

CERCLA/Gas Station: Federal Court Addresses the Applicability of Petroleum Exclusion



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The United States Court of Appeals, Fourth Circuit ("Fourth Circuit") addressed in a July 30th Opinion an issue arising out of a landowner's Comprehensive Environmental Response,

Compensation and Liability Act ("CERCLA") and common law action alleging contamination from a neighboring gas station. *See Harris Investment Holdings, LLC v. BFJ of USA, LLC*, 2026 WL 2196425.

The question addressed was whether the CERCLA Petroleum Exclusion was applicable to the contamination allegedly released from this adjoining facility.

Harris Investment Holdings, LLC ("Harris") purchased property in Greensboro, North Carolina adjacent to a gas station and convenience store ("Gas Station") owned by BJF of USA, LLC ("BFJ"). The Gas Station is stated to have been in operation for decades before BFJ purchased it. BFJ continued to operate a gas station on the site.

The prior owners of the Gas Station are stated to have installed four underground storage tanks ("USTs") in the late 1950's holding:

- Kerosene
- Waste oil
- Heating oil

These USTs are stated to have been closed in place in 1996.

The prior owners installed four USTs for gasoline and diesel fuel in 1982; however, they were removed in 2007.

BFJ, after purchasing the property in 2007, installed two USTs on the property in 2008. Such tanks were still in operation.

The prior owners of the Gas Station are stated to have been cited for failure to have a leak detection system for the kerosene or waste oil USTs. Further, during the closure of the USTs the soil is stated to have been stained and contained product odor indicating a release. No groundwater samples were taken but petroleum-related substances were stated to have been identified in the soil beneath the USTs which included oil and grease associated with the waste oil tank.

A release is also stated to have been discovered when the second set of USTs were removed in 2007. A limited environmental assessment is stated to have been performed in connection with that release found above-regulatory-standard levels of benzene and other petroleum hydrocarbons in the soil and

groundwater. The State ultimately issued a no further remedial action notice. Nevertheless, it determined that the property was suitable only for industrial or commercial use because the contamination exceeded residential standards.

The State environmental agency conducted compliance inspections of the USTs every two or three years since BFJ installed them. Violations of the UST regulations are stated to have been identified, including:

- Failure to test the USTs leak-detection and spill-prevention systems.
- Failure to conduct necessary visual inspections.
- Failure to contain and report spills and overfills.

The property Harris purchased is stated to have been operated as a car repair facility and a portion used as a junkyard for old cars. Harris planned to build an office for a commercial staffing company and performed an environmental assessment. The assessment found VOCs and other hazardous substances in the groundwater at concentrations above regulatory standards.

Harris filed an action in the United States District Court against BFJ asserting claims under CERCLA and a state common law action.

The District Court concluded that BFJ was entitled to judgment in its favor by virtue of the CERCLA Petroleum Exclusion.

CERCLA excludes petroleum from the definition of hazardous substances. Petroleum is defined as:

... crude oil or any fraction thereof unless specifically listed or designated under CERCLA.

The scope of the Petroleum Exclusion has been a recurring issue in CERCLA response activities.

Generally, the United States Environmental Protection Agency's ("EPA") position has been that contaminants present in used oil, or other petroleum substances, do not fall within the exclusion. Falling outside the scope of the Petroleum Exclusion are substances not normally found in refined petroleum fractions or present levels which exceed those normally found in such fractions.

The District Court determined that the evidence indicated that "any released substances were unadulterated petroleum products," citing expert reports which repeatedly used the phrase petroleum constituents" when describing the substances present on the properties. Also noted was the existence of prior petroleum releases on BFJ's property. It therefore rejected Harris's argument that other evidence in the record showed the presence of substances outside the scope of the Petroleum Exclusion, including Harris's argument that substances not covered by the Petroleum Exclusion could have been released from the group of USTs that were closed in 1996 which were used for kerosene, heating oil, and waste oil.

The Fourth Circuit in addressing the issue undertakes a detailed of the relevant statutory language and EPA's interpretations of the provision, along with the summary judgment evidence.

It also states that once a CERCLA plaintiff satisfies the relatively minimal elements of a prima facie claim, the defendant bears the burden of proving the applicability of one of the statute's limited defenses. The Petroleum Exclusion is one of those defenses. Therefore, it states that a defendant seeking to establish the applicability of the Petroleum Exclusion bears the burden of proving that the petroleum released was not contaminated with non-petroleum hazardous substances.

Harris is noted to have submitted evidence that in the late 1950's the prior owners of the property installed a UST to collect and store waste oil. The tank was characterized as having no system for detecting leaks and was in use until it was closed in 1996. During the closing-in-place process, oil and grease were found in the soil below the waste oil tank.

The fact that waste oil can "pick up" contaminants through use is refuted. Further, the Fourth Circuit states that a plain reading of the Petroleum Exclusion does not warrant the inclusion of oil which has become contaminated with hazardous substances through use. Case law is cited for the idea that normal

use of engine oil adds hazardous substances that do not fall within the Petroleum Exclusion. Also cited is a 1987 EPA Petroleum Exclusion memorandum.

The Fourth Circuit concludes that the evidence of a leaking waste oil tank on BFJ's property at a minimum raised a question of fact about the release of contaminated oil falling outside the scope of the Petroleum Exclusion. Therefore, the Fourth Circuit determined that the District Court erred by granting summary judgment to BFJ.

A copy of the Opinion can be found [here](#).