

PFAS: REGULATION OF FIREFIGHTING FOAM

Nov 13, 2020

This blog was originally published in November 2020. [Visit our up-to-date blog on PFAS in firefighting foam \(AFFF\) and equipment: state-by-state regulations >](#)

26 states have either passed or proposed regulations regarding per- or polyfluoroalkyl (“PFAS”) based Class B Aqueous Film-Forming foams (“AFFF”) used for firefighting. These regulations typically involve restrictions in four general areas:

1. Discharge or use requirements – These regulations usually limit or prohibit the use of AFFF in training or testing exercises, and only allow the use of AFFF in active firefighting situations;
2. Storage or “take-back” provisions – Some states have enacted state run programs to purchase and dispose of AFFF, usually purchasing from government agencies;
3. Notification or reporting requirements – When continued use of AFFF is allowed, some states have required that businesses report specific details regarding their use; and
4. Limitations on personal protective equipment (“PPE”) – In some cases states have limited or prohibited PPE for firefighters that contains PFAS-materials.

While the specific regulations are listed in the chart below, BCLP wants to begin by providing an overview of the potential risks that businesses face as a result of AFFF use or storage.

- **Regulatory Action.** Businesses who own(ed) or operate(d) property where AFFF was historically used, stored, or disposed of may be the focus of regulatory investigation and enforcement actions based on PFAS impacts to drinking water, groundwater, and other media, as well as municipal systems like sewers and water treatment plants. In addition, some state’s AFFF regulations impose use restrictions and reporting requirements for businesses that chose to continue to use AFFF, and failure to comply with those requirements creates further regulatory enforcement risk.
- **Impacted Industries.** To date, airports have been the primary focus of investigations by regulatory agencies, usually focusing upon impacts to drinking water wells and groundwater

supplies near the airports. If your business is involved in aviation, it may be advisable to review your company's current or historic use of AFFF. Other impacted industries include the oil and gas sector, marine facilities, mining, and certain types of industrial facilities.

- **Litigation.** States, cities, and individual plaintiffs have all begun filing suits based on impacts from AFFF, usually targeting the manufacturers of these chemicals. The risk of litigation extends beyond the original manufacturers, and for example, to businesses that stored, used, or disposed of the chemicals.

DEPARTMENT OF DEFENSE RESPONSE

On December 20, 2019, Congress passed the National Defense Authorization Act ("NDAA").¹ This lengthy law phases out the use of AFFF, subject to some limited exceptions, at all military sites by October 1, 2024. In the meantime, the NDAA forbids training exercises with the use of any AFFF releases.

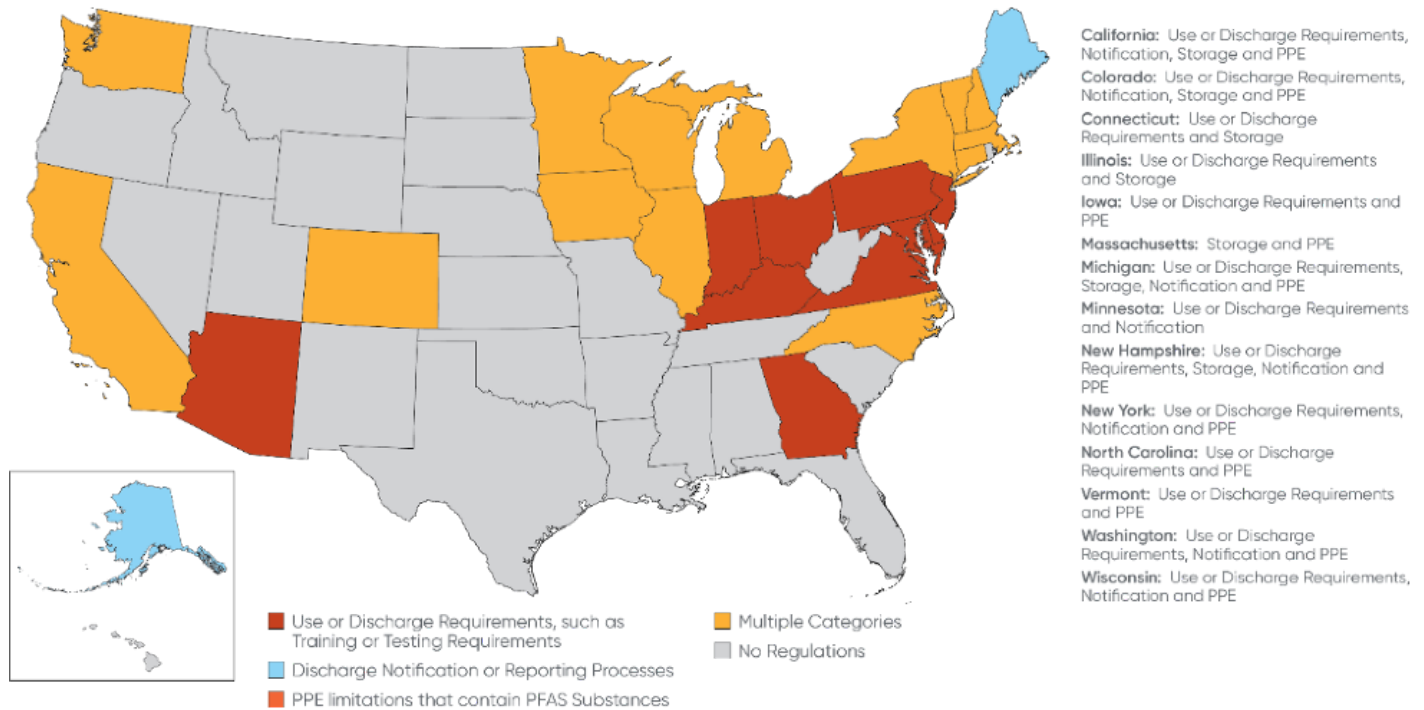
Importantly, the provisions of the NDAA only apply to military facilities on property owned by the federal government, and do not apply to any civilian facilities. However, defense contractors should be aware of the provisions of the NDAA both for planning and risk mitigation purposes.

CONCLUSION

A map showing the states that have enacted or proposed regulations regarding AFFF is below, along with a detailed chart providing more information on the specific provisions of those regulations. Because the regulation of AFFF, and PFAS more generally, is developing rapidly it is important to note that this client alert reflects the status of state regulation of PFAS in AFFF as of **November 10, 2020**.

If you believe that you may be impacted by an enacted or proposed regulation, or if you have a question about an AFFF regulation in a specific jurisdiction, please contact Tom Lee or John Kindschuh at Bryan Cave Leighton Paisner LLP.

ENACTED AND PROPOSED PFAS FIREFIGHTING FOAM REGULATIONS



As of November 10, 2020

State	Product Categories	Regulatory Status	Reference
Alaska	Reporting: Immediately reporting discharges of AFFF as certain PFAS materials are defined as hazardous substances.	Enacted	Reporting discharges in regions pursuant to 18 AAC 75
	Notification: A public notice should be issued when a PFAS substance is used for a firefighting purpose that is no longer required by applicable federal law.	Proposed	Notify: SB 176
Arizona	Discharge and Use: Beginning on January 1, 2020, a person, local government or state agency may not discharge or use AFFF for training or testing purposes unless the testing facility has implemented appropriate containment, treatment, and disposal	Enacted	Ariz. Rev. Stat. 36-1696

	measures to prevent releases of AFFF to the environment.		
California	<p>Discharge and Use: Beginning on January 1, 2022, manufacturers of AFFF are prohibited from selling or distributing AFFF. Discharges or uses of AFFF for training purposes are also prohibited.</p> <p>Reporting: Entities who use AFFF shall report their use to the State Fire Marshal within five business days of the use, including the identity of the AFFF, the quantity used, the total PFAS concentration, the application for which the AFFF was used, and the duration of the fire.</p> <p>Notification: On or before July 1, 2021, a manufacturer of AFFF shall notify, in writing, persons that sell the manufacturer's products in the state. For products sold after July 1, 2021, a manufacturer shall provide that notification on or before December 31, 2021.</p> <p>PPE: Beginning on January 1, 2022, a person, including a manufacturer, that sells PPE must provide a written notice to the purchaser at the time of sale if the PPE contains PFAS substances.</p>	Enacted	SB 1044
Colorado	Discharge and Use: Beginning on August 2, 2019, a person or fire department may not discharge or use any AFFF for training or testing purposes, subject to certain exceptions. Also, beginning on August 2, 2021, a manufacturer may not sell or	Enacted	Use: CRS 24-33.5-1234; CRS 25-5-1303

	distribute any AFFF that contains PFAS substances, subject to certain exceptions.		
	Notification: A manufacturer of AFFF must notify, in writing, persons that sell the manufacturer's products in the state prior to August 2, 2020.		Reporting: CRS-25-5-1304
	PPE: Beginning on August 2, 2019, a person, including a manufacturer, that sells PPE must provide written notice to the purchaser at the time of sale if the PPE contains PFAS substances.		PPE: CRS 25-5-1305
	Take-back Program: The Department of Public Health and the Environment shall purchase and dispose of eligible materials, subject to available funds.		Storage: CRS 25-5-1311
Connecticut	<p>Use: Beginning on July 1, 2021, no person, local government or state agency may use AFFF for training purposes or any firefighting purpose unless an agency fails to identify an alternative by April 1, 2021. Also, beginning on January 1, 2021, no person, local government or state agency may use AFFF that contains PFAS substances for any purpose.</p> <p>Take-back Program: Beginning on October 1, 2021, an agency shall develop a take-back program for municipal sources of PFAS substances.</p>	Proposed	SB 297 and HB 5288
Delaware	Discharge: Beginning on January 1, 2021, it is unlawful to discharge AFFF, subject to certain exceptions for emergency firefighting operations and	Proposed	SB 217

	for training or testing purposes.		
Georgia	Discharge and Use: Beginning on January 1, 2020, no person, including fire departments, state agencies and political subdivisions, shall discharge or use AFFF, subject to some exceptions.	Enacted	O.C.G.A. 25-2-41
Illinois	Discharge and Use: A person, fire department, local government or state agency may not discharge or use AFFF for training or testing purposes. Also, beginning on January 1, 2021, a manufacturer of AFFF is prohibited from selling or distributing AFFF. Additionally, beginning on June 30, 2020, a person, unit of local government, or state agency shall not use AFFF for training or testing purposes unless the testing facility has implemented appropriate containment, treatment, and disposal measures to prevent releases of AFFF to the environment.	Proposed	Use: SB 3154, HB 5003
	Take-back Program: A voluntary take-back provision is established for local fire departments that store older firefighting foam made with PFAS materials.		Storage: HB 5529
Indiana	Use: Beginning on June 30, 2020, a person, unit, or state agency shall not use AFFF for training or testing purposes unless the testing facility has implemented appropriate containment, treatment, and disposal measures to prevent releases of AFFF to the environment.	Enacted	Ind. Code 36-8-10.7-6 and 7

Iowa	Use and PPE. It will be unlawful to manufacture, distribute, or sell AFFF or PPE. Note: this is a very general set of proposed bills.	Proposed	H.F. 775 and H.F. 2241
Kentucky	Use: Beginning on July 15, 2020, AFFF shall not be used for training or testing purposes, unless the testing facility has implemented best industry practices to prevent uncontrolled releases of AFFF into the environment.	Enacted	Ky. Rev. Stat. 227.395
Maine	Reporting: A person causing a discharge of AFFF into any waters of the state shall report the discharge as soon as practicable, but no later than 24 hours after the discharge occurs. Notification. Beginning on January 1, 2023, a manufacturer of a product that contains PFAS materials shall submit a written notification, subject to some exemptions.	Proposed	LD 2147
Maryland	Use: Beginning on October 1, 2021, AFFF may not be used for training or testing purposes, subject to some exceptions.	Enacted	Md. Code, Envir. 6-1603, 1604
Massachusetts	Take-back Program: Extensive AFFF materials (128,000 pounds; 15,000 gallons) are disposed in this program.	Enacted	Take-back program details
	PPE: Beginning on January 1, 2020, a manufacturer that sells PPE to any person, local government, or state agency must provide written notice to the purchaser at the time of sale if the PPE contains PFAS chemicals. Also, beginning on January 1, 2022, a manufacturer that sells PPE to any person, local government, or state	Proposed	PPE: SD 1784 and HD 3661

	agency shall not manufacture, sell, or distribute for use PPE containing intentionally added PFAS chemicals.		
Michigan	Use and PPE (Mich. Comp. Law 408-1014r): Rules involve the containment and handling of PFAS materials, including the decontamination of PPE, following the use of AFFF and a prohibition for AFFF in training purposes. Also, beginning on January 1, 2020, AFFF should not be used for equipment calibration purposes, subject to two exceptions.	Enacted	Mich. Comp. Laws 408-1014r ,
	Use and PPE (Mich. Comp. Law 29-369c): Beginning on October 6, 2020, AFFF must not be used in any training. Also, until December 31, 2023, the training must follow two requirements: (1) include the proper use, handling, and storage of the AFFF; and (2) adhere to the best environmental and public health practices, including the containment, disposal, and decontamination of the PPE.		Mich. Comp. Laws 29-369c,
	Notification: Immediately after a fire department uses AFFF, the fire chief shall report the incident to the Michigan Pollution Emergency Alert System.		Mich. Comp. Laws 324.14703 , and
	Take-back Provisions: A collection program is available for properly disposing of any firefighting foam containing PFAS substances.		Mich. Comp. Laws 324.14705
Minnesota	Discharge: Beginning on July 1, 2020, no person, political subdivision, or state agency shall discharge AFFF for training purposes, subject to some	Enacted	Minn. Stat. 325F.072

	<p>exceptions, and for testing purposes, unless the testing facility has implemented appropriate containment, treatment, and disposal measures to prevent releases of AFFF to the environment.</p> <p>Notification: Beginning on July 1, 2020, any person, political subdivision, or state agency that discharges AFFF must be reported to the Minnesota Fire Incident Reporting System within 24 hours of the discharge.</p>		
New Hampshire	<p>Discharge and Use: Beginning on January 1, 2020, no person, local government, or state agency may use AFFF for training or testing purposes, but the testing may occur if there are containment, treatment, and disposal measures to prevent any releases of AFFF to the environment. Also, beginning on January 1, 2020, a manufacturer shall not sell or distribute AFFF, subject to some exceptions.</p> <p>Take-back Provision: After evaluating some additional information, beginning on July 1, 2021, the Department of Environmental Services will establish a take-back program for the purpose of safe and contained disposal of firefighting foams containing PFAS materials.</p> <p>Notification: The municipality discharging the AFFF shall notify the Department of Environmental Services within 48 hours of the discharge.</p>	Enacted	<p>Use, Take-back provision, Reporting: N.H. Rev. Statute 154:8-b</p>

	PPE: Beginning on January 1, 2020, a manufacturer or other entity that sells PPE to any person, municipality, or state agency must provide written notice to the purchaser at the time of sale if the PPE contains PFAS chemicals.		PPE: N.H. Rev. Statute 154:8-c
New Jersey	Discharge: Beginning two years after the date of enactment, no person shall discharge AFFF for training or testing purposes, unless the testing facility has implemented the appropriate containment, treatment, and disposal measures to prevent harm of any AFFF release to the environment.	Proposed	A747
New York	Discharge and Use: No person, local government, or state agency will discharge or use AFFF for training purposes. Also, beginning two years after the effective date, manufacturers may not manufacture, sell, or distribute AFFF, subject to some exceptions.	Enacted	Use and PPE: S439A
	PPE: A manufacturer or other person that sells PPE to any person, local government, or state agency must provide written notice to the purchaser at the time of sale if the PPE contains PFAS substances. Notification: Releases must be reported by an employee, agent, or representative of the person who has knowledge of the release of a hazardous substance to the Department's Spill Hotline within two hours after discovery of the release. PFOS and PFOA are		Reporting: 6 NYCRR 597 ; Listing PFOS and PFOA as hazardous substances

	specifically listed as hazardous substances.		
	No incineration: Incineration of AFFF shall be prohibited in a city with a population between 16,000 and 17,000 and in a region designated by the Department of Environmental Conservation as an environmental justice area.	Proposed	Disposal: A9952
North Carolina	<p>Discharge and Use: Beginning on July 1, 2022, no person may discharge or use AFFF for training purposes. Also, a manufacturer may not manufacture, sell, or distribute AFFF, subject to some exceptions.</p> <p>PPE: Beginning on July 1, 2022, a manufacturer that sells PPE to any person, local government, or state agency must provide written notice to the purchaser at the time of sale if the PPE contains PFAS chemicals.</p>	Proposed	HB560
Ohio	Use: Beginning on January 1, 2020, no person shall use AFFF containing intentionally added PFAS chemicals for training or testing purposes. The AFFF can only be used for testing purposes if the facility has implemented appropriate containment, treatment, and disposal measures to prevent releases of AFFF into the environment.	Proposed	HB328
Pennsylvania	Discharge and Use: Beginning on July 1, 2021, no person, entity, or a municipality may discharge or use AFFF for testing or training purposes, subject to some exceptions including:	Proposed	SB919

	(1) the testing facility has implemented appropriate containment, treatment and disposal measures to prevent releases of AFFF into the environment; and (2) the training replaces the AFFF that contains a PFAS chemical with non-fluorinated substance.		
Vermont	<p>Discharge and Use: A person, municipality, or state agency must not discharge or use AFFF for training purposes. Also, a manufacturer of AFFF shall not manufacture, sell, or distribute AFFF, subject to numerous exceptions.</p> <p>PPE: A manufacturer that sells PPE to any person, municipality, or state agency shall provide written notice to the purchaser at the time of sale if the PPE contains PFAS.</p>	Proposed	S295 and H721
Virginia	Discharge and Use: Beginning on July 1, 2021, no person, local government, or agency shall discharge or use AFFF for training, subject to some exceptions, or testing purposes. AFFF can only be used for testing purposes if the facility has implemented appropriate containment, treatment, and disposal measures to prevent releases of AFFF into the environment.	Enacted	VA Code Ann. 9.1-207.1
Washington	Discharge and Use: Beginning on July 1, 2018, a person, local government, or state agency may not discharge or use AFFF for training purposes. Also, beginning on July 1, 2020, a	Enacted	Use: RCW 70A.400.010 and RCW 70A.400.020

	manufacturer of AFFF may not manufacture, sell or distribute any AFFF, subject to some exceptions.		
	PPE: Beginning on July 1, 2018, a manufacturer that sells PPE to any person, local government, or state agency must provide written notice to the purchaser at the time of sale if the PPE contains PFAS chemicals.		PPE: RCW 70A.400.030
	Notification: A person discharging AFFF or any substance containing PFAS materials must immediately notify the Division of Emergency Management within the state military department and the Department of Ecology within 24 hours of the discharge. Also, a person discharging AFFF or any substance containing PFAS materials to state waters or in a location where a rain event would lead to a discharge of unrecovered foam to state waters must immediately notify the Division of Emergency Management within the state military department and the Department of Ecology within 24 hours of the discharge.	Proposed	Notify: HB 1143
Wisconsin	Discharge and Use: No person may discharge or use AFFF, including for training or testing purposes, subject to some exceptions. The testing facility must implement appropriate containment, treatment, disposal, or storage measures to prevent discharges of AFFF to the environment.	Enacted	Use: Wis. Statute 299.48

	(3m Notification: A person who uses or discharges AFFF shall notify the Department of Natural Resources immediately or as soon as practicable without hindering fire prevention operations.		
	Storage: The Department of Agriculture, Trade and Consumer Protection, in cooperation with the Department of Natural Resources, shall administer a program to collect and store or dispose of foam that contains PFAS substances that was voluntarily surrendered by the person in possession of the foam.	Proposed	Storage: AB792

No Regulations: Alabama, Arkansas, Florida, Hawaii, Idaho, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.

1. <https://www.congress.gov/bill/116th-congress/senate-bill/1790>.

RELATED CAPABILITIES

- PFAS

MEET THE TEAM



Thomas S. Lee

San Francisco

tom.lee@bclplaw.com

+1 415 675 3447



John R. Kindschuh

St. Louis

john.kindschuh@bclplaw.com

+1 314 259 2313

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