
Recent New PFAS Information of Relevance to Airports and Other Property Owners

Legal Alert

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There have been numerous stories recently about a category of so-called “forever chemicals” known simply as “PFAS”, which are otherwise more scientifically referred to as per- and polyfluoroalkyl substances. Unlike many other chemicals, PFAS substances, of which there are literally thousands, contain a strong carbon-fluorine bond. This makes them difficult to break down when exposed to heat, cold, water, bacteria, other chemicals, or simply aging and time. The carbon-fluorine bond is characteristic for stability and longevity, and is precisely why they are very useful and can be found in so many consumer products and industrial operations. However, their major benefit is also their Achilles Heel. This is because the tendency of these PFAS substances to be chemically stable and long lasting allows them to accumulate in the environment and in the bodies of animals and people, posing health risks.

One example of a product that has been known to add PFAS chemicals into the environment when used is AFFF, or “Aqueous Film Forming Foam”, which is a fire suppressant used to extinguish flammable liquid fires such as fuel fires. The Federal Aviation Administration (FAA), which follows the standards set by the United States Department of Defense (DOD), still mandates that a certain kind of AFFF be used at all commercial airports. To date, the AFFF which is produced cannot meet the DOD’s “milspec”, or Military Specification, for the required AFFF performance standard unless it contains some form of PFAS, until recently PFOA and/or PFOS (two well-known and widely used PFAS chemicals). As required by the FAA, this PFAS containing AFFF must be stored, trained with, and otherwise used by airports to put out fires.

While the FAA has been working hard to find an adequate replacement type of AFFF which does not contain PFOA and PFOS, to date no substitute AFFF has been approved. As the extent of PFAS contamination at airports becomes more well-known and as government moves inexorably toward mandating the removal of PFAS contamination from anywhere that it is found in the environment, airport managers have become increasingly worried that they could be sitting on a powder keg of potential cleanup liability, and costs, merely because a governmental agency, the FAA, mandates that they use a particular type of AFFF.

Against this backdrop comes an authoritative new national study which concludes that PFAS contamination is presumed to exist at more than 57,000 different sites in the United States. Of these 57,000 sites, the principal locations for finding PFAS contamination are airports, industrial facilities, military sites, and wastewater treatment plants.

The fear of the airport managers is not unfounded. The sheer number, 57,000, constitutes an extremely large amount of contaminated properties that will need to be cleaned up. The sheer size of that number, however, might actually turn out to be good news for airports, as they are not alone in having to deal with and address potential PFAS contamination on their properties.

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The following is a link to an article discussing the study described above:

<https://phys.org/news/2022-10-scientists-pfas-contamination-presumed-sites.html>

Depending on how the issues shake out, the immense size of the problem nationally may suggest that the old “let the polluter pay” paradigm will need to be adjusted in the case of PFAS. Simply put, the problem may be too large and too intractable to expect it to be addressed on a non-coordinated basis by each and every owner of contaminated property, and one site at a time, regardless of how that contamination found its way to each particular property. Each such property owner now finds itself faced with potentially significant cleanup liability to clear its property of PFAS contamination, despite the fact that in certain cases the PFAS may have gotten there through no actual fault of the property owner. One can expect significant legislative interest and involvement in this problem in the near future, and we will be watching and keeping everyone updated.

There is an additional item of recent PFAS news that is noteworthy, especially for any owners of PFAS-contaminated property in New Jersey or states whose state environmental protection agencies act in a similar fashion as the New Jersey Department of Environmental Protection (NJDEP).

Specifically, according to revelations from the NJDEP during this past week’s Site Remediation Advisory Committee (SRAG) meeting, and barring some unforeseen delay, the NJDEP plans to publish interim Soil Remediation Standards for PFAS in the upcoming October 17, 2022 New Jersey Register. Heretofore, NJDEP has issued no (publicly known) standards for the remediation of PFAS contamination in soil. This is notwithstanding the fact that for some time now the NJDEP has had numbers for groundwater contamination/ safe drinking water purposes for several different PFAS compounds, and it has long been suspected of working internally on these soon to be proposed soils remediation numbers.

However, the NJDEP’s announcement is not without controversy. Issues presented by the recent SRAG announcement include:

- A).** The new soils standards are not in fact complete – for example, there is no proposed standard for migration to groundwater. This omission will no doubt significantly weaken the utility of the new standards when a New Jersey Licensed Site Remediation Professional (LSRP) is making decisions about source control and the like;
- B).** GenX, as a PFAS compound, will have its own soils remediation standards even though, curiously, the NJDEP has not, to date, designated GenX an actual “hazardous substance” so it even requires remediation at this time when present in the environment. To date only PFOA, PFOS, and PFNA have been declared “hazardous substances” by NJDEP; and
- C).** NJDEP’s notice does not appear to comply with the New Jersey Administrative Procedures Act because there has been no known stakeholder involvement in the setting of the soils standards at all (NJDEP did this completely internally). While the new standards are interim, they will be immediately applicable as soon as they are published in the New Jersey Register.

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The link below is from Rodger Ferguson, LSRP, past President of the Licensed Site Remediation Professional Association, who has reported on the recent SRAG meeting and provides more important information regarding the NJDEP's announcement:

<https://www.linkedin.com/feed/update/urn:li:activity:6985595305178103808/>

For more information on this alert, or for questions regarding PFAS contaminants, contact Marty Judge, or any member of our firm's PFAS Taskforce or Environmental Department.

ATTORNEYS MENTIONED

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