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**39th Annual Institute
Energy & Mineral Law
Foundation
June 17-19, 2018**



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Program Schedule

An “All of the Above” Approach to Energy

Sunday, June 17, 2018

- 1:30 p.m. **Executive Committee Meeting**
- 2:00 p.m. **Registration Opens**
- 3:00 p.m. **Board of Trustees Meeting**
- 5:00 p.m. **Hosted Welcome Reception**

Monday June 18, 2018 — General Session

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

8:30 a.m. **Welcome**

- Erin E. Magee, EMLF President, *Jackson Kelly PLLC*, Charleston, WV
- Jessica B. Brisendine, Program Co-Chair, *EQT Corporation*, Pittsburgh, PA
- M. Shane Harvey, Program Co-Chair, *Jackson Kelly PLLC*, Charleston, WV

8:45 a.m. **Keynote Speaker**

Dr. Peter Balash, an economist with the National Energy Technology Laboratory (NETL), conducted a study about fossil energy and power availability during extreme weather events, including the recent “bomb cyclone” that hit the Eastern United States in December and January. This report found that combined, fossil and nuclear energy plants provided 89 percent of electricity during peak demand across all the independent system operators and that coal provided the most resilient form of generation in PJM. Dr. Balash will discuss these reports and other findings, including the conclusion that underestimation of coal and nuclear retirements could give rise to reliability concerns and an inability to meet projected electricity demand.

- Peter C. Balash, Ph.D., National Energy Technology Laboratory, *U.S. Department of Energy*, Pittsburgh, PA

9:30 a.m. **#MeToo and the Energy Industry (Ethics)**

The #MeToo movement has significantly impacted many industries, and the energy industry will be no exception. This panel will cover how investigations of sexual harassment claims in the workplace, settlements of harassment claims and arbitration and litigation of harassment disputes have changed and what to expect in the future. The discussion will touch on the ABA’s new guidelines on sexual harassment, the status of the EEOC’s enforcement guidance on workplace harassment, ethical issues in conducting harassment investigations, harassment training and a host of other issues arising in conjunction with complaints and suits.

- Allison Williams, *Steptoe & Johnson PLLC*, Bridgeport, WV, moderator
- Gregory J. Ossi, *Venable LLP*, Tysons, VA
- Betty S.W. Graumlich, *Reed Smith LLP*, Richmond and Tysons, VA
- Karina R. Kendrick, *McDonald Hopkins LLC*, Cleveland, OH

10:30 a.m. **Break**

10:50 a.m. **Legislative Update**

This session will cover new legislation affecting the energy industry in the Foundation’s footprint.

- Kelley M. Goes, *Jackson Kelly PLLC*, Charleston, WV
- Michael Killion, *EQT Corporation*, Harrisburg, PA



MCGEE



BRISENDINE



HARVEY



BALASH



WILLIAMS



OSSI



GRAUMLICH



KENDRICK



GOES

11:40 a.m. **Energy Law Update**

This presentation will highlight key legal issues and litigation relevant to our member organizations.

- Daniel L. Wolff, *Crowell & Moring LLP*, Washington, DC
- Elizabeth B. Dawson, *Crowell & Moring LLP*, Washington, DC

12:30 p.m. **Hosted Luncheon**

1:45 p.m. **Industry Issues Involving the Foreign Corrupt Practices Act**

The coal and natural gas industries wish to attract foreign investment in the United States as well as export coal and liquid natural gas abroad. The Foreign Corrupt Practices Act (FCPA) sets high standards for American businesses dealing with foreign officials and presents substantial risk to individuals and businesses unfamiliar with FCPA requirements. This presentation will explain the requirements of the FCPA and similar statutes and provide guidance on how energy producers can remain compliant.

- Erica Williams, *Kirkland & Ellis LLP*, Washington, DC

2:30 p.m. **What You Don't Know Can't Hurt You, Right? Resolving the Inherent Tension Between the Yates Memo and the Collective Knowledge Doctrine in Environmental Criminal Enforcement Actions**

Oil and gas industry participants have always recognized the constant risk of strict civil liability that accompanies violations of environmental statutes, and appreciated the specter of a criminal prosecution for the most egregious violations. Current enforcement trends, however, demonstrate that prosecutors are seeking ways to transform seeming civil violations into criminal actions by broadening criminal culpability through the use of evolving legal concepts such as the collective knowledge doctrine. Some perceived the 2015 release of the Yates Memo by the U.S. Department of Justice as a pendulum swing away from corporate criminal prosecutions to a renewed focus on individual accountability. This presentation will provide a background on the mens rea required in criminal prosecutions, focusing on traditional rules used by prosecutors to expand the reach of corporate punishment from civil to criminal, including concepts such as willful blindness, the responsible corporate officer doctrine, and the collective knowledge doctrine. Then, this article will survey several recent post-Yates Memo environmental prosecutions to examine whether there was a sea change in the application of prosecutorial discretion, as some predicted. Finally, this presentation will highlight the potential ethical pitfalls that legal practitioners may face during an environmental enforcement action, particularly in light of the Yates Memo, and how to avoid them.

- Mark A. Rush, *K&L Gates LLP*, Pittsburgh, PA
- Katherine M. Gafner, *K&L Gates LLP*, Pittsburgh, PA

3:30 p.m. **Break**

3:45 p.m. **Personally Identifiable Information: Privacy and Security in the Energy Industry**

This presentation will provide an overview of applicable laws, regulations, and standards for the privacy and protection of personal data by energy companies in the U.S., with a brief discussion of the applicability of the E.U.'s General Data Privacy Regulation.

- Mary L. Fullington, *Wyatt Tarrant & Combs LLP*, Lexington, KY

4:30 p.m. **Cryptocurrency Capitalization Options in the Energy Sector
After Deflation of the Bitcoin Bubble**

Bitcoin and other cryptocurrencies are down from their recent astronomical rise. Recent pronouncements from the SEC and other federal agencies demonstrate that regulators are taking notice but the regulatory environment remains murky. Nevertheless, capital formation around the blockchain space continues, and the energy sector remains ripe for deployment of this fast-growing technology. This presentation explores why blockchain remains an area of interest to energy companies and walks through a typical initial coin offering (ICO), focusing on accepted practices and potential regulatory roadblocks, providing insight into whether this relatively new capitalization option holds promise for energy sector companies.

- John S. Wagster, *Frost Brown Todd LLC*, Nashville, TN
- Gray Sasser, *Frost Brown Todd LLC*, Nashville, TN

5:15 p.m. **Hosted Reception**



WOLFF



DAWSON



WILLIAMS



RUSH



GAFNER



FULLINGTON



WAGSTER



SASSER

Tuesday, June 19, 2018 — Breakout Sessions

“Because our members’ practices often translate across the various parts of the energy industry, we grouped breakout sessions by broad areas of law — Litigation/Risk Management and Commercial/Title. By avoiding sub-industry “silos,” we hope to provide attendees with a broader perspective and exposure to cross-applications of the law. Let us know what you think about this effort to encompass an “all of the above” approach to the study of energy and mineral law.”

Erin E. Magee, EMLF President



MCLUSKY



MILLER



SWIGER



SIMPSON



WATSON

Litigation/Risk Management Track

8:00 a.m. The Intersection of the Natural Gas Act and Environmental/Land Use Laws

The Sierra Club and regional anti-gas advocates have consolidated their resources to focus on challenges to interstate natural gas lines, knowing that the long term vitality of the industry depends on getting gas to new markets and that they do not have the resources to impede the industry by challenging the permit needed for individual well sites. Many of the challenges are spearheaded by the same people and groups that spent over a decade challenging large scale surface mining in Central Appalachia. With pipelines, though, those groups have run head long into the Natural Gas Act and the nearly exclusive authority it gives to the Federal Energy Regulatory Commission (FERC) both to authorize the use of eminent domain by private developers and to regulate the permitting, construction and operation of interstate natural gas facilities. Additionally, many local governments have adopted ordinances designed specifically to block pipeline construction. Even though most of these efforts are subject to the preemptive effects of the NGA, pipeline developers need to be wary of pitfalls in applying that doctrine. This presentation will explore the intersection of the NGA with both the primary environmental programs applicable to pipelines and with local land use laws adopted to limit them.

■ Robert G. McLusky, *Jackson Kelly PLLC*, Charleston, WV

8:45 a.m. Pitfalls Associated with Affiliate Transactions in the Gas Industry.

The unbundling of the gas industry in the early 1990s, coupled with spinoffs and business transactions between corporate affiliates, can lead to a variety of legal problems, ranging from royalty litigation, claims of discriminatory conduct, efforts to pierce the corporate veil and loss of certain common law and statutory defenses and immunities. The presentation will examine examples of various types of pitfalls and litigation related to affiliate transactions and operations, and will offer guidance on ways to minimize the risk.

■ Timothy M. Miller, *Babst Calland Clements and Zonnir PC*, Charleston, WV

9:30 a.m. Litigating Procurement Agreement Disputes

It is becoming more common for contractors to underbid a project and then seek eleventh-hour change orders or walk off the job on pipeline companies, which often have tight deadlines for in-line dates to meet pre-existing shipping commitments. Additionally, when contractors fail to pay, the subcontractors of vendors are placing liens not only on wells, but also landowners’ surface estates, regardless of whether the surface owner owns any interest in the minerals when contractors fail to pay subs. This presentation will cover the best ways to make sure your MCSA encourages contractors finish work on budget and on time and protect you and your landowners to minimize the risk of a lien.

■ Brian R. Swiger, *Jackson Kelly PLLC*, Charleston, WV

10:15 a.m. Break

10:30 a.m. Value-based Lawyering

This presentation will involve examining a variety of examples on how utilizing reservoir engineering analysis to value the relevant assets optimizes legal strategy. Additionally, this discussion will explore how an attorney can risk value based on facts at issue and controlling case law, in order to create an appropriate litigation budget, procedural strategy, and appropriately evaluate various settlement options at various points in time.

■ Zachary M. Simpson, *Gulfport Energy Corporation*, Oklahoma City, OK

■ Danny A. Watson, P.E., *Gulfport Energy Corporation*, Oklahoma City, OK

11:15 a.m. **When the Trains Don't Come: Suing the Railroad**

Railway operating companies can harm energy companies by failing to employ a sufficient number of trains, providing slow train service, or demanding unreasonable rates. These actions can damage the business of energy companies by (among other things) delaying their production, slowing their service to customers, causing them to breach supply contracts with customers, and forcing them to pay demurrage and other late charges. Although current legal standards are railroad-friendly, energy companies have potential claims against the railroad under federal, contract, and tort law. For example, energy companies can sue railway operating companies for failing to provide adequate and reasonable rail service in violation of 49 U.S.C. §§ 11101(a) and 11121, failing to charge reasonable tariff rates in violation of 49 U.S.C. § 10701, failing to provide adequate service under the parties' contract and under quasi-contractual doctrines, and tortiously harming the energy company's reputation and business with false statements about who is to blame for delayed or missed shipments.

- Kevin B. Huff, *Kellogg Hansen Todd Figel & Frederick PLLC*, Washington, DC
- Kylie C. Kim, *Kellogg Hansen Todd Figel & Frederick PLLC*, Washington, DC

Noon **Effective Use of a Company Representative in Litigation**

This presentation will discuss the role of the company representative witnesses in litigation, and address topics such as distinguishing the role of company representative witnesses from the role of fact and expert witnesses; court rules governing depositions and testimony of company representative witnesses; best practices for counsel preparing a witness to testify as a company representative; best practices for persons preparing to serve as a company representative witness; and considerations in taking and defending company representative witness depositions, in conducting examination of such witnesses at hearings or trial, and in testifying as a company representative.

- Philip F. Downey, *Vorys Sater Seymour and Pease LLP*, Akron, OH
- John R. Conley, *Vorys Sater Seymour and Pease LLP*, Akron, OH

12:45 p.m. **Adjourn**

Commercial/Title Track

8:00 a.m. **The New Electricity Business Model**

With declining costs for distributed solar and more technology-based tools available to customers to manage their electricity costs, the traditional utility business model is eroding. In some states, utilities are transitioning into being "distribution platform operators" that integrate distributed energy resources, demand response, battery storage and energy efficiency providers. Correspondingly, regulators must also develop a new regulatory model that sets rates based on something other than kWh sales. To what extent are these trends emerging in our region? What are state regulators within our region doing to explore these issues, or do they need to do anything at all at this point, due to relatively low electricity prices? What effect will these developments have on the traditional sources of electricity generation within this region? This presentation will explore these issues.

- James M. Van Nostrand, *West Virginia University College of Law*, Morgantown, WV

8:45 a.m. **"Up in the Air:" An Overview of Issues that Arise with Wind Development**

Is the law keeping up with the industry? This presentation will discuss various legal issues and considerations for siting and operating a wind farm, including an overview of permitting and land-use requirements; real estate interests needed by developers and lenders of wind projects; potential severance of "wind" rights from surface ownership; conveyance instruments best utilized; similarities and differences to mineral leases; and issues with correlative rights and concurrent development/use of the land.

- Dylan Lewis, *Orbital Engineering, Inc.*, Pittsburgh, PA
- Britt A. Freund, *Steptoe & Johnson PLLC*, Southpointe, PA

9:30 a.m. **Deals Gone Wrong in the Coal Industry**

A postmortem on major commercial and environmental litigation involving "deals" – either purchase and sale agreements, credit or bond indentures, coal sales contracts, coal leases, and environmental permits. The presentation will look at where the deal went wrong, what the key was to the litigation, and whether there was a way to have worded the deal or permit differently in anticipation of any potential dispute.

- Nicholas S. Johnson, *Bailey & Glasser LLP*, Washington, DC

10:15 a.m. **Break**



HUFF



KIM



DOWNEY



CONLEY



VAN NOSTRAND



LEWIS



FREUND



JOHNSON

10:30 a.m. **What Do You Mean We Can't Do That? Antitrust Law Implications for Upstream Joint Development Arrangements**

In December 2017, the Bradford County Court of Common Pleas issued a decision in the case of *Commonwealth of Pennsylvania v. Chesapeake Energy Corp.*, suggesting that E&P operators may have violated Pennsylvania's common law on antitrust by entering into and acting under a joint development arrangement as to a specific geographical area that, allegedly, caused signing bonuses and royalty percentages for new oil and gas leases in the area to plummet. This presentation will begin with a short discussion of the Bradford County decision, then shift to a discussion of the relevant state and federal antitrust laws that might be implicated by joint development arrangements between operators. Following the legal analysis, the presentation will shift to a discussion of practical matters, including considerations when negotiating and drafting Joint Development Agreements, Area of Mutual Interest Agreements, and Joint Operating Agreements; factors that might push an otherwise acceptable agreement too far; and potential litigation risks. The practical discussion would give in-house counsel the tools necessary to alert negotiating teams to potential pitfalls, evaluate litigation risk, and make informed decisions when drafting these types of agreements.

- Jeffrey Kramer, *Range Resources – Appalachia, LLC*, Canonsburg, PA
- Matthew C. Blickensderfer, *Frost Brown Todd LLC*, Cincinnati, OH
- Kenneth J. Witzel, *Frost Brown Todd LLC*, Pittsburgh, PA
- Michael Brewster, *Frost Brown Todd LLC*, Pittsburgh, PA

11:15 a.m. **Co-Tenancy and Statutory Pooling/Unitization**

This presentation will compare and contrast the state of co-tenancy law of West Virginia, Ohio, Kentucky and Pennsylvania with special emphasis on West Virginia's new co-tenancy law, which will be effective in June 2018. In accordance with the new legislation, West Virginia will be promulgating rules to implement the new legislation over the next few months and a review of those rules as they exist at the time of the Annual Institute will be covered. An overview of force pooling statutes in Ohio and Kentucky also will be featured to provide context and comparative analysis to the new rules and regulations in West Virginia.

- J. Kevin West, *Steptoe & Johnson PLLC*, Columbus, OH

Noon **Quiet Title Actions – Burdens and Benefits**

This session will focus on the Quiet Title Procedural Rules in Pennsylvania and West Virginia, which often are well known to be the most challenging titles in all of Appalachia. If practitioners, particularly litigators, do not take full advantage of the burden shifting principals that the rules of both jurisdictions provide, bad things can happen. Content will be directed at defending against adverse claims and will also provide interesting historical background on the "difficult" titles of the regions.

- J.C. Wilkinson III, *Wilkinson Law LLP*, Eagles Mere, PA
- Eddie Wagoner, *Goddard & Wagoner*, Morgantown, WV

12:45 p.m. **Adjourn**



KRAMER



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WITZEL



BREWSTER



WEST



WILKINSON



WAGONER



2018 EMLF POWER PATRON



2018 EMLF PILLAR PATRON



2018 EMLF PRODUCTION PATRON



Yes, I want to attend the 39th 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 39 of the Energy & Mineral Law Institute publication in electronic format in early 2019. Guest registration fee covers hosted receptions on Sunday and Monday and lunch on Monday.

<i>Registration fees</i>	<i>Early Bird by May 25</i>	<i>After May 25</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	\$100	\$100

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 \$ _____

Total \$ _____

Conference accreditation is to be determined from states with mandatory Continuing Legal Education and with the AAPL. Please indicate on your registration form where you are seeking credit. Complete information for reporting your credits will be available at the conference. Additional fees may be required for certain states/organizations. In 60 minute states, there are 10 total hours including 2 hour of ethics; in 50 minutes states, there are 12.5 total hours, which includes 2.4 hours of ethics.

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 8 will receive a full refund less a \$75 administrative fee. No refunds for cancellations after June 8, but course materials will be sent after the conference. Substitutions can be made at any time at no charge. EMLF members who cancel after June 8 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



39th Annual Institute

June 17-19, 2018

Renaissance

Hotel Nashville

Nashville, Tennessee

Conference Accommodations

The host hotel for the Annual Institute is the Renaissance Nashville Hotel, 611 Commerce Street. Located in the heart of downtown Nashville, it's the perfect base for the EMLF's 39th Annual Institute. The hotel is within walking distance of premier downtown attractions, including B.B. King's Blues Club, Country Music Hall of Fame, Ryman Auditorium and the historic Second Avenue District, not to mention all the fine eateries at the hotel or nearby. Touted as "One of the best places to visit in 2018" by the travel industry, Nashville will make the 39th Annual Institute memorable.

Reservations can be made by going to the EMLF website or calling directly to Marriott Reservations (staffed 24/7): 888.236.2427 and referencing the EMLF 39th Annual Institute Meeting room block; cutoff date for the discounted room rate/room block is May 24, 2018.