



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNSEL

MEMORANDUM

To: House Committee on Human Services

From: Damien Leonard, Legislative Counsel
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Date: April 21, 2021

Subject: State Authority to Prohibit the Use of Fluorinated Firefighting Foam at Burlington International Airport

Question Presented

Can Vermont adopt legislation prohibiting the use of fluorinated firefighting foam at Burlington International Airport?

Short Answer

No, airport safety regulations adopted pursuant to the Federal Aviation Act require Burlington International Airport to have at least one firefighting vehicle that can dispense fluorinated firefighting foam.

Federal Airport Safety Regulations and Preemption of State Law

Burlington International Airport is one of two Vermont airports that are covered by 14 C.F.R. Part 139, which establishes rules for the certification and operation of airports serving scheduled passenger flights utilizing aircraft with a capacity of at least nine passengers or unscheduled passenger flights utilizing aircraft with a capacity of at least 31 passengers.¹ Federal regulations prohibit an airport that is subject to Part 139 from operating “without an Airport Operating Certificate or in violation of that certificate, the applicable provisions, or the approved Airport Certification Manual.”² According to the Federal Aviation Administration (FAA), Burlington International Airport falls under Airport Rescue and Firefighting Index B, which requires the Airport to maintain at least one firefighting vehicle that can dispense fluorinated firefighting foam.³ Specifically, the Airport must maintain either:

¹ See 14 C.F.R. § 139.1; see also Part 139 Airport Certification Status List, eff. March 25, 2021; available at: https://www.faa.gov/airports/airport_safety/part139_cert/media/part139-cert-status-table.xlsx. The other Vermont airport that is subject to Part 139 is Rutland-Southern Vermont Regional Airport.

² 14 C.F.R. § 139.101.

³ See 14 C.F.R. § 139.315; see also Part 139 Airport Certification Status List, eff. March 25, 2021; available at: https://www.faa.gov/airports/airport_safety/part139_cert/media/part139-cert-status-table.xlsx. Because of the smaller size of the aircraft that it serves, Rutland-Southern Vermont Regional Airport falls

(1) One vehicle carrying at least 500 pounds of sodium-based dry chemical, halon 1211, or clean agent **and** 1,500 gallons of water and the commensurate quantity of [fluorinated firefighting foam] for foam production.

(2) Two vehicles—

(i) One vehicle carrying the extinguishing agents as specified in paragraphs (a)(1) or (a)(2) of this section; **and**

(ii) One vehicle carrying an amount of water and the commensurate quantity of [fluorinated firefighting foam] so the total quantity of water for foam production carried by both vehicles is at least 1,500 gallons.⁴

The Federal Aviation Act preempts state laws attempting to regulate airport safety. The Second Circuit Court of Appeals, which is the federal appeals court for Vermont, recently addressed the issue of preemption in relation to a Connecticut statute that prohibited Tweed New Haven Airport from extending the length of a runway to come into compliance with federal safety requirements necessary to “allow for the safe use of larger aircraft, allow flights with no seating restrictions, allow more passengers on each airplane, and allow service to more destinations.”⁵ In its decision finding that Connecticut’s law was preempted, the Second Circuit wrote:

The [Federal Aviation Act] “was enacted to create a uniform and exclusive system of federal regulation in the field of air safety . . . [It] was passed by Congress for the purpose of centralizing in a single authority . . . the power to frame rules for the safe and efficient use of the nation’s airspace.” With these objectives in mind, we have held that the [Federal Aviation Act] impliedly preempts the entire “field of air safety.” Accordingly, “[s]tate laws that conflict with the [Federal Aviation Act] or sufficiently interfere with federal regulation of air safety are . . . preempted.”⁶

Under the Act, the FAA has established specific requirements for airport rescue and firefighting, including the provision that requires Burlington International Airport to have at least one firefighting vehicle that is capable of dispersing fluorinated firefighting foam. While in many instances the State can regulate both fire safety and the National Guard while it is operating in state status, in this case the Federal Aviation Act preempts the State from adopting and enforcing a law that conflicts with the requirements of 14 C.F.R. Part 139. Absent a change in federal law or the requirements established by the FAA, State law cannot prohibit the National Guard’s firefighting unit at Burlington International Airport from using fluorinated firefighting foam.

As it passed the Senate, S.20 included language in 18 V.S.A. § 1663(b) that specifically permits the “manufacture, sale, or distribution of Class B firefighting foam”

under Index A, which does not require the Airport to maintain a firefighting vehicle that can dispense fluorinated firefighting foam.

⁴ 14 C.F.R. § 139.317 (emphasis added).

⁵ *Tweed-New Haven Airport Authority v. Tong*, 930 F.3d 65, 69 (2d Cir. 2019), cert. denied, 140 S. Ct. 2508 (2020).

⁶ *Tweed*, 930 F.3d at 74.

containing PFAS in instances where it is required pursuant to federal law, including in relation to Burlington International Airport.

Recent Federal Developments

While the State is preempted from prohibiting the use of fluorinated firefighting foam at Burlington International Airport, recent developments at the federal level may reduce or eliminate the use of fluorinated firefighting foam at the Airport.

In the FAA Reauthorization Act of 2018, Congress directed the Federal Aviation Administration to cease requiring the use of fluorinated firefighting foam on or before October 4, 2021.⁷ While the FAA is currently researching fluorine-free foams, it has not yet identified any that provide the same level of fire suppression as the fluorinated foams currently approved for use at airports.⁸ The FAA has, however, approved three different types of testing equipment that will enable firefighting vehicles to be tested in relation to the Airport's periodic airport certification safety inspection without dispersing fluorinated foam.⁹

In addition, Congress directed the Secretary of Defense in the National Defense Authorization Act for Fiscal Year 2020 to prohibit the uncontrolled release of fluorinated firefighting foam except during an emergency response or “for the purposes of testing of equipment or training of personnel, if complete containment, capture, and proper disposal mechanisms are in place to ensure no [fluorinated firefighting foam] is released into the environment.”¹⁰

Thus, while Vermont cannot prohibit the use of fluorinated firefighting foam at Burlington International Airport, Congress has taken multiple steps since 2018 towards eliminating, or at least reducing, the use of fluorinated firefighting foam at airports and by the military.

⁷ FAA Reauthorization Act of 2018; Pub. L. 115-254, § 332; *available at*:

<https://www.congress.gov/115/plaws/publ254/PLAW-115publ254.pdf#page=89>.

⁸ Federal Aviation Administration National Part 139 CertAlert 19-01; Aqueous Film Forming Foam (AFFF) Testing at Certificated Part 139 Airports; page 2; *available at*:

https://www.faa.gov/airports/airport_safety/certalerts/media/part-139-cert-alert-19-01-AFFF.pdf.

⁹ Federal Aviation Administration National Part 139 CertAlert 19-02; Aqueous Film Forming Foam (AFFF) Testing at Certificated Part 139 Airports; page 2; *available at*:

https://www.faa.gov/airports/airport_safety/certalerts/media/part-139-cert-alert-19-02-AFFF.pdf.

¹⁰ National Defense Authorization Act for Fiscal Year 2020; Pub. L. 116-92, §§ 323-324; *available at*:
<https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>.