

Obama Administration Proposes New Federal Role in Siting Shale Gas Development in Combination With Renewables

by E. Donald Elliott

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One of the most interesting aspects of the State of the Union for the energy industry was not what the president said, but something buried in the accompanying White House fact sheet¹: a proposal for the federal government to assume an enhanced role in “helping” to plan shale gas development and at the same time promote renewable energy.

Creating Jobs Through Shale Gas Development.

The President is calling on Congress to work with the Administration and State and local governments to create *Sustainable Shale Gas Growth Zones*, helping regions come together to make sure shale gas is developed in a safe, responsible way that helps build diverse and resilient regional economies that can withstand boom-and-bust cycles and can be leaders in building and deploying clean energy technologies. Smart regional planning and federal technical assistance to States and local communities can ensure we develop shale gas the right way—and, at the same time, create stable communities with well-paying jobs.

The language seems to support shale gas development, at least if it is within one of the federally approved “Sustainable Shale Gas Growth Zones.” Plus, who could be opposed to developing shale gas in a “safe, responsible way” that creates “stable communities with well-paying jobs”?

The proposal is still vague,² so there may be opportunities to shape it, but at the outset, it is not clear what prob-

lem the federal government believes it would be helping state governments to solve; President Barack Obama himself took credit³ in his State of the Union speech for the American energy renaissance that has largely been driven by fracking and horizontal drilling under state regulation. While all forms of energy development come with some risks, neutral academic observers conclude that fracking has lower risks than most.⁴ There is strong support for fracking in states with experience with the practice, although there is also concern with minimizing possible adverse effects to the environment.⁵

The reference to “federal technical assistance” to promote “smart regional planning” is particularly provocative because it is paired with the goal of “diverse and resilient regional economies that can withstand boom-and-bust cycles and *can be leaders in building and deploying clean energy technologies.*” Does this imply that Washington wants to tie shale gas development to “deploying clean energy technologies” on the rationale that combining the two will help “regional economies . . . withstand boom-and-bust cycles”? Is that what they mean by *Sustainable Shale Gas Growth Zones*? Is shale gas growth somehow *not* “sustainable” in their view unless it is paired with deploying more clean energy technologies?

1. The White House, *The State of the Union Fact Sheet: Opportunity for All* (Jan. 28, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/28/state-union-fact-sheet-opportunity-all>.
2. Talia Buford, *White House Shale “Zones” a Mystery to Many*, POLITICO Pro, Jan. 30, 2014 (“We have no idea what is meant by sustainable shale gas growth zones,” said Erik Milito, director of upstream and industry operations for the American Petroleum Institute.), <https://www.politicopro.com/go/?id=30330>.

3. Gary Guzy, *President Obama’s State of the Union Continues a Central Focus on Energy and the Environment*, COVINGTON & BURLING INSIDE ENERGY & ENVIRONMENT BLOG (Jan. 29, 2014), <http://www.insideenergyandenvironment.com/2014/01/president-obamas-state-of-the-union-continues-a-central-focus-on-energy-and-the-environment/> (last visited Feb. 4, 2014).
4. Susan L. Brantley & Anne Meyendorff, *The Facts on Fracking*, N.Y. TIMES, Mar. 13, 2013, http://www.nytimes.com/2013/03/14/opinion/global/the-facts-on-fracking.html?pagewanted=all&_r=0 (last visited Feb. 4, 2014).
5. Alan J. Krupnick & Juha Silkamäki, *Would You Pay to Reduce Risks From Shale Gas Development? Public Attitudes in Pennsylvania and Texas*, RESOURCES No. 185, 38, 40 (2014) (59% support fracking, but 41% in Pennsylvania and 34% in Texas say they are extremely concerned or very concerned about possible environmental risks).

None of this is clear yet, but it appears that the Administration may have in mind trying to persuade state and regional government to require cross-subsidies from shale gas to renewables as a condition of development. This approach, which is sometimes called a “fee-bate” by its supporters,⁶ is a double whammy of economic incentives: the extra cost makes fossil energy more expensive while the money raised is funneled into renewables to make them less expensive.

The suggestion that shale gas development should be tied to deploying more clean energy technologies comes at a time when taxpayer-funded subsidies for renewable energy development are drying up, with the production tax credit for wind slated to expire at the end of the calendar year. Advocates for renewable energy development are looking for new sources of funding. Rather than taxing or borrowing for subsidies, which requires congressional approval, the Administration and some of its allies believe that it can fund renewables indirectly without congressional approval by giving “credit” against new regulatory requirements. For example, national environmental groups such as the Natural Resources Defense Council (NRDC) and the Environmental Defense Fund have suggested that existing fossil fuel-fired power plants get credits against the upcoming U.S. Environmental Protection Agency (EPA) standard for greenhouse gases (GHGs) from existing power plants by funding renewable energy projects: “Lower emitting sources such as gas, wind and solar would earn credits that other plants could use, to reduce average emissions rates.”⁷ EPA is seriously considering such fossil-renewables offsets as a possible new funding mechanism for renewable energy and to reduce pollution at lower cost. The Agency is quietly developing a new computer program, “AVERT” (AVoided Emissions and geneRation Tool) whose only function would be to quantify the reduction in GHG emissions attributable to energy efficiency and renewables projects. Expect this strategy to feature prominently in EPA’s proposal of new GHG rules for existing electric power-generating units slated for proposal in summer 2014 and a final rule in summer 2015.

Is the proposal by the Obama Administration for an increased federal role in planning shale gas develop-



Billboard in Oklahoma City, OK.

ment part of a similar effort to get the shale gas industry to subsidize renewables through Sustainable Shale Gas Growth Zones that would combine shale gas and renewable energy development? The fact sheet states that the president “is calling on *Congress* to work with the Administration and State and local governments to create these new Sustainable Shale Gas Growth Zones.” But this comes at a time when the U.S. House of Representatives opposes expanding federal regulation of fracking, which has traditionally been under state and local jurisdiction. For example, last July, the House Natural Resources Committee passed H.R. 2728, a bill that would prohibit the federal government from regulating fracking even on federal lands.⁸

If the U.S. Congress declines to enact new legislation creating the president’s proposed Sustainable Shale Gas Growth Zones, will the Administration try to go it alone using executive authority? In his State of the Union speech, President Obama pledged, “wherever and whenever I can take steps without legislation to expand opportunity for more American families, that’s what I’m going to do.”⁹ The proposed Sustainable Shale Gas Growth Zones are reminiscent of another federal program intended to influence siting decisions traditionally made at the state and local level. The Obama Administration recently began designating energy right-of-way corridors

6. Bennett Cohen & Cory Lowe, *Feebates: A Key to Breaking U.S. Oil Addiction*, SOLUTIONS J., Summer 2010, <http://www.rmi.org/FeebatesKeyBreakingOilAddiction> (last visited Feb. 4, 2014).

7. Press Release, NRDC, Innovative NRDC Plan Featuring Federal-State Partnership Saves Americans More Than \$25 Billion in Climate and Health Costs While Unleashing Billions in Clean Energy Investments (Dec. 4, 2012), available at <http://www.nrdc.org/media/2012/121204.asp>; NRDC, *Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America’s Biggest Climate Polluters* (Mar. 2013), available at <http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf>.

8. Raymond J. Keating, *House Committee Votes to Stop Federal Regulations of Fracking*, Aug. 1, 2013, <http://www.sbecouncil.org/2013/08/01/house-committee-votes-to-stop-federal-regulation-of-fracking/> (last visited Feb. 4, 2014).

9. *Full Transcript: Obama’s 2014 State of the Union Address*, WASH. POST, Jan. 28, 2014, http://www.washingtonpost.com/politics/full-text-of-obamas-2014-state-of-the-union-address/2014/01/28/e0c93358-887f-11e3-a5bd-844629433ba3_story.html (last visited Feb. 4, 2014).

on federal lands, thereby nudging¹⁰ local governments to site transmission lines to line up with the federally preferred routes. That program was created not by legislation, but by a June 7, 2013, Presidential Memorandum for the Heads of Executive Departments and Agencies. It seems highly unlikely the Republican-controlled House will give the Administration an enhanced role in siting shale gas development and require cross-subsidies to encourage renewable energy. Instead, will President Obama again wield his infamous “pen” to bypass Congress?¹¹ There is a

long history of presidents acting on their own when their initiatives are thwarted by Congress,¹² but these assertions of extraordinary executive authority are often later set aside in court.¹³

The Obama Administration’s proposal to “help” regions manage shale gas development through “smarter regulation” reminds one of Ronald Reagan’s famous line that “The nine most terrifying words in the English language are, ‘I’m from the government and I’m here to help.’”¹⁴

10. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

11. Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBSNEWS.COM, Jan. 14, 2014, <http://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress/> (last visited Feb. 4, 2014); Ron Fournier, *A Pen, a Phone, and a Flailing President*, NAT’L J., Jan. 27, 2014, <http://www.nationaljournal.com/white-house/a-pen-a-phone-and-a-flailing-president-20140127> (last visited Feb. 4, 2014).

12. Jim Powell, *How President Obama Could Be Swept Away With His Executive Orders That Defy Congress and the Courts*, FORBES, Jan. 30, 2014, <http://www.forbes.com/sites/jimpowell/2014/01/30/how-president-obama-could-be-swept-away-with-his-executive-orders-that-defy-congress-and-the-courts/> (last visited Feb. 4, 2014).

13. See, e.g., *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *Youngstown Sheet-Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

14. Quotation #33742 from *Michael Moncur’s (Cynical) Quotations*, THE QUOTATIONS PAGE, <http://www.quotationspage.com/quote/33742.html> (last visited Feb. 4, 2014).