

Environmental Law & Litigation

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Petroleum Exclusion Reaffirmed Despite Assertions of Hazardous Substances Within It: Middle District of North Carolina CERCLA Decision

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On May 8, the Middle District of North Carolina granted summary judgment dismissing cost recovery and declaratory judgment claims brought under the Comprehensive Environmental Response, Compensation, and Liability Act¹ (CERCLA) on the grounds that the claims were barred by CERCLA's petroleum exclusion in the definition of "hazardous substance." The court confirmed that unadulterated petroleum does not create liability under CERCLA and that admissible evidence that petroleum was "adulterated" is required to overcome granting a defendant summary judgment on the issue.

Background

In 2021, Harris Investment Holdings, LLC (Harris) purchased a property in Greensboro, North Carolina. Harris subsequently discovered its property was contaminated, allegedly by releases from underground storage tanks on an adjoining property owned by the defendant, BFJ of USA, LLC (BFJ). Harris installed a vapor intrusion mitigation system on its property.

In 2023, Harris sued BFJ under the Resource Conservation and Recovery Act² (RCRA) and CERCLA. BFJ moved for summary judgment.

Claims Barred by the Petroleum Exclusion

To succeed on a CERCLA cost recovery claim,³ the plaintiff must prove, among other things, a "release or a threatened release of hazardous substances."⁴ Importantly, CERCLA defines "hazardous substances" to exclude petroleum.⁵ Accordingly, "if a defendant proves that the released substances were unadulterated petroleum products, then the plaintiff cannot recover."⁶

BFJ offered evidence that any released substances from its property were unadulterated petroleum products, not hazardous substances. Harris, the court found, failed to create a question of material fact as to whether those petroleum releases were mixed with any hazardous substances. Notably, Harris relied on an expert declaration filed in connection with its opposition to BFJ's motion for summary judgment in which its expert opined that the petroleum releases from BFJ's property may have been mixed with chromium. Harris also relied on certain documents that mentioned chromium to try to overcome the petroleum exclusion. The court rejected these arguments, holding the expert evidence was not disclosed within time limits and therefore was inadmissible, and the documentary evidence did not actually indicate that petroleum containing chromium was released on BFJ's property. As a result, neither of these pieces of evidence could create a material factual dispute sufficient to overcome summary judgment.

The court also determined Harris' RCRA claims were barred because Harris failed to give statutory notice to the Environmental Protection Agency administrator before filing the lawsuit, in violation of the statute's notice requirement.

Potential Implications

The decision confirms that assertions that released petroleum contains hazardous substances, unsupported by admissible evidence, are not sufficient to overcome CERCLA's petroleum exclusion to liability. Companies dealing with petroleum releases should be mindful of the evidence necessary to support and establish the petroleum exclusion in the event a subsequent dispute arises.

For more information about CERCLA liability and defense, please contact the authors of this Client Alert.

¹ 42 U.S.C. 9607 et seq.

² 42 U.S.C. 9601 et seq.

³ 42 U.S.C. 9607.

⁴ *Harris Inv. Holdings, LLC v. BFJ of USA, LLC*, No. 1:23-CV-851, 2025 U.S. Dist. LEXIS 87748, at *12 (M.D.N.C. May 8, 2025) (quoting *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 167 (4th Cir. 2013)).

⁵ 42 U.S.C. 9601(14).

⁶ *Harris*, at *12-13 (citing 42 U.S.C. 9601(14)).

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