Miller, Foundation President, *Robinson & McElwee PLLC*, Charleston, WV
- Timothy W. Gresham, Program Chairman, *Penn Stuart & Eskridge*, Abingdon, VA
- Timothy J. Hagerty, Coal Chair, *Frost Brown Todd LLC*, Louisville, KY
- Natalie N. Jefferis, Oil and Gas Chair, *EQT Midstream*, Pittsburgh, PA
  
- Jon Anderson, *Jackson Kelly PLLC*, Charleston, WV
- Sherrie A. Armstrong, *Crowell & Moring LLP*, Washington, DC
- Vanessa Baxter, *EQT Corporation*, Pittsburgh, PA
- Kathy Beckett, *Jackson Kelly PLLC*, Charleston, WV
- John T. Boyd II, *John T. Boyd Company*, Canonsburg, PA
- David K. Brooks, *Energy, Minerals, and Natural Resources Department*, Santa Fe, NM
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- Steven M. Carpenter, *Advanced Resources International*, Batavia, OH
- Keith J. Coyle, *Babst Calland*, Pittsburgh, PA
- Charles J. Crooks, *Jackson Kelly PLLC*, Charleston, WV
- Bruce E. Cryder, *Bingham Greenebaum Doll LLP*, Lexington, KY
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- Daniel W. Wolff, *Crowell & Moring LLP*, Washington, DC
- David L. Yaussy, *Robinson & McElwee PLLC*, Charleston, WV