



**BROADBANDUSA**  
CONNECTING AMERICA'S COMMUNITIES

# NTIA Broadband Technology Opportunities Program

## Consultations with the U.S. Fish & Wildlife Service and Other Federal Agencies



*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.*

February 2011

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## U.S. Fish & Wildlife Service (USFWS) Consultation

- Two categories of species are given protection under the Endangered Species Act (ESA):  
Endangered & Threatened
- Unlawful to “take” any endangered species
- Applies to every BTOP project with an infrastructure component
- ESA requires consultation with USFWS and potentially with the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS)
- Consultation can be informal or formal (NTIA initiated informal consultation with USFWS)
- Consultations determine:
  - Species or habitat affected
  - Required mitigation (actions) to avoid or reduce impacts
- NTIA ESA Section 7 guidance: <http://www2.ntia.doc.gov/compliance#environmental>





## Informal ESA Consultation Process

- Document all communications with the USFWS or NMFS, as appropriate, in the EA
- After NTIA initiates ESA Section 7 consultation with the USFWS or NMFS, recipients must follow-up and provide additional data and information, as required
- Employ qualified biologists to determine whether protected species or critical habitat may be present in the project area and make determinations for potential adverse impacts
- Keep NTIA informed regarding communications with USFWS and NMFS, and any issues that might come up during the consultation process
- Possible outcomes of informal consultation are:
  - *No effect* – no further consultation required, however USFWS concurrence is preferred
  - *May affect but not likely to adversely affect* – requires USFWS or NMFS concurrence of determination with possible mitigation
  - *Likely to adversely affect* – requires a Biological Assessment (BA) and formal consultation (typically undertaken during a 4-month period)





## Permits or Reviews for Projects Proposed on Lands Managed by Other Federal Agencies

- Early in the process, check the scope of the project to see if it proposed implementation of any kind on lands managed by other Federal agencies – for example:
  - Bureau of Land Management (BLM)
  - National Park Service (NPS)
  - U.S. Department of Agriculture – Forest Service (USDA-FS)
- Initiate early contact with these agencies to determine their respective approaches to permitting, project review, or other involvement as stakeholders or cooperating agencies
- Provide to the agencies information similar to that provided to the SHPO or USFWS – project descriptions, maps, and impact analyses
- Work proactively with the agency representatives to successfully conclude their permitting or review processes
- Notify NTIA if any problems arise





## 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 (USACE) Districts, Section 404 Clean Water Act (CWA) Wetlands Permit Office
  - Federal Emergency Management Agency (FEMA) (flood plain issues)
  - U.S. or State Departments of Transportation (DOT) – for projects in rights-of-way





## Best Practices

- Recipients are **strongly** encouraged to begin developing their Environmental Assessment and consultations as soon as the grant is accepted
  - Critical milestones are completion of USFWS 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
- Recipients must use *qualified experts* to meet the requirements of their Environmental SACs
- Complete route, site selection, and engineering design sufficient to establish a proposed action that can be evaluated under NEPA and applicable laws and regulations
- Consult with regulatory agencies early and often (e.g. SHPO, USFWS, USACE, etc.)
- Keep in close communication with NTIA regarding any issue or problem you encounter that could impact your ability to meet the EA deadline or complete your consultations





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## National Historic Preservation Act Compliance



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# National Historic Preservation Act Section 106 Consultation

- Required of all federal undertakings
- Necessary to issue a FONSI: the EFFECT DETERMINATION is the basis for EA analysis of cultural resource impacts







## 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 (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





## National Historic Preservation Act of 1966 (NHPA)

- Section 106 requires that the **Federal government** take into account the effect of its actions on historic, cultural, and Tribal resources and provide the Advisory Council on Historic Preservation an opportunity to comment on such undertakings
- Projects with the potential to affect historic properties require consultation with the appropriate State Historic Preservation Office (SHPO) and/or Federally-recognized Tribes
  - Full text of NHPA: <http://www.achp.gov/docs/nhpa%202008-final.pdf>
- Section 106 is the Federal Agency's Obligation
  - Must be done prior to approving expenditure or license
  - Programmatic Agreement (11/2009) allows NTIA to conduct reviews post-award
  - NTIA Delegation Letter (08/2009) authorizes applicants to carry out some steps on behalf of the agency
  - ***The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines***





## BTOP/BIP Programmatic Agreement

- Allows Section 106 review post-award
- Recognizes that NTIA delegates Section 106 activities to grantees
- NTIA **MUST** maintain government to government consultation with Federally recognized Native American Tribes
- Applicants should design projects to avoid historic properties
- NTIA must retain ability to withdraw awards until Section 106 is completed
- No ground disturbing activities can commence before Section 106 is completed
- **Broadband over existing power lines is exempt from review**
- Educational efforts, awareness, training, equipment purchase, and support are exempt from review





## BTOP Historic Preservation Compliance Process

- BTOP Grant Office signs award
- NTIA initiates NHPA Section 106 consultation
  - State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) with letter, project description, maps
    - Letter indicates recipient will follow up to determine scope of work required
  - Federally recognized Native American tribes by uploading information into TCNS system
- Recipient contacts SHPO Office to determine Area of Potential Effect and Level of Effort
- Recipient contracts Cultural Resource Professional to complete work
- Recipient submits results of identification and assessment of effects to SHPO to request concurrence
- ONGOING: NTIA receives notice of interested Native American tribes, coordinates response (maintaining government to government sovereignty)





## What is the Area of Potential Effect?

- The geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist
- The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking





## APE Considerations

- Aerial fiber on existing poles is EXEMPT from review
- The test is alteration of character or use of historic property: paving, utilities, and past disturbance in existing disturbed rights of way should be considered when defining the APE
- The type of insertion, size of cut, depth, construction lay-down, and access needs should be considered in scoping
- Because AVOIDANCE is emphasized, a desk review of the route corridor can assist recipients in designing to avoid historic properties and may eliminate additional field review requirements
- NTIA has developed Best Management Practices for sensitively attaching broadband to historic buildings and identifying burials in rights of way. These tools should be considered in determining the “potential for effects” and its area
- For telecommunication facilities regulated by the FCC, NTIA applies a Program Comment that makes the FCC the lead agency, and restricts the APE to that established in their Nationwide Programmatic Agreement





## Consultation Considerations

- Establish the appropriate APE for the project
- Identify historic properties within the APE
  - Desk review may be sufficient. (Determined in consultation with SHPO)
  - Field survey could be required
  - Cultural resource consultant should assess this and make proactive recommendation – they are closest to their study and your scope. SHPO must agree
- Avoid Historic properties and culturally sensitive areas
  - Cultural resource consultant should recommend how to avoid adverse effects to historic properties
  - Committing to follow these recommendations (specific construction methods, route changes, BMP, etc.) may enable a SHPO to concur on a No Adverse Effect determination and allow your project to move forward in a timely manner





## Consultation Considerations (cont.)

- If you cannot avoid historic properties, evaluate their eligibility for listing in the national register
  - National Register eligible and listed properties must be avoided/mitigated
  - If a property does not meet one of the 4 National Register criteria, it is not considered as eligible or “historic” for Section 106 purposes
- Apply the Criteria of Adverse Effect- will the action diminish the integrity of the characteristics qualifying the property for National Register Listing?
  - No = No Adverse Effect requiring concurrence of SHPO/THPO consulting parties
  - Yes = Adverse Effect requiring consultation to Mitigate Adverse Effect







## Licenses and Permits from other Agencies

- Recipients must contact permitting agencies directly for more information regarding the application processes for specific projects
- Federal agencies permitting use of rights of way or licensing activities associated with the project have Section 106 responsibilities for those activities. Their reviews must be coordinated with the NTIA review for maximum efficiency
  - U.S. Army Corps of Engineers (ACOE) Permits
  - 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
- Early identification of other Federal agencies and coordination regarding Section 106 will reduce the potential for conflicts over requirements and/or schedules





## What if Section 106 Consultation Cannot be Completed within EA Schedule?

- Summarize your progress and status and review the outstanding issues with your FPO as soon as you identify this risk
- Determine whether there is enough information to establish and commit to conditions to ensure the avoidance of adverse effects, and willingness of SHPO to support a Conditional No Adverse Effect determination. NTIA will track adherence to conditions post-FONSI
- Propose a Programmatic Agreement addressing the specific issues requiring resolution, the steps and schedule for completion, and mechanisms for implementation within the overall project schedule





## Best Practices

- Recipients are strongly encouraged to follow up with the SHPO as soon as NTIA initiates Section 106 consultation
- Recipients are advised to use qualified experts meeting the requirements of the Secretary of the Interior's Professional Qualifications (36 CFR 61)
- Accurately communicate the route, engineering design, and construction methods to the SHPO/THPO sufficient to establish an appropriate APE and level of effort
- Consult with SHPO/THPO/tribes early and often
  - Promptly respond to any tribal inquiries forwarded by NTIA, copying your FPO/Environmental Specialist
- Keep in close communication with NTIA regarding the potential for adverse effects and/or any tribal concerns
- Request the SHPO concurrence on a specific determination of effect based on the undertaking, the identified properties, and (as appropriate) avoidance measures

