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NTIA Broadband Technology Opportunities Program

National Environmental Policy Act 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 Broadband Technology Opportunities Program (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.

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Made Possible by the Broadband Technology Opportunities Program

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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 (SAC).





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) and/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://www2.ntia.doc.gov/compliance#environmental>

- Please review and reference the BTOP Post Award [EA Guidance for Recipients](#) when developing the EA
- Completed Final EAs and FONSIs are posted on the BTOP website: <http://www2.ntia.doc.gov/infrastructure>
- 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/angered/>





BTOP Environmental and Historic Preservation Compliance Process

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

- BTOP Grant Office signs award – *this step begins the 6-month period to comply with Environmental Special Award Conditions (SAC) and receive funding for project implementation. Extensions are not encouraged.*
- Recipient addresses Environmental SAC
 - Recipient provides NTIA with sufficient project description and maps 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 initiate informal Endangered Species Act (ESA) Section 7 consultation with U.S. Fish and Wildlife Service (FWS) District staff.
 - Recipient follows up with SHPO and FWS District staff to confirm if additional information is required by the agencies.
 - 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 and delivers Environmental Assessment (EA) document to NTIA.





BTOP Environmental and Historic Preservation Compliance Process

- Recipient submits completed Draft EA to NTIA for review and approval by the end of the 6 month deadline.
 - Several reviews and discussions may be required before NTIA accepts the EA as complete and final (note that NHPA Section 106 and ESA Section 7 consultations must be completed before an EA can be finalized).
- 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 Recipient to resolve the issues.
- Issuance of the FONSI will lift any restrictions on allowable project activities related to NEPA that were established in the Environmental SAC. However, the project must be implemented as it is described in the FONSI.
- NTIA monitors project for compliance with applicable requirements.
- Any changes to the project may require review by NTIA and others.





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 have 30 days to review and respond to consultation requests.
 - SHPOs 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 the 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
BTOP Grant Office signs award	<i>begins 6-mo period to complete EA</i>
Drop-In Call/Webinar 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 consultants to assemble information, write the EA, and assist in NHPA Section 106 consultation, if needed.	within 1 month of grant acceptance
Resource agency consultations and coordination initiated, including for NHPA Section 106, ESA Section 7, and required Federal permits. (Early initiation is critical to meeting schedule.)	within 1 month of grant acceptance
Consultation comment letters received from resource agencies	usually within 30 days of consultation initiation
ESA and NHPA compliance decision letters received from resource agencies. (Final EA will not be accepted without these actions being completed.)	usually within 30 days of consultation initiation
Other permits and regulatory approvals received	usually within 30 days of agency contact
Draft EA submitted to NTIA for review and comment	no later than 6 month from grant award date
Final EA submitted to NTIA	within 2 weeks of receipt of comments from NTIA on the Draft EA





NTIA Roles and Responsibilities Post Award

- Ensure compliance with environmental and historic preservation laws.
- Initiate and support completion of NHPA Section 106 consultation with SHPOs and THPOs, and ESA Section 7 consultation with FWS.
- Monitor tribal responses and provide coordination between recipients and tribes.
- Ensure transparency of the environmental compliance decision-making process.
- Work with Recipient and SHPO to develop Programmatic Agreements and Memoranda of Agreement, as appropriate.
- Review and comment on Draft EA, accept Final EA, and draft FONSI.





Recipient Roles and Responsibilities Post-Award EA

- Review NTIA provided *Environmental Assessment Guidance for BTOP Recipients* at <http://www2.ntia.doc.gov/compliance#environmental> for completion of the Final EA.
- Gather and submit project-level information to NTIA and resource agencies.
- Follow up with SHPO and FWS District staff after NTIA initiates consultation to provide any additional information required by the agencies.
- Conduct studies required by a consulting resource agency (e.g. SHPO, FWS, Army Corps of Engineers (ACOE), etc..) and complete any mitigation activities required for approvals.
- Provide information directly to a THPO or tribe, if requested by NTIA.
 - *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 NHPA Section 106 and ESA Section 7 consultations no later than six months after award date in order to meet EA completion schedule.





NEPA Action Segmentation

- **Segmentation is prohibited!**
 - Segmentation occurs when a Federal project is broken into a number of smaller actions and analyzed separately.
 - *Example:* A project consisting of multiple project sites reviews the potential environmental impacts at each site, and then submits a separate EA for each site (or one EA with individual impact assessments) instead of submitting a comprehensive EA addressing the cumulative impacts of the entire project funded by NITA.
 - 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).
 - This means one Environmental Assessment must be submitted addressing potential impacts for the entire project, not separate assessments for individual sites or activities.





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National Historic Preservation Act Section 106 Consultation



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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 preservation 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 with potential to affect historic properties 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 (l)(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 Recipients at: <http://www2.ntia.doc.gov/compliance#environmental>
- Initiate NHPA Section 106 consultation with SHPOs and THPOs.
 - NTIA initiates consultation with SHPOs and THPOs.
 - Recipient provides data and follow-up, as required.
 - NTIA notifies Tribes using the FCC's Tower Construction Notification System (TCNS)
 - Construction or expansion of communication facilities (cell towers) licensed by the Federal Communications Commission (FCC). These activities must go through a streamlined Section 106 review under the National Programmatic Agreement (NPA) specific to the FCC. Other aspects of the project, such as cabling, may require separate Section 106 consultation with the NTIA as lead agency. The NTIA Historic Preservation Specialist will assist recipients in determining if this applies.
- Identify historic resources
 - 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.





NHPA Section 106: 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.
- http://www.nps.gov/history/local-law/arch_stnds_9.htm





Endangered Species Act Section 7 Consultation



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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 and National Marine Fisheries Service 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://www2.ntia.doc.gov/compliance#environmental>





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. need to be documented in the EA.
- Initiate ESA Section 7 consultation with FWS and NMFS.
 - NTIA initiates consultation with FWS and NMFS.
 - Recipients provide data and follow-up, as required, which may include evaluations of species and habitats present in the project area and determinations of potential for impacts for their review and concurrence.
 - Recipients need to keep NTIA informed regarding communications with FWS, and any issues that might come up during the consultation process.
- Recipients must employ qualified biologists to evaluate available data to determine whether protected species or critical habitat may be present within the project area and make determinations of the project's potential for adverse impact that provide the basis for ESA Section 7 consultation with FWS/NMFS.





Informal Consultation Process

- If FWS does not respond within 3 months, NTIA will send a letter to FWS initiating direct informal consultation. NTIA will attach to this letter the biological resources section from Chapters 3 and 4 of the EA. These sections will need to be completed by the Recipient in order to issue the letter.
- FWS/NMFS has 60 days (up to a maximum of 120 days) to provide a written statement.
- Possible outcomes of Informal Consultation are:
 - i. No effect – *no further consultation required, however FWS concurrence is preferred.*
 - 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.





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Other Potential Environmental Compliance Requirements

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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 (DEQs) (water quality and pollution issues),
 - State Coastal Zone Management Program (funded and administered by NOAA),
 - U.S. Army Corps of Engineers (ACOE) Districts, Section 404 Clean Water Act (CWA) Wetlands Permit Office,
 - Federal Emergency Management Agency (FEMA) (flood plain issues),
 - State and U.S Park Services, Bureau of Land Management (BLM), and other land-owning government agencies.





Projects in Right of Ways

- Use of a Right of Way (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.
 - Coordination with state Department of Transportation (DOT) is required.





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

- Recipients are **strongly** encouraged to begin developing their Environmental Assessment as soon as the grant is accepted.
- Recipients must use *qualified experts* to meet the requirements of their Environmental SACs.
 - The costs of hiring experts and contractors is 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.
 - Qualified biologists are required to support development of biological resource sections in the EA, and consultations with the FWS.
- Complete route, site selection, and engineering design sufficient to establish a proposed action that can be evaluated under NEPA.
- Consult with regulatory agencies early and often (e.g. SHPO, FWS, ACOE, etc).





Start of Project Work and Scope Changes

- NEPA review and compliance determination (by NTIA) must be completed prior to the initiation or completion of any project work. No work can occur before a FONSI is issued.
- 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 .
- Following issuance of a FONSI, 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.
- Any changes to Project Scope after grant award must be approved, in writing, by the Grants Officer.





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.
 - *Exception* : Allowable use of a limited amount of funds may be available, upon request, to the grant award recipient under the Environmental SAC through the Environmental SAC Budget Process.
- BTOP awards can be used to pay for expenses associated with NEPA/NHPA and other environmental compliance requirements
 - See the SAC for details.
 - Payments to Tribes for consultation are not required and are not reimbursable.





Environmental SAC Budget

- Allowable, but limited, procurement funds are available to BTOP grant award recipients for the following:
 - Purchase or lease of equipment, or entering into binding contracts to do so;
 - Purchase of applicable or conditional insurance;
 - Funds used to secure land or building leases, including the right-of-way easements.
- Activities potentially resulting in environmental impacts, such as site preparation, demolition, or construction, are not allowable expenses within your Procurement Spending Plan.
- A list of allowable expenditures and conditions with the use of these procurement funds is specified in the Environmental SAC .
- The use of BTOP grant funds for procurement activities is optional and available to grant recipients only upon request and subject to review and approval by the BTOP Grants Officer with the concurrence and recommendation of the Environmental Program Manager and Federal Compliance Officer.



Environmental SAC Budget Process

- Recipients requesting funds for procurement activities must develop and submit a Procurement Spending Plan covering the remaining time of the 6-month timeframe specified in the award documents.
- To initiate this process, Recipients must file an Award Action Request through PAM/Grants Online with assistance from the FPO.
- The Procurement Spending Plan must provide a complete list of all expenditures and cannot exceed the 6 month projected budget in application and baseline. For each expenditure the following information is required before approval:
 - Products or services to be procured.
 - Purpose the product and services will serve.
 - Dollar amount of procurement.
 - Justification explaining reasons procurement is needed before the 6-month deadline for EA submission.
- Recipients should refer to the *Guidelines to Prepare Six Month Budget for Environmental Assessment SAC* available through this link or from your FPO.
- Once the plan is submitted and approved, the Grants Office will notify the recipient of their authorization to use funds for procurement activities.

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Take Away

- There are a lot of things that you need to be doing now that will determine your success later.
- Take the 6-month deadline for the Environmental Assessment seriously.
- Retain experts to collect information, assist SHPO consultations, and complete the EA as soon as possible.
- Critical milestones are completion of FWS ESA Section 7 and NHPA Section 106 SHPO/THPO consultations. These are likely to take longer than you may expect and are essential to completing the EA.
- Keep in close communication with NTIA regarding any issue or problem you encounter that could impact your ability to meet the EA deadline.

