



October 21-22, 2015
Hyatt Regency
Lexington, Kentucky

Kentucky Mineral Law Conference

*Energy
& Mineral Law
Foundation*



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Program Schedule

Wednesday, October 21

7:00 a.m. **Registration Opens**

7:00 – 9:00 a.m. **Continental Breakfast**

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

- G. Brian Wells, Foundation President, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY
- Kathy G. Beckett, Program Chair, *Steptoe & Johnson PLLC*, Charleston, WV
- Britt A. Freund, Oil and Gas Chair, *Bowles Rice LLP*, Canonsburg, PA
- R. Clay Larkin, Coal Chair, *Dinsmore & Shohl LLP*, Lexington, KY

9:00 – 9:50 a.m. **Is the Supreme Court Changing the Scope or Breadth of the *Chevron* Deference Doctrine?**

This presentation will canvass recent administrative law cases from the Supreme Court of the United States (SCOTUS), primarily during the time of Chief Justice John Roberts since 2005, to analyze the apparent fluidity in foundational principles of administrative law and separation-of-powers, and engender discussion whether the judiciary is becoming less deferential to Executive agencies and the validity of their regulations. If a judicial trend of less deference is emerging, what could this mean for newly proposed regulations from the Environmental Protection Agency (EPA), or other Executive Branch agencies, and could such regulations become more vulnerable to legal challenge? Even if a trend is emerging, how far is the judiciary likely to go in applying a less deferential analysis of Executive Branch regulations?

- Douglas L. McSwain, *Wyatt, Tarrant & Combs, LLP*, Lexington, KY

9:50 – 10:40 a.m. **Litigation Affecting the Energy Industry**

This session provides a critical analysis of significant cases which have or will impact the energy sector.

- J. Thomas Lane, *Bowles Rice LLP*, Charleston, WV

10:40 – 11:00 a.m. **Break**

11:00 – Noon **Professional Ethics: Examples from Constitutional History**

Emphasis upon ethical professional behavior is a good idea, despite the laments of lawyers everywhere that they “have to sit through another boring ethics presentation.” But ethics is a subject that is anything but boring — there are so many good examples of bad behavior from which we can learn. Indeed, as we shall see, many prominent figures from our constitutional history might have benefitted from studying professional responsibility, and from attending an occasional ethics CLE course. This presentation will use several of these colorful examples from our constitutional heritage to illustrate ethical pitfalls that were as common “back in the day” as they are now.

- Professor Stewart L. Harris, *Appalachian School of Law*, Grundy, VA

Noon – 1:15 p.m. **Hosted Luncheon and Guest Speaker**

- The Honorable Patrick James Morrissey, *Attorney General of West Virginia*, Charleston, WV



Wells



Beckett



Freund



Larkin



McSwain



Lane



Harris



Morrissey

1:15 – 2:00 p.m. **The Foreign Corrupt Practices Act**

How about these headlines? “Former Petrobras Exec Claims Bribes from Singapore Shipbuilders.” Or “Brazilian Police Arrest 2 Construction Moguls and 3 Other Senior Executives in Petrobras Fallout.” Or maybe “Brazil’s Electrobras Hires Lawyers to Investigate Potential Violations of Foreign Corrupt Practices Act and Brazil’s Anti-Corruption Law.” These are three true stories from only one country. If your company does business outside the U.S. or with companies or individuals outside the U.S., you and your companies may have unknowing exposure to serious civil and criminal sanctions from the U.S. or other governments. This presentation gives a summary of anti-corruption statutes across the globe, and then discusses ways to minimize your risks. For example, a payment to a Lower Slobovian public official to do some ministerial act may be perfectly legal and a normal way of doing business in Lower Slobovia, but it may be an illegal jail-time offense under American law. We will discuss common sense, real life solutions to how you get things done without hearing a cell door slam shut behind you.

- William D. Wilmoth, *Steptoe & Johnson, PLLC*, Wheeling, WV



Wilmoth



Magee

2:00 – 2:45 p.m. **Wage and Hour Issues in the Energy Industry**

The United States Department of Labor has an ongoing initiative focused on the misclassification of American workers, whether the situation involves an employee purportedly misclassified as an independent contractor or an employee allegedly misclassified as exempt from federal overtime regulations. In fact, the agency has targeted the oil and gas industry for wage and hour investigations, resulting in the recovery of back pay and penalties of over \$4.5 million in the Marcellus region alone over the past few years. This presentation will outline the DOL’s efforts and areas of focus, as well as providing perspective about how to avoid the pitfalls of compliance with the Fair Labor Standards Act.

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



Miller



Perry

2:45 – 3:00 p.m. **Break**

3:00 – 4:00 p.m. **EPA’s Clean Power Plan**

EPA has released its pre-published final Clean Power Plan (CPP) and the proposed Federal Implementation Plan for the CPP. This discussion will provide some highlights of the over 3,000 pages that comprise the CPP to include: anticipated impacts of the plan on the regulated EGUs, industrial consumers of electricity, those who provide coal and natural gas as a raw material, and the state agencies tasked with implementation. Also discussed will be strategies for managing the CPP to include “just say no,” “just use your own plan” and “just file the lawsuit.”

- Stephen L. Miller, Of Counsel, *Steptoe & Johnson PLLC*, Louisville, KY
- Christopher S. Perry, President and CEO, *Kentucky Association of Electric Cooperatives*, Louisville, KY



Hagerty



Ashcraft

4:00 – 4:45 p.m. **Waters of the United States: What Now?**

After years of litigation, conflicting guidance, and hundreds of thousands of public comments, the U.S. Environmental Protection Agency and the Army Corps of Engineers recently published a final rule defining “Waters of the United States” under the Clean Water Act. The rule purports to provide clarity and certainty for the regulated community in an area that has been fraught with confusion and uncertainty for years. But what exactly is clear or certain now about the scope of federal jurisdiction under the Clean Water Act? This session will provide a brief overview of the new rule’s major elements, followed by an in-depth discussion of the practical implications of the rule for those doing business in the energy arena. The focus of this presentation will be on what businesses can expect from this rule in their everyday operations.

- Timothy J. Hagerty, *Frost Brown Todd LLC*, Louisville, KY
- Rusty Ashcraft, Mgr., Environmental Affairs, *Alliance Coal, LLC*, Lexington, KY
- Phillip R. Elswick, P.E., President, *Summit Engineering*, Pikeville, KY



Elswick



Heywood

4:45 – 4:50 p.m. **Break**

4:50 – 5:50 p.m. **Professional Ethics**

Mr. Heywood will outline and discuss the role and duties of members of boards of directors and several related topics, including the respective roles of boards and CEOs; the sources of duties and obligations of board members; and issues related to board member standards of conduct, liability, and immunities. Attendees will come away from the presentation with a practical understanding of how to discharge their role, duties and obligations as board members, and how to be a more effective board member.

- Thomas A. Heywood, *Bowles Rice LLP*, Charleston, WV

6:00 – 8:00 p.m. **Hosted Reception**

Thursday, October 22 – Mining Track

8:00 – 8:50 a.m. **Identify the Pattern: Challenges to MSHA Enforcement of Its POV Rule**

This presentation will discuss the latest developments in enforcement of MSHA's pattern of violations (POV) rule, focusing on pending litigation challenging both the validity of the rule and the application of the rule, including MSHA's interpretations of what constitutes a pattern of violations and how the agency determines that citations constitute such a pattern.

■ Melanie J. Kilpatrick, *Rajkovich, Williams, Kilpatrick & True, PLLC*, Lexington, KY



Kilpatrick



Gorton

8:50 – 9:40 a.m. **Flagrant Violations: Is There a Light at the End of the Tunnel?**

As part of the landmark MINER Act of 2006, Congress amended the Federal Mine Safety and Health Act of 1977 to include a "flagrant" provision that authorizes a penalty of up to \$242,000 for a single violation. Nearly a decade later, application of this provision remains mired in uncertainty. This presentation traces the history of the flagrant provision, highlights the key points of clarification that may be on the horizon, and offers insights as to how operators can be proactive to avoid incurring this consequence.

■ Daniel Z. Zaluski, *Blackhawk Mining, LLC*, Lexington, KY



Hoffman

9:40 – 10:00 a.m. **Break**

10:00 – 10:50 a.m. **Financial Assurances, Suretyship and Bonding**

State and federal laws governing resource extraction require that the permittee provide financial assurances to the regulatory agencies to guarantee compliance with land and water reclamation/restoration. Financial assurances can be in several forms including corporate surety bonds, self-bonding and other forms of collateral. In light of market conditions numerous coal companies have filed for Ch. 11 bankruptcy protection. Whether they can emerge without having addressed their environmental obligations is a big concern to state and federal agencies, the public and land owners. The surety companies play an important role at this intersection of environmental and bankruptcy law. This presentation will explain the concept of suretyship, reclamation obligations and current issues in the field in light of recent Ch. 11 filings.

■ William T. Gorton, III, *Stites & Harbison, PLLC*, Lexington, KY



Rosser



Armstrong

10:50 – 11:40 a.m. **Individual Liability for Coal Company Operations**

The liability for coal mining operations extends far beyond the corporate or company level. This presentation addresses the potential liabilities officers, directors, agents and owners of coal companies face for their companies' operations under SMCRA, the Mine Safety and Health Act, and other applicable laws. It will also examine the impact of bankruptcy on those liabilities.

■ Warren J. Hoffmann, *Frost Brown Todd LLC*, Lexington, KY

11:45 a.m. – 1:30 p.m. **Lunch – On Your Own
EMLF Committee Luncheons (Membership, Programming,
Technology, Law School, Governance)**

1:45 – 2:35 p.m. **Coal Combustion Residuals**

The process of disposing of and storing coal combustion residuals has been subject to increased scrutiny in recent years, stemming from recent incidents involving the release of coal combustion residuals into surrounding communities and waters. Brent Rosser, partner at Hunton & Williams LLP, will examine the potential legal impacts of these disposal and storage practices, as well as the pertinent regulatory programs, including EPA's recently finalized coal combustion residuals rule.

■ Brent A. Rosser, *Hunton and Williams, LLP*, Charlotte, NC

2:35 – 3:25 p.m. **OSM's New Stream Buffer Rule**

In July, the Department of the Interior's Office of Surface Mining Enforcement and Reclamation issued its long-awaited revamped Stream Protection Rule after years of litigation and controversy. The Bush Administration's 2008 changes to the stream buffer zone regulation were vacated by a federal judge in 2014 after environmental group litigation. The new proposed rule would make several changes to the existing 1983 regulation, including imposing for the first time a federal definition for "material damage to the hydrologic balance outside the permit area," comprehensive groundwater and surface water monitoring, and protection or restoration of perennial and intermittent streams. This presentation will provide an overview of the proposed rule and its potential implications for mining operators.

■ Sherrie A. Armstrong, *Crowell & Moring LLP*, Washington, DC

3:25 – 4:15 p.m.

Buyer's Counsel — Current Issues in Coal Asset Acquisitions

While savvy industry investors can take advantage of current market conditions to acquire quality coal assets at a discount, the market and changing environmental regulations present new issues for buyer's counsel conducting due diligence and negotiating transaction documents. Whether dealing with environmental regulations that can impact acquired coal operations; issues associated with long-term enforceability of contracts with insolvent entities; assignment and subleasing issues under coal leases; the complexity associated with acquiring assets out of bankruptcy; or structuring unique financing arrangements, transaction lawyers must navigate many issues in order to identify and mitigate risk for their clients. This presentation will present and address some of these important current issues.

■ Brady W. Dunnigan, *Dinsmore & Shohl LLP*, Lexington, KY



Dunnigan



Swift

4:15 p.m.

Adjourn

Thursday, October 22 – Oil & Gas Track

8:00 – 9:00 a.m.

What Happens at the Intersection of Liquids Rich Gas, Pipeline Quality Specs and Royalties in an Oversaturated Market?

Over the past 12 months the prices for natural gas liquids (NGL) has plummeted due to an oversaturated market. The increased levels of NGLs and processing capacity in Appalachia have created a unique dynamic for producers. Where once the conversation was about royalty owners participating in NGL “uplift,” now the discussion has shifted to passing the NGL processing costs onto the royalty owners. This discussion will provide a high level overview of the need for processing liquids rich gas to meet pipeline spec, what has happened to the NGL market and ultimately why producers may end up holding the bag on liquid rich gas.

■ Peter Swift, *EQT Energy LLC*, Houston, TX



Patterson



Nicas



Smith

9:00 – 10:15 a.m.

Pooling in the Appalachian Shale Plays

This past year the state of West Virginia came very, very close to passing a pooling bill for horizontal drilling in all formations (including Marcellus). The bill was proposed in light of West Virginia's historic statutory pooling for deeper formations, which is now being applied to the Utica, but not to the Marcellus. Other Appalachian states have pooling, or some variation of pooling. This presentation will examine the often-times competing concerns amongst stake-holders (the needs of working interest owners, surface owners, oil and gas owners, and others) and the ways in which applicable statutory pooling schemes attempt to provide for stake-holders' varying interests. Panelists will discuss the specific state statutes that are already in place and whether to borrow concepts from states like Texas and Oklahoma in enacting or revising comprehensive modern pooling legislation. We will also look at how the Appalachian regulators are applying their existing statutory framework to horizontal drilling techniques, the implications for non-pooled multi-lease development by way of “allocation wells,” and the process for establishing units that do not conform with traditional well spacing.

■ George A. Patterson, III, *Bowles Rice LLP*, Charleston, WV

■ James R. Nicas, *Steptoe & Johnson, PLLC*, The Woodlands, TX

■ William H. Smith, *Steptoe & Johnson, PLLC*, Bridgeport, WV



Saffer



Symonds

10:15 – 10:30 a.m.

Break

10:30 – 11:40 a.m.

Title Defects, Potential Curative Efforts, and Risk Assessment Issues

This presentation brings together a panel of title and land professionals to discuss a wide variety of title defect issues in the Appalachian Basin. The panel will discuss and provide analysis regarding specific real world title defects, including description problems, interpretation of reservations, unknown or missing owners, effect of tax sales, incomplete estate administration and other issues. The panel will also discuss addressing defects through curative efforts and the likelihood of successfully obtaining curative in a timely manner to meet management expectations. The panel will also focus on the assessment of risk associated with a defect following curative efforts whether successfully obtained or not and on recommendations to be made in regard to operations concerning defects.

■ Moderator: Charles F.W. Saffer, *Robinson & McElwee PLLC*, Charleston, WV

■ Joel E. Symonds, Vice President of Land, *Mountaineer Keystone, LLC*, Wexford, PA

■ Michael L. Rush, Senior Title Manager, *Rice Energy Inc.*, Canonsburg, PA

■ Jacob M. Biehl, RPL, Senior Landman, *Triad Hunter, LLC*, Marietta, OH



Rush



Biehl

11:45 a.m. – 1:30 p.m. **Lunch – On Your Own**
EMLF Committee Luncheons (Membership, Programming,
Technology, Law School, Governance)

1:45 – 2:35 p.m. **Competing Surface Uses for Oil and Gas Development**

With the robust development of pipeline infrastructure in the Appalachian basin, competition for surface rights related to oil and gas development and transportation is fierce. In some instances, operators will use “exclusive” rights to surface as a competitive edge. This presentation will cover competing rights to surface-use as between operators and the information necessary for evaluating this competition across relevant jurisdictions. The correlative rights at play necessarily invoke issues with recording and notice of rights, adequacy of descriptions, exclusivity under oil and gas leases, exclusivity for right-of-ways, blanket easements, implied surface rights versus express surface grants, and the accommodation doctrine.

■ Travis L. Brannon, *K&L Gates LLP*, Pittsburgh, PA

2:35 – 3:25 p.m. **Master Service Agreements**

The presentation examines the industry’s use of uniform Master Service Agreements (MSAs) across the jurisdictions, and the problems and challenges this one-size-fits-all approach presents, particularly with respect to indemnification provisions. The session will address commonly litigated indemnity language and the interplay between indemnity and insurance, and compare and contrast how courts, in both those states newer to the oil and gas industry such as Pennsylvania and Ohio, as well as those more familiar with it such as Oklahoma and Texas, have addressed those issues. The purpose of the paper is to enable counsel to better advise clients on their indemnity rights and obligations in the states they do business, so they can avoid common pitfalls and more importantly, know what to expect in each jurisdiction.

■ Daniel R. Michelmore, *Jackson Kelly PLLC*, Pittsburgh, PA

3:25 – 4:15 p.m. **What You Should Know About Induced Seismicity**

This session presents a discussion on induced seismicity and the legal impacts on upstream oil and gas and disposal operations. The public, researchers, state regulators and our industry have all become focused on induced seismic events as shale plays have increased throughout the United States. The result has led to delays in the permitting of disposal wells and heightened monitoring of oil and gas drilling operations. The panel discussion provides a broad presentation on what EMLF members should know about induced seismicity, including the basics on what is induced seismicity, how it is regulated at the state level and how those regulations are impacting the oil and gas industry. The presentation includes a review and discussion of recent regulatory efforts and litigation.

■ Michael J. Settineri, *Vorys Sater Seymour and Pease LLP*, Columbus, OH

■ J. Daniel Arthur, President, Chief Engineer, *ALL Consulting LLC*, Tulsa, OK

4:15 p.m. **Adjourn**



Brannon



Michelmore



Settineri



Arthur



Yes, I want to attend the Kentucky Mineral Law Conference

The full conference registration includes all program materials on a USB drive, continental breakfasts, Wednesday lunch, refreshment breaks and hosted reception on Wednesday. Registrants choosing to have program materials in looseleaf binder at the time of the program for an additional \$65 should mark that choice on the registration form.

Registration fees	Conference through Oct. 1	Conference after Oct. 1
Non-member Registration Fee	\$590	\$650
EMLF Member	\$425	\$475
Young Lawyer (3 years or less)	\$325	\$375
Law Students* and Retirees	\$100	\$100
Printed Program Materials (Conference Registrants Only)	\$65	\$65

*Registration fee is waived for 3 law students from each EMLF member law school.

First Name _____ M.I. ____ Last Name _____ Badge Name _____

Organization/Firm _____ Title _____

Address _____

City, State, Zip _____

Daytime Phone _____ Fax # _____

Email Address _____

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

Fees:

Conference Registration \$ _____

Hard Copy Notebook \$ _____

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. Application will be made for 765 minutes of continuing education, including 120 minutes of ethics. In states which calculate 50 minutes as a CLE hour, this will be 15.3 hours of CLE. In states which calculate 60 minutes for a CLE hour, this will be 12.75 hours of CLE credit. 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

Full refunds less a \$75 administrative fee will be given for written registration cancellations received by October 10. No registration refunds will be made thereafter, but substitutions can be made by calling the Foundation at 859.231.0271. Persons not entitled to any refund will receive meeting materials. EMLF members who cancel their registrations after October 10 receive materials and a \$100 credit toward a future 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

Look for information about the conference hotel elsewhere in this brochure



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

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Mineral Law
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October 21-22, 2015
**Hyatt Regency
Lexington
Lexington, KY**

Conference Hotel

Accommodations for the conference are at the Hyatt Regency Lexington, 401 West High Street, Lexington, KY 40507. The room rate is \$189 plus tax, currently at 13.4 percent, for reservations made through September 29 or sell out.

Call 1.800.233.1234 and ask for the EMLF Group rate. Check-in time is 3 p.m. and check-out time is noon. Cancellations must be made by 3 p.m. the day prior to arrival. Failure to cancel a guaranteed reservation prior to 3 p.m. on the day prior to arrival will result in a no-show charge. Or go to the EMLF website — www.emlf.org — for a link to online registration.

Parking for the Hyatt Regency is provided in the Lexington Convention Center parking lot directly across the street from the hotel. Parking is complimentary for overnight guests of the hotel only and meeting attendees at the Hyatt, based on availability.

Airport shuttle: The Hyatt Regency Lexington offers complimentary shuttle transportation to and from Lexington Bluegrass Airport on a first come, first serve basis. Airport transportation is not guaranteed.

Please note: If you have special needs addressed by the Americans with Disabilities Act, please let us know two weeks prior to the program. Also, please advise us if you have special dietary needs.

Save the Dates!

- *February 28, 29 and March 1*
Winter Workshops
on Energy Law
Fort Lauderdale, Florida
- *June 12-14, 2016*
37th Annual Institute
Charleston, South Carolina