The Subsidiaritization of Climate Change Policy in the EU & US

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I. Introduction

Recently much scholarship has been written about the importance of multilevel governance in climate change policymaking.[1] While it is clear that the international community has "scaled up" its regulatory approach to climate change,[2] the actual implementation of policies aimed at mitigating and adapting to climate change has been increasingly done at levels closer to the people.[3] This "subsidiaritization" of climate change policy has been apparent in both the European Union and United States over the law few years, coinciding with the worldwide focus on negotiations regarding the post-Kyoto climate regime.[4] When determining the appropriate roles for different levels of government in climate change policy according to the principle of subsidiarity, the issue is not simply whether supranational or federal climate change legislation should preempt national or state and local laws.[5] Rather, the real concern is which level-supranational, national, sub-national, or local government can most effectively enact policies that properly tackle climate change.[6] States, municipalities, non-governmental actors, as well as litigation brought against federal climate change rulings have all proven to be effective in driving

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[1] *E.g.*, Judith Resnik, et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008); Benjamin K. Sovacool & Marilyn A. Brown, *Scaling the Policy Response to Climate Change*, 27 POL'Y & SOC'Y 317 (2009).
[2] Hari M. Osofsky, *Is Climate Change "International"? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L., 585, 589 (2009).
[3] *Id.*
[4] *Id.*
[5] Jared Snyder & Jonathan Binder, *The Changing Climate of Cooperative Federalism: The Dynamic Role of the States in a National Strategy to Combat Climate Change*, 27 UCLA J. ENVTL. L. & POL'Y 231, 236 (2009).
[6] *Id.*

climate change policy forward in recent years, and thus have contributed to the subsidiaritization of climate change policy in the EU and US.[7]

II. Subsidiarity in EU Climate Change Policy

The notion of subsidiarity is "derived from federal theory and stipulates that policymaking should occur at the lowest effective level."[8] The Maastricht Treaty resolved "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity."[9] It has been noted that subsidiarity creates a presumption in favor of decentralization[10] since it dictates that actions be taken at the national level unless such action would be more effective at the supranational level.[11]

There are two major factors perpetuating climate change subsidiaritization in the EU: Member State reluctance to accept federalization of climate change policy, and the resulting regulatory gap which Member States have filled by implementing national and local climate change policies.[12] A third factor sustaining this trend has been the EU's support for national climate change adaptation and mitigation programs, with the goal of consolidating such programs in the near future.[13] In effect, this would amount to federalization of climate change policies by stealth; hence, Member States have not hesitated to sue the European Commission

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[7] *Id.*
[8] ANDREW JORDAN ET AL., CLIMATE CHANGE POLICY IN THE EUROPEAN UNION: CONFRONTING THE DILEMMAS OF MITIGATION AND ADAPTATION? 43 (2010).
[9] Treaty on European Union, art. A, July 29, 1992, O.J. C 191.
[10] Andrew Jordan & Time Jeppesen, *EU Environmental Policy: Adapting to the Principle of Subsidiarity?*, 10 EUR. ENV. 64, 66 (2000).
[11] Treaty on European Union, *supra* note 9, at art. 3(b).
[12] Jordan & Jeppesen, *supra* note 10.
[13] *Commission Green Paper on Adapting to Climate Change in Europe: Options for EU Action*, at 354, COM (2007) 849 final (June 29, 2007) [hereinafter *Commission Green Paper*].

when it has exceeded its authority by attempting to control decision-making with regard to National Adaptation Programs.[14]

To maintain the EU's negotiating credibility at the December 2009 UN Conference in Copenhagen, the then European Council President Nicolas Sarkozy worked diligently to keep the EU Climate Change Plan on track through 2008, and managed to secure a watered down deal that was acceptable to all Member States and the European Parliament.[15] The final package included a revision of the European Trading System for carbon emissions, "an effort-sharing agreement, a legal framework for carbon capture and storage, a renewable energies directive, regulations on emissions for cars and a fuel quality directive."[16] Numerous Member States and national trade union groups denounced the plan, claiming it would export greenhouse gas emissions while importing unemployment and such fears were only aggravated by the economic crisis.[17] In the end, Poland, Hungary, Italy, and Germany, amongst others, secured revisions and concessions to the climate change package.[18] Ostensibly, the EU's capacity to act unilaterally in the field of climate change has thus been negatively affected by the unsettled status of the climate package, derogations and internal division on the subject.[19] This loss of credibility may compromise the EU's ability to exercise effective leadership, especially at the climate talks in

[14] *See, e.g.,* Case T-183/07, Republic of Poland v. Commission, 2009 O.J. C 267; Case T-263/07, Estonia v. Commission, 2009 O.J. C 267 (holding that the Commission exceeded its powers and violated the principle of subsidiarity by rejecting Poland and Estonia's national plans).
[15] Charles F. Parker & Christer Karlsson, *Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?* 48 J. COMMON MKT. STUD. 923, 930 (2010).
[16] *Id.* at 935.
[17] *Id.*
[18] BBC NEWS, *Nations Challenge EU Climate Plan* (Oct. 15, 2008), http://news.bbc.co.uk/2/hi/europe/7672335.stm.
[19] *Id.*

Cancun.[20] The risk of a setback looks very concrete, with Member States appearing to pursue national agendas rather than common European goals.[21]

Meanwhile, National Adaptation Strategies have incorporated the principle of subsidiarity with measures to meet European climate change targets.[22] The European Commission's Green Paper on *Adapting to Climate Change in Europe: Options for EU Action*[23] and the subsequent White Paper entitled *Adapting to Climate Change: Towards a European Framework for Action*[24] stressed the importance of implementing national initiatives by 2013 when an EU level adaptation strategy will also be in place.[25] Since 2005, Member States have been adopting comprehensive National Adaptation Strategies to facilitate and coordinate "a general plan of action for addressing the impacts of climate change, including climate variability and extremes."[26] The objectives of National Adaptation Strategies are:

> (1) identifying the most appropriate (and desirable) forms of adaptation and their viability; (2) mobilizing tacit knowledge and experiences of stakeholders on local vulnerabilities and impacts; (3) analyzing the capacity of stakeholders to cope with the impacts of climate change; (4) building shared understanding of the impacts, vulnerabilities and options of adaptation; and (5) enhancing the ability to identify priority areas.[27]

The strategies of Denmark and the Netherlands focus on setting up local social learning, self-organization, and mobilization frameworks "to enable lower levels to make effective and

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[20] Parker & Karlsson *supra* note 15, at 938.
[21] Euractiv, *Europe Inches Towards Changed Role on World Stage* (Oct. 5, 2010), http://www.euractiv.com/en/priorities/europe-inches-towards-changed-role-world-stage-news-498445.
[22] G. Robbert Biesbroek et al., *Europe Adapts to Climate Change: Comparing National Adaptation Strategies*, 20 GLOBAL ENVTL. CHANGE 440, 444 (2010).
[23] *Commission Green Paper*, *supra* note 13, at 354.
[24] *Commission White Paper on Adapting to Climate Change: Towards a European Framework for Action*, at 147, COM (2009) 354 final (June 25, 2009).
[25] Biesbroek et al., *supra* note 22, at 440.
[26] I. Niang-Diop & H. Bosch, *Formulating an adaptation strategy*, *in* ADAPTATION POLICY FRAMEWORKS FOR CLIMATE CHANGE: DEVELOPING STRATEGIES, POLICIES AND MEASURES, 185-86 (B. Lim et al. eds.) (2005).
[27] Biesbroek et al., *supra* note 22, at 446.

efficient adaptation decisions."[28] Moreover, the local administrative level has had relatively strong influence on climate policymaking in EU Member States over the last few years, and this influence is expected to increase.[29]

The subsidiaritization of European climate change policy is also exemplified by the launch of city Climate Action Plans.[30] London, Paris, Rome, Madrid, and Warsaw, as the only European members of the C-40, a voluntary association of mayors of the world's largest cities, supported by the Clinton Foundation,[31] have each enacted their own policy plans to combat climate change. Mayor Boris Johnson has focused London's climate change initiatives on "achieving a 60% reduction in London's CO_2 [and] ensuring that 25% of London's energy is delivered through more efficient decentralized energy by 2025."[32] This will be accomplished in part by improving energy efficiency in residences and businesses, reducing transport emissions, and "capturing the environmental and economic benefits of making London a low carbon city."[33] Madrid's Plan for the Sustainable Use of Energy and Climate Change Prevention aims to contribute to national Kyoto targets, as well as "[r]educe the external energy dependence of the city of Madrid while improving supply guarantee, quality and security."[34] The climate plan resolves to "[p]romote the city of Madrid's participation in forums of cooperation at institutional,

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[28] Frans Coenen & Marijke Menkveld, *The Role of Local Authorities in a Transition Towards Climate-Neutral Society*, *in* GLOBAL WARMING & SOCIAL INNOVATION: THE CHALLENGE OF A CLIMATE-NEUTRAL SOCIETY 107-126 (Marcel Kok, et al. eds., Earthscan 2002).
[29] *Id.*
[30] *Id.*
[31] Resnik, et al., *supra* note 1, at 732.
[32] CITY OF LONDON, *Aiming for big reductions in carbon emissions*, http://www.london.gov.uk/priorities/environment/climate-change (last visited Oct. 25, 2010).
[33] *Id.*
[34] CITY OF MADRID, *City of Madrid Plan for the Sustainable Use of Energy and Climate Change Prevention*, 15 (2008), http://www.madrid.es/UnidadWeb/Contenidos/Publicaciones/TemaMedioAmbiente/Sustainable_Use_of_energy_web.pdf.

national and international levels, on clean energies and the battle against climate change."[35] Likewise, Rome's Action Plan is charged with achieving the city's Kyoto targets and implementing local projects to help mitigate and adapt to climate change.[36] Paris' Climate Plan is incredibly comprehensive, and includes strategies for everything from more efficient organization of public transportation to management of waste disposal services to limit carbon emissions.[37] Moreover, the Paris Climate Agency was established and a Climate Label Plan was created to inform consumers through the labeling of products whose producers have taken concrete actions to reduce energy consumption and greenhouse gas emissions.[38]

Through litigation EU Member States have keenly protected their subsidiarity with respect to climate change policies.[39] The Court of First Instance recently examined the distribution of powers between Member States and the Commission in establishing national allocation plans for greenhouse gas emission allowances.[40] In the cases of *Poland v. Commission*[41] and *Estonia v. Commission*,[42] the Court found that the Commission exceeded its powers and violated the principle of subsidiarity by rejecting Poland and Estonia's national plans.[43] It held that only Member States have the power to set down their respective "NAP stating the total quantity of allowances which it proposes to allocate for the period concerned and

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[35] *Id.* at 16.
[36] CITY OF ROME, *Project Plan for a Sustainable Rome*, (2009) http://www.romaenergia.org/Le%20proposte%20di%20RomaEnergia/%28scheda%20Roma%20citt_340%20sostenibile%29.pdf.
[37] CITY OF PARIS, *Le Plan Climat de Paris* (2007), http://www.paris.fr/portail/pratique/Portal.lut?page_id=8413 (follow the "Le Plan Climat de Paris (PDF)" hyperlink).
[38] *Id.* at 61.
[39] *See, e.g.,* Case T-183/07, Republic of Poland v. Commission, 2009 O.J. C 267; Case T-263/07, Estonia v. Commission, 2009 O.J. C 267 (holding that the Commission exceeded its powers and violated the principle of subsidiarity by rejecting Poland and Estonia's national plans).
[40] *Id.*
[41] EUROPEAN COMMISSION LEGAL SERVICE, *Summaries of Important Judgments: T-183/07* Poland v Commission *and T-263/07* Estonia v Commission, (Nov. 2009) http://ec.europa.eu/dgs/legal_service/arrets/07t183_en.pdf.
[42] *Id.*
[43] *Id.*

the manner in which it proposes to allocate them, and […] to decide on the allocation of this quantity among economic operators and to launch the process for individually allocating those allowances."[44] Furthermore, Member States have the right to choose measures they consider most appropriate to achieve the objectives of Directive 2003/87/EC.[45] Thus, the Commission is precluded from encroaching on the exclusive competence retained by the Member States to develop and implement national climate change plans.[46]

III. Subsidiarity in US Climate Change Policy

The Supreme Court noted in *Massachusetts v. Envtl. Prot. Agency*[47] that just because "these climate-change risks are 'widely shared' does not minimize state interest" in climate change policy.[48] States and local government must adapt to varying consequences of climate change.[49] In the United States, subsidiarity in the field of climate change policy has traditionally been in the form of "cooperative federalism," which includes state and local governments as collaborative partners of the federal government in working to address a complex and wide-ranging problem.[50] Yet, the recent subsidiaritization of climate change policy in the US has led state and local governments to go beyond a collaborative partnership with the federal government and take initiative to reduce carbon dioxide emissions by employing their traditional competences of regulating utilities, transportation, energy, and land use within their jurisdictions.[51] Likewise, states either acting alone or in groups have pursued climate-oriented

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Massachusetts v. EPA*, 549 US 497, 522 (2007).
[48] *Id.* (discussing the particularized impacts of climate change on the Commonwealth of Massachusetts in the context of determining standing to sue).
[49] *Id.*
[50] Snyder & Binder, *supra* note 5, at 233.
[51] Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?* 39 J. FEDERALISM 432, 433 (2009).

policies to promote energy efficiency, develop renewable energy technologies, and reduce greenhouse gas emissions.[52]

In 2009 alone, cities and local governments eliminated more than 23 million tons of greenhouse gases, which is equivalent to the emissions of 1.8 million households.[53] While the city of Boston established the country's first green building code mandated for private projects, Chicago promoted public walking and cycling through its pedestrian and bike plan, and Asheville shortened its work week to cut energy demand.[54] Santa Monica enacted its Community Energy Independence Initiative to reduce net emissions to zero before 2020 by using solar power and promoting energy efficiency with free energy efficiency and solar assessments for residential and commercial property owners and contractors.[55] Meanwhile, PlaNYC was announced in 2007 by New York Mayor Bloomberg, as a sustainability and climate change initiative to improve energy production, air and water quality, housing, and transportation, as well as reduce citywide greenhouse gas emissions 30% by 2030.[56] While PlaNYC will cost city taxpayers $2 billion, the city projects it will break even by 2013 through annual savings in operating costs.[57]

The involvement of local governments in national and transnational organizations that support climate change initiatives is another manifestation of subsidiaritization.[58] Organizations such as the US Conference of Mayors, the National Association of Clean Air Agencies, the

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[52] Barry G. Rabe, *States on Steroids: The Intergovernmental Odyssey of American Climate Policy*, 25 REV. OF POL'Y RES. 105, 112 (2008).
[53] Climate Progress, *Climate Action Goes Local: Cities Confront the Global Challenge, Embrace Clean Energy* (Sept. 15, 2010), http://climateprogress.org/2010/09/15/iclei-think-globally-act-locally-climatel/.
[54] *Id.*
[55] *Id.*
[56] CITY OF N.Y., *Mayor Bloomberg Presents PlaNYC: A Greener, Greater New York*, Apr. 22, 2007, http://www.nyc.gov/html/om/html/2007a/pr119-07.html.
[57] CITY OF N.Y., *Mayor Bloomberg Announces Long-Term Plan to Reduce Municipal Energy Consumption*, July 7, 2008, http://www.nyc.gov/html/om/html/2008b/pr264-08.html.
[58] Jared Snyder & Jonathan Binder, *supra* note 5.

International Council for Local Environmental Initiatives (ICLEI), and C40, provide cities with "political autonomy, financial resources, and technological expertise" aimed at reducing greenhouse gas emissions.[59] The US Conference of Mayors successfully lobbied for an Energy Efficiency and Conservation Block Grant (EECBG) program to fund energy-technology investments, and subsidize costs resulting from private sector fiscal and informational barriers.[60] Congress passed the Energy Independence and Security Act of 2007,[61] establishing legislation for the federal EECBG, and the American Recovery and Reinvestment Act of 2009[62] allocated EECBG $3.2 billion, $1.9 billion of which was reserved for cities and counties.[63] Thus, cooperative federalism has manifested as federal funding for local action, propelling the subsidiaritization of climate change policy in the US.[64]

Thirty-six states have developed Climate Action Plans that incorporate emission-reduction targets with timetables, emission registry mechanisms and policy recommendations.[65] In 2009, forty US states, six Mexican states, three tribal nations, and eleven Canadian provinces came together to form the Climate Registry, a comprehensive greenhouse gas emission registry aimed at developing a uniform way to measure, report, and verify greenhouse gas emissions in various sectors of industry.[66] More than half of US states have instituted renewable portfolio standards that reduce greenhouse gases while creating jobs, new businesses, greater energy security, and

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[59] Resnik, et al., *supra* note 1, at 732.
[60] Resnik, et al., *supra* note 1, at 736.
[61] Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 49 U.S.C.).
[62] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.
[63] U.S. CONFERENCE OF MAYORS, *The Energy Efficiency and Conservation Block Grant (EECGB),* http://www.usmayors.org/climateprotection/list.asp (last visited October 14, 2010); *see also* Kevin McCarty, *EECBG Spending Plans Begin to Take Shape in Cities Across US*, Apr. 27, 2009, http://usmayors.org/usmayornewspaper/ documents/04_27_09/pg3_eecbg.asp.
[64] *Id.*
[65] U.S. CONFERENCE OF MAYORS, *supra* note 63.
[66] *Id.*

cleaner air.[67] Such standards "require electric utility companies to generate a certain percentage of electricity from qualifying renewable energy sources."[68] The Regional Greenhouse Gas Initiative is a joint venture of ten Northeastern and Mid-Atlantic States, establishing a regional cap-and-trade program for carbon dioxide emissions.[69] From 2009, emissions from electric power generators are capped and must be reduced by 10% before the end of 2019.[70] The Western Climate Initiative, which was created by Western States and two Canadian Provinces, will be adopting emissions reduction targets and timetables.[71] Lastly, the Midwest Greenhouse Gas Reduction Accord established a multi-sector cap-and-trade system to meet its greenhouse gas reduction targets.[72] By acting in groups, states are able to reap the benefits of both collective action and subsidiarity.

Litigation has constituted yet another catalyst for the subsidiaritization of climate change policy in the US. Between December 2009 and May 2010, the Environmental Protection Agency promulgated four significant rules concerning the regulation of greenhouse gas emissions.[73] In December 2009, the "endangerment finding" declared that greenhouse gases are a serious threat to human health and welfare.[74] In March 2010, the "timing rule" determined when greenhouse gases would be subject to regulation under the Clean Air Act.[75] In April 2010, the "auto rule" set

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[67] PEW CENTER ON GLOBAL CLIMATE CHANGE, *Renewable & Alternative Energy Portfolio Standards*, http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm (last updated Oct. 27, 2010).
[68] *Id.*
[69] Engel, *supra* note 51, at 435.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 436.
[73] *See* 42 U.S.C. §7521; ELR STAT. CAA §202.
[74] *Id.*
[75] ENVTL. PROT. AGENCY, *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs* (March 29, 2010), http://www.epa.gov/nsr/documents/psd_memo_recon_032910.pdf.

greenhouse emissions standards for cars and light trucks.[76] Lastly, decided in May 2010, the "tailoring rule" permits the agency to issue rules for greenhouse gases to apply to major emitters without impacting the millions of small farmers and business owners who emit carbon in comparatively smaller quantities.[77] Numerous states, local governments, trade associations, businesses, and advocacy groups have demonstrated the subsidiaritization of climate change policy through a deluge of challenges to these recent EPA rulings.[78] The EPA reported at least ten separate administrative petitions filed for reconsideration of the endangerment finding.[79] Petitioners included Texas, Virginia, the US Chamber of Commerce, and the Coalition for Responsible Regulation.[80] Moreover, seventeen petitions for review, consolidated by the D.C. Circuit under *Coalition for Responsible Regulation, et al. v. EPA*[81] were filed against the EPA's endangerment finding.[82] Texas, Virginia, Alabama, various energy, mining, and agricultural trade groups, as well as a number of US Representatives were named as petitioners.[83] The EPA denied the petitions to reconsider its endangerment finding on July 19, 2010.[84] States and industry groups also filed seventeen petitions against the EPA's auto rule, which were consolidated by the D.C. Circuit under *Coalition for Responsible Regulation v. EPA*.[85] Moreover, twenty petitions for review have been filed against the EPA's tailoring rule and were consolidated by the D.C. Circuit under *Georgia Coalition for Sound Environmental Policy, Inc.*

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[76] ENVTL. PROT. AGENCY, *EPA and NHTSA Announce a First Step in the Process for Setting Future Greenhouse Gas and Fuel Economy Standards for Passenger Cars and Light Trucks* (May 21, 2010), http://www.epa.gov/oms/climate/regulations/420f10051.htm.
[77] ENVTL. PROT. AGENCY, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (May 13, 2010), http://www.epa.gov/nsr/documents/20100413fs.pdf.
[78] Jessica Lee Reese, *More Challenges to EPA Greenhouse Gas Rulemaking*, (Oct. 5, 2010, 2:20 PM) http://www.sgrlaw.com/blog/2010/10/more-challenges-to-epa-greenhouse-gas-rulemaking/.
[79] *Id.*
[80] *Id.*
[81] Coalition for Responsible Regulation, Inc. et al., v. Environmental Protection Agency, No. 09-1322 (D.C. Cir. Feb.18, 2010) (order for consolidation of cases).
[82] ARNOLD & PORTER, LLP, *Climate Change Litigation in the US*, 242 (2010) http://www.climatecasechart.com/ .
[83] *Id.*
[84] *Id.*
[85] Coalition for Responsible Regulation v. EPA, Index No. 10-1092 (D.C. Cir. filed Aug. 26, 2010).

v. EPA.[86] This case was then consolidated with *Southeastern Legal Foundation v. EPA*,[87] and it remains to be seen whether the EPA will respond in the same fashion as it did to the petitions filed against its endangerment finding. Regardless, it is apparent that states and non-governmental actors will continue to fight vehemently against the federalization of climate change policy in the US.

IV. Conclusion

In essence, the subsidiaritization of climate change policy in the EU and the US is illustrated by the recent actions of sub-federal actors such as states, municipalities, and non-governmental organizations, aimed at mitigating and adapting to climate change. Such subsidiaritization is a significant trend that is likely to continue in the near future. Regardless of the justifications for a global climate change regime espoused by proponents of the "scaling up" of climate change policy, the potential collective impact of local governments' proprietary activities is unlikely to be either trivial or counterproductive.[88] "Rather than asking why local governments are acting unexpectedly or irrationally in the face of collective action problems, we may instead want to ask why they have not captured these fiscal and environmental savings sooner."[89]

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[86] Georgia Coalition for Sound Environmental Policy, Inc. v. EPA, No. 10-1200 (D.C. Cir. filed Aug. 12, 2010).
[87] Southeastern Legal Foundation v. EPA, No. 10-1131 (D.C. Cir. Sept. 3, 2010) (order for consolidation of cases).
[88] Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 734 (2010).
[89] *Id.* at 733.