

FIRST QUARTER 2020
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On January 7, 2020, the United States Court of Appeals for the Fourth Circuit vacated the air permit for the Atlantic Coast Pipeline’s Buckingham compressor station located in the historic community of Union Hill in Buckingham County, Virginia. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020). Petitioners filed the petition for review contending that the Virginia Air Pollution Control Board erred in: (1) failing to consider electric turbines as zero-emission alternatives to gas-fired turbines in the compressor station and (2) failing to assess the compressor station’s potential for disproportionate health impacts on the predominately African-American community of Union Hill. *Id.* at 71. In vacating and remanding the award of the permit, the Court agreed with petitioners and held that defendants failed to provide sufficient and rational explanation of their failure to consider electric turbines in place of gas-fired turbines and the board failed in its statutory duty to determine the character and degree of injury to the health of the Union Hill residents. *Id.* at 93.

On February 11, 2020, the United States Court of Appeals for the Fourth Circuit issued an opinion addressing when the statute of limitations period commences for civil enforcement claims brought by the Federal Energy Regulatory Commission (“FERC”) under the Federal Power Act (“FPA”). *Fed. Energy Regulatory Comm’n v. Powhatan Energy Fund, LLC*, 949 F.3d 891 (4th Cir. 2020). FERC filed an action seeking an order affirming civil penalties against energy-trading firms and individuals for violation of the FPA. The FPA provides two procedural options by which FERC can assess civil penalties: (1) a FERC administrative law judge will hear the dispute or (2) adjudication occurs in federal district court. *Id.* It is up to the violator to choose the procedure it will follow. *Id.* The district court denied defendants’ motion to dismiss which asserted that most of the conduct underlying FERC’s claim fell outside of the five-year statute of limitations. *Id.* The

Fourth Circuit Court affirmed the denial of dismissal and held that under the second option, the claim accrues when the recipient of an order assessing penalties refuses to pay within 60 days of the order. *Id.*

On March 6, 2020, the United States Court of Appeals for the Fourth Circuit issued an opinion affirming that an action by the City of Baltimore seeking to hold fossil fuel companies accountable for climate change belongs in state court. *Mayor of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020). In the appeal, energy companies argued that the case belonged in federal court on federal officer removal grounds because some of the companies had entered into fuel supply and strategic petroleum reserve agreements with the U.S. Navy and held federal offshore drilling leases. *Id.* The Court reasoned however that the agreements do not justify removal, noting that accepting the argument “would bring every seller of contracted goods and services within the ambit of [federal officer removal] when the government is a customer.” *Id.*

On March 24, 2020, the United States District Court for the Northern District of West Virginia granted in part and denied in part a motion for summary judgment in an action brought by West Virginia citizens alleging that Eagle Natrium LLC (“Eagle”) had discharged pollutants from its Natrium, West Virginia plant in violation of its Clean Water Act (“CWA”) permit. *Ohio Valley Envtl. Coal. v. Eagle Natrium, LLC*, No. 5:19-cv-236, 2020 WL 1443046 (N.D. W. Va. March 24, 2020). Eagle argued that the action is barred by 33 U.S.C. §1365(b)(1)(B) which bars citizen suits when the EPA or applicable state agency is diligently prosecuting an action in their own right, noting that the West Virginia Department of Environmental Protection (“WVDEP”) has prosecuted the same violations in 2010 and 2013. *Id.* at *5. Plaintiffs argued that the WVDEP orders were invalid and ineffective due to lack of notice and comment. *Id.* They further cited the lack of maximum penalties as an indication of lack of diligence. *Id.* The Court noted differences in the limit of benzene hexachlorides (“BHC”) and mercury. *Id.* Regarding BHC, the Court found that

plaintiffs failed to meet their high burden of showing a lack of diligence in the prosecution of the violations and granted that portion of Eagle's Motion for Summary Judgment. *Id.* at *7. However, the Court determined that with regard to the mercury limits, the WVDEP failed to follow appropriate procedures to modify the permit and is enforcing the wrong standard in its pending action against Eagle. *Id.* Thus, the WVDEP is not diligently prosecuting the violation and plaintiffs have standing to bring the claim. *Id.*