Recommended Approaches to Streamline Midstream Permitting

To Address Procedural Delays Resulting from Interagency Coordination:

1 Enter into Interagency MOUs or similar commitments to coordinate decision-making among multiple federal agencies

The most effective MOUs designed to coordinate decision-making are those that proscribe duties and establish specific timelines for action. While not restricting agency discretion, these MOUs establish specific expectations for the agencies involved. For example, MOUs could

- Provide specific timelines for approvals and responses, along with minimal, but substantive, penalties for missing those timelines.
- Provide protocols for the elevation of interagency disputes (at the district or regional level) to senior policymakers within those agencies.
- Establish an interagency review panel to resolve interagency disagreements during the permitting of energy projects. This panel would be external to the agencies in question and would operate under the aegis of the White House.
- Establish an Office of Advocacy or Ombudsman within the Department of Energy to address difficult issues or agency disagreement, along the lines of that within the Small Business Administration

2 Enter into MOUs with the key states where there is significant duplication and delay.

Significant delay and duplication can result from separate state processes and procedures. To facilitate better federal-state collaboration with California, for example, the administration negotiated an MOU with the State regarding their environmental review processes.

For some states, MOUs would identify and reduce duplication, but could also include timelines and commitments to achieve streamlining results.

- An MOU between the Advisory Council on Historic Preservation and certain State Historic Preservation Offices could be used to accelerate a process that remains overly lengthy and procedurally unpredictable.
- Where both federal and state permitting and environmental review is required, a project may endure multiple, duplicative proceedings and appeals even if largely federal in nature. The Natural Gas Act provides that FERC's final approval largely precludes inconsistent state conclusions. This principle deserves wider application and should be memorialized in federal-state agreements, premised on the shared desire to foster economic activity and investment.

To Address Procedural Delays Resulting from Disproportionality:

3 Adopt additional, and more nuanced, Categorical Exclusions (CEs)

The use of CEs, which limit National Environmental Policy Act (NEPA) analysis, could be expanded.

- The administration, with public input, could identify circumstances when even large projects are unlikely to cause a significant adverse environmental impact and therefore would not require NEPA analysis.

- The administration could add a category for pre-identified mitigated CEs or Findings of No Significant Impact (along the lines of nationwide wetlands permits), in which the mitigation reduces the environmental impacts below the level of significance.

4 Undertake programmatic Environmental Impact Statements for policy-level decisions.

The NEPA process can result in duplicative and uninformative analysis that bogs down environmental reviews and provides additional handholds for litigation challenges. Much duplication would be avoided if the administration performed an analysis of key issues of wide applicability. Under NEPA, programmatic-level reviews of these policy issues can be prepared and simply referenced in later project-level analyses. Topics could include

- Climate change. Any consideration of carbon significantly complicates a project, adding unnecessary uncertainty and inviting litigation. Instead of considering climate at the project level, the administration could analyze, at a programmatic level, whether the state of the science is yet sufficient to link specific projects to specific, significant impacts to our climate.

- Shale gas development, including the macro-level policy costs and benefits, such as environmental risk, energy independence, decreased energy costs, and increased manufacturing. Such a study would be the natural offshoot of the current EPA shale gas study.

- LNG exports, such as the impacts to the US economy and energy security.

- Impacts of energy development on specific environmental resources. Currently, "the first energy project" of a particular type triggers a massive impact analysis that can be wholly disproportional to the project's scale and purpose. This burdens early adopters and pilot projects, impeding development and beneficial use of energy resources. Instead of using project-level documents for these regional-level analyses, resource agencies could proactively undertake advance study of the impacts of energy development in areas ripe for potential projects, like BLM did for solar energy development on federal land.

To Address Litigation Delays:

5 Strengthen Statements of Decision to have the maximum preclusive effects to (1) channel / direct litigation and (2) prevent duplication at the state level (i.e., preemption).

Agency decision documents and their supporting administrative records should be drafted to be as legally defensible as possible. In many circumstances, federal decisions can preempt state law if there is a federal intent to do so. Federal agencies should craft their decision documents to maximize this preclusive effect. This will serve to both (1) channel and direct the litigation toward the appropriate federal analysis and (2) eliminate duplicate state claims to the extent possible.

6 Ensure that there is adequate information in the record to address the "balancing of harms" test for preliminary injunctions directed at stopping the initiation of project construction.

Most environmental lawsuits in the energy arena are decided at the preliminary injunction stage, when opponents seek an emergency court order to prevent commencement of construction. These are high-stakes mini-trials that can indefinitely delay construction and cause a litany of financial and other harms to the project and its commercial partners. Courts must decide preliminary injunctions within days, so they rely heavily on the existing administrative record for information about the potential harms to the project and the environment. Agencies can lay the groundwork for an effective defense by adding information to the administrative record that is directly pertinent to the legal test for the preliminary injunction.