

# Michigan Court Limits State PFAS Enforcement Authority Where FAA Mandates AFFF Use

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As federal regulation of per- and polyfluoroalkyl substances (PFAS) narrows or stalls, states have accelerated efforts to regulate PFAS. One of the regulatory mechanisms employed by states is to bring enforcement actions to force entities to investigate and remediate PFAS. Recently, however, a Michigan court, in a case of first impression, limited the authority of a state government to require investigation and remediation of PFAS where federal mandates govern the relevant conduct of the alleged polluter. In *Michigan Department of Environment, Great Lakes and Energy v. Gerald R. Ford International Airport Authority*, the State of Michigan (the state) sought injunctive relief to force the Gerald Ford International Airport Authority (GFIAA), which utilized PFAS-containing aqueous film-forming foam (AFFF) as part of its firefighting operations, to investigate and remediate any PFAS on and off airport property, and to recover natural resource damages, civil penalties, and enforcement costs.

Plaintiff alleged that GFIAA violated Part 201 of Michigan's Natural Resources & Environmental Protection Act (NREPA) by failing to obtain state-issued permits for its release of PFAS. GFIAA countered that it had no choice but to release PFAS, as the Federal Aviation Administration (FAA) mandated that it and all airports certified under FAA Part 139 regulations utilize PFAS-containing AFFF not only in response to actual emergencies, but also in annual safety training exercises in order to maintain their certification.

Both parties filed motions for summary disposition. The court denied the state's motion but granted GFIAA's motion, holding that the state's claims were preempted by federal law. The court found that "the use of AFFF is a matter of aviation safety," a field thoroughly occupied by the federal government.<sup>1</sup> "[A]s a result, federal preemption applies and bars [the state] from litigating their claims against the airport."<sup>2</sup>

The court further held that even if that state's claims were not preempted, they are barred because the Michigan Department of Transportation (MDOT) license held by the airport established the airport's use of AFFF constituted a "permitted release" under Part 201 of the NREPA.<sup>3</sup> Part 201 of the NREPA defines a "permitted release" to include a "release in compliance with an applicable, legally enforceable permit issued under state law."<sup>4</sup> The court held that "[b]y certifying the airport, MDOT has found that the airport is in compliance with existing state and federal regulations. As such, GFIAA could not have violated the regulations as a matter of law.

Although this decision is limited to one state court and is currently on appeal, its ramifications could be widespread, as it could signal a limit to a state's authority to require investigation and remediation of PFAS contamination, at least where the federal government has mandated the actions at issue. This could be a game changer for the approximately 520 Part 139 airports in the United States, particularly in conjunction with the EPA's superfund enforcement discretion policy that attempts to free airports and other "passive receivers" of PFAS from federal liability.

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<sup>1</sup> *Michigan Department of Environment, Great Lakes and Energy v. Gerald R. Ford International Airport Authority*, Mich. Cir. Ct., Case No.: 23-08850-CE (2024) at 6.

<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.*

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<sup>4</sup> *Id.*

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