



Successful Navigation of Section 404 of the Clean Water Act

Presented to:

Rocky Mountain Environmental Health and Safety Peer Group

Denver, CO

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CALDWELL

Today's Discussion

- Clean Water Act (404)
- Endangered Species Act (Section 7)



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Section 404 Clean Water Act



**US Army Corps
of Engineers®**



Regulates the discharge of fill material into Waters of the U.S.

- Waters of the U.S. include:
 - Most rivers and streams that are part of the interstate tributary system
 - Wetlands adjacent to jurisdictional rivers and streams (1987 ACOE Manual)
 - Lakes or ponds that are tributary to an interstate waterway
 - Certain intrastate lakes with a significant interstate commerce nexus (Great Salt Lake in Utah)

Typically NOT Waters of the U.S.

- Isolated wetlands
- Some isolated lakes and ponds
- Wetlands supported solely by artificial irrigation
- Man-made ditches excavated in dry land
- Water/Wastewater Treatment Ponds
- Swales lacking an ordinary high water mark or wetland characteristics

Activities Requiring a Permit

- Most construction activities within waters of the U.S.
 - Placement of fill material (soil, rock, sand)
 - Drill pads
 - Access roads
 - Pipeline trenches
 - Compressor station foundations
 - Stormwater ponds
 - Installation of grade control structures
 - Grading and pushing of earth in waters of the U.S.

When a permit may NOT be required??

- Maintenance of existing structures
- Clean excavation and sediment removal (caution)
- Construction and maintenance of irrigation ditches and related structures
- Certain access roads (farming, forestry, mining)

404 Permit Types

■ General Permits

- Letters of Permission
- Nationwide Permit
- Regional Permits
- Streamlined review
- Typ. 45-day review

■ Individual Permits

- Project specific review
- Public & Agency input/review
- Can take several months to years depending on complexity

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Why does my permit take so long?



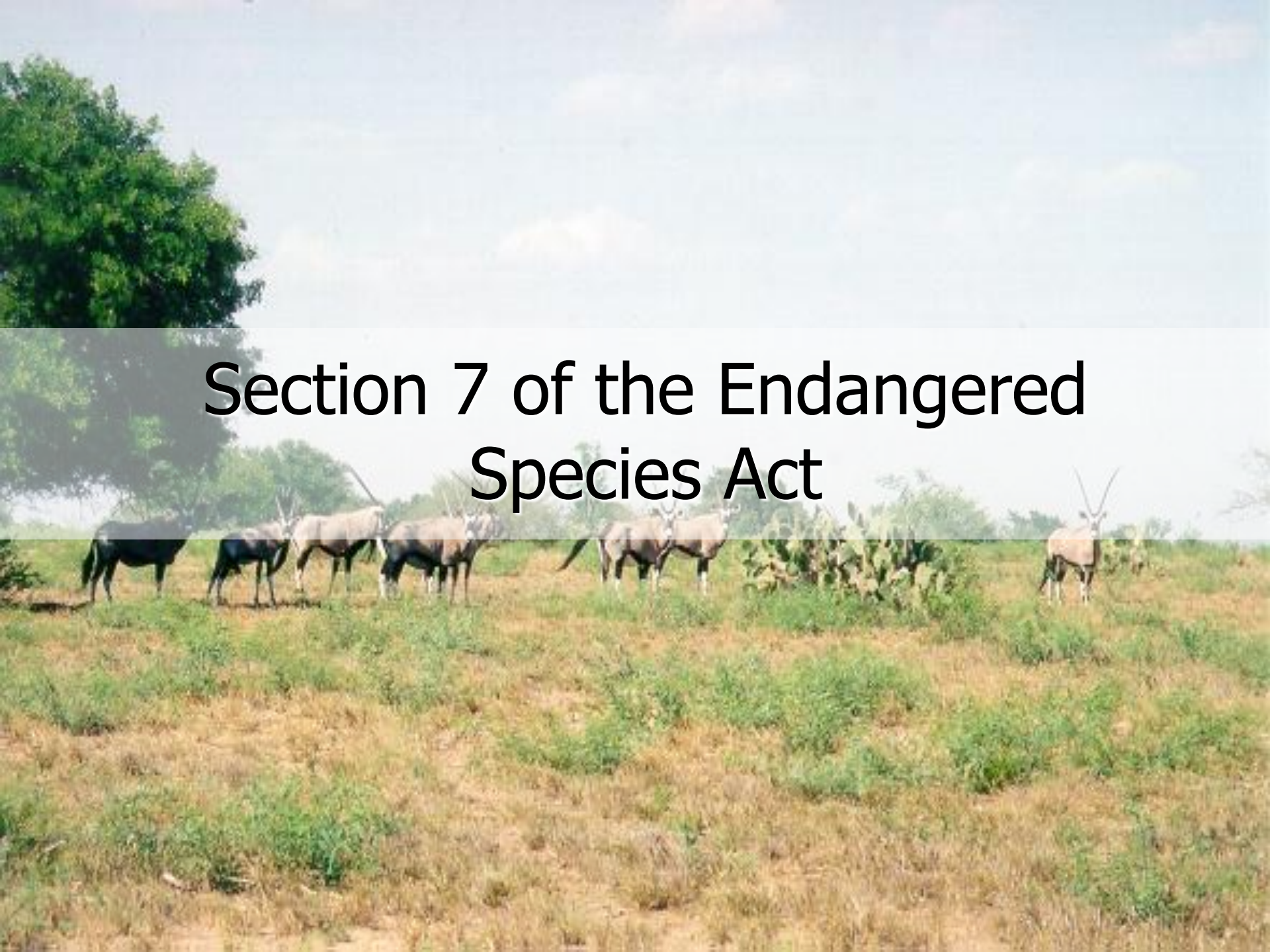
A low-angle photograph of a classical building with columns and an American flag flying on a tall pole against a blue sky. The building features large, fluted columns and a pediment. The American flag is waving on a tall pole to the right. The sky is a clear, bright blue with a few wispy clouds. The text "Federal Action" is overlaid in the center of the image.

Federal Action

Associated Reviews

- Endangered Species Act
- National Historic Preservation Act
- National Environmental Policy Act

Section 7 of the Endangered Species Act



Typical Colorado Issues

- Preble's meadow jumping mouse
- Ute ladies tresses orchid
- Bald Eagle
- Depletions to South Platte River
 - Least tern
 - Piping plover
 - Pallid sturgeon
 - Whooping crane




ESA Compliance

- No Formal Consultation –
 - No effect or effects are discountable, insignificant or entirely beneficial

ESA Compliance

- Formal Consultation and Biological Opinion (BO) –
 - May adversely affect a listed species
 - Agency consults with USFWS (135-day review) for BO
 - Conditions are developed under which the agency action can continue and protect the species
 - If conditions are not available to avoid jeopardizing the species as a whole, the project cannot move forward (rare situation)



Why can this cause
frustration??????

Variable Process

- Why?

- Site Specific Issues

- Unique or significant wetlands (Fens)
- Endangered Species habitat
- Cultural Resources

- Varied regulatory interpretations

Hypothetical Project Example A

- Proposed 5-mile gas gathering line
 - Two wetland crossings
 - No endangered species issues
 - Covered by Nationwide Permit 12
 - Corps verification received in 3 weeks

Hypothetical Project Example B

- Proposed 5-mile gas gathering line
 - Two wetland crossings
 - Passes near occupied Preble's mouse habitat, and is not discountable impact
 - Within 20 feet of a natural spring
 - Individual Permit required
 - Public Notice and detailed review
 - 135-Day consultation with USFWS
 - Corps approval received in 5 months

Success Strategies



Why wait???

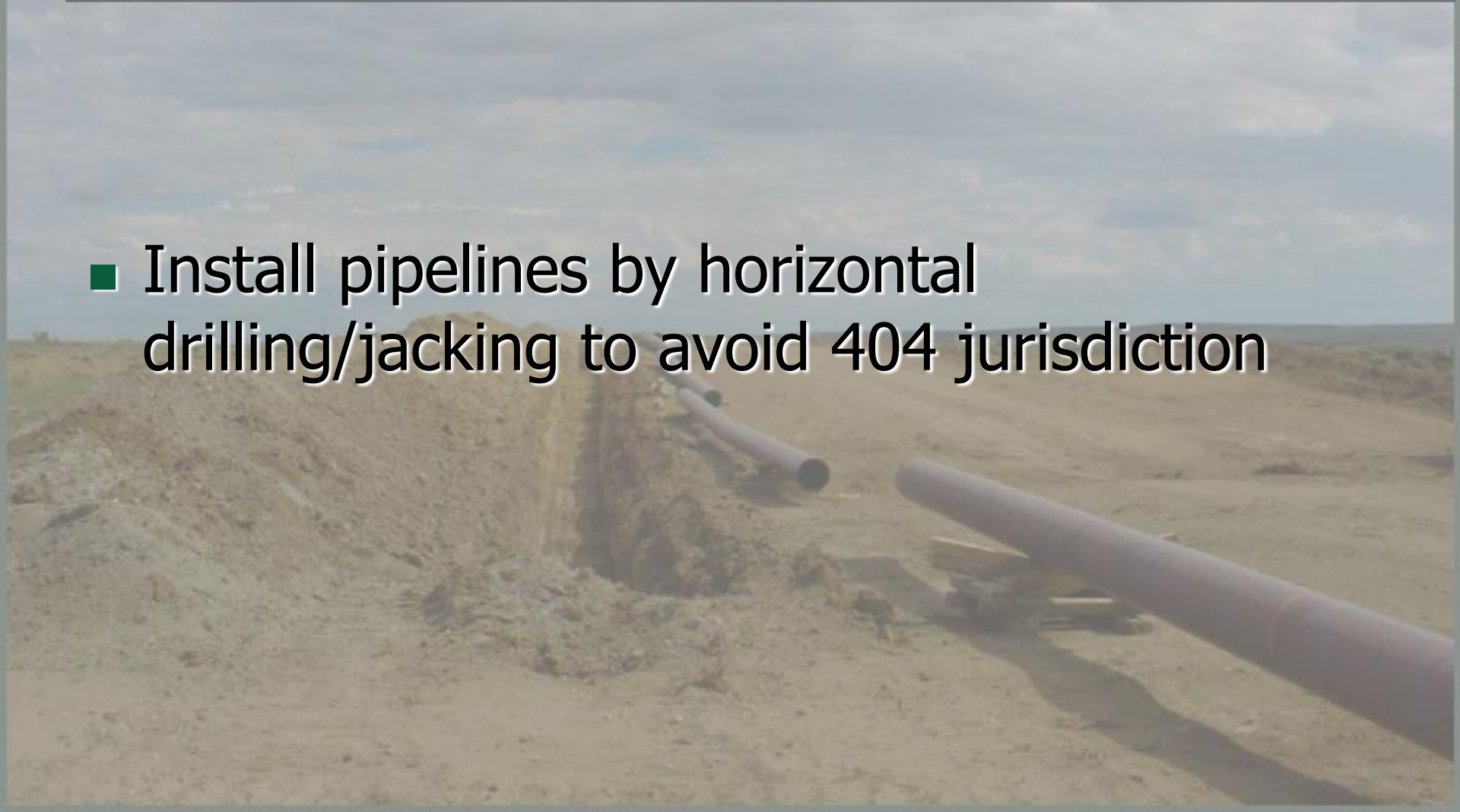
- Early information is most valuable, denial is not a good strategy
- Obtain key site specific information before schedule commitments are made
- Incorporate environmental review and contingency time into your schedule
- Use site information as a decision making tool rather than only a permitting requirement
- Use identified environmental constraints as a go/no go tool or as leverage in real estate/contract negotiations

Why this, why here???

- Environmental constraints and estimates of permitting/mitigation costs should be factored into the evaluation of alternatives
- Use/Modify existing infrastructure where possible
- Weigh costs of non-ideal designs against costs/uncertainty of permitting
- Strategic site selection that lacks permitting issues

Strategy Examples

- Install pipelines by horizontal drilling/jacking to avoid 404 jurisdiction



Example

- Perform construction activities while an endangered species is hibernating or has migrated south

Example

- Identify issues at several potential sites for a new facility and select the one with the least constraints

Example

- Consider costs of permitting as well as compliance and post-project monitoring

Final Notes

- 404 is not always a complex process
- Yet, 404 is a variable process
- Site specific issues drive the process
- Early information and discussion of options



Thank you for listening!