



Annual Institute

Energy & Mineral Law Foundation

June 12-14, 2016

DoubleTree by Hilton

Charleston, South Carolina



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Pittsburgh, PA

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Charleston, WV

Program Schedule

Sunday, June 12, 2016

3:00 – 7:00 p.m. **Registration Open**

3:00 – 5:00 p.m. **Board of Trustees Meeting**

5:00 – 7:00 p.m. **Welcome Reception**

Monday, June 13, 2016

8:45 – 9:00 a.m. **Welcome and Introductions**

- G. Brian Wells, President, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY
- Kevin K. Douglass, Chair, *Babst Calland*, Pittsburgh, PA

9:00 – 9:30 a.m. **The State of the Energy Business – Energy Markets, Export Markets, Coal, Oil, and LNG**

- Seth Schwartz, President, *Energy Ventures Analysis*, Arlington, VA

9:30 – 10:15 a.m. **A Generator’s Portfolio – Meeting State and Federal Mandates**

- Charles R. Patton, President and COO, *Appalachian Power*, Charleston, WV

10:15 – 10:30 a.m. **Break**

10:30 – 11:15 a.m. **Federal Mitigation with Project Development**

Mitigation is a central focus of the federal government right now, and new policies are likely to increase the cost of project development and require additional advance planning. This session looks at the mitigation policies of various federal agencies, including the U.S. Department of Interior, U.S. Department of Agriculture, and the U.S. Army Corps of Engineers, and reviews practical strategies for incorporating mitigation into project development.

- James M. Auslander, *Beveridge & Diamond PC*, Washington, DC
- Randy Wilgis, Chief Solutions Officer, *Resource Environmental Solutions*, Columbia, SC

11:15 a.m. – 12:15 p.m. **Ripped from the Headlines: Politics, Scandal and Professional Responsibility**

This ethics hour will examine the application of the Rules of Professional Responsibility to the rash of recent high-profile cases involving lawyers, judges and lawyer-politicians. Ethical issues stemming from *Caperton v. A.T. Massey Coal, Pennsylvania v. Jerry Sandusky*, and *Pennsylvania v. (Supreme Court Justice) Joan Orie Melvin* will be discussed, along with the ethical conundrum facing the Pennsylvania Supreme Court in the wake of the email scandal and the Attorney General’s disbarment following her alleged leak of Grand Jury testimony. Other high-profile cases from Ohio, West Virginia, Indiana and elsewhere will be included. We’ll focus on Rules 1.6, 1.13, 8.3, and 8.4 of the Model Rules of Professional Conduct as well as the Code of Judicial Conduct. Finally, we’ll discuss the impact of these cases on the perception of the bench and bar.

- Kevin L. Colosimo, *Frost Brown Todd LLC*, Pittsburgh, PA

12:15 – 1:30 p.m. **Hosted Luncheon and Guest Speaker: “South Carolina’s Changing Energy Portfolio”**

- Danny Kassis, Vice President for Community Affairs and Renewables *South Carolina Electric & Gas Co.*, Columbia, SC



WELLS



DOUGLASS



SCHWARTZ



PATTON



AUSLANDER



WILGIS



COLOSIMO



KASSIS

1:45 – 2:30 p.m.

Perspectives from the Bench: An Overview of Energy Industry Bankruptcies

Judge Fitzgerald served as a United States Bankruptcy Judge for 25 years in four districts including Western and Eastern Pennsylvania, Delaware and the U.S. Virgin Islands. She will share her experiences and opinions regarding the current state of energy industry bankruptcies and what we can expect in the future. Her presentation will cover a general overview of the process and what's involved in a pre-packaged bankruptcy plan, who drives the case, structured dismissals, and trends in filings. Judge Fitzgerald will also discuss what makes energy sector bankruptcies unique, what we have learned from past coal and steel company bankruptcies, and how strategies of these past bankruptcies will affect shale producers today.

■ Judith K. Fitzgerald, *Tucker Arensberg, P.C.*, Pittsburgh, PA



FITZGERALD

2:30 – 3:15 p.m.

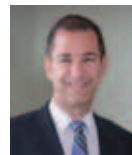
Protecting Personal Assets of Directors and Officers Ahead of Potential Bankruptcy: The Domsday Analysis

Distress and restructuring pressures are impacting the entire continuum of the energy sector. This presentation provides meaningful insights on the most important insurance coverage line, the Directors & Officers Liability Coverage (D&O). JLT's Specialty Solutions Group will walk through some of the most important clauses and wordings which need to be embedded in an insurance contract ahead of insolvency/ bankruptcy. A case study specific to the coal industry will be incorporated.

■ Carrie O'Neil, Senior Vice President, *JLT Specialty Solutions Group*, Denver, CO



O'NEIL



LORENZEN

3:15 – 3:30 p.m.

Break

3:30 – 4:15 p.m.

EPA's Clean Power Plan: A Post-Argument Assessment

In early June, the D.C. Circuit will hear oral argument on the legality of EPA's Clean Power Plan, which would regulate carbon dioxide emissions from existing power plants by shifting generation to lower-emitting and zero-emission energy sources. Though the rule has been stayed by the Supreme Court pending review, all eyes are on the three D.C. Circuit judges who will hear the arguments and write the first merits decision on the rule. Tom Lorenzen, who represents a number of the petitioners, will provide a post-argument analysis of the rule's prospects.

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



MAGEE



MORRISON

4:15 – 5:00 p.m.

“Surprise! You Are a Joint Employer.”

The National Labor Relations Board, the Department of Labor and some courts are now holding that among others, franchisors, companies that use independent contractors and companies with affiliates are joint employers. This session will address the risks involved in being designated a joint employer, such as additional Family and Medical Leave Act liabilities, and the factors upon which the NLRB, the Department of Labor and courts are relying in order to reach their conclusions.

■ Erin E. Magee, *Jackson Kelly PLLC*, Charleston, WV

■ C. David Morrison, *Steptoe & Johnson PLLC*, Bridgeport, WV



BURT



FORBES

5:00 p.m.

Adjourn

6:00 – 7:00 p.m.

Hosted Reception

Tuesday, June 14, 2016

Breakout Session A

8:00 – 8:45 a.m.

New and Unsettled Issues in Federal Natural Gas Act Condemnation and State Law Condemnation in the Marcellus and Utica Shale Plays

Update on recent developments in federal condemnation law and procedure under the Natural Gas Act, including new and unsettled legal issues, and update on state condemnation issues in the Marcellus and Utica Shale plays, with a focus on regulation of pipeline companies as “public utilities” and related litigation.

■ Stefanie L. Burt and Ariel N. Forbes, *Reed Smith LLP*, Pittsburgh, PA



LIGGINS

8:45 – 9:30 a.m.

Help! I Think My Counter-Party May Be Insolvent

The presentation will discuss issues to address when you suspect that a counter-party to a contract is insolvent or may file bankruptcy. Specifically, the session will focus on executory contracts with a specific emphasis on joint operating agreements and proactive steps to take.

■ Demetra L. Liggins, *Thompson & Knight LLP*, Houston, TX



9:30 – 9:45 a.m. Break

9:45 – 10:30 a.m. **Pre-Bankruptcy Strategies to Deal with the Downturn – What Industry Players Need to Know About Treatment of Their Contracts in Bankruptcy**

During this presentation, Vorys' partners Rob Bell and John Sparacino will address strategies that operators, producers and downstream players should consider to stay ahead of an economic downturn. Such strategies include proactive planning to survive a downturn, including evaluating options for lenders and industry players/contract counterparties. They will also discuss what industry players and contract counterparties need to know about treatment of their contracts in bankruptcy, including the "white hot" strategy of debtors seeking the rejection and/or renegotiation of midstream agreements as seen in the *Sabine*, *Quicksilver* and *Magnum Hunter* bankruptcy cases.

- Robert A. Bell, Jr., *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- John J. Sparacino, *Vorys, Sater, Seymour and Pease LLP*, Houston, TX

10:30 – 11:15 a.m. **Coal Industry Insolvencies and Reclamation Financial Assurance Issues**

Widespread bankruptcies in the coal industry have created a dilemma regarding the ability of the debtor companies to reorganize and meet reclamation obligations. In many instances, particularly sites with long term water liability, the mines are under bonded, especially where the mine is "self-bonded." Regulators are calling for replacement of hundreds of millions in self-bonds across the U.S. Whether or not there is surety capacity to support those obligations in this market is questionable. This panel will discuss current issues and dilemmas facing the debtors, the regulators and the sureties.

- Ronald E. Gold, *Frost Brown Todd LLC*, Cincinnati, OH
- William H. Gorton III, *Stites & Harbison, PLLC*, Lexington, KY
- Emily S. Medine, *Energy Ventures Analysis*, Pittsburgh, PA

11:15 – 11:30 a.m. Break

11:30 a.m. – 12:15 p.m. **Selling a Former Coal-fired Electric Generating Station**

Babst Calland lawyers Justin Ackerman and Don Bluedorn will discuss some of the practical legal issues associated with selling a former coal-fired electric generating station, with a particular focus from the seller's perspective. Justin Ackerman will discuss the primary commercial issues in the transaction and some of the typical seller and buyer goals. Don Bluedorn will then discuss some of the unique environmental regulatory issues in the transaction, including the application of US EPA's CCR (coal combustion residuals) Rule which was finalized in 2015.

- Justin D. Ackerman and Donald C. Bluedorn II, *Babst Calland*, Pittsburgh, PA

12:15 – 1:00 p.m. **Recent Developments in Oil and Natural Gas Wastewater Regulation**

The management of flowback, produced fluid, and other oil and gas wastewater continues to be a significant industry concern as the pace of new drilling slows with lower natural gas prices. The presentation summarizes federal and state regulatory initiatives with the potential to make oil and natural gas wastewater treatment and/or disposal more heavily regulated. With respect to wastewater treatment, suggested topics of conversation include EPA's proposal to formally prohibit publicly owned water treatment plants from accepting wastewater from unconventional wells, EPA's ongoing study of the centralized wastewater treatment industry and operator handling of wastewater, EPA's draft hydraulic fracturing assessment, and the recently adopted amendments to Pennsylvania's Chapter 78 as they apply to wastewater management. Wastewater disposal topics include EPA's new guidance on reducing the risk of induced seismicity, the U.S. Geological Survey's preliminary model for forecasting induced seismic events, and the States First primer on managing permit conditions to reduce the risk of induced seismicity.

- Kevin J. Garber and Michael K. Reer, *Babst Calland*, Pittsburgh, PA

1:00 p.m. **Adjourn**



BELL



SPARACINO



GOLD



GORTON



MEDINE



ACKERMAN



BLUEDORN



GARBER



REER

Breakout Session B

8:00 – 8:45 a.m.

From Monopolies to Markets and Beyond – The Evolution and Future of the U.S. Electricity System

This session takes a historical and analytical look at the electricity system (generation, transmission and now demand response) in the U.S. It will focus on the systematic efforts of federal agencies (particularly FERC) to remake an industry of historically vertically integrated fossil fuel-oriented monopolies into a market system intended to accommodate renewable generation and demand response. It will examine the effect of those efforts on federal and state regulation, generation choices, and some of the unintended consequences of that market restructuring. The presentation will focus on FERC Order 745 which places demand response on an economically equal footing with generation and the U.S. Supreme Court's recent affirmation of that rule in *Federal Energy Regulatory Commission v. Electric Power Supply Association*.

■ Karen J. Greenwell, *Wyatt, Tarrant & Combs LLP*, Lexington, KY



GREENWELL



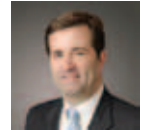
HUGEE

8:45 – 9:30 a.m.

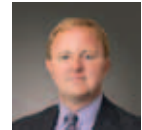
The Role of Regional Transmission Organizations and FERC in Improving Efficiencies in Grid Management, Grid Reliability and Operating Competitive Electricity Markets

Interstate wholesale electricity markets are regulated by FERC. While a large portion of the country operates under more traditional electricity market structures, FERC estimates that two-thirds of the electricity load in the United States is served by Regional Transmission Organizations (RTO) and Independent System Operators (ISO). Ms. Hugee will review the purpose and function of an RTO/ISO, why a utility would want to become a member of an RTO/ISO and how becoming a member of such an organization can affect the decisions of the utility with respect to the construction, operation and decommissioning of facilities, in addition to the operation of wholesale electricity markets by RTOs/ISOs.

■ Jacquelyn Hugee, Associate General Counsel, *PJM Interconnection*, Audubon, PA



GRIFFITH



KELLY

9:30 – 9:45 a.m.

Break

9:45 – 10:30 a.m.

Power Purchase Agreements

The long-term power purchase agreement (PPA) continues to be the cornerstone document for successfully developing power generation facilities of all types and sizes. In the Southeast, recent policies to promote utility-scale renewable energy generation, especially solar, require utilities, developers, and other market participants to understand and negotiate around new regulatory, financing and development challenges. This panel will present key considerations for utilities negotiating PPAs with renewable generators in the Southeast, as well as highlight new concepts such as “virtual PPAs” that are becoming increasingly prevalent in other parts of the country.

■ W. Mark Griffith, *McGuireWoods LLP*, Raleigh, NC

■ Brian J. Kelly, *McGuireWoods LLP*, Baltimore, MD



MAJUMDER



SMITH

10:30 – 11:15 a.m.

Like-Kind Exchanges in the Oil and Gas Industry

Like-kind exchanges under Internal Revenue Code (IRC) Section 1031 can be a powerful tool for energy companies seeking to reduce risk exposure while avoiding potentially crippling tax bills. We will review an assortment of potential transaction structures that qualify for favorable tax treatment under IRC Section 1031 as like-kind exchanges, including simple sales and issues related to Overriding Royalty Interests (or quasi-ORRI) retention. Additionally, we will touch upon issues related to Intangible Drilling Costs (IDC) and depletion deductions and how the recapture rules may impact the types of target assets.

■ I. Bobby Majumder, *Perkin Coie LLP*, Dallas, TX

11:15 – 11:30 a.m.

Break

11:30 a.m. – 12:15 p.m.

The “Double Fraction” Issue

The “Double Fraction” issue is a problem in multiple jurisdictions because the 1/8 royalty is no longer the standard in oil and gas leases. While some courts interpret double fractions as a fixed (also known as “fractional”) royalty (for example, 1/3 of 1/8, being a 1/24 interest), other courts are interpreting them as floating (also known as “fraction of”) royalty (for example, 1/3 of 1/8, being 1/3 of whatever the royalty is). This is an issue in various instruments (deeds, wills, assignments, etc.), and impacts different types of oil and gas interests. The Texas Supreme Court looked at the issue in *Hysaw v. Dawkins* and determined that intent should prevail over mechanical construction. That decision focused on the four corners rule, utilizing a holistic approach of looking at the intent of the grantor. While this decision does not provide a bright-line rule or test, it does provide instruction that an instrument's language as a whole shall be considered to deduce intent.

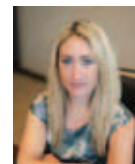
■ Kelli D. Smith, *Step toe & Johnson PLLC*, The Woodlands, TX

12:15 – 1:00 p.m.

Oil and Gas Anti-Trust Concerns

Antitrust concerns flare in highly competitive environments. As natural gas companies implement strategies for reducing costs and increasing efficiencies, they must ensure that their business practices, joint ventures, and other collaborative efforts do not offend federal and state antitrust laws. Antitrust concerns are particularly thorny and compelling in natural gas marketing and transportation by virtue of pipeline control over physical connection to markets. Antitrust exposure is not mitigated by federal regulation, and an antitrust violation carries severe financial and even criminal penalties.

■ Devan K. Flahive, *Robinson & McElwee PLLC*, Clarksburg, WV



FLAHIVE

1:00 p.m.

Annual Institute Adjourns

37th Annual Institute Planning Committee

Program Planning Committee

- Program Chair, Kevin K. Douglass, *Babst Calland*, Pittsburgh, PA
- Kevin L. Colosimo, *Frost Brown Todd LLC*, Pittsburgh, PA
- Sharon J. Daniels, *Energy & Mineral Law Foundation*, Lexington, KY
- Sharon O. Flanery, *Steptoe & Johnson PLLC*, Charleston, WV
- Sheila Nolan Gartland, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- Timothy J. Hagerty, *Frost Brown Todd LLC*, Louisville, KY
- Frank B. Harrington, *Alpha Natural Resources, Inc.*, Bristol, VA
- Natalie N. Jefferis, *EQT Energy*, Pittsburgh, PA
- Amber Nisbet Hodgdon, *EnerVest, Ltd.*, Charleston, WV
- Erin E. Magee, *Jackson Kelly PLLC*, Charleston, WV
- C. David Morrison, *Steptoe & Johnson PLLC*, Bridgeport, WV
- G. Brian Wells, *Wyatt Tarrant & Combs, LLP*, Lexington, KY
- Daniel W. Wolff, *Crowell & Moring LLP*, Washington, DC

Contributors

- Christopher J. Allwein, *Kegler Brown Hill + Ritter*, Columbus, OH
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- Ilya Batikov, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
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- Stefanie L. Burt, *Reed Smith LLP*, Pittsburgh, PA
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- Allyn G. Turner, *Steptoe & Johnson PLLC*, Charleston, WV
- Webb I. Vorys, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- Kristin L. Watt, *Vorys, Sater, Seymour and Pease LLP*, Columbus, OH
- Mary L. Will, *Faegre Baker Daniels LLP*, Denver, CO
- William G. Williams, *Krugliak Wilkins Griffiths & Dougherty Co., L.P.A.*, Canton, OH



Yes, I want to attend the 37th 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 37 of the *Energy & Mineral Law Institute* publication in electronic format in early 2017. Guest registration covers Sunday and Monday receptions.

| <i>Registration fees</i> | <i>Early Bird by May 11</i> | <i>After May 11</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 |
| 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. The program contains 630 minutes of CLE, including 60 minutes of ethics. This is equal to 10.5 CLE hours in 60-minute states and 12.6 hours 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 May 16 will receive a full refund less a \$75 administrative fee. No refunds for cancellations after May 16, 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 16 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



37th Annual Institute

June 12-14, 2016

**DoubleTree by Hilton
Hotel & Suites — Charleston
Charleston
South Carolina**

Conference Accommodations

The host hotel for the Annual Institute is the DoubleTree by Hilton Hotel & Suites — Historic Charleston, SC. The hotel is conveniently located at 181 Church Street in the heart of historic Charleston, just across the street from the outdoor market, within walking distance or carriage ride to “Rainbow Row” on Battery Street with its beautiful antebellum homes. There are many other area attractions and restaurants within walking distance of the hotel and we have arranged the program schedules so that Tuesday afternoon is open to enjoy historic Charleston. Special EMLF rates of \$189 single or double for a variety of room configurations, plus taxes available for reservations made through May 11. Call 877.408.8733 and identify yourself with the EMLF room block, or register online by going to the EMLF website. After May 11, rooms will be confirmed on a space available basis at the prevailing rate. Check in is 4:00 p.m. and check-out time is noon. Guest amenities include breakfast on site at the Lighthouse Cafe, lunch at Brasserie Gigi, and dinner at Hank’s Seafood Restaurant — voted as Charleston’s Best Seafood Restaurant five years running, room service (dinner only, from Hank’s), high speed Internet access in all rooms, remote guest printing services, and wireless Internet access in hotel public areas, fitness center, gift shop, and sightseeing tours.