



30th Annual Institute

Energy & Mineral Law Foundation

May 17-19, 2009

Hilton Oceanfront Resort

Hilton Head Island

South Carolina

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*Cover photo courtesy of the
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Program Schedule

Sunday, May 17, 2009

9:20-10:16 a.m. Golf Tee-off – Robert Trent Jones Course at Palmetto Dunes
2:00-5:00 p.m. EMLF Registration Desk Open – Admiral's Landing
6:00-9:00 p.m. Oceanside Reception and Dinner at Hilton's Shorehouse
Entertainment by *The Corduroy Road*, Athens, GA

Monday, May 18, 2009

7:00 a.m. Registration Desk Opens – Admiral's Landing
Continental Breakfast – Admiral's Landing

General Session – Commodore Hall (A-C)

8:00-8:10 a.m. Welcome and Introductions

- Maureen D. Carman, Foundation President
- Stephen G. Allen, Program Chairman

8:10-8:50 a.m. Energy Policy Under the Obama Administration

President Obama was outspoken about energy policy during the campaign. He promoted policies including a \$150 billion clean energy investment fund; putting one million plug-in hybrid cars on the road by 2015; a renewable portfolio standard that would require that 25 percent of electricity come from renewable sources by 2025; and a reduction in greenhouse gases of 80 percent by 2050 – an environmental policy that would have enormous impact on energy matters. The relative priorities for fossil fuels, including coal, and nuclear power, remain open questions. In addition to policy, personnel matters have become important as well. President Obama has restructured how energy policy issues will be handled in his administration by establishing a new White House Office of Energy and Climate Policy, headed by a new Energy and Climate “Czar,” Carol M. Browner, the former head of the U.S. Environmental Protection Agency under President Clinton. This action has raised concerns among Members of Congress and others about how energy and climate policy will be developed, about the transparency of the process, and about the roles of the Secretary of Energy and current head of EPA vis a vis the Climate Czar.

- Peter D. Robertson, *Crowell & Moring LLP*, Washington, DC

8:50-9:30 a.m. The Outlook for Greenhouse Gas Regulation Under the Clean Air Act in 2009 and Beyond

Less than a week after taking office, President Obama directed the new Administrator of the Environmental Protection Agency (EPA), Lisa Jackson, to reconsider EPA's previous denial of California's request for a waiver to regulate greenhouse gases (GHGs) from motor vehicles under the Clean Air Act (CAA) section 209. The decision signals President Obama's commitment to regulate GHGs under the CAA. The new Administration's plans have an even greater sense of urgency as a result of the Supreme Court's 2007 decision requiring EPA to consider whether GHGs endanger public health or welfare, and the release of an advanced notice of proposed rulemaking by EPA analyzing the possibility of GHG regulation under all major provisions of the CAA. These separate but related developments raise critical questions about how, in timing and substance, EPA is likely to begin down the path toward GHG regulation. The paper and presentation will discuss the legal and policy issues facing EPA in its decision about how to regulate GHGs, and project what kind of regulations are on the horizon. Whatever EPA decides, its actions will have profound and lasting ramifications, even if new climate change legislation passes in the next Congress, as many speculate.

- Chet Thompson and Jessica Hall, *Crowell & Moring LLP*, Washington, DC

9:30-9:45 a.m. Refreshment Break

9:45-10:15 a.m. Exclusive Granting Rights for Easements in the Appalachian Basin:
Taking an Easement from the Surface Owner May Not Be Enough

This presentation covers important concepts that must be understood before energy and utility companies acquire easements in the Appalachian Basin for pipelines, haul roads, electric lines, and other necessary infrastructure. Many practitioners believe that the surface owner of a tract of land is the legal owner of the right to grant surface easements, but in certain cases courts have determined that the mineral owner has the exclusive right to grant easements. A surface owner's entitlement to surface damages for construction or use of an easement across their surface when the surface owner is *not* the owner of the exclusive right to grant surface easements will also be discussed. A decision rendered by the Virginia Supreme Court of Appeals in 2008 will be examined for a determination as to whether a mineral lessee may acquire exclusive easement granting rights pursuant to its mineral lease.

■ Benjamin M. Sullivan, *EQT Corporation*, Charleston, WV

10:15-11:00 a.m. *Force Majeure* for Sure? Contractual Coal Supply Obligations in a Changing World

In the past few years, the mining industry has faced a myriad of developments that significantly impact the ability of coal producers to keep up with their contractual obligations. As a result, many producers have declared performance of their contracts impossible – and therefore excused – under what is known as a *force majeure* clause. With record high energy prices in recent years, *force majeure* declarations can have serious implications for coal buyers, such as electric utilities and steel manufacturers, who usually have long-term supply contracts often at prices well below market rates. Not surprisingly, coal buyers are not always willing to accept *force majeure* declarations and litigation ensues. This session will provide an overview of the legal landscape, recent issues that have resulted in *force majeure* declarations, future issues of concern, and the potential implications if a *force majeure* declaration is found invalid.

■ Robert M. Stonestreet, *Dinsmore & Shohl LLP*, Charleston, WV

11:00 a.m.-Noon E-Discovery Ethics: Staying Out of the Briar Patch

Reports about attorneys being sanctioned for misconduct in the handling of e-discovery are becoming all too common – they involve negligence, reckless disregard, and worse. A recent high profile case resulted in a post-trial sanctions hearing, with conflicts between the client and trial counsel. Getting hung up in the briar patch of e-discovery violations is the last place a lawyer wants to find him or herself. Learn about the ethical obligations in e-discovery and the right strategies to keep you OUT of the briar patch.

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

Noon-2:00 p.m. Lunch On Your Own

12:15-1:45 p.m. EMLF Board of Trustees Luncheon – Promenade 6 & 7
Trustees Annual Meeting and election of officers

Monday Afternoon: Concurrent Sessions

Landman's Workshop – Captain's Gallery

2:00-5:00 p.m. Division of Royalties: Who Gets What?

This session will consist of three (3) parts: the first part is a review of title issues affecting royalty payments, including apportionment versus non-apportionment, unitization provisions, entireties clauses and other issues affecting the division of royalties. The second part will be a workshop. Attendees will be divided into groups and will be assigned the task of calculating the division of royalties involving leases and units. The third part will be a review of the workshops, including an explanation of the proper treatment of the issues contained in the workshop problem.

■ Sean Cassidy, *Cassidy, Kotjarapoglus & Pohland*, Greensburg, PA

General Session Continues in Commodore Hall A-C

2:00-2:50 p.m. The Next Interstate: Extra-High Voltage Transmission to Enable Our Energy Future

As interest in renewables continues to evolve, electric utilities have to be able to move the power to markets. Areas ideally situated for renewable energy projects such as wind power, are often in locations remote from the power grid and the customers that need to be served. American Electric Power is in the forefront of high voltage transmission planning. This session looks at the transmission infrastructure and what is being done to bring renewables into the fuel mix.

■ Mike Heyeck, Senior Vice President – Transmission, *American Electric Power*, Columbus, OH

2:50-3:40 p.m. Property Rights in a Sustainable World: More than Minerals and Surface

Combustion-based, energy and resource companies feed traditional energy production and will continue to be important for the foreseeable future. With their large property holdings and extensive infrastructure that includes rail, roads, collecting lines, and equipment, these entities could also be poised to provide non-traditional, renewable energy sources and processes. This presentation focuses on legal and regulatory aspects of the issues that lie at the intersection of non-traditional and traditional energy production, and explores questions that include the role of property rights in carbon sequestration, geothermal energy, and wind, solar, and biomass energy production.

■ W. Blaine Early, III, Ph.D., *Sities & Harbison PLLC*, Lexington, KY

3:40-4:00 p.m. Break

4:00-5:00 p.m. Electric Power Panel: How Will the U.S. Address Global Climate Change Concerns and Meet the Growing Demand for Power?

The Obama administration and Congress have made it clear that addressing climate change will be a top priority. A key issue that needs to be addressed in any legislation or regulation of greenhouse gas emissions is how to ensure the reliability and supply of affordable electric power for the nation while limiting greenhouse gas emissions. This panel will discuss this important issue including the possible roles of carbon capture and sequestration technology, energy efficiency, cap-and-trade programs, and transmission issues.

- Moderator: Allison D. Wood, *Hunton & Williams*, Washington, DC
- Rae E. Cronmiller, Environmental Counsel, *National Rural Electric Cooperative Association*, Arlington, VA
- William L. Fang, Deputy General Counsel and Climate Issues Director, *Edison Electric Institute*, Washington, DC
- Mike Heyeck, Senior Vice President – Transmission, *AEP*, Columbus, OH
- Felicia Rhue Howard, Director Demand Side Management, *SCANA Corp.*, Columbia, SC
- Victoria D. Sullivan, Climate Strategy Manager, *Southern Company*, Birmingham, AL
- Linda R. Whelan, Senior Director Energy and Environment Policy, *Dynegy*, Houston, TX

6:30-7:30 p.m. Hosted Reception – Hilton’s Courtyard

7:30 p.m. Dine Around Hilton Head

Tuesday Morning, May 19, 2009

Concurrent Sessions – Commodore Hall (A-C) and Promenade 6&7 Track A – Oil and Gas

8:00-8:30 a.m. Oil & Gas Update

The annual update on recent cases and regulatory developments impacting oil and gas law.

- Matthew S. Casto, *Chesapeake Energy*, Charleston, WV

8:30-9:30 a.m. The Eastern Oil & Gas Lease

The “best available” eastern oil and gas lease will be unveiled at the 30th Annual Institute, the work product of the Eastern Oil and Gas Lease Discussion Group, comprised of land professionals, landowners, severed oil and gas interest owners, attorneys and oil and gas operators in eastern states. The Group has worked together to compile lease language appropriate for use in eastern states generally and, in certain cases, required to be used in specific eastern states by the common or statutory law of those states. Attention has also been given to lease language appropriate for use in cases in which horizontal wells are anticipated to be drilled and operated.

- Russell L. Schetroma, *Culbertson Weiss Schetroma & Schug*, Meadville, PA

9:30-9:45 a.m. Refreshment Break

9:45-10:35 a.m. *Coastal Oil & Gas Corp. v. Garza Energy Trust*: Some New Paradigms for the Rule of Capture and Implied Covenant Jurisprudence

The Texas Supreme Court in its recent opinion, *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008) dealt with two significant oil and gas law issues. The first is whether a hydraulic fracturing operation that extends beyond the property line can constitute an actionable trespass. In a “fractured” decision, five justices say it is not an “actionable” trespass, one justice concludes it is not a trespass while 3 justices conclude that it is a trespass. The second issue is what is the appropriate measure of damages for breach of the implied covenant to develop the leasehold. Some earlier cases had suggested that the “lost royalty” standard should be used while others suggested that the “interest” on the delayed royalties should be used. The Texas Supreme Court opts for the “interest” damages model and gives its reasons why that is the appropriate model.

- Bruce M. Kramer, Maddox Professor of Law Emeritus, *Texas Tech University School of Law*, Lubbock, Texas and Of Counsel, *McGinnis, Lochridge & Kilgore*, Houston, TX

10:35-11:25 a.m. Thinking Horizontally in a Vertical World: Practical Considerations for Practitioners Advising Clients on Horizontal Development in the Marcellus and Big Sandy Fields

In a world where clients are relying on “vertical” leases, old title opinions, unrecorded farmouts and laws based on vertical drilling practices, what should you and your client consider before drilling a horizontal well? This presentation provides a basic review of the engineering behind drilling a horizontal well along with a review of relevant legal issues to discuss with a client prior to drilling a horizontal well.

- Natalie N. Jefferis and Joel Symonds, *EQT Corporation*, Pittsburgh, PA and Charleston, WV

11:25 a.m.-12:15 p.m. Water Supply and Wastewater Challenges in Marcellus Shale Development

Across the Appalachian Basin, efforts to tap the potential of the Marcellus Shale formation face a range of significant water supply and wastewater regulatory and legal issues. This panel will explore some of the key legal and regulatory issues arising as eastern states tackle the water quantity and quality challenges, including questions of riparian water rights, state and river basin commission withdrawal regulations, and the technical and legal challenges in finding a viable method for flowback wastewater management.

- R. Timothy Weston, *K&L Gates LLP*, Harrisburg, PA
- Cathleen Curran Myers, Deputy Secretary for Water Management, *Pa. Department of Environmental Protection*, Harrisburg, PA
- Mark Gannon, *Tetra Tech*, Pittsburgh, PA

12:15-2:00 p.m. Lunch on Your Own

12:30 p.m. Past Presidents' Luncheon (Promenade 4)
Speakers' Luncheon (Promenade 1)

Track B – Coal Track

8:00-8:40 a.m. Increased Enforcement and Higher Penalties Under the Mine Act –
Do They Improve Worker Safety?

Since 2006, MSHA has greatly increased its efforts to enforce the Mine Act. In 2008, that led to more than 100,000 citations and orders being issued along with assessments in excess of \$150 million dollars – more than six times the 2004 assessment amounts. In addition, the agency is now using the Pattern of Violations process and new Flagrant penalties to greatly increase enforcement. While generating lots of headlines and dollars for MSHA, this session examines whether or not this enforcement actually makes mining safer – including examination of recent fatal and non-fatal injury rates and lost time accident rates.

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

8:40-9:20 a.m. Current Issues Involving Accident Reporting

With the passage of the 2006 MINER Act and MSHA's heightened attention to accident reporting following the Sago and the Crandall Canyon mine accidents, MSHA's interpretation and enforcement of the accident reporting requirements in 30 C.F.R. Part 50 are proving to be increasingly problematic. This presentation examines emerging issues that operators are facing with increasing frustration, including questions about the 15-minute clock for immediate notification, what MSHA wants to treat as the "active workings" for purposes of reporting roof falls, and the potential consequences of violations in light of the MINER Act's revised penalty scheme and MSHA's subsequent mine emergency regulatory revisions.

- Daniel W. Wolff, *Crowell & Moring*, Washington, DC

9:20-10:00 a.m. "Flagrant" Violations Under the Mine Act: What's a Little More Ambiguity Among Friends?

Given the material amount (up to \$220,000) of a fine that may and has been imposed for this relatively new enforcement weapon (included with the MINER Act of 2006), this session will explore the elements that MSHA must establish to prove a "flagrant" violation once the dramatic impact of headlines based on *allegations* of such a violation have passed. Specifically the chapter will explore what constitutes a "reckless or repeated failure to make reasonable efforts to eliminate a known violation of mandatory health or safety standard?" and what is needed to prove that the "reckless or repeated failure substantially and proximately caused, or reasonably [could have] been expected to cause, death or serious bodily injury?"

- F. Thomas Rubenstein and Heather A. Blandford, *Dinsmore & Shohl LLP*, Morgantown, WV

10:00-10:15 a.m. Refreshment Break

10:15-10:45 a.m. Coal Law Update

The annual update on recent cases and regulatory developments impacting coal law.

- J. Kevin Ellis, *Steptoe & Johnson, PLLC*, Morgantown, WV

10:45-11:25 a.m. The Selenium Controversy in West Virginia

Earlier this decade, USEPA discovered selenium levels in West Virginia streams at levels exceeding the existing in-stream standard of 5 parts per billion. Selenium can cause mortality and defects in fish populations, so its presence at levels exceeding those established to protect aquatic life was troubling. Later investigation suggested that the source of much of the selenium was existing surface mines. For mine operators, its presence posed several challenges. First, the particular rock strata in which it was located had to be identified so that mines could be designed to prevent its formation in the first place. Second, at those sites where it was already being discharged, regulatory, permitting and treatment solutions needed to be devised. Selenium is very difficult and expensive to treat after it is formed, and it appears to pose far greater risks in slowly flowing environments than in the faster flowing streams in most of West Virginia. As a result, the State is concerned that it apply a sufficiently protective standard without imposing a needlessly overprotective one, and with issuing reasonable compliance periods for achieving permit limits.

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

11:25 a.m.-12:15 p.m. The Clean Water Two-Step: The Corps of Engineers' Authority to Permit 'Fills' Under the Clean Water Act Takes One Step Forward and One Step Back

For over a decade, the federal courts have seen a succession of cases exploring the boundaries of the Corps of Engineers' permitting authority under Section 404 of the Clean Water Act. The mining industry has been front-and-center in that debate. Successive actions brought by environmental interest groups have sought to limit the ability of the Corps to issue permits for the discharge of "fill material" into regulated waters of the United States in a variety of settings – most particularly in the construction of valley fills for the disposal of excess overburden from surface mining operations. The plaintiffs have argued that the excess spoil from mining constitutes "waste" that cannot be "disposed of" in regulated waters pursuant to a Corps permit. Repeated successes for these plaintiffs at the District Court level have been followed by repeated setbacks at the appeals court level, as the appellate courts have generally upheld the Corps' permitting practices. This presentation will discuss the course of this debate in recent years and will focus on two recent appellate court decisions – one that upheld the Corps' authority to permit in-stream sediment pond systems below valley fills, and another that struck down the Corps' ability to permit the discharge of mine tailings as "fill material" where EPA has adopted a wastewater performance standard prohibiting such discharges. One step forward, and one step back.

■ Timothy J. Hagerty, *Frost Brown Todd LLC*, Louisville, KY

12:15-2:00 p.m. Lunch on Your Own

12:30 p.m. Presidents' Luncheon (Promenade 4)
Speakers' Luncheon (Promenade 1)

Tuesday Afternoon, May 19, 2009

General Session Resumes – Commodore Hall A-C

2:00-2:15 p.m. Scholarship Awards, John L. McClaugherty Award and Election Results

2:15-3:00 p.m. Spiraling Costs and Crashing Markets – Who Will Be Left Holding the (Empty) Bag for Depleted Pensions and Unfunded Health Care Liabilities?

A discussion of the legal landscape facing plan sponsors or trustees in meeting pension and benefit obligations. The review of recent judicial decisions will touch on benefit "hot button" issues including: Who is a fiduciary subject to a duty of loyalty to plan participants in matters involving investments and the provision of benefits? What is the state of the law concerning the use of an employer's stock to fund pension plans? What sorts of actions may an employer (*i.e.*, plan sponsor) take without triggering fiduciary obligations, even though they adversely impact plan participants? What "cost containment" initiatives may be allowable under the Coal Act? Who has standing to bring an action against a plan sponsor or administrator? What kinds of remedies are available to a participant who alleges harm resulting from the actions (or failure to act) of a fiduciary? Recent trends in litigation concerning bargaining and modification to retiree health benefits.

■ David R. Warner and Gregory J. Ossi, *Venable LLP*, Vienna, VA

3:00-4:00 p.m. The Evolution of Consents

The mineral lease has evolved from the absence of language restricting the assignment of the lease to one that prohibits or severely restricts the ability of the lessee to assign or encumber the lease, yet in today's corporate environment and capital markets, more lessees are requiring the flexibility to transfer or assign assets, complete corporate reorganizations and secure financing via the granting of leasehold mortgages and/or overriding interests to lenders or equity partners. The lessee's flexibility is countered by arguments from mineral owners and lessors that restrictive language in mineral leases provides a prudent business practice allowing them greater control over the parties to whom they have a business relationship and prohibits encumbrances (leasehold mortgages and overrides) that could hamper future development of their assets. Other consent issues such as gas well locations, mine plans, final reclamation, contract miners, subleasing, and assignments will also be discussed from the viewpoints of mineral owners, lessors, lessees and lenders.

■ Nick Carter, *Natural Resource Partners L.P.*, Huntington, WV

■ Bruce E. Cryder, *Greenebaum Doll & McDonald*, Lexington, KY

■ David Stetson, Managing Director, *Dome Capital Advisors, LLP*, Union, KY

■ Arthur J. Wright, *Thompson & Knight*, Dallas, TX

4:00 p.m. Adjourn

The Hilton Oceanfront Resort is a perfect, tropical paradise, located just off the coast of South Carolina on world-renowned Hilton Head Island. Situated within the exclusive, 2,000-acre resort community of Palmetto Dunes, come experience the luxury of the Hilton name. The beach is only the beginning. Call 1-800-HILTONS and ask for the EMLF block. Or register online by going to www.emlf.org. Cutoff date is April 28 or sell out. Guestrooms at \$209 have mini-kitchen and balcony. Ocean View suites are \$249 per night. Rates offered from May 13-23 based on availability, plus 11% guestroom tax rate. Parking is \$8.00 per night. There is no resort fee.

Join the Foundation at a reduced rate and register at the Member Rate! 2009 individual membership dues \$425.
 New individual membership and Annual Institute registration \$1,000 by April 15.



**Yes, I want to attend the 30th Annual Institute May 17-19, 2009
 at Hilton Oceanfront Resort, Hilton Head Island, South Carolina**

Registration fee includes all educational sessions, meeting materials and handbook, Sunday evening reception and dinner, Monday reception, refreshment breaks, and a copy of 30th Energy & Mineral Law Institute Annual Proceedings.

| <i>Registration fees</i> | <i>Early Bird (by April 15)</i> | <i>After April 15</i> |
|--------------------------------------|---------------------------------|-----------------------|
| Non-member Registration Fee | \$800 | \$900 |
| EMLF Member Attorney | \$650 | \$750 |
| EMLF Member Landman | \$450 | \$550 |
| Young Lawyer (3 years or less) | \$450 | \$550 |
| Combined dues/ registration | \$1,000 | \$1,100 |
| Board of Trustees Luncheon | \$40 | \$40 |
| Guest Registration Fee | \$100 | \$100 |
| Golf Outing | \$120 | \$140 |

First Name _____ M.I. _____ Last Name _____ Nickname _____

Organization/firm _____ Title _____

Address _____

City, state, zip _____

Daytime phone _____ Fax # _____

Email address _____ Guest _____

State(s) for CLE Credits _____

Please send me information on a Tennis Outing for Sunday afternoon

Fees:

Conference registration \$ _____
 Golf outing \$ _____
 New Membership/Registration \$ _____
 Trustees Luncheon \$ _____
 Guest registration \$ _____
 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 720 minutes of instruction, including 60 minutes of professional ethics. Approximately 14.4 CLE hours in 50-minute states and 12 hours in 60-minute states will be available. 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

Refunds less a \$75 administrative fee will be given for written registration cancellations received by May 1. No registration refunds will be made thereafter, but substitutions can be made without charge. No golf refunds after May 1 unless a substitute can be found. Persons cancelling after May 1 are not entitled to any refund but will receive the handbook and all course materials. EMLF Members who cancel after May 1 can credit their registration fee less \$200 for a future EMLF program.

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



THE CORDUROY ROAD

Since its inception by Drew Carman and Dylan Solise in early 2006, The Corduroy Road has molded bluegrass, Americana, folk rock, and old-time country with the rawest of live performances. The two, born and raised in the Central Kentucky Bluegrass Region where they learned their craft, now reside in the musical gem of the southeast: Athens, GA. With the addition of John Cable on drums and Tim Helms on bass, The Corduroy Road quickly gained a reputation in Athens as an up and coming band on the scene after sharing the stage with such notable bands including The Avett Brothers, Paleface, The Packway Handle Band, Ian Thomas, Langhorne Slim, Drakkar Sauna and more. Athens *Banner Herald* called them “bluegrass rockers...influenced by old time country and Americana, while the live performances exude the energy of punk rock.” The band caught the ear of Mule Train Records’ founder Ryan Kelly, who quickly signed the band to the upstart label. In November of 2008, The Corduroy Road entered the studio of local legend John Keane (Widespread Panic, REM, BR549, Uncle Tupelo) to record their Mule Train debut tentatively scheduled for release in Spring 2009.

Website — <http://www.emlf.org> • E-mail — emlf@aol.com

Energy & Mineral Law Foundation
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Lexington, KY 40508



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