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Clean Air Act and the Federal Removal Statute: Do They Fit Together or Are We Missing a Piece of the Puzzle? California v. United States

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THE CLEAN AIR ACT AND THE FEDERAL REMOVAL STATUTE: DO THEY FIT TOGETHER OR ARE WE MISSING A PIECE OF THE PUZZLE?

California v. United States[1]

I. INTRODUCTION

Under the Clean Air Act[2], Congress vested the states with the responsibility of implementing pollution control at the local level.[3] The main purpose of the Clean Air Act was to protect and enhance the quality of the nation's air resources.[4] Under the original Act it was unclear what remedies were available for states choosing to bring an enforcement action. Besides the ambiguity in the available remedies, many states were unsure of the proper forum for these actions, while others were denied the proper forum. Recognizing the problem with the original Act, Congress amended the Clean Air Act in 1977 to explicitly provide a local forum for states to bring suit in enforcement actions. However, Congress failed to address the effect of the Act on the sovereign immunity of the United States and its facilities. In addition, Congress failed to address the Act's relationship with the federal removal statute.[5]

II. FACTS AND HOLDING

Sacramento Metropolitan Air Quality Management District ("Sacramento Air District") brought suit in state court against the Department of the Air Force, Sacramento Air Logistics Center and McClellan Air Force Base (collectively "the United States") under the California Health and Safety Code.[6] On January 9, 1996, the Sacramento Air District provided the United States with a permit for eight gas heaters that were installed at the McClellan Air Force Base.[7] This permit limited the volume of gas that the eight heaters could consume.[8] According to Sacramento Air District, the United States released an excess amount of nitrogen oxides into the air above the permitted 2.47×10^6 cubic feet for the first quarter of the 1996 calendar year.[9] Once the United States was informed of these excess emissions, they immediately discontinued use of the heaters.[10]

Shortly thereafter, the United States submitted an application to the Sacramento Air District to increase the amount of gas the heaters could consume.[11] While this application was pending, the Sacramento Air District filed the above-mentioned suit. Specifically, the Sacramento Air District sought both $13,050 in civil penalties and injunctive relief.[12] Shortly after filing this action in state court, the Untied States removed this action to the district court under 28 U.S.C. § 1442(a)(1).[13]

In the present case the United States Court of Appeals had to decide whether the present action was improperly removed from the state court pursuant to 28 U.S.C. § 1442(a)(1) and whether the district court had subject matter jurisdiction on any other ground to hear the case.[14]

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[1] *California v. United States*, 215 F.3d 1005 (9th Cir. 2000).
[2] 42 U.S.C. § § 7401-7642 (1999).
[3] *California*, 215 F.3d at 1007 (discussing Cal. Health & Safety Code § 42300).
[4] *Id.*
[5] 28 U.S.C. § 1442 (1999).
[6] 215 F.3d at 1007. The Sacramento Air District is one of the thirty-five local agencies in California that has the responsibility for controlling air pollution. *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1010.

III. LEGAL BACKGROUND

A. Clean Air Act

Overview

Congress enacted the Clean Air Act in 1967 to control the "amount and complexity of air pollution brought by urbanization, industrial development, and the increasing use of motor vehicles."[15] The Clean Air Act states that the reduction or elimination of air pollution and control at its source is the primary responsibility of the states and local governments.[16] In order to help the states with this responsibility, Congress indicated that it would provide technical and financial assistance to State and local governments to develop and execute their air pollution control programs.[17] Besides the technical and financial assistance, the federal government is required under the Act to encourage States to make agreements and compacts between them to prevent air pollution.[18]

On a national level, the Environmental Protection Agency ("EPA") is required under the Clean Air Act to establish a national research and development program to control air pollution.[19] In this program, Congress not only included mechanisms for monitoring air pollution, but also research on environmental health effects of polluted air, the effects on the ecosystem, the effects of pollution on human health and the effects of acid precipitation.[20] In addition to the research on pollution control, the Act also requires the EPA to research issues related to fuels and vehicles and develop programs to deal with related problems.[21]

Congress also delegated the power to establish national and primary ambient air quality standards to the EPA.[22] The national ambient air quality standard proscribes maximum acceptable concentrations of various pollutants in the air.[23] In contrast, the secondary national air ambient quality standard prescribes the level required to protect the public welfare from any known or anticipated adverse effects.[24] After the EPA has established the national primary ambient air quality standard, each state is obligated to meet this standard.[25] Specifically, the Clean Air Act requires each state to establish a plan for the implementation, maintenance, and enforcement of the national primary ambient standard.[26]

The Supreme Court has held that every federal appellate court has the duty to satisfy itself not only of its own jurisdiction, but the court must also review the lower court's jurisdiction.[27] Further, the Supreme Court has held that if the record indicates that the lower court was without jurisdiction, the appellate court should take notice of the defect, even if the parties make no contention concerning it.[28] Accordingly, when the lower federal court lacks jurisdiction, the appellate court has jurisdiction in order to correct the error of the lower court in entertaining the suit.[29] In this case, Sacramento Air District did not dispute the subject matter of the lower court. Yet, upon review of the action the Court of Appeals questioned whether there was proper subject matter jurisdiction and ordered the parties to submit supplemental memoranda on the issue.[30]

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[15] 42 U.S.C. § 7401 (1995). Congress also indicated that the purpose of the Act is to protect and enhance the quality of the air resources across the nation. *Id.*

[16] *Id.* "[E]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State..." *Train v. Natural Defense Council*, 421 U.S. 60, 95 (1975).

[17] 42 U.S.C. § 7401(b)(3) (1995).

[18] 42 U.S.C. § 7402(a) (1995).

[19] 42 U.S.C. § 7403(a) (1995).

[20] 42 U.S.C. § 7403 (1995).

[21] 42 U.S.C. § 7404(a) (1995).

[22] 42 U.S.C. § 7408(a) (1995).

[23] PPG Industries, Inc. v. Costle, 659 F.2d 1239, 1242 (D.C. Cir. 1981). The standard is set to allow an adequate margin of safety and it is a requisite to protect the public health. *Id.*

[24] *Id.* at 1242.

[25] 42 U.S.C. § 7410(a) (1995).

[26] *Id.* Each plan must provide for the establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor and analyze data on ambient air quality in the state. *Id.*

[27] *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986).

[28] *Id.*

[29] *Id.*

[30] *California*, 215 F.3d at 1010.

Hancock v. Train[31]

In *Hancock*, the Supreme Court did not decide whether federal installations must comply with established air pollution measures; rather, the Court decided how compliance with these measures would be enforced.[32] In 1972, Kentucky submitted its Clean Air Act implementation plan to the EPA as required under 42 U.S.C. § 7410.[33] Under the Kentucky plan, certain air contaminants could not be released into the air without a permit from the Kentucky Air Pollution Control Commission ("Kentucky Commission"), in order to insure the required ambient air quality for the state.[34] The central issue in *Hancock* was the extent to which federal installations were subject to state regulation and whether this regulation required federal installations to get permits from state commissions such as the Kentucky Commission.[35]

The Court found that where Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation.[36] The Court was unable to find that, on its face or in relation to the Clean Air Act, any clear and unambiguous declaration by Congress that federal installations may not perform their activities unless a state issues a permit.[37] Applying these findings, the Court held that the Clean Air Act did not require federal installations to be subject to State permit requirements or State control.[38] The Court indicated that "[s]hould this nevertheless be the desire of Congress, it need only amend the Act to make manifest intention."[39] Congress amended the Clean Air Act in 1977 to specifically hold federal facilities responsible to comply with state pollution laws.[40]

1977 Amendment to the Clean Air Act[41]

In 1977, Congress amended the Clean Air Act to deal with a number of pollution problems that had arisen, including one with federal facilities.[42] Even after the 1970 Amendment, federal facilities were delaying and evading compliance with state and local air quality laws.[43] One purpose of the 1977 Amendment was to clarify the Act, finding that it "constitute[d] a waiver of sovereign immunity, such that Federal facilities and persons operating them must comply with all State and local air pollution control requirements."[44] Another reason behind the 1977 amendment was to clarify that all federal facilities must comply with 'procedural' as well as 'substantive' requirements of the state and local laws.[45] Congress specifically stated that the amendment was adopted to "fundamentally overrule the Supreme Court's ruling in *Hancock v. Train*, which was decided after the committee adopted last year's bill."[46]

According to the First Circuit, the Senate-House conference report provided clear insight into Congress's intentions in the passage of the 1977 Amendment to the Clean Air Act.[47] While the original House bill provided that federal facilities must comply with substantive and procedural aspects of state and federal law, the Senate bill allowed for removal of these cases to federal court.[48] At conference, the conferees deleted the Senate's removal provision from the

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[31] *Hancock v Train*, 426 U.S. 167(1976).
[32] *Id.* at 173.
[33] *Id.* at 172.
[34] *Id.* at 172-73.
[35] *Id.* at 168.
[36] *Id.* at 179.
[37] *Id.* at 180.
[38] *Id.* at 197.
[39] *Id.*
[40] H.R. Rep. No. 294, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 1077, 1977 WL 16034 (Leg. Hist.) P.L. 95-95, CLEAN AIR ACT AMENDMENTS OF 1977 (Section 113 Federal Facilities).
[41] Clean Air Act Amendments of 1977, Public Law 95-95 (Aug. 1977).
[42] *California*, 215 F.3d at 1010. Another purpose of the 1977 Amendment to the Clean Air Act was to ensure that additional efforts would be made to bring an area of the country into compliance that had not met the time requirements of the Act. *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985).
[43] *Id.*
[44] H.R. Rep. No. 294, 95TH Cong., 1ST Sess. 1977, 1977 U.S.C.C.A.N. 1077, 1977 WL 16034 (Leg.Hist.) P.L. 95-95, CLEAR AIR ACT AMENDMENTS OF 1977 (Section 113 Federal Facilities).
[45] *Id.*
[46] *Id.*
[47] *United States v. Puerto Rico*, 721 F.2d 832 (1st Cir. 1983).
[48] *Id.* (citing 1977 U.S. Code Cong. & Ad. News 1077, 1517-18).

amendment.[49] The purpose of the adoption of the House bill and the deletion of the Senate's section was "to require compliance with all procedural and substantive requirements, to authorize States to sue Federal facilities in state courts, and subject such facilities to state sanctions."[50] The First Circuit further held that in passing the 1977 Amendment, Congress acted upon the belief that "state court adjudication of state law issues was of paramount importance in air pollution control matters." [51]

Statutory Interpretation

The statutory interpretation of the Clean Air Act and the federal removal statute is crucial in determining whether *U.S. v. California* was properly decided. In *Kremer v. Chemical Construction Corporation*, the Supreme Court discussed how repeals by implication are disfavored.[52] The Court held that, whenever possible, statutes should be read consistently, even when there is a possibility of an implied repeal.[53] However, the Court indicated that there are two well-settled categories of repeals by implication.[54]

The first category is where the provisions in the two acts are in an irreconcilable conflict and the later act, to the extent of the conflict, constitutes an implied repeal of the earlier one.[55] The second category applies if the later act covers the whole subject of the earlier one and is clearly intended as a substitute.[56] If this is so it will operate similarly as a repeal of the earlier act.[57] The Court provided that, in either case, the intention of the legislature to repeal the Act must be clear and manifest.[58] According to the principals of statutory interpretation the Supreme Court set out, it is clear that repeal by implication is improper.

Independent Jurisdiction under Federal Question Jurisdiction

Federal question jurisdiction is established in a case when the dispute is "arising under the Constitution, laws, or treaties of the United States."[59] "Whether a civil action 'arises under' federal law is determined by the 'well-pleaded complaint rule'".[60] Under the well-pleaded complaint rule, federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.[61] Accordingly, the federal district courts are empowered to hear only those cases in which plaintiff's "well-pleaded complaint establishes whether federal law creates the cause of action or that plaintiff's right to relief necessarily depends on the resolution of a substantial question of law."[62]

B. The Federal Court's Jurisdiction over a Case Removed from State Court.

Federal Removal Statute[63]

Congress has provided two options for state civil actions to be removed into federal court under 28 U.S.C. § 1441 and 28 U.S.C. § 1442. Any civil action that a federal district court has original jurisdiction over can be brought into

[49] *Id.* (citing 1977 U.S. Code Cong. & Ad. News at 1518).
[50] *Id.* (quoting 1977 U.S. Code Cong. & Ad. News at 1518).
[51] *Id.* at 839. Congress signaled precisely the opposite intent when in adopted the removal provision for the Clean Water Act. *Id.* at 839.
[52] *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982). The Court indicated that this was one of the cardinal principles of statutory construction. *Id.* at 468 (citing *Radzanower v. Toucher Ross & Co.*, 426 U.S. 148, 152 (1976)).
[53] *Id.* at 468 (citing *Radzanower*, 426 U.S. at 154).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] 28 U.S.C. § 1331 (1999).
[60] *Berger Levee Dist. V. United States*, 128 F.3d 679, 681 (8th Cir. 1997) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)).
[61] *Caterpillar, Inc.*, 482 U.S. at 392.
[62] *Franchise Tax Bd. V. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).
[63] 28 U.S.C. § 1442 (1999).

federal court under section 1441.[64] Under section 1442 only civil actions brought in a state court against the United States or any agency thereof, may be removed to the district court of the United States.[65] Regardless of whether the federal court would have had jurisdiction over the matter had it originated in federal court, section 1442 provides an independent jurisdictional basis.[66]

Clean Air Act "Nonrestriction Provision"[67]

Congress indicated in the Clean Air Act that nothing in the Act restricts any right of a person or a party under any statute or common law to seek enforcement of any emission standard or limitation to seek any other relief.[68] Furthermore, Congress provided that nothing in the act or in any law of the United States should be construed to prohibit any state or local authority from obtaining any judicial remedy or sanction in state court.[69]

IV. INSTANT DECISION

The Ninth Circuit Court of Appeals held that action was improperly removed under 28 U.S.C. § 1442(a)(1) and should be remanded to the state court since the district court lacked subject matter jurisdiction to consider the merits of this dispute.[70] The Court based its decision on the affirmative duty that Congress established for federal facilities to comply with all federal, state, interstate and local air pollution requirements.[71] Based on this duty the Court indicated that where there was a violation of a state or local requirement, that violation could be properly resolved in a state or local forum.[72]

Sacramento Air District argued that the district court improperly removed the action and that the Court lacked subject matter jurisdiction.[73] In contrast, United States argued that the action was properly removed and there was sufficient subject matter jurisdiction.[74] The Court held that the action was improperly removed from the state court pursuant to 28 U.S.C. § 1442(a)(1) and that the Court had no subject matter jurisdiction over the case.[75]

In *California v. United States*, Sacramento Air District brought the action in state court under the California Health and Safety Code.[76] As stated *supra*, in order for federal question jurisdiction to be applicable to the case at hand, it would have to arise under the Constitution, laws or treaties of the Untied States. In addition, it has long been settled that the existence of federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one that, in the statutory sense, arises under federal law. [77]

A. Statutory Construction Analysis

The Court first considered the Supreme Court's decision in *Hancock v. Train*, which challenged the ability of state and local governments to enforce their air quality laws.[78] The Court stated the holding of *Hancock* as "though the Clean Air Act imposed an affirmative duty on the federal government to comply with all substantive air quality requirements, Congress did not intend to subject federal facilities to state procedures used to enforce those requirements."[79]

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[64] 28 U.S.C. § 1441 (1999).
[65] 28 U.S.C. § 1442 (1999).
[66] *Id.* at 1009 (citing *Florida v. Cohen*, 887 F.2d 1451, 1451 (11th Cir. 1989)).
[67] 42 U.S.C. § 7604(e) (2000).
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1007.
[71] *Id.* at 1010.
[72] *Id.*
[73] *Id.* at 1015.
[74] *Id.* at 1013.
[75] *Id.*
[76] *Id.* at 1007.
[77] *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (citing *Gully v. First National Bank*, 299 U.S. 109 (1936)).
[78] *Hancock*, 426 U.S. at 172-175.
[79] *Id.* at 184, 196, 198-99.

After examining the scope of *Hancock*, the Court examined the effect of the 1977 Amendment to the Clean Air Act, which nullified the Supreme Court's decision in *Hancock*.[80] The express purpose of this amendment to the Clean Air Act was to subject federal facilities to procedural and substantive requirements in the control and abatement of air pollution. According to the Court, under 42 U.S.C. § 7404(e) the "text of the amendment necessarily prohibits the removal of actions that are brought by state and local governments pursuant to their own air quality laws."[81]

The Court next discussed the legislative history of the Clean Air Act.[82] The Court stated that the act's legislative history indicated that Congress was frustrated with the "federal government's laggard and obstinate approach towards complying with state and local air quality laws."[83] The Court cited the House committee report, which provided that federal agencies have continuously tried to evade the requirement of federal law to comply with all state and local requirements.[84]

Next, the Court analyzed the relationship between the federal removal statute[85] and the Clean Air Act.[86] The Court found that although the federal removal statute generally authorizes removal of state cases, the Clean Air Act implicitly prohibits the removal of actions against federal agencies where there is violation of state and local air quality laws.[87] Although seemingly contradictory, the Court found these two statutes to be reconcilable.[88] The Court indicated that while Congress intended to provide the federal government a general right of removal, it did not intend for this right to apply to state and local governments bringing suit under their own air quality laws.[89]

B. Federal Question Jurisdiction Analysis

The Court concluded its decision with a discussion of whether the district court had federal question jurisdiction.[90] The Court examined whether there was federal question jurisdiction under the well-pleaded complaint rule.[91] The Court found that a court must consider "what necessarily appears in the plaintiff's statement of his [or her] own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it thought the defendant may interpose" under this rule.[92] After an examination of Sacramento Air District's complaint, the Court indicated that all of the claims were based on the state and local laws, which do not give rise to federal cause of action.[93] Accordingly, the Court found that since there was no diversity jurisdiction and since there was no federal question jurisdiction, the district court lacked subject matter jurisdiction to hear the case.

V. COMMENT

Based on the 1977 Amendment and the cases that have interpreted it, states can bring an enforcement action in state court seeking sanctions when a federal facility violates a state regulation concerning air pollution.[94] *California v. United States* upholds a state's right to bring suit in state court for such a violation. Clearly, the federal government and its agencies have the right to remove certain cases to the federal courts.[95] However, this right is not absolute and was

[80] *California*, 215 F.3d at 1010.
[81] *Id.* at 1011.
[82] *Id.* at 1011.
[83] *Id.*
[84] *Id.* at 1012 n. 5.
[85] 28 U.S.C. § 1442(a)(1) is the federal removal statute that the United States used to remove this action to the district court.
[86] *California*, 215 F.3d at 1012.
[87] *Id.* at 1013. The Court concluded that Congress established the removal rule to allow the government to defend itself in a federal forum where there are complex issues of federal law. *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 1014. The Court's discussion of federal question jurisdiction was necessary since there was an absence of diversity jurisdiction. *Id.*
[91] *Id.* at 1014. The well-pleaded complaint rule states, "federal question jurisdiction only exists when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.*
[92] *Id.*
[93] *Id.* at 1015.
[94] *California*, 215 F.3d at 1011.
[95] "Congress intended to establish a general rule allowing the federal government to defend itself in federal courts when complex federal issues are involved." *California*, 215 F.3d at 1013.

specifically limited in the 1977 Amendment to the Clean Air Act. Without a provision to enable state and local courts to have jurisdiction of enforcement proceedings, this author believes that states would be severely limited in their ability to comply with the pollution abatement goals of the Clean Air Act.

Under the original Clean Air Act, Congress delegated a large amount of responsibility to the states. While there was a large amount of power delegated, Congress failed to provide sufficient means to ensure that states could properly deal with pollution on the state level. While states where able to bring suit against all non-governmental actors for failure to comply with a state implementation plan, there were insufficient means to bring claims against federal facilities. Since the states were unable to control the federal facilities many states were unable to meet the primary national ambient air standards the EPA established.

Even after the 1970 Amendment to the Clean Air Act, many states had problems meeting the proscribed standards. This author asserts that one of the reasons behind meeting these standards was because of the lack luster performance of the federal facilities to comply with local & state regulations. These federal facilities were placing the burden on the private sector, which, in turn, had to deal with some of the pollution emitted from the federal facilities. Since Congress developed the Clean Air Act to deal with pollution, it seems clear that Congress would require the federal facilities to be in compliance.

The Supreme Court was hesitant to find that Congress had delegated any real power over the federal government to the states.[96] It was not until the passage of the 1977 Amendment that the states were given any real opportunity to limit federal facilities and the amount of pollution they emitted.[97] The Ninth Circuit was the first circuit to hold that the Clean Air Act limited the federal government's use of the federal removal statute. However, it was not the first court to hold that the Clean Air Act waived the federal government's sovereign immunity.[98]

In *United States v. Tennessee Air Pollution Board*, the Sixth Circuit discussed the extent to which the federal government's sovereign immunity had been waived by section 118(a) and section 304 (e) of the Clean Air Act.[99] According to the Supreme Court, "[a]ny waiver of sovereign immunity must be 'unequivocally expressed in the statutory text'."[100] The Sixth Circuit held that the "text unequivocally and unambiguously effects a wavier of sovereign immunity."[101]

Clearly, Congress specifically waived the federal government's sovereign immunity in the Clean Air Act. However, Congress was not as specific when it addressed the relationship with the federal removal statute. A "vast majority of cases involving the federal government are unaffected by the Clean Air Act and may be removed to federal court."[102] Since a majority of cases can be removed to federal court, it seems that when a dispute arises over a state air quality law it should be able to be resolved in a local forum. This author believes that the Ninth Circuit's holding was necessary for the limited number of cases that arise concerning the state and local air quality laws. Without a local forum, it seems likely that the states would have insufficient control over pollution on a local level.

The problem the Court grappled with in *California v. Untied States* was whether the United States had the required subject matter jurisdiction for federal court. Congress granted the courts of appeals jurisdiction over all final decisions of the district courts of the United States.[103] Accordingly, if there is a final judgment as in this case, the court of appeals has jurisdiction to review the judgment.

VI. CONCLUSION

In order for a state to have control over the regulation of pollution control and abatement, the state must be able to bring suit in state court to hold federal agencies responsible. By establishing this local forum to resolve local pollution controls, Congress has ensured that states have the proper means to carry out their duties under the Clean Air Act.

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[96] *See* Hancock v Train, 426 U.S. 167 (1976).
[97] "Congress acted on the specific belief that the adjudication of actions arising under state and local air quality laws in state and local courts is of paramount importance to the control and abatement of air pollution." *California*, 215 F.3d at 1013.
[98] *See* United States v. Tennessee Air Pollution Board, 185 F.3d 529 (6th Cir. 1999)
[99] *Id.* at 531.
[100] *Id.* (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)).
[101] *Id.* at 531.
[102] *California*, 215 F.3d at 1013.
[103] 28 U.S.C § 1291 (1999).

Without such a forum, it would be likely that federal facilities would be able to circumvent air pollution regulations. This policy to allow state suits in state court will lead to a more effective enforcement of the Clean Air Act and ensure that the health and welfare goals of the act will be best served.

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