

# It's Time To Designate PFAS a “Hazardous Substance”

By Melanie Benesh (EWG)

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Per- and polyfluorinated substances, known as PFAS, are often characterized as “emerging contaminants.” However, ask the residents living in the communities polluted by decades of unregulated discharges of these chemicals and they’ll tell you that it’s a contamination crisis that has arrived long ago.

PFAS chemicals are a group of chemicals that, because of their nonstick and heat-resistant properties, have been used since the 1940s in a wide variety of industrial and consumer applications. Exposure is associated with myriad health impacts, including cancer, kidney disease, ulcerative colitis, high cholesterol, preeclampsia, low birth weight and **reduced effectiveness of vaccines**.

EWG recently identified **610 sites in 43 states** contaminated by PFAS, including 117 military sites. EWG also identified **nearly 500 industrial sites** that are potentially discharging PFAS into the air and water. Because the military has required the use of PFAS in firefighting foams for 50 years, there

is likely some level of PFAS contamination near virtually every military base, fire training center and commercial airport in America.

However, because there are no requirements to test or monitor for PFAS, no one knows the true scope of PFAS contamination.

Once in the environment, PFAS chemicals never break down. This means that even decades after PFAS are released, people will still be exposed and face health risks from these “forever chemicals” if contaminated sites are not cleaned up.

That’s why it’s so important that PFAS be designated as “hazardous substances” under the federal Superfund law, which would jumpstart the process of identifying and cleaning up PFAS-polluted communities. PFAS chemicals also build up in our bodies and can stay there for decades. So, the longer communities continue to be exposed to PFAS, the greater the risks they face.

Superfund distinguishes between chemicals that have been designated as “hazardous substances” and things that are merely considered “pollutants or contaminants.” Under current law, PFAS chemicals are considered “pollutants or contaminants” but not “hazardous substances.” This significantly limits the power of the Environmental Protection Agency and the states to clean up PFAS pollution.

A “hazardous substance” designation under Superfund triggers **reporting requirements** for releases over a certain threshold. Anytime the hazardous substance is released into the air, land or water in amounts exceeding the threshold, it triggers an investigation and potential cleanup. By contrast, when a substance is simply a “pollutant or contaminant,” it must be shown to pose an **“imminent and substantial danger”** to public health before the site can be investigated and cleaned up – and, even then, the EPA has considerable discretion over whether to pursue cleanup.

Even when the EPA is able to meet the high bar to take action on a “pollutant or contaminant,” the actions it can take are much more limited. Perhaps most significantly, EPA has no mechanism to ensure that the polluters responsible for the contamination pay for the cleanup. The upfront costs, and sometimes total costs, of cleanups are often paid by the EPA from a specified account

(“the Superfund”) funded by Congressional appropriations[1] that have **decreased over time**.

Use of these funds is largely **limited to actions** related to “hazardous substances,” and the funds are often not sufficient to cover the full costs of remediation. As a result, the EPA finances many cleanups by **suing the polluters** responsible for the pollution to recover its costs and then negotiates settlements for remaining costs. However, the EPA can only use this powerful tool to clean up “hazardous substances.” EPA cannot recover costs for cleanups of “pollutants or contaminants.”

Although anyone who contributed to pollution at a contaminated site may be asked to pay for cleanup, Superfund contains important **provisions limiting liability for certain parties**. This includes local governments that have involuntarily obtained contaminated properties (for instance, through bankruptcy or abandonment); parties that contributed very small amounts of waste; innocent or “bona fide” purchasers; and parties with limited ability to pay. In particular, Superfund exempts from liability some parties that generated or transported waste if they contributed *de micromis* amounts. Superfund also exempts certain parties that only contributed municipal solid waste to a listed site.

Another reason we need to designate PFAS as a “hazardous substance” is to ensure that the military cleans up contaminated sites.

The federal Superfund law also applies to federal agencies that own or operate contaminated properties, including the Department of Defense. The **section of the law** that explicitly allows these federal facilities to be regulated under Superfund also largely focuses on the cleanup of “hazardous substances.” Unless, PFAS is designated as a “hazardous substance,” military officials will continue to delay clean-up efforts.

The Air Force, which used fire-fighting foams made with PFAS for decades, has used that distinction to try to minimize its cleanup obligations and escape liability for PFAS pollution at some sites. In response to a violation notice from the Michigan Department of Natural Resources for failure to meet state cleanup standards for significant PFAS contamination at the former Wurtsmith Air Force Base, **the Air Force claimed that:**

[PFAS] do not qualify as CERCLA hazardous substances; they are CERCLA pollutants or contaminants under 42 USC § 9601(33). PFOS and PFOA also are not hazardous wastes, and they obviously are not petroleum. . . . [T]he federal government is immune under 42 USC § 9620(a)(4) from a state enforcing its laws for the release of anything other than CERCLA hazardous substances.

Last year, the Navy took steps to remove **3,500 tons of PFAS-contaminated soil** from the former Naval Air Station Joint Reserve Base Willow Grove, in Horsham, Pa. However, a Navy official announced recently that it would stop the practice after it was unable to find a landfill willing to take the contaminated soil. To justify stopping the practice, another Navy official said that “there is no requirement to take the soil out, there are no limits, there are no regulations.”

PFAS used in firefighting foams on military bases, at commercial airports, and at fire training centers is thought to be one of the most significant sources of PFAS contamination in groundwater. Although the EPA has reported that it is engaged in PFAS-related cleanup at **58 federal facility Superfund sites**, the Department of Defense has identified **at least 401 sites** with known or suspected PFAS contamination. That means service members and their families who lived on or near those sites, as well as civilians living in nearby communities, all were likely exposed to potentially unsafe levels of PFAS.

Designating PFAS as hazardous substances would go a long way toward ensuring that DOD and other federal agencies stop dragging their feet and instead meet their obligations to investigate and clean up those contaminated sites so that people are not further exposed.

Legislators in both the House and Senate have proposed bipartisan legislation that would designate PFAS as a “hazardous substance” under the Superfund law. Ongoing negotiations over the National Defense Authorization Act – defense spending legislation that Congress must pass every year – also present an opportunity for Congress to weigh in.

Last week, the Senate passed its version of the NDAA, which included several provisions related to PFAS, including groundwater monitoring, reporting PFAS releases into the air and water, blood tests for military firefighters, phasing out PFAS firefighting foams, and guidance for the

destruction and disposal of PFAS. These provisions would go a long way toward helping to identify the scope and location of PFAS contamination. These provisions may also provide valuable information about communities that should be part of the Superfund program but may not currently be on the radar of EPA or state authorities.

However, little can be done to ensure that those sites get cleaned up without PFAS being designated as “hazardous substances” under Superfund. Unfortunately, the Senate missed an opportunity to designate PFAS as a hazardous substance. This month, the House will consider its own version of the NDAA and decide which PFAS measures will be included in its final bill.

In May 2018, Scott Pruitt **pledged** to designate PFAS as a hazardous substance under the Superfund law. But, since then, the Trump Administration has made empty promises and issued unfulfilled “action” plans. It’s up to Congress to protect people, especially our military families, from toxic PFAS pollution.

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**[1]** When Congress created the Superfund program, in 1980, the fund was mostly paid for through taxes on industries known to cause pollution. However, this authority expired in 1995 and Congress has never renewed it. The fund is now much smaller and paid for through budget appropriations by Congress.