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DOES THE RCRA CITIZEN SUIT PROVISION APPLY TO CROSS-MEDIA IMPACTS?

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In mathematics, often the most eloquent answer is the simplest one. In the 1970s, Congress took this approach in enacting a triad of statutes to address environmental pollution in the air, water, and on land. Responding to such serious environmental impacts as the Donora, Pennsylvania Smog, the use of the Hudson Rivers as a sanitary sewer, and a national crisis in the management of hazardous and solid waste, Congress enacted the Clean Air Act of 1970 to address air, the Clean Water Act of 1972 to address water, and the Resource Conservation and Recovery Act ("RCRA") of 1978 to address solid and hazardous waste, thereby "eliminate[ing] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 94-1491, at 4, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241-42. Recently, plaintiffs have used RCRA's citizen suit provision, claiming an imminent hazard for releases of air emissions or water contamination and suggesting that this "citizen watch dog" provision is an ideal way to deal with alleged threats posed by air emissions and water discharges. This paper discusses the case law, RCRA and its legislative history, and suggests that interpreting RCRA as a cross-media statute undermines the legislative intent of allowing the "environmental laws to function in a coordinated and effective way." *Id.*

Some Reasons that Plaintiffs File Citizen Suits for Cross-media Pollution under RCRA

Why might a plaintiff want to bring a citizen suit under RCRA—why not bring a citizen suit under the Clean Air Act or the Clean Water Act? One answer is that it may be easier to get a claim into court under RCRA. Both the Clean Air Act and the Clean Water Act authorize citizen suits: (1) when an entity is violating an emission or effluent standard or limitation or an agency order; or (2) when the administrator has failed to undertake a non-discretionary duty. The Clean Air Act also allows citizen suits when an entity begins construction of a new or modified major source prior to obtaining a permit. Neither statute has a citizen suit provision like RCRA that allows a citizen suit against an entity who "has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. §6972(a)(1)(B). Thus, in most instances the citizen suit provisions of the Clean Air Act and the Clean Water Act confine the plaintiff to discrete violations of distinct published standards or permits. RCRA's citizen suit is not so confined and allows actions based on a much broader concept of "endangerment." Thus, there appears to be more "room" for bringing a claim against an entity under RCRA.

In addition, while the citizen suit provisions under the Clean Air Act, the Clean Water Act, and RCRA allow a plaintiff to recover reasonable attorney fees, a plaintiff cannot recover damages. While the citizen suit provisions of RCRA do not allow damages, upon filing a RCRA imminent and substantial endangerment claim, a plaintiff can add state-based tort claims such as trespass or nuisance and seek to recover damages as well as providing a basis for federal court jurisdiction of cases that are in essence state law-based claims.

While there may be an appeal to filing a RCRA citizen suit for alleged violations of air or water, as described below, there are statutory and policy reasons that should preclude this.

The Purpose of RCRA Is To Regulate the Generation, Transportation, Treatment, Storage, and Handling of Solid Waste Materials

By 1977, Congress had not addressed the increasing amount of solid and hazardous waste being dumped into unregulated landfills. *Id.* at 2, *reprinted in* 1976 U.S.C.C.A.N. at 6238. By enacting RCRA, the House Interstate and Foreign Commerce Committee noted that "the federal government [was] spending billions of dollars to remove pollutants from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner." *Id.* at 4, *reprinted in* 1976 U.S.C.C.A.N. at 6241-42.

As evidence of Congress' intent to regulate air, water, and the land independently but concurrently, Congress enacted a RCRA provision entitled "Integration with other Acts," which required U.S. EPA to:

> integrate all provisions of this chapter for purposes of administration and enforcement and shall ***avoid duplication***, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act …, the Federal Water Pollution Control Act …, the Federal Insecticide, Fungicide, and Rodenticide Act …, the Safe Drinking Water Act …, the Marine Protection, Research and Sanctuaries Act of 1972 …, and such other Acts of Congress as grant regulatory authority to the Administrator.

42 U.S.C. §6905(b)(1) (emphasis added). While it would appear that the statute made clear that RCRA covered solid waste disposal, plaintiffs have asserted that there is enough ambiguity in the statutory definitions to allow them to bring RCRA claims for alleged violations that more appropriately fall under the Clean Air Act or Clean Water Act.

The "disposal" of "solid waste" goes right to the heart of these challenges. 42 U.S.C. §6903(27) defines "solid waste" as:

> any garbage, refuse, ***sludge from a waste treatment plant***, water supply treatment plant, or ***air pollution control facility*** and other discarded material, including solid, liquid, semisolid, or ***contained gaseous material*** resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but ***does not include*** solid or dissolved material in domestic sewage, or ***industrial discharges which are point sources subject to permits under section 1342 of Title 33 [NPDES Permits]***, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended.

(emphasis added). Disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. §6903(3). As to

facilities or activities that discharge emission to the air or water, these definitions suggest that RCRA was intended to cover the solid wastes collected from air or water pollution activities and not the actual emissions from a stack or point of discharge, all of which are pervasively regulated by the Clean Air Act and the Clean Water Act.

To illustrate the intent of Congress to close the loophole on the disposal of solid wastes, imagine a power plant that accumulates fly ash from the electrostatic precipitator during the combustion of coal for making electricity. The purpose of RCRA was to address the waste that was removed from the air through proper disposal. *See*, *also*, Daniel H. Squire, THE RCRA PRACTICE MANUAL 21 (noting that the Clean Air Act and RCRA overlap in that the Clean Air Act requires a source to install air pollution controls to reduce air emissions and then requires disposal of those wastes in compliance with RCRA once they are collected in air pollution control devices). Hence, state programs specifically address this type of waste. *See*, *e.g.*, Ohio Adm.Code 3745-30, Residual Solid Waste Disposal; U.S. EPA, *Guidance on the Use of Section 7003 of RCRA*, EC-G-1998-378, 16 (Oct. 1997) (including "fly ash, bottom ash waste, slag waste, and flue gas emission control waste generated from the combustion of fossil fuels" as "solid waste"). As another example, municipal waste water treatment plants remove pollutants from the water and generate sludge that eventually is addressed through land application rules. *See*, *e.g.*, Ohio Adm.Code 3745-40, Sewage Sludge; Iowa Adm.Code 567-121. More recently, U.S. EPA has evaluated whether the Bevill Exemption under RCRA should be repealed (42 U.S.C. §6921(b)(3)(A)(i); 40 C.F.R. 261.4(b)(4)) and is engaged in extensive rulemaking to determine if fly ash disposal sites should be regulated as a solid or hazardous waste. When Congress enacted RCRA and its amendments, it was clearly aware of potential problems with air and water pollution control residues, and it is hard to imagine that it intended the broad provisions of RCRA's citizen suit provisions to allow Courts to supplement its comprehensive regulatory scheme.

Despite Congress' intent, courts have been asked to determine whether air emissions or pollutants in water effluents constitute a disposal of solid waste. While the answer to this question should be "no," it is surprising that there is not a consistent answer. Naturally, defendants that are posed with these citizen suits have sought to dismiss these RCRA claims but have met mixed results. Caution, however, must be taken regarding the case law because these opinions were decided at the motion to dismiss or motion for summary judgment stage, for which the burden on the moving party is substantial.

The Case Law "For" and "Against" RCRA Citizen Suits for Alleged Air Emission Violations

While the definition of "solid waste" could not be more explicit that it should not cover air emissions, some courts have found that air emissions may fall within the purview of the Act. As discussed, Congress intended RCRA to complement the regulation of air and water by regulating the disposal of solid waste. This is evident as Congress explicitly regulated air pollution control waste under RCRA by including "sludge from a[n] … air pollution control facility" while excluding uncontained gaseous material released from a source. 42 U.S.C. §6903(27). U.S. EPA's own publications demonstrate that the various environmental statutes were intended to "work together to address hazardous waste problems [by] include[ing] media-specific statutes that limit the amount of waste released into a particular environmental medium." U.S. EPA Office of Solid Waste, RCRA ORIENTATION MANUAL VI-7 (2011); 56 Fed. Reg. 24393 (May 30, 1991).[1] U.S. EPA acknowledges

[1] This guidance document discusses U.S. EPA's enforcement authority under the Clean Air Act in instances where there is an imminent and substantial endangerment. U.S. EPA asserts that its enforcement authority under 42 U.S.C. §6973 (RCRA §7003) is not media specific. However, the

that while RCRA addresses solid wastes such as pollution control sludge, the Clean Air Act addresses emissions from sources, including particulate matter. *Id.* at VI-3. Nevertheless, several courts allowed regulation of emissions from ***all*** air pollutant sources under the purview of RCRA on the premise that all gas emissions contain some form of particulate.

In *Orchard Lane Road Ass'n v. Pete Lien & Sons, Inc.*, No. 91-Z-1075, 24 Chem. Waste Lit. Rep. 693 (D. Col. Jan. 8, 1992), plaintiffs survived a motion for summary judgment on a RCRA claim for emissions of silica dust. The court read the definitions of "disposal" and "solid waste" in broad terms and found that the term disposal included emissions to the air and that silica dust particles, although small particulates, were solid waste under the definition. The court noted:

> [i]t does … in paragraph (b) of [RCRA Section 1006, 42 U.S.C. Section] 6905, indicate that the Administrator "shall integrate provisions of this chapter … to the maximum extent [practicable], with the appropriate provisions of the Clean Air Act" …. [I]t appears to me that what this means is that where RCRA and the Clean Air Act both apply, that RCRA having the ability of a citizen suit, [and the] Clean Air Act not having that ability, they should … be … interpreted so that they make sense where there is a citizen suit. In summary, I see nothing … that indicates that Congress intended to tell the courts or tell citizens that because we have the Clean Air Act applying, we don't have RCRA applying.

Orchard Lane Road Ass'n, 24 Chem. Waste Lit. Rep. at 694 (quoting 42 U.S.C. §6905). The reasoning fails to address the fact that the definition includes "contained gaseous materials" which should, therefore, preclude uncontained gases. Despite missing this point, the court did raise a policy issue that was not addressed in the opinion: Can a facility that is in compliance with the Clean Air Act be in violation of RCRA for the disposal of particulate matter emitted from its stack? As discussed below, this is one of the problems with treating RCRA as a cross-media statute.

Similar to *Orchard Lane Road Ass'n*, a court came to a similar conclusion in *Citizens Against Pollution v. Ohio Power Company*, 2006 WL 6870564 (S.D. Ohio 2006), and denied defendant's motion for summary judgment. Ohio Power Company installed selective catalytic reactors at its power plant to reduce nitrogen oxides from the flue gas stream. As a result of operation, there was an increase in sulfur trioxide in the flue gas. This flue gas took the shape of a blue plume that "appeared to touch down on the land around the … [p]lant on numerous occasions." *Citizens Against Pollution*, 2006 WL 6870564, *2. The court found that the flue gas emitted from the plant's stack was discarded solid waste that, upon touching the ground, was disposed of. Interpreting the statute broadly, the court refused to entertain defendant's argument that flue gas was not a "liquid, solid, semisolid or ***contained gaseous*** material." *Id.* at *5 (quoting 42 U.S.C. §6903(27)) (emphasis added).

What is striking about *Citizens Against Pollution* is that it failed to analyze prior precedent of another judge in the same District. As an earlier opinion noted, RCRA's definition of solid waste could not be clearer in its common sense exclusion of air emissions from the definition of solid waste because RCRA defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or ***contained*** gaseous material resulting from industrial …

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guidance also states that U.S. EPA should coordinate any action with its enforcement powers under other statutes. 56 Fed. Reg. at 24395.

operations.…" 42 U.S.C. §6903(27) (emphasis added). Thus, in *Helter v. AK Steel Corp.*, 1997 WL 34703718, *12 (S.D. Ohio 1997), the court granted Defendant's motion to dismiss, finding "no authority for Plaintiffs' position that the [coke oven gas] that leaked, in its gaseous form, from Defendant's pipe … was contained at the time when it became 'discarded.' Absent such authority, the Court conclude[d] that the plain language in 42 U.S.C. §9603(27) excludes the leaked [coke oven gas], in its gaseous form, from the definition of 'solid waste' and, thus, from RCRA's coverage." *See*, *also*, Daniel H. Squire, THE RCRA PRACTICE MANUAL 20 (Theodore L. Garrett ed., 2d ed., ABA 2004) ("Although air emissions from industrial facilities may exhibit hazard [sic] characteristics and may be viewed as 'wastes,' they ordinarily would not be 'solid wastes' within the meaning of RCRA, thus avoiding an overlap in the Clean Air Act and RCRA regulatory programs").

More recently, the Central District of California took a similar approach of the court in *Helter* and granted a motion to dismiss in *Center for Community Action and Environmental Justice v. Union Pacific Corporation*, 2012 WL 2086603 (C.D. Cal. 2012). Plaintiffs brought a claim under RCRA, asserting that defendants' diesel-engine exhaust at their rail yards was causing an imminent and substantial risk to human health. The court agreed with defendants that diesel-engine exhaust was regulated under the Clean Air Act. *Center for Community Action and Environmental Justice*, 2012 WL 2086603, *3-6. Further, the court analyzed RCRA and found that the definition did not include uncontained gases and, therefore, precluded diesel-engine exhaust from the definition. *Id.* at *7-8. In addition, the court dismissed the opinion in *Citizens Against Pollution*, cited above. The court found that the Ohio Southern District Court:

> was able to reach this conclusion only by ignoring the well-established canon of statutory construction, *expression unis est exclusion alterius*, which "creates a presumption that when a statute designates certain persons, things or manners of operation, all omissions should be understood as exclusions" …. This Court will not interpret the statute so broadly that the language "including solid, liquid, semisolid, and contained gaseous material" is superfluous. The statute would not need to specify that contained gaseous material constitutes solid waste if Congress intended for all gaseous material to constitute solid waste.

Id. at *9 (quoting 42 U.S.C. §6903(27)).

Is Water Pollution Excluded Based on the Definition of Solid Waste?

The definition of solid waste specifically excludes "solid or dissolved material in domestic sewage, or industrial discharges which are point sources subject to permits under section 1342 of Title 33 [NPDES Permits]." Thus, it appears to be difficult for a plaintiff to bring a citizen suit under RCRA for pollutants in effluent streams. Does this mean that all pollutants falling within the realm of the Clean Water Act are protected from RCRA citizen suits? Not necessarily—at least according to one court.

In *Raritan Baykeeper, Inc. v. NL Industries, Inc.*, 2013 WL 103880 (D. N.J. 2013), plaintiffs filed a citizen suit alleging, among other things, that stormwater runoff from roads managed by the defendant was creating an imminent hazard under RCRA. Defendants filed a motion to dismiss, arguing that (1) stormwater is not a solid waste, (2) there is an express exemption for point sources subject to permits under the Clean Water Act, (3) the anti-duplication provision bars the suit, and (4)

defendants were not engaging in active disposal of a pollutant. *Raritan Baykeeper, Inc.*, 2013 WL 103880, *25.

The court denied defendant's motion to dismiss. First, the court found that storm water is solid waste because "[w]hen it flows over urban environments, it collects suspended metals, sediments algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants." *Id.* at *26 (quoting *Natural Res. Def. Council v. County of Los Angeles*, 673 F.3d 880, 883-84 (11th Cir. 2011)(internal quotation marks omitted)). Thus, because the stormwater contained particles, it too was a solid waste. Second, although stormwater permits clearly fall within the purview of the NPDES program (*see*, 33 U.S.C. 1342(p)), the court found that the exemption in the definition did not apply to defendants. The court noted that the exemption only applied to an industrial discharge, which is defined as "the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." *Id.* (quoting 40 C.F.R. 122.26(14))(internal quotation marks omitted). Because the stormwater at issue in this case was not industrial, the court concluded that the exemption did not apply. *Id.* Third, the court found that defendants were actively contributing to the handling of solid wastes because defendants managed the municipal separate storm sewer systems. Finally, the court found that the anti-duplication provision did not apply because a party could bring suit under two acts where the acts are not inconsistent. *Id.* at *27.

The court's reasoning that stormwater is solid waste stretches the definition beyond what Congress intended. In fact, stormwater runoff is extensively regulated under the Clean Water Act. 33 U.S.C. 1342(p). Under this interpretation, municipalities throughout the country could face citizen suits under RCRA even though they have a valid permit as discussed below.

A Case against Treating RCRA as a Cross-media Statute

While there is clearly a split among some trial courts on what media fall under RCRA's citizen suit, there are several sound statutory and policy arguments to be made against treating RCRA as a statute covering cross-media (air, water, and land) and that the most logical conclusion is that RCRA was not intend to go so far.

First, Congressional history suggests that RCRA was intended to address the final media not addressed by the Clean Air and Clean Water Act. Congress was concerned with transferring pollutants from one media—water or air—to another media, the ground. Thus, the Clean Air Act, the Clean Water Act, and RCRA served to complement each other—not duplicate; hence the purpose to the anti-duplication provision in RCRA.

Second, where Congress intended regulation of air emissions under RCRA and hazardous substances under the Clean Air Act, it explicitly granted that authority. For example, RCRA specifically grants U.S. EPA the authority to regulate air emissions from the burning of hazardous waste in boilers and industrial furnaces. *See*, *e.g.*, Burning of Hazardous Waste in Boilers and Industrial Furnaces; Final Rule, 56 Fed. Reg. 7134 (Feb. 21, 1991). U.S. EPA also regulates the emission of hazardous air pollutants (HAPs) under the Clean Air Act. 42 U.S.C. §7412. In the 1984 Hazardous and Solid Waste Amendments, Congress directed U.S. EPA to regulate air emissions from hazardous waste disposal facilities under RCRA. In 1987, U.S. EPA promulgated proposed rules for the "Burning of Hazardous Waste in Boilers and Industrial Furnaces." 52 Fed. Reg. 16982 (May 6, 1987). U.S. EPA eventually finalized these rules after the enactment of the 1990 Clean Air Act Amendments. 56 Fed. Reg. 7134. In response to amendments to 42 U.S.C. §7412, which

addressed the regulation of HAPs, U.S. EPA noted uncertainty about regulating air emissions from hazardous waste disposal facilities under ***both*** RCRA and the Clean Air Act, noting:

> It is premature for the Agency to attempt to provide a definitive opinion on the relationship of [Section 112 of the Clean Air Act] to today's rule. Sources covered by the present rule may not ultimately be required to be further regulated under amended section 112. In this regard, amended section 112(n)(7) provides that if sources' air emissions are regulated under subtitle C, "the Administrator shall take into account any regulations of such emissions … and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent." Thus, at a minimum, Congress was concerned about the potential for duplicative regulation and urged the Agency to guard against it.

Id. at 7137. In 1999, pursuant to the Clean Air Act, U.S. EPA promulgated MACT standards for hazardous waste facilities. Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 64 Fed. Reg. 52828 (Sept. 30, 1999). This rule was vacated because U.S. EPA had not adequately demonstrated that the rule satisfied 42 U.S.C. §7412. *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 857 (D.C. Cir. 2001). However, in 2005, U.S. EPA promulgated revised MACT standards. National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 70 Fed. Reg. 59402 (Oct. 12, 2005). In that rule, U.S. EPA announced, pursuant to 42 U.S.C. §6905(b)(1), that the 1991 "RCRA regulations no longer apply once a facility demonstrates compliance with the MACT standards in subpart EEE and any duplicative requirements have been removed from the RCRA permit." *Id.* at 59523 (emphasis added). Thus, the regulatory framework promulgated under RCRA and the Clean Air Act recognizes that the regulation of hazardous waste facilities should avoid duplicative requirements under the two statutes.

Similarly, 42 U.S.C. §7412 regulates hazardous air pollutants in lieu of regulation under RCRA. 42 U.S.C. §7412 requires U.S. EPA to establish emission standards for major sources that emit HAPs that are listed under 42 U.S.C. §7412(b)(1). A source is major if it emits "10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. §7412(a)(1). Under this section:

> Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section … that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standards applies …

42 U.S.C. §7412(d)(2).

Third, to the extent that air pollutants could impair property, the Clean Air Act addresses this with its Secondary National Ambient Air Quality Standards ("NAAQS"). The Secondary

NAAQS are promulgated to be protective of public welfare and the environment. Allowing these suits would undermine the decision of the Administrator to set these standards as discussed more fully below.

Fourth, as pointed out by the court in *Center for Community Action*, applying RCRA to other media would lead to absurd results. As that court pointed out, "[i]f diesel exhaust were a solid waste when emitted by vehicles in Defendants' rail yards, it would necessarily also be a solid waste when emitted by any diesel-burning vehicle anywhere." *Center for Community Action and Environmental Justice*, 2012 WL 2086603, *7. Allowing RCRA to apply to pollutants typically covered under the Clean Air Act or the Clean Water Act would open a floodgate of litigation under the RCRA citizen suit provision. This could include RCRA claims against automobile makers for automobile exhausts or claims against cities for stormwater runoff.

Fifth, as posed by the court in *Orchard Lane Road Ass'n*, how would a court treat a situation where a plaintiff brings a claim under RCRA's citizen suit for pollutants that a facility is permitted to emit? *Orchard Lane Road Ass'n*, 24 Chem. Waste Lit. Rep. at 694. Under the Clean Air Act citizen suit provision, a party could not bring this claim if a facility had not violated its permit conditions. However, if these types of claims were permitted under RCRA, a party could collaterally attack a permit even though it never challenged the permit during the permitting process. This would create an onerous problem as well as costly litigation over a permit that was lawfully issued.

Finally, allowing citizen suits under RCRA across media replaces the substantial judgment of the Administrator with inconsistent jury or judge determinations. Both the Clean Air Act and the Clean Water Act allow the Administrator to set limits through State Implementation Plans, NPDES programs, and a host of other programs, which require the Administrator and State Agencies to be protective of human health and public welfare. These limits are implemented on individual sources in complicated and time-consuming permit proceedings such as Title V Permits, New Source Permits, and NPDES permits. By allowing Plaintiffs to file a claim under RCRA's imminent and substantial endangerment citizen suit, courts disregard the judgment of the Administrator to ensure that the air and water are protective of human health and the environment and allow the jury or judge to make the determination of what is "safe" under what will amount to generalized common law determinations.

Conclusion

RCRA was not intended to cover the discharge of emissions to the air and water. Allowing the imminent and substantial provisions to be construed this "broadly" or to fill some imaginary gaps essentially allows creative plaintiffs and courts to substitute judgments as to how air and water emissions should be regulated. After four decades of comprehensive regulation of air and water emission, allowing Courts to fill in regulatory gaps undermines these exceedingly comprehensive programs. Allowing RCRA cross-media citizen suits contradicts the legislative history, increases environmental litigation, and disregards the judgment of the Administrator in setting limits that are protective of human health and the environment. But more importantly, from a statutory point of view, there is no support for creating such a new right of action.

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