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PFAS State Law Passed in New Jersey

March 22, 2024

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On January 8, 2024, New Jersey Governor Phil Murphy signed into law P.L. 2023, c. 243 (A4125/ S2712). With certain industry exceptions not presently relevant (for example, oil refineries and petroleum terminals), and commencing two years from the date the legislation was approved, or by January 8, 2026, the new law now expressly forbids the sale, manufacture, distribution, or use of any class B firefighting foam containing intentionally added perfluoroalkyl and polyfluoroalkyl substances (commonly known as PFAS chemicals) within the State. As defined in the new statute, Class B firefighting foams are those designed to prevent or extinguish a fire in flammable liquids, combustible liquids, petroleum greases, tars, oils, oil-based paints, solvents, lacquers, alcohols and flammable gasses. The most frequently used abbreviation for such foam is AFFF, short for Aqueous Fire Fighting Foam.

Aside from the new prohibitions described above, the new legislation also allocates $250,000 to the New Jersey Department of Environmental Protection (NJDEP) and directs that agency to establish a collection and disposal program to properly dispose of AFFF that will no longer be allowed to be used in the State in the future.

The new law in New Jersey will no doubt have significant importance to commercial airports located in that State, which have been historically required for decades under federal regulations long ago adopted by the Federal Aviation Agency (FAA), to use certain Department of Defense (DOD) approved milspec formulas for AFFF that historically have contained PFAS chemicals as ingredients. Under the legal principle of federalism, states have historically lacked the authority to outlaw or preempt the storage or use of chemical formulas for AFFF that otherwise meet FAAs duly promulgated federal standards, even if they do contain PFAS as an ingredient.

Effective in October 2018, as part of its periodic reauthorization of the FAA as a federal agency, Congress directed that agency to no longer require the use of firefighting foams containing PFAS or similar fluorinated chemicals as ingredients, and the FAA was given three years to carry out this mandate. In October 2021, the FAA did formally remove its previous requirement that firefighting foams must adhere to certain milspecs that contain PFAS, although the FAA failed to announce at that time its official approval of any specific Fluorine Free Foam (F3) products that would be acceptable to it, and it still has not done so as of this writing. Meanwhile, it has been reported that the DOD, which along with the FAA has been testing F3 alternatives for acceptability as AFFF substitutes for some time and on whose approval process the FAA typically relies has reportedly all but finally approved at least two new F3 alternatives (and possibly a third will be announced soon), although a formal announcement to that effect has not yet been issued.

Regardless, whenever all such approvals are finally in place, it is still going to take some time for most airports to fully migrate from AFFF to F3, not only because the transition process to clean out and reuse existing firefighting equipment (or to buy new equipment, if needed or preferable) is reportedly cumbersome, technical, and pricey, but also because firefighters must be specifically trained to use different techniques for extinguishing fires before actually using the new F3 products due, principally, to different viscosities and other physical characteristics between the old (AFFF) and new (F3) kinds of foams. Also contributing to anticipated delays in the transition are likely to be the anticipated scarcity of the newly approved F3 alternatives until the manufacturers and others in the supply chain are able to catch up to the anticipated demand (which, needless to say, will not be confined to airports alone).

Against this backdrop, the new law in New Jersey has now been approved with a deadline for compliance (for airports, at least) of January 8, 2026. Meanwhile, there is no stated exception in the new law allowing a commercial airport to continue to store and use PFAS containing AFFF after that date.

Although airports in New Jersey can certainly hope that the FAAs and DODs ongoing testing and evaluation of new PFAS-free firefighting foams will soon reveal even more PFAS-free substitutes whose formulas are acceptable to those agencies, and there will be increased availability of even more approved products, the competing laws continue to remain unclear, if not actually in conflict, as to what may happen if the FAA and DOD are unable to identify enough federally acceptable PFAS-free foam in time and with sufficient quantities that are commercially available to allow New Jersey airports to stop using PFAS containing foam before the deadline stated in the new State law.

Therefore, while it seems unlikely to happen and if it does the New Jersey Legislature might have to consider enacting an extension to P.L. 2023, c. 243, to remove any deadline conflicts if there are not enough PFAS-free foam products available for New Jersey airports to meet the new State statute deadline of January 8, 2026 there does remain some possibility that FAA certificated commercial airports in New Jersey might find themselves faced with a Hobsons Choice of having to choose how to comply with conflicting State and federal mandates and deadlines respecting PFAS containing AFFF at the same time. If that should happen, and absent a State legislative or federal statutory or regulatory fix, there is even the possibility that the situation might need to be resolved by a federal court to determine which particular laws is controlling, although the likelihood of that occurring seems rather remote at this time.

Meanwhile, for New Jersey airports, it is essential to continue to be current with the latest information and commands from the FAA (and now the NJDEP as well) concerning the green lighting of a substitute firefighting foam and, as quickly as possible, to change over once that final authorization is given by all agencies having oversight authority. Further, as the take back program is established, it can also be helpful in making the exchange and following whatever programs may be available for airports to obtain some compensation for the proper disposal of any old foam and the cleaning out and switching to PFAS-free equipment, such as firetrucks, hoses, and the like.

ATTORNEYS MENTIONED

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