



**BROADBANDUSA**  
CONNECTING AMERICA'S COMMUNITIES

# NTIA Broadband Technology Opportunity Program (BTOP)

## National Environmental Policy Act (NEPA) Compliance



*National Telecommunications and Information Administration (NTIA) is an agency in the U.S. Department of Commerce that serves as the executive branch agency principally responsible for advising the President on telecommunications and information policies.*



*The American Recovery and Reinvestment Act of 2009 (ARRA) provides \$4.7 billion to establish BTOP for awards to eligible entities to develop and expand broadband services to rural and underserved areas and improve access to broadband by public safety agencies.*

Made Possible by the Broadband Technology Opportunities Program

Funded by the American Recovery and Reinvestment Act of 2009





## This Webinar Focuses on...

- National Environmental Policy Act of 1969 (NEPA) and National Historic Preservation Act of 1966 (NHPA) requirements
- NEPA and NHPA review and compliance process in the BTOP program
- Resources, information, tools, and assistance available to BTOP grant recipients to:
  - Comply with NEPA, NHPA, and other applicable environmental laws and permitting requirements
  - Document fulfillment of Environmental Special Award Conditions (SACs)





## National Environmental Policy Act of 1969 (NEPA)

- Requires that the Federal government examine the potential impacts of an action and its reasonable alternatives prior to making a final decision
- Applies to actions funded by Federal grants and matching funds
  - *Projects funded by the American Recovery and Reinvestment Act (ARRA) are not exempt from NEPA*
  - White House Council of Environmental Quality (CEQ) website has additional NEPA and ARRA information: <http://www.whitehouse.gov/administration/eop/ceq>

## National Historic Preservation Act of 1966 (NHPA)

- Section 106 requires that the Federal government examine the potential impacts of its actions to historic, cultural, and Tribal resources prior to making a final decision
- Projects with the potential for adverse impacts requires consultation with the appropriate State Historic Preservation Office (SHPO) or Federally-recognized Tribes
  - Full text of NHPA is available at: <http://www.achp.gov/docs/nhpa%202008-final.pdf>





# BTOP Environmental Compliance Help

posted at: <http://broadbandusa.sc.egov.usda.gov/compliance.htm>

- BTOP Round One Environmental Review Process Helpful Tips:  
<http://broadbandusa.sc.egov.usda.gov/files/EnvironmentalCompliance081409Final.pdf>
- Round One Environmental Guidance to Applicants:  
<http://broadbandusa.sc.egov.usda.gov/files/EnvironmentalGuidancetoApplicants.pdf>
- BTOP NEPA and NHPA Guidance for Round Two Applicants:  
[http://www.broadbandusa.gov/files/NEPA and NHPA Guidance for BTOP Round 2 Applicants%202-23-10.pdf](http://www.broadbandusa.gov/files/NEPA_and_NHPA_Guidance_for_BTOP_Round_2_Applicants%202-23-10.pdf)
- Environmental Assessment (EA) Guidance for BTOP Grantees:  
<http://broadbandusa.sc.egov.usda.gov/files/Environmental%20Assessment%20Guidance%202.4.10%20v1.0.pdf>
- CEQ's site for guidance and information concerning NEPA requirements:  
<http://www.whitehouse.gov/administration/eop/ceq/>
- Advisory Council on Historic Preservation for information regarding compliance with Section 106 of NHPA:  
<http://www.achp.gov/>
- U.S. Fish and Wildlife Service (U.S. Department of the Interior) threatened and endangered species program:  
<http://www.fws.gov/endangered/>





# BTOP Environmental and Historic Preservation Compliance Process

## **GRANTEES ARE STRONGLY URGED TO BEGIN DEVELOPING THEIR ENVIRONMENTAL ASSESSMENT AS SOON AS POSSIBLE AFTER ACCEPTANCE OF AWARD!!!!**

- Applicant accepts BTOP grant – *this step begins the 6-month period to comply with Environmental Special Award Conditions and receive funding for project implementation. Extensions are not encouraged*
- Recipient addresses Environmental SAC
  - Recipient provides NTIA with sufficient project description and maps, if necessary, for NTIA to initiate NHPA Section 106 consultation with State Historic Preservation Officer (SHPO), Federally recognized Native American tribes, Tribal Historic Preservation Officer (THPO), Native Hawaiian organizations, and the Advisory Council on Historic Preservation (ACHP), as required
  - Recipient initiates informal Endangered Species Act (ESA) Section 7 consultation with U.S. Fish and Wildlife Service (FWS) District staff
  - Recipient coordinates with other Federal, State, and local authorities to demonstrate compliance with other applicable environmental laws and regulations, and secure required project permits
  - Recipient develops Environmental Assessment (EA) document





# BTOP Environmental and Historic Preservation Compliance Process

- Recipient submits completed Draft EA to NTIA for review and approval
  - Several version reviews and discussions may be required before NTIA accepts the EA as complete and final
- NTIA evaluates EA and other Environmental SACs for compliance
  - Issues a Finding of No Significant Impact (FONSI), if appropriate
  - If the EA is found insufficient, NTIA will work with the Grantee to resolve the issues
- Once a FONSI is finalized, NTIA will lift the Environmental SAC and Grantee may commence work associated with ground disturbing and construction activities
- NTIA monitors project for grant compliance





# Environmental and Historic Preservation Compliance Advice to BTOP Recipients

- Recipients are strongly advised to submit comprehensive and accurate project data to all regulatory and consulting authorities and offices as early as possible
- Late submissions and data corrections delay and prolong compliance determinations, permitting, and receipt of BTOP grant funding for project implementation
- Schedule and project risk notes:
  - SHPOs and FWS have 30 days to review and respond to consultation requests made by a Federal agency.
    - Requests for consultation made by an entity that is not a Federal agency cannot assume concurrence, if a response is not received from the SHPO or FWS at the end of 30 days
    - SHPOs and FWS may ask for additional project data and thereby extend the consultation period beyond 30 days
  - THPOs have no time limit to acknowledge consultation requests or to review provided project information.
    - All THPO consultation will be initiated and completed by NTIA
    - Recipients have responsibility to work with the THPOs only when the Tribes have agreed to work with them
  - Other regulatory agencies and authorities have specific processes and schedules for reviewing proposed project and issuing permits





# Environmental Assessment Milestones

Major EA Milestones	Approximate Schedule
Recipients accepts BTOP grant	<i>begins 6-mo period to complete EA</i>
Drop-In Call with NTIA FPO and Environmental Compliance Specialist	within 2 weeks of award
Completion of engineering design sufficient for NEPA analyses – <i>basic project design data, including construction footprint, profile, and alignment, are needed to conduct the EA</i>	within 1 month of grant acceptance
Hire EA contractors, if needed	within 1 month of grant acceptance
Draft Purpose, Need, and Alternatives sections of the EA	within 1 month of grant acceptance
Resource agency consultations and coordinations initiated, including for NHPA Sec. 106, ESA Sec. 7, and required Federal permits	1 week after definition of Purpose, Need, and Alternatives
Consultation comment letters received from resource agencies	usually within 30 days of consultation initiation
ESA and NHPA compliance decision letters received from resource agencies	usually within 30 days of consultation initiation
Other permits and regulatory approvals received	usually within 30 days of agency contact
Draft Affected Environment section of the EA	1 month after completion of Draft Purpose, Need, and Alternatives sections
Draft Environmental Consequences, Cumulative Effects, and Mitigation sections of the EA	1 month after completion of Affected Environment section
Draft Reference section and Administrative Record of the EA – <i>includes all personal communication such as e-mails, phone conversations, and meeting summaries</i>	2 weeks after completion of Environmental Consequences section
Draft EA	2 weeks after completion of References and Admin Record
Final EA – <i>interim Draft Final versions expected as NTIA reviews and comments, and Recipient revises and submits update sections of the EA</i>	Within 1 month of receipt of Draft EA





# NTIA Roles and Responsibilities Post Award

- Ensure compliance with environmental and historic preservation laws
- Initiate NHPA Sec 106 consultation with SHPOs and THPOs
- Support recipient-initiated consultation with FWS
- Ensure transparency of the environmental compliance decision-making process





# Recipient Roles and Responsibilities Post-Award EA

- Review NTIA provided *Environmental Assessment Guidance for BTOP Grantees* at <http://www.broadbandusa.gov/files/Environmental%20Assessment%20Guidance%202.4.10%20v1.0.pdf>
- Gather and submit project-level information to NTIA and resource agencies
- Initiate ESA Section 7 consultation with FWS
- Conduct studies required by DOC or a consulting resource agency
- Provide information directly to a SHPO or THPO, if requested by DOC
  - *Recipients can work directly with SHPOs after NTIA initiates consultation*
  - *Recipients can work with Tribes/THPOs after NTIA initiates consultation **and** the THPO/Tribes agree to work directly with the recipients*
- Obtain required permits, authorizations, and letters from appropriate governmental authorities
- *Complete all required environmental and historic preservation compliance activities no later than six months after award*





## NEPA Action Segmentation

- *Segmentation is prohibited!*
  - Segmentation occurs when a Federal project is broken into a number of smaller actions to avoid the appearance of significance
  - Because the impacts of the Federal project must be evaluated in their entirety under NEPA, NHPA, and other laws, environmental compliance determinations will not be finished until all project segments are characterized and evaluated together.
    - There are no compliance determinations for partial BTOP projects
    - Award funding is withheld until the FONSI is issued for the entire project (no partial FONSI)





# National Historic Preservation Act Section 106 Consultation





## National Historic Preservation Act

- Primary law governing historic preservation programs for the United States
- Defines historic preservation responsibilities of Federal agencies
- Administered by ACHP, SHPOs, and THPOs
- Section 106 pertains to Federal agency actions

## Advisory Council on Historic Preservation (ACHP)

- Independent Federal agency and policy advisor to the President for historic preservation
- Administers Section 106 (historic review)

## State/Tribal Historic Preservation Officers

- SHPOs and THPOs implement the National Historic Preservation Program
- Maintain inventories of historic and cultural properties in the State and Tribal lands
- Primary contacts for NHPA Section 106 consultations at the State/local level





## Section 106 "Undertaking"

- NTIA determined whether the proposed project is an undertaking during pre-award review.
  - NHPA Section 106 regulations define "undertaking" as a "project, activity or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency . . ." 36 CFR 800.16 (I)(1)
  - This definition covers a broad range of Federal activities, including construction, rehabilitation, and repair projects; licenses; permits; loans and loan guarantees; grants; and leases
- Projects determined to constitute an undertaking were awarded with an Environmental SAC requiring consultation under NHPA Section 106
- Examples of BTOP projects activities that might require consultation include
  - Construction
  - Rehabilitation and Repair
  - Demolition
  - Licenses and Permits





## BTOP NHPA Section 106 Review

- Consult the NHPA Section 106 Guidance for BTOP Grantees at:  
<http://broadbandusa.sc.egov.usda.gov/compliance.htm>
- Initiate Sec 106 consultation with SHPOs and THPOs
  - NTIA initiates consultation with SHPOs and THPOs
  - Recipient provides data and follow-up, as required
- Identify historic resources
  - NTIA provided guidance to Recipients on regulatory requirements and NHPA Sec.106 SACs
  - Recipient identifies and retains staff or contractor that meets Secretary of Interiors Standards (defined by the National Park Service in 36 CFR Part 61) to assist with the identification of historic resources
  - Recipient works with SHPOs and THPOs (if requested to do so) to complete identification of historic resources and assess effects
- Resolve adverse effects
  - NTIA and Recipients work with SHPOs and THPOs to resolve adverse effects, if any





## Secretary of the Interior's Standards

- The Secretary of the Interior (SOI) established guidelines for the renovation and maintenance of historic properties
- The SOI also established professional qualification standards to define who would be considered qualified to complete historic preservation work and make determinations of effect
- *BTOP recipients must use an individual who meets the SOI Professional Qualification Standards to meet historic preservation requirements, as defined by the National Park Service in 36 CFR Part 61*







# Endangered Species Act Section 7 Consultation





## Endangered vs. Threatened

Two categories of species are given protection under the Endangered Species Act (ESA):

- Endangered
- Threatened

## ESA “Taking”

- Unlawful to “take” any endangered species
  - The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a protected species
- Applies to every BTOP project with an infrastructure component
- Penalties can include project injunctions and individual prosecution





## Consultation with Fish and Wildlife Services Under the ESA Section 7

- Consultation can be “informal” or “formal”
- Consultation determines:
  - Species or habitat affected
  - What mitigation may be required

## BTOP ESA Compliance Tools

- NTIA has developed BTOP-specific guidance for ESA Section 7 compliance
  - Available at: <http://broadbandusa.sc.egov.usda.gov/compliance.htm>





## Informal Consultation Process

- Includes all discussions with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), as appropriate.
  - Telephone discussions, meetings, written correspondence, etc.
- Recipients work with FWS/NMFS to determine whether protected species or critical habitat “may be present” within project area, and if the project has the potential for adverse impact
- FWS/NMFS usually responds to consultation requests within 30 days
  - If no response within 30 days, the Recipient should telephone FWS/NMFS and notify NTIA
  - If FWS or NMFS request a Formal ESA Section 7 Consultation, the Recipient should notify NTIA immediately
- Possible outcomes of Informal Consultation are:
  - i. No effect – *no further consultation required*
  - ii. May affect but not likely to adversely affect – *requires FWS or NMFS concurrence of determination with possible mitigation*
  - iii. Likely to adversely affect – *requires a Biological Assessment (BA) and Formal Consultation*
    - ESA Section 7 BA development and Formal Consultation typically requires a 4-month period to complete





# Other Potential Environmental Compliance Requirements





## Permits for Projects in Wetlands, Floodplains, Coastal Zones, and other Protected Areas

- Recipients must contact permitting agencies directly for more information regarding the application processes for specific projects
- Not all permitting, regulatory, and coordination requirements are specified in the Environmental SAC
- The permitting agency depends on the location of the project, but often includes local, State, and Federal natural resources regulators, such as:
  - Municipal planning authorities and building departments,
  - State departments of environmental quality (DEQ),
  - NOAA or State Coastal Zone Management Program,
  - U.S. Army Corps of Engineers (USACE) Districts, Section 404 Clean Water Act (CWA) Wetlands Permit Office,
  - Federal Emergency Management Agency (FEMA)
  - State and U.S Park Services, Bureau of Land Management (BLM), and other land-owning government agencies





## Projects in Right of Ways (ROW)

- Use of a ROW may be convenient, least expensive, and the most environmentally preferable alternative, but it does not exempt the project from NEPA or NHPA compliance requirements.
  - This is true for roadway, railroad, and utility ROWs
  - Many ROWs were established long ago, have no available NEPA documentation, or have NEPA documentation that is not applicable to the proposed BTOP project





# Documenting Environmental SAC Compliance

- Recipients document compliance with their Environmental SAC by sending NTIA their completed draft EAs, copies of permits obtained, and correspondence with resource agencies
- NTIA will review and follow-up as needed, and inform recipients when all Environmental SAC requirements are met and the environmental review is completed







## Best Practices

- Grantees are **strongly** encouraged to begin developing their Environmental Assessment as soon as the grant is accepted.
- Recipients are encouraged to use *qualified experts and contractors* to assist them with meeting the requirements of their Environmental SACs if they do not have the expertise in-house.
  - The costs associated with hiring experts and contractors are an allowable use of BTOP grant funds
- The use of a professional who meets the Secretary of the Interior's Professional Qualification Standards for Historic Preservation is required for any historic preservation work resulting from Section 106 consultation.





## Post-Award Project Start and Scope Changes

- NEPA review and compliance determination (by NTIA) must be completed prior to the initiation or completion of any project work
- Initiating or completing work before an environmental review is completed may result in a finding of non-compliance with the award and the withholding or withdrawing of award funds
- All changes to the scope of work (SOW) of an approved project must be resubmitted for environmental review, including change of project :
  - Location
  - Schedule
  - Scale
- If an approved project has a change in the SOW, the recipient must stop work and wait for the environmental review to be completed and approved on the new SOW before re-initiating work





## BTOP funding for NEPA/NHPA compliance

- BTOP funding cannot be disbursed until completion of the environmental review process and the lifting of the Environmental SAC
- BTOP awards can be used to pay for expenses associated with NEPA/NHPA and other environmental compliance requirements
  - See the Special Award Conditions for details
  - Payments to tribes for consultation are not required and are not reimbursable





# Questions

