

31st Annual Institute

Energy & Mineral Law Foundation

May 9-11, 2010

Amelia Island Plantation

Amelia Island, Florida



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*Photo courtesy
of Amelia Island Plantation*

Program Schedule

Sunday, May 9, 2010

Activities – Golf Outing
4:00 p.m. Registration
4:30 p.m. Board of Trustees Meeting
6:00-9:00 p.m. Welcome Dinner Party and Live Music by The Corduroy Road

Monday, May 10, 2010

7:00 a.m. EMLF Registration Desk Opens

General Session

8:10 a.m. Welcome and Introductions
■ C. David Morrison, EMLF President, *Steptoe & Johnson PLLC*, Clarksburg, WV
■ Sharon O. Flanery, Program Chair, *Steptoe & Johnson PLLC*, Charleston, WV

8:15-8:45 a.m. Keynote Address
■ Dennis E. Welch, Executive Vice President – Environment, Safety & Health and Facilities, *American Electric Power*, Columbus, OH

8:45-9:30 a.m. Climate Change Tort Litigation: An Emerging Wave?
In *Connecticut v. American Electric Power Company*, the Second Circuit handed the first-ever victory to States and private plaintiffs in a lawsuit alleging that greenhouse gas emissions from five electric utilities were contributing to climate change — a public nuisance — and plaintiffs' subsequent personal injuries and property damage. A few weeks later, in *Comer v. Murphy Oil*, the Fifth Circuit gave a comparable win to Mississippi residents alleging climate change-related injuries sustained during Hurricane Katrina in 2005. In both cases, the courts of appeal refused to allow the principle of separation of powers or the standing doctrine to defeat judicial resolution of plaintiffs' grievances. They insisted that the judiciary has the tools and competence to resolve plaintiffs' claims, and they were unwilling to let the claims be defeated at an early stage where plaintiffs had purportedly asserted at least some relationship between their alleged injuries and defendants' alleged contribution to climate change. Although *AEP* and *Comer* share many factual and legal similarities, they also present key differences, including whether the claims were brought under state or federal common law and whether plaintiffs seek damages to redress past injuries or an injunction to prevent future harms. This presentation will discuss the direction of climate change tort litigation, including related litigation in the Ninth Circuit, in which a district court parted ways and dismissed claims filed by an Alaskan native village against multiple energy companies. The presentation will also address how existing cases relate to ongoing negotiations for more comprehensive energy legislation, as well as what the cases mean for other emitters of greenhouse gases.

■ Jessica A. Hall, *Crowell & Moring LLP*, Washington, DC

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

9:45-10:30 a.m. Expert Opinions in Environmental Litigation – A *Daubert* Update
Environmental litigation almost always involves scientific issues and expert opinions, often with multiple experts in different disciplines. In 1993, the U. S. Supreme Court issued its landmark *Daubert* decision that both established a gatekeeping requirement, under which courts must screen expert opinions for reliability and exclude “junk science,” and a new, more flexible test to be used in this process. This session will review these standards as they have become better defined through rules amendments and application by federal and state courts over the past 16 years.

■ Joseph R. Brendel, *Thorp Reed & Armstrong*, Pittsburgh, PA
■ Jerri A. Ryan, *Thorp Reed & Armstrong*, Pittsburgh, PA

10:30-11:15 a.m. Risk Management in the Energy Industry; Prospective Congressional Reform and Over the Counter Derivatives

Congressional and CFTC proposals aimed at reforms of the derivatives markets are causing concern in the electric power, natural gas and coal industries, which argue that entering into over-the-counter (OTC) trades directly between two parties instead of through centralized clearinghouses or exchanges allows them to manage risk and minimize price volatility in a cost-effective way, all of which benefits electricity and other end-use customers. (OTC transactions are instruments that utilities and other businesses use to manage financial risks and market volatility in various commodities markets, including commodity fuel and wholesale electricity markets.) Energy companies use OTC transactions as part of their overall hedging strategy both with respect to their own production (such as gas producers entering into an OTC transaction to secure what is believed to be favorable pricing on future planned production) and for purposes of promoting price stability for their own energy needs (such as coal producers executing OTC deals as part of an overall hedging program related to diesel fuel or natural gas needs). The developing landscape in this area also has created jurisdictional issues regarding the scope and authority of the CFTC to regulate market activities traditionally subject to FERC control. A related issue is whether and to what extent OTC and other transactions entered into by producers and consumers of energy commodities are properly treated as “forward contracts” subject to special treatment under the Bankruptcy Code.

■ David McIndoe, *Hunton & Williams*, Washington, DC

11:15 a.m.-12:15 p.m. Ethics Issues for In-house (and Out-house) Counsel

This session addresses various professional responsibility issues of interest to both in-house corporate counsel and outside counsel, including attorney-client privilege and work product – when communications involving in-house and outside attorneys are (and are not) protected, joint defense privilege, intercorporate privilege, agency disclosures / selective waiver, and inadvertent waiver; and temporary legal employees – rights and obligations when either the client or the outside firm retains contract employees.

■ Randall C. Light, *Steptoe & Johnson PLLC*, Clarksburg, WV

■ Kara Cunningham Williams, *Steptoe & Johnson PLLC*, Charleston, WV

12:30-1:45 p.m. Luncheon – Guest Speaker – Coal and Natural Gas Market Update

■ John T. Boyd II, President and CEO, *John T. Boyd Co.*, Pittsburgh, PA

Monday afternoon — General Session Resumes

2:00-2:40 p.m. Responding to the Public Policy Debate – Strategies for Developing a Diverse Portfolio for New Age Energy

As the U.S. considers its options for addressing “climate change” issues, there have been a number of initiatives to advance the development of renewable sources of electricity, with the goals of reducing carbon emissions and thereby responding to the international global climate change dilemma, while increasing energy independence and security.

■ Kathy G. Beckett, *Jackson Kelly PLLC*, Charleston, WV

2:40-3:20 p.m. Developing Alternative Energy Projects – Commercial and Legal Considerations

The daily headlines are filled with references to alternative energy projects and the debate over government policies designed to nurture the growth of this emerging sector of the energy industry. However, what does it really take to develop a successful alternative energy project in the United States? This session will outline the practical commercial and legal considerations associated with the development of alternative energy projects, with a case study discussion of landfill-gas-to-energy projects that produce renewable natural gas.

■ Christopher Davis, VP of Business Development, *Montauk Energy Capital*, Pittsburgh, PA

■ Seth Rice, *Babst, Calland, Clements, and Zomnir, P.C.*, Pittsburgh, PA

3:20-3:35 p.m. Break

3:35-4:15 p.m. Innovative Approaches to Post-Mining Land Use

The debate over the post-mining effects of coal mining and the associated reclamation continues to rage in the Appalachian coal industry. A few states and Congress have enacted legislation to create programs intended to encourage the post-mining development of reclaimed mine lands and the resulting economic benefits to coalfield communities. This session explores existing state and federal programs for the redevelopment of mined properties and strategies for incorporating the potential benefits of these programs into mine reclamation and mitigation plans.

■ William M. Herlihy, *Spilman Thomas & Battle, PLLC*, Charleston, WV

4:15-5:15 p.m. Cap and Trade System – Issues and Opportunities for Coal Mines

There are many views regarding the nature and pace of global climate change and the ability to differentiate between natural variations from those caused by human activity. Regardless of those views, companies operating in the coal mining sector need to plan for success by recognizing that some form of state, federal or international carbon regulation is going to continue to develop. This session will provide an overview of the basic parameters of a “cap and trade” system and how the issuance of “allowances” to emit carbon dioxide is interrelated with the ability to generate “offsets” by reducing greenhouse gas emissions. The process to develop, verify, and register greenhouse gas “offsets” and thereafter monetize them is reviewed in the context of coal mining operations. A particular emphasis is placed on the methane gas released during coal mining as this release is viewed by regulators as an area ripe for regulation in order to help fight climate change, while at the same time being a potentially large source of easily verifiable “offsets.” Mr. Walker will provide an overview of activities since 2003 at the Northern Appalachian longwall operations of Alpha Natural Resources affiliates to capture coal mine methane instead of venting it to the atmosphere. Finally, he will review some of the emerging issues in the area of coal mine methane release that will require attention of coal operators and their advisors in the future.

■ Greg Walker, Senior Vice President, *Alpha Natural Resources*, Linthicum Heights, MD

6:30-7:30 p.m. Reception

7:30 p.m. – Dine-around Amelia Island

Tuesday, May 11

7:00 a.m. Registration opens

Concurrent Session A – Coal and Mine Safety

8:00-8:40 a.m. Coal Law Update with MSHA Coverage

The annual update on cases and regulations affecting the coal industry.

■ Wesley B. Boggs, *Penn Stuart & Eskridge*, Bristol, TN

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

8:40-9:30 a.m. Critical Issues in the Law of Civil and Criminal Liability Under the Mine Act

This session will explore issues in the interpretation and enforcement of federal laws that expose mine operators and supervisors to civil and criminal liability, focusing on sections 110(c) and 110(d) of the Mine Act. Presenters will outline principles discernable from case law and experience useful for guiding mine supervisors’ conduct so as to avoid liability, and explore potentially critical issues not yet fully addressed by the courts or the Federal Mine Safety & Health Review Commission, including: (1) how the “reasonably prudent miner standard” and the “collective knowledge doctrine” apply in the prosecution of alleged knowing and willful violations under sections 110(c) and (d), and (2) whether and how federal conspiracy, obstruction, and false statement law apply in investigations of mine operator misconduct. The presentation will also cover strategies for responding to investigations without compounding operators’ exposure.

■ Bridget Littlefield and Ann Mason, *Crowell & Moring LLP*, Washington, DC

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

9:45-10:30 a.m. Conducting Internal Accident and Incident Investigations

This session examines internal accident and incident investigations, documenting the investigations, and maintaining the documentation as privileged. Also discussed will be learning from accidents and documenting/acting in such a manner that qualifies remedies and/or improvements as subsequent remedial measures.

■ Michael O. McKown, *Murray Energy Corp.*, Pepper Pike, OH

10:30-11:15 a.m. Mine Permit Transfers, SMCRA Ownership and Control Changes, and Reclamation Liability

This session explores federal and state regulations on when mine permit transfers are required under SMCRA and delegated state programs, as distinguished from operator assignments and ownership and control updates, and how that could affect excess reclamation cost claims.

■ Christopher B. Power, *Dinsmore & Shohl LLP*, Charleston, WV

■ Donnie L. Adkins II, *Dinsmore & Shohl LLP*, Charleston, WV

11:15 a.m.-12:30 p.m. Enhanced Review of Clean Water Act 404 “Fill” Permits by EPA and the Corps of Engineers
After the Fourth Circuit issued a decision early in the Obama Administration that appeared to clear the way for dozens of permits stalled before the Corps, the new administration acted swiftly to re-review pending applications with a far more critical approach. The effect has been further delay and the assertion of new policies concerning water quality that threaten the coal industry in central Appalachia. This panel will evaluate the current status of EPA’s and the Corps’ permit reviews and policies, the prospects for further regulatory changes, and, most importantly, the practical implications for regulated entities seeking to advance their mining plans in an economical and expeditious manner.

- Moderator: Timothy J. Hagerty, *Frost Brown Todd LLC*, Louisville, KY
- Karen C. Bennett, Vice President, Environmental Affairs, *National Mining Association*, Washington, DC
- Robert G. McLusky, *Jackson Kelly PLLC*, Charleston, WV
- Roger L. Nicholson, General Counsel, *International Coal Group, Inc.*, Scott Depot, WV

12:30-1:30 p.m. Hosted Luncheon – Awards and Recognition

Concurrent Session B – Oil and Gas

8:00-8:50 a.m. FERC: Who Is It, What Does It Do, and How Does It Affect the Natural Gas Industry?

A short tour of how the Federal Energy Regulatory Commission (FERC) regulates the natural gas industry, with a focus on facilities, construction and abandonment, and how FERC’s view of its jurisdictional reach impacts development of new gas supply, such as the Marcellus shale formation.

- Fredric J. George, *NiSource Corporate Services*, Charleston, WV

8:50-9:30 a.m. Oil & Gas Update

The annual update on cases and regulations affecting the oil and gas industry.

- Stephen Bupp, *EQT Production Co.*, Charleston, WV

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

9:45-11:00 a.m. Exploration and Development Agreements

Given the significant costs of evaluating and developing the shale plays that have emerged from Louisiana and Arkansas to Pennsylvania and New York, companies are electing to join forces with other participants. When there are multiple participants in a project, the group has to work together to make decisions on such issues as data gathering, identifying prospects, and drilling test wells. To establish a framework for the decision making process, participants typically enter into a joint development or exploration agreement that governs the project. This presentation will address common provisions in a sample exploration and development agreement, including the implementation and funding of data gathering and lease acquisition activities, the confidentiality of data, the establishment of an area of mutual interest, and the interplay of the exploration and development agreement with the operating agreement. This presentation will also provide alternative provisions that address more difficult issues such as the selection of the operating or managing party and the consequences of a participant electing not to participate in a seismic shoot or an initial well.

- Debra J. Villarreal, *Thompson & Knight LLP*, Dallas, TX

11:00-11:40 a.m. Is It a Deep Well or a Shallow Well and Who Cares?

The statutory definition and rules related to formation of special field rules for oil and gas development are being challenged by the coal industry and others, and the Surface Owners’ Rights Organization has intervened. The determination whether a well is a shallow or deep well has important implications related to well spacing, permitting and compliance differences, forced pooling implications, and surface damage and compensation issues. Also discussed is the likelihood of legislation in several states to modify the statutory framework to require a surface owner “royalty” or compensation for “deep” wells, and requirements for horizontal drilling and forced pooling of shallow Marcellus wells.

- Timothy M. Miller, *Robinson & McElwee*, Charleston, WV

11:40 a.m.-12:30 p.m. Marcellus Shale Water Issues Panel

The Marcellus Shale play presents challenges at both ends of the water spectrum — obtaining fresh water to support hydraulic fracturing, and disposal of produced water. Although the Susquehanna River Basin Commission has well-settled rules, the Delaware River Basin Commission is still developing its policies and New York State is establishing its own policies through the Supplemental Generic Environmental Impact Statement process. This panel will address these issues, plus the potential for EPA regulation of hydraulic fracturing should Congress act to remove the hydraulic fracturing exemption from Safe Drinking Water Act regulation.

- Nicholas “Corky” DeMarco, *West Virginia Oil & Natural Gas Association*, Charleston WV
- George A. Patterson, III, *Bowles Rice McDavid Graff & Love LLP*, Charleston, WV
- Thomas S. West, *The West Firm, PLLC*, Albany, NY
- R. Timothy Weston, *K&L Gates LLP*, Harrisburg, PA

12:30-1:30 p.m. Hosted Luncheon – Awards and Recognition

General Session Resumes

1:45-2:30 p.m. Water and Energy: Balancing Essential Needs for the Quality of Human Life

Water is essential to life and to the production of energy. While life cannot be sustained without water, the quality of life cannot be sustained without energy. However, both resources are becoming scarce. Until recently, western states seemed to have a monopoly on water scarcity issues. This is no longer true. Governments, industries and individuals have suffered substantial shortages in the east in the last two decades. This session will review eastern common law riparian rights relevant to energy production, including a discussion of ownership and liability issues, inter-basin transfers, diversions, and water issues raised by mining operations and by gas extraction in the Marcellus Shale formation, including quantity, storage, treatment and disposal.

- Joyce E. McConnell, Dean, *West Virginia University College of Law*, Morgantown, WV

2:30-3:15 p.m. Environmental Representations and Warranties in Purchase and Sale Transactions: Disclosure and Diligence Obligations with Respect to GHG Emissions

This session reviews the final EPA rules regarding the regulation of GHG emissions and reporting, and explores the extent to which emerging climate change legislation, existing and pending EPA rules regarding GHG emissions, and pending GHG litigation should influence the scope of environmental representations and warranties in the sale and purchase of real estate and appurtenant facilities. Also explored will be the extent of seller’s disclosure obligations with respect to GHG emissions, and the cost of monitoring and reporting, and the extent of buyer’s due diligence in ascertaining GHG related issues. The session will also suggest drafting considerations for standard representations and warranties in a purchase and sale agreement *vis a vis* GHG emissions, monitoring, and reporting.

- J. Kevin Ellis, *Bluestone Energy Partners*, Ellenboro, WV

3:15-3:30 p.m. Break

3:30-4:30 p.m. Techno Ethics – Proceed with Caution!

Technology provides great benefits to attorneys, including efficient workflow, unprecedented access to information, rapid, cost-effective communications, and more. With these benefits, however, come great risks, particularly in the area of confidentiality. Technology gone wrong can lead to ethics violations, waiver of privilege, and malpractice claims. This session will cover e-mail, blogs, social networking, cloud computing, and more.

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

4:30 p.m. Adjourn

The conference hotel is the Amelia Island Plantation, Amelia Island, Florida. Call 888.261.6165 for Group Reservations and identify yourself as Group 8BE7NW - \$169 plus taxes and \$12 daily resort fee. A one-night deposit will be required by check or credit card, and deposits will not be refunded unless the reservation is cancelled seven (7) days prior to arrival. Resort fee covers unlimited high speed internet access, unlimited on property shuttle transportation, self parking, unlimited use of health & fitness center, 1 bucket of range balls, in room coffee, housekeeping and transportation driver gratuities, local and toll free phone access. Cutoff date for room block – March 25. Check-in is at 4:00 p.m. and check-out is at 11:00 a.m.

You can also register online by going to the EMLF website for access to the link: www.emlf.org/Content/amelia.aspx

Join the Foundation at a reduced rate and register at the Member Rate! 2010 individual membership dues \$425.
 New individual membership and Annual Institute registration \$1,000 by April 9.



**Yes, I want to attend the 31st Annual Institute May 9-11, 2010
 at Amelia Island Plantation, Amelia Island, Florida**

Registration fee includes all educational sessions, meeting materials and handbook, welcome dinner party on Sunday evening, hosted reception on Monday, lunch on Monday and Tuesday, and refreshment breaks. Guest registration includes Sunday's welcome dinner party and Monday reception.

<i>Registration fees</i>	<i>Early Bird (by April 9)</i>	<i>After April 9</i>
Non-member Registration Fee	\$850	\$950
EMLF Member Attorney	\$700	\$800
EMLF Member Landman	\$500	\$600
Young Lawyer (3 years or less)	\$500	\$600
Combined Dues/ Registration	\$1,000	\$1,100
Guest Registration Fee	\$130	\$130
Gold outing - Ocean Links Golf Course, Amelia Island Sunday, May 9	\$135	\$135

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 _____

Fees:

Conference registration \$ _____
 New Membership/Registration \$ _____
 Guest registration \$ _____
 Golf outing \$ _____
 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 780 minutes of CLE, including 120 minutes of ethics. This is equal to 13 CLE hours including 2.00 hours of ethics in 60-minute states and 15.6 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

Refunds less a \$75 administrative fee will be given for written registration cancellations received by April 30. No registration refunds will be made thereafter, but substitutions can be made without charge. No golf refunds after April 30 unless a substitute can be found. Persons cancelling after April 30 are not entitled to any refund but will receive the handbook and all course materials. EMLF Members who cancel after April 30 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

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



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Amelia Island Plantation
Amelia Island, Florida

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Things to Do in Amelia Island

Amelia River Cruises: Tours from Amelia River Cruises & Charters are fully narrated as you explore the backwaters of Amelia Island and Cumberland Island, cruise up Egan's Creek to the Amelia Island Lighthouse or spend the day in historic St. Mary's, Georgia. Guests to Cumberland Island can visit the Greyfield Inn which has been operated by Carnegie descendents since the 1960s. Watch dolphins frolic in the river, wild horses run the beach on Cumberland Island and take in the breathtaking sunsets.

Paddle for Pleasure: Come face to face with egrets, herons and perhaps a dolphin, manatee or sea turtle with the fine folks at Kayak Amelia. Explore the tranquil salt marsh of the Talbot Islands State Park and Timucuan Preserve. The three-hour trip includes a half-hour kayak fitting on the beach, basic safety and paddle instruction and balance drill on water. Beginners constitute more than 90 percent of Kayak Amelia's clientele.

At Water's Edge: Travel back to the Amelia Island Marina and view working shrimp boats as you shop the eclectic seaside shops to take home your own piece of Amelia Island's history. Visit one of the world's largest manufacturers of hand-sewn shrimp nets, the Burbank Trawl Makers, or the Net House, as deemed by the Island's locals.

A Horse-Drawn Carriage: For a unique perspective of historic downtown Fernandina, take a horse-drawn carriage ride with Amelia Carriages while you listen to a historical narrative of the historic district. Guests will hear tales of new and old as they learn about the true past of the people and inns that shape Amelia's history.

A Glimpse into Amelia's Past: The Isle of Eight Flags comes to life with a visit to Florida's only spoken history museum, the Amelia Island Museum of History, located in what used to be the county

jail. Narrated, 90-minute walking tours take visitors through the streets of Fernandina Beach up Historic Centre Street and into the Silk Stocking District, introducing them to the many great historical figures who influenced the architecture and business on the island. Also included is Fort Clinch, one of the most well-preserved 19th century forts in the country. Daily tours with period re-enactors depicting garrison life bring the fort to life for visitors.

Through the eyes of nature: A nature lover's paradise, Amelia Island provides the perfect outdoor playground. Amelia Island Plantation Nature Center Programs for people of all ages and levels of experience are offered daily. Several island bike shops rent bicycles to guests, and resort properties can arrange bike rental on- or off-site. The Amelia Island Plantation has seven miles of trails.

Historic Centre Street: Once a vibrant, Victorian seaport village, charming downtown Fernandina Beach escaped the mass commercialization of the 20th century and boasts a beautiful 50-block historic district with many original structures dating back to the late 19th century, including many Victorian-style mansions and Victorian cottages. Take a stroll through the heart of Amelia Island's shopping district, historic Centre Street, and peruse through books from The Sailor's Wife Book Exchange, beautiful jewelry at Jeff Steel Jewelers, and gifts from The Ship's Lantern.

Tee Time: Amelia Island is truly a golfer's paradise. Named "Silver Medal Golf Resort" by Golf Magazine, Amelia Island Plantation boasts 54 championship holes. Amelia Links, designed by Pete Dye and Bobby Weed, offers 36 holes on two signature courses, Oak Marsh and Ocean Links. Long Point, home of the Amelia Island Plantation School of Golf, is designed among primal marshlands and the towering sand dunes of the Atlantic.

For visitor information and online planning, visit www.ameliaisland.com