

Sanitation Deficiency System Guidance Update Summary of Tribal Consultation Comments and Responses (May 2019)

BACKGROUND: The 1988 amendments to the Indian Health Care Improvement Act (IHCIA, P.L. 94-437) required Indian Health Service (IHS) to maintain inventories of sanitation deficiencies for existing Indian homes and communities, to prioritize those deficiencies, and to annually report those deficiencies to Congress. Since 1989, IHS has annually reported these needs to Congress in the form of projects, which are catalogued in the Sanitation Deficiency System (SDS). Projects are identified in terms of the facilities to be provided, the cost of those facilities, and the number of homes to be served. Funding for projects is distributed to Areas based on an allocation formula that takes into account the needs identified in each Area's SDS inventory. The IHS Division of Sanitation Facilities Construction (DSFC) provides guidance to Area and Tribal staff involved in the identification of sanitation deficiencies and the development and prioritization of projects to address those deficiencies.

The most recent published guidance for the SDS is the *May 2003 Working Draft: Sanitation Deficiency System (SDS) Guide for Reporting Sanitation Deficiencies for Indian Homes and Communities* (the SDS Guide). Over the years since the issuance of the SDS Guide, the Areas' implementation of the SDS became less consistent, and the IHS found it more difficult to meet its statutory responsibilities under the IHCIA. This was largely due to inconsistencies in the SDS Guide and some Areas' lack of adherence to its requirements. Beginning in 2014, the DSFC Program began an effort to improve the quality of the data in the SDS and bring the Areas' implementation into consistent compliance with statutory requirements and longstanding program policy. Part of this effort included updating the SDS Guide. While the Guide was being updated, supplemental guidance memos were issued to the Areas to improve the project data entered into the SDS, clarify inconsistencies in the SDS Guide, and return program implementation to the governing requirements set forth in IHCIA.

TIMELINE OF SDS GUIDE UPDATE

December 2015 – Development of the updated guidance document kicked off with a meeting of Area DSFC Directors and other key personnel at IHS Headquarters to identify and understand the Program's areas of inconsistency in guidance and implementation.

February 2016 – A draft SDS Guide was distributed for internal review and comment. Feedback indicated a need to expand the deficiency level examples provided and clarify the health impact scoring table, among other issues. A targeted workgroup of mid-level SFC Program managers was convened to revise these sections.

July 2016 – A draft revision to the SDS Guide was distributed for internal review and comment. Feedback indicated a wide difference in how the SDS Guide was being implemented, particularly with regard to deficiency level determinations. Consultation with the IHS Office of General Counsel (OGC) was initiated, and clarified guidance was developed to bring implementation back into compliance with the Program's statutory requirements.

March 2017 – Updated guidance on deficiency level assignments was distributed via memo to IHS Areas. A one-on-one discussion of the updates was carried out with each Area DSFC Director to gather feedback and clarify any ambiguities.

December 2017 – A draft revision to the SDS Guide was distributed for internal review and comment. Finalization was held off due to the ongoing U.S. Government Accountability Office (GAO) review of SFC Program implementation that was initiated independently from the SDS Guide review.

March 2018 – Feedback from GAO was received, which included improving how the Program identifies eligible homes and their deficiencies and re-evaluating the SDS project prioritization system. Responses to GAO’s recommendations were developed that required further updates to the SDS Guide. A determination was also made that the updated guidance would be distributed for tribal consultation.

July 2018 – Tribal consultation was initiated by the IHS on the draft update to the SDS Guide, with a 75-day open comment period. Comments were received (see summary below) and categorized for response.

November 2018 – A summary of the comments received through tribal consultation was presented to the Area OEHE Directors and Area DSFC Directors at their annual meeting at IHS Headquarters. Proposals for addressing comments were discussed.

December 2018 – A summary of consultation comments and proposed actions was presented to IHS leadership, including the IHS Director. Feedback was received and addressed.

March 2019 – A summary of consultation comments and proposed actions was presented to the IHS Facilities Appropriations Advisory Board (FAAB) at IHS Headquarters to seek input on the recommendations made by IHS prior to finalizing the SDS Guide.

Summer/Fall 2019 (Proposed) – The final SDS Guidance will be issued for implementation. The 2020 SDS project submission will use the newly updated guidance.

SUMMARY OF CONSULTATION COMMENTS: The open comment period was held from July 2, 2018 to September 14, 2018. 41 response letters were received from 39 Tribes and tribal organizations.

In order to organize the consideration of responses, the comments were analyzed and put into three categories:

- 1) Recommendations that the HQ SFC Program addressed directly (e.g. through edits to the SDS Guide or by clarifying a misunderstanding).
- 2) Recommendations for which the HQ SFC Program reached out to Area staff to gather input.
- 3) Recommendations that conflict with the SFC Program’s statutory requirements and/or fundamental policy decisions.

In November 2018, Area OEHE and SFC Directors met in Rockville, MD to review and discuss, among other things, the tribal consultation comments and proposed responses. A detail of comments and responses is included at the end of this document. Comments from Category 2 were the primary focus of the meeting and were discussed in depth. Input was gathered, resulting in four recommendations:

- A. The **SDS scoring methodology** needs to be evaluated and modified to facilitate increasing the SDS priority score of high deficiency level projects. The methodology should use the same current scoring framework, but modify the relative weights of the Deficiency Level (DL) and Capital Cost scoring categories (Deficiency Level score will be increased, and Capital Cost score will be decreased).
- B. The methodology for determining **allowable unit costs** should be revised to make use of actual cost data from completed sanitation facilities construction projects that serve American Indian and Alaska

Native homes. This recommendation is in line with the Department's Strategic Shift to "Leverage the Power of Data" by "getting better insights from better data" (refer to the *HHS ReImagine* initiative).

- C. **Needs identification and project planning** requirements should be established for a wider range of project classifications (referred to as tiers) that allow for different levels of project planning effort. Three tiers of projects will be established: Ready to Fund, Preliminarily Assessed, and Pending Evaluation. Projects in the first two tiers will be used to allocate IHS Regular funds to the Areas. Projects in the third tier (Pending Evaluation) will not be used to allocate funds but will be included in the annual report to Congress.
- D. **Area specific follow-up** was identified and carried out for particular topics that were primarily relevant to a particular IHS Area.

Recommendations A and C above are reflected in updates to the SDS Guide. Recommendation B is a longer-term effort that will require data gathering and analysis; the SFC Program will continue to use the current allowable unit cost methodology until such time that the data gathering and analysis is complete. Issues identified under Recommendation D were addressed and do not require updates to the SDS Guide. Refer to Figure 1 at the end of this document for a visual summary of how consultation comments were categorized and addressed.

RESPONSES TO COMMENTS:

Category 1: Recommendations that the HQ SFC Program addressed directly (e.g. through edits to the SDS Guide or by clarifying a misunderstanding)

1. Comment: The proposed guidance includes additional prohibitions on homes constructed under the Department of Housing and Urban Development (HUD) Section 184 loan guarantee program, because Section 184 often creates instances where the home is not solely titled in the name of the occupant. Homes constructed through Section 184 should be eligible for inclusion in SDS regardless of the title being solely in the name of the occupant, the Tribally-Designated Housing Entity (TDHE), or a combination of the two.

Response: SFC Project Funds can be used under HUD 184 Loan Guarantee Program. Added language to Section 4e(8) to clarify that Section 184 is not a housing program.

2. Comment: The requirement to actively partner with TDHEs even when HUD homes are considered eligible for IHS funding is an administrative burden. Recommend rephrasing this as a best practice and eliminate the documentation requirements.

Response: Documentation of consultation with Tribes in the development of SDS projects is necessary to ensure conformance with P.L. 86-121, and including evidence of consultation with TDHEs when they are a major stakeholder is a minor burden relative to the value gained. The SDS Guide was clarified to note that documentation of input from TDHEs can be as simple as a Journal comment.

3. Comment: Recommend that IHS remove the designation that projects in non-Indian communities with populations greater than 10,000 will "typically be DL2".

Response: This language was removed in the draft version distributed for tribal consultation. No additional changes are necessary.

4. Comment: In section 4.h.(5) – it is recommended that an “adequately functioning individual well” be clarified as meeting the U.S. Environmental Protection Agency (EPA) Safe Drinking Water Act (SDWA), as is pointed out later in the Guide under section 7a. regarding Health Impact (HI) Scoring.

Response: Added language to Section 4h(5) to clarify an “adequate” individual well meets the primary water quality criteria of the SDWA.

5. Comment: Section 4(h) allows the listing of projects which may not be eligible for IHS funding provided the costs are coded as ineligible. However, when there are no eligible costs associated with a project it is excluded from the SDS list. We suggest that this section allow the addition of projects that may be ineligible for IHS funding, but may be funded by other agencies, such as the EPA.

Response: The SDS Guide already allows for listing of ineligible projects if the Program sees a need to do so (e.g. to facilitate funding by other parties), and if Program resources allow. These projects are not “excluded” from the SDS list; however, they are not assigned a priority and are not included on the annual report to Congress. The Guide has been clarified on the issue of how Areas can work with Tribes and funding agencies on projects that are ineligible for IHS funding.

6. Comment: We would like to ensure that IHS will consider the impacts of global warming on our American Indian and Alaska Native (AI/AN) communities and homes.

Response: The IHCIA requires the reporting of existing need. This need must be based on measureable documented evidence. Climate-driven issues, such as progressive erosion, can be used to justify a project when there are impacts on the operation of sanitation facilities. The DL examples in Appendix E include the following: "External environmental conditions (e.g. significant settlement or erosion) negatively impacting the operational integrity of existing facilities". Additionally, the SDS Guide has been clarified in Section 4h(2) to note that progressive erosion can be used to justify a project when a trend line can demonstrate an immediate (i.e. within one year) future condition. Lastly, the SDS Guide has been clarified to note that Areas can work with funding partners to prepare the advance planning and engineering analyses necessary to address longer-term threats to sanitation infrastructure.

7. Comment: The elimination of standalone planning projects could negatively impact program implementation. In some IHS Areas, the SDS program has funded standalone planning projects utilizing a Planning Agreement Reserve, which allows the Area SFC Director to utilize up to 20% of the Area's Regular funding allocation to fund these project agreements.

Response: The SDS Guide does not limit the Area's ability to enter into planning agreements with Tribes; it only requires that the planning costs for these projects be combined in SDS along with the construction costs in order to prioritize them, as opposed to listing projects in SDS that only include planning work. Language has been added to the SDS Guide to clarify the process for funding planning activities.

8. Comment: Table 1 in the proposed changes requires additional documentation and data collection that increases the administrative burden. Recommend removing these requirements.

Response: The proposed Table 1 includes the addition of two drop-down selection boxes in the SDS Project Details tab. The additional effort to make these designations for SFC projects will be minimal and will generate valuable data for the Program.

9. Comment: There is no Primary Infrastructure Category for source water supply infrastructure. Recommend adding it as a category.

Response: Changed 'Water transmission' to 'Water source/transmission' in the list of Primary Infrastructure Categories and added language to describe each category.

10. Comment: What is the purpose of the Project Classification categories?

Response: These categories will allow the IHS to better characterize the infrastructure needs in Indian country for program stakeholders. IHS and Tribes will also be able to filter and sort their SDS lists based on the deficiency when updates to the SDS web platform are complete.

11. Comment: Ensure that the guidelines clearly identify by whom appropriate documentation is accepted from, i.e. epidemiologists, physicians, or environmental health professionals, that details the impact or likely impact.

Response: Added a sentence to Section 7a: "When required by the Area, support documentation for health impact scoring should be provided by appropriate health professionals (e.g. epidemiologists, physicians, environmental health officers)."

12. Comment: Some IHS Areas do not use the proposed method for calculating capital costs. Use of a single Average Unit Cost doesn't adequately represent the costs, because of the large geographic variances within some IHS Areas.

Response: The table in Section 7d is not intended to be a single table for the entire Area - it is intended to represent how the costs can be distributed for a single geographic area of consideration (this is usually broken down by state). Added language to Section 7d to make that clear.

13. Comment: In previous iterations of the guideline, there was a section on "Distribution of Funds" which detailed the factors considered for project funding. Transparency in all aspects of the SDS process is imperative. Recommend that the IHS add a "Distribution of Funds" section within the proposed guidelines.

Response: Added Section 8e: "Distribution of IHS Funds" using similar wording as the 2003 version.

14. Comment: Appendix E Deficiency Level Guidance for Sewer DL3, S3.2 "discharges" should include failed/leaking geomembrane liners.

Response: If wastewater is seeping significantly through the dike and is surfacing on the other side, it could be considered a DL 3 discharge. Per the guidance, seepage that goes into the ground is a DL 2 capital improvement issue unless it is contaminating a drinking water aquifer. Modified the DL 3.2 example language accordingly.

15. Comment: Homes that have been provided with facilities that partially improve sanitation conditions for homes with no piped water and/or sewer (e.g. off-site watering points or Portable Alternative Sanitation Systems) should still be considered a DL 4 or 5 when proposing additional infrastructure.

Response: This has been the intended approach. Added language to Section 4e to clarify this point.

16. Comment: Tank painting that is meant to include complete tank rehabilitation (sandblasting and repainting) to return the tank to like-new condition (typically after 20 plus years of service), should be considered a DL 2 capital improvement need.

Response: Deficiency levels are assigned based on the condition of the facilities being addressed, not based on the work being done. Some tank rehabs may be considered a DL 2 capital improvement need, but that determination is made on the basis of the condition of the tank. Refer to the examples provided for deficiencies that qualify for a DL 2 (e.g. an inability to properly operate the system, system leakage).

17. Comment: Appendix E, Deficiency Level example W3.2 has "water distribution pressures that are less than 20 psi under normal operating conditions" as a DL3 example. This pressure threshold does not take into account state regulations that may be more stringent than the referenced 20 psi. For example, a state DEQ that requires public water supplies to provide water at pressures not less than 25 psi. Recommend including wording such that state regulations are recognized where applicable.

Response: The proposed guidance allows for the use of different engineering standards if there is a more geographically-relevant one available. For the situation described, Deficiency Level example W3.7 could be used to justify the DL 3 project.

18. Comment: General improvements are necessary to improve data entry efficiency. Develop a method to allow continuous entry of data year-round, while not compromising snapshots and projects under review. Color code Home Inventory Tracking System (HITS) homes by home type and improve printing capabilities. Create a tool in the Sanitation Tracking and Reporting System (STARS) that encourages and facilitates the IHS goal of leveraging outside funding.

Response: STARS is currently being redesigned to improve end user experiences. Input from Self-Governance (SG) Tribes and tribal organizations on this topic should be provided to Area Offices. Assistance is available to Areas and SG Tribes that would like to export tailored data for specific purposes.

19. Comment: Sanitary conditions in some locations are poor due to badly managed solid waste disposal practices.

Response: The commenter should contact their IHS Area Office or representative Self-Governance organization to request technical assistance with this issue.

20. Comment: Table 1 of the Dear Tribal Leader Letter (DTLL) summarized the "Key Updated SDS Guide Elements". This table is not sufficient to note changes. Recommend that the revision should include references to earlier versions, highlighting changes where wording changes the meaning or makes previous statements more clear.

Response: This comment was addressed during the open comment period through the issuance of a supplemental table of contents cross-walk to compare the proposed guidance with the current version.

21. Comment: The 30-business day comment period does not constitute a meaningful open and free exchange of information. The announced level of consultation is inadequate - request a minimum 60-day comment period (90-day preferred).

Response: This comment was addressed by extending the open comment period to 75 days.

22. Comment: The Criteria Document is outdated and omits any mention of Title V. Suggest that the SFC Program engage in tribal consultation to update the Criteria Document before the SDS Guide is overhauled.

Response: The SFC Program's need to update the Criteria Document is acknowledged, and the update will be initiated after the SDS Guide is finalized. Tribes will be engaged in that effort through consultation.

23. Comment: The guidelines should allow flexibility for an emergent project process at the Area level that would protect both Area and Tribal Nations if project funding deviates from annual plans.

Response: If an Area has emergent needs that are not included in the SDS inventory, those can be addressed through procedures already covered in the Criteria Document, Chapter 6 Section VI, "Special Projects and Emergency Projects".

24. Comment: Request that the IHS quantify the entire need for water and sanitation deficiencies in Indian country and request the needed appropriations to eradicate all such deficiencies within the next 5 years.

Response: IHS quantifies the entire sanitation facility need associated with AI/AN homes and communities through the SDS and reports them annually to Congress. This information is used by IHS in the budget request process.

25. Comment: IHS should be providing Congress with the full funding need regardless of what an Area determines is funded from year to year.

Response: IHS does in fact report to Congress the full funding need captured in the SDS inventory. This includes all reportable projects, whether or not they are ready to fund and/or economically feasible.

26. We are concerned that after years of operating from a working draft, it wasn't until IHS received recommendations from the GAO that IHS moved forward on the Guidelines. IHS seems to be relinquishing its primary obligations to Tribal Nations by accommodating the recommendations of the GAO.

Response: The IHS SFC Program has in fact been evaluating and updating its guidelines for the implementation of the Sanitation Deficiency System continually over the years through the use of Interim Guidance Documents, and the most recent effort to update and publish a new guideline document began in 2015, notwithstanding the more recent involvement from GAO.

27. Comment: We strongly recommend that IHS work with the Facilities Appropriation Advisory Board to ensure that the proposed comments and recommendation have been fully vetted and are inclusive of the input gathered and reflective of the tribal consultation process.

Response: IHS presented the consultation results and proposed guidance updates to the FAAB in March 2019 and received their input, which was used to further edit the SDS Guide.

28. Comment (received from a Tribal Historic Preservation Office): We would like to enter into consultation on this project under Section 106. Please allow additional time for review of this guide that has been proposed.

Response: The update of the SDS Guide does not represent an “undertaking” as defined at 36 CFR 800.16(y), therefore Section 106 compliance under the National Historic Preservation Act is not required. The comment period was extended from 30 days to 75 days.

29. Comment: Recommend involving the Area’s Tribal Advisory Committee in the decision making process to differentiate projects with equal scores instead of leaving the decision solely made by the Area SFC Director.

Response: Edited Section 7i as follows: "The Area SFC Director's decision must be based on the merits of the projects and should incorporate input from the Area’s Tribal Advisory Committee as applicable."

30. Comment: Recommend deleting the language "completed design" from the list of items required for a project to be certified as Ready to Fund.

Response: Removed the term “completed design” and changed wording in Section 8a to better describe planning work involved in making a project Ready to Fund: sufficient planning and design work is complete (and appropriately documented) such that plans and specifications can be created without delay once the project is funded.

31. Comment: The requirement to document all buildings using home codes is an unnecessary administrative burden. Recommend reducing the number of categories and removing requirements for geospatial location of non-Native homes and other non-reportable buildings.

Response: The current categories for home types were reviewed with Area staff. The consensus was that use of the current options is not burdensome. Some Areas have more of the home types than others. It was never the expectation that the SFC Program will document the geospatial location of non-Native homes and non-reportable buildings. Added language in Appendix D to note that geospatial locations are not needed for non-reportable buildings and non-Tribal homes.

32. Comment: The standards presented in Appendix E reference minimum water supply standards for undeveloped countries published by the World Health Organization, and do not reflect the average daily usages of an American household of 300 gallons per day. Homes with water sources that produce as little as 31 gallons per capita per day are not deemed deficient.

Response: The reference points used for water usage in the Appendix E deficiency level examples were based on the statutory language of the IHClA. Homes with water sources that produce 31 gallons per capita per day can receive a DL 2, which is a significant capital improvement need and qualifies as a deficiency. DL 2 projects can and do get funded in Areas once higher-ranking projects have been addressed.

Category 2: Recommendations for which the HQ SFC Program reached out to Area staff to gather input

The following consultation comment was considered when developing *Recommendation A: SDS Scoring Methodology*

33. Comment: The current capital cost scoring weight is flawed and contributes to lower DL and (Health Impact) HI scored projects receiving funding ahead of those with higher DL and HI scores. Recommend an assessment of the scoring weight, as also recommended by GAO.

Response: The HQ SFC Program reviewed the current scoring weights with Area staff. Potential scoring framework alternatives were developed and analyzed for their effectiveness in addressing the issue of feasible high-DL projects never reaching the funding range. A new scoring framework was selected that raises the priority of high-DL projects while still keeping the current proportional weight of scoring categories other than DL and capital cost. The SDS Guide has been updated to reflect this adjustment.

The following comments were considered when developing *Recommendation B: Allowable Unit Cost Methodology*

34. Comment: A systematic approach and schedule for updating unit cost caps is critical and should not be left to discretion of the SFC Director. Recommend creating additional geographic areas to reflect cost variations, utilize Army Corps of Engineers cost information as a basis for allowable costs, and set the allowable costs for DL 3 projects the same as DL 4. Additionally, allowable costs for DL 5 projects should reflect the gross historical costs to pipe a community.

Response: The process for developing and updating allowable unit costs was reviewed with Area staff. A proposal was developed to move the Program toward the use of more local, actual cost data collected by IHS, Tribes, and tribal organizations. Until such time that we have the data necessary to adjust the methodology, the current approach will continue to be used. Therefore, no changes are proposed for the SDS Guide at this time. Mechanisms will be established to facilitate the gathering of necessary data for future changes.

35. Comment: Homes in remote areas can be very expensive to serve. Establishing an arbitrary cost cap means that these communities will never be provided with essential public health services. IHS should change the unit cost cap.

Response: The current allowable unit costs are not developed arbitrarily. A methodology is used to develop these costs based on cost indices used by the IHS Facilities program and HUD. The process for developing and updating allowable unit costs was reviewed with Area staff. A proposal has been developed to move the Program toward the use of more local, actual cost data. See response to #34 above.

36. Comment: The current regulatory structure does not serve our unserved communities. Request that caps on unit costs be waived for communities that remain without piped sewer and water service.

Response: See response to #34 above. While IHS intends to keep using an allowable unit cost, we intend to transition the development of those allowable costs toward the use of more local, actual cost data.

37. Comment: Allowable unit costs should consider local cost policy in addition to local conditions - in other words, if local policy (construction standards, regulations, taxes, etc.) raises costs, the allowable unit cost should not necessarily be higher. It may be appropriate to expect higher cost localities to participate with their own funding to offset the effect of their own policies.

Response: The process for developing and updating allowable unit costs was reviewed with Area staff. See response to #34 above. Areas generally determine whether local fees, taxes, and assessments are eligible for IHS funding, in accordance with the Criteria Document. Certain requirements may not be eligible if they do not meet SFC Program Criteria. DSFC HQ staff are available to discuss unique situations.

38. Comment: Appendix B says that "the indices and methodology used to develop the total allowable unit cost figures may be modified at the discretion of the Director of the Division of Sanitation Facilities Construction". SFC should consult with tribes prior to making alterations rather than exercising unilateral authority.

Response: See response to #34 above. The quoted statement was determined to be unnecessary and deleted from the SDS Guide. The HQ Program updates the allowable unit costs periodically using the current methodology, but changes to the methodology itself will be addressed in the context of future guidance document updates.

39. Comment: How is the methodology in determining the total allowable unit cost related to the actual cost to provide sanitation facilities? Of the 37 States/Geographical locations noted in Table B-2, some states fall below both the average and median allowable unit costs, despite having the largest reservation land bases in the country, with many very remote communities with very high construction costs for community water infrastructure. The IHS should consider other factors in the methodology.

Response: See response to #34 above.

40. Comment: How is the percentage of the total allowable unit cost by type of facility and project deficiency level determined? For DL 5, the percentage of the Total Allowable Unit Cost is 50% for water costs and 50% for sewer costs. Homes on some reservations are located in very rural environments where wastewater facilities are predominantly on-site septic tanks and drainfields. These costs are typically very low. On the other hand, water costs can be very expensive due to a variety of factors. Why can't the overall Total Allowable Unit Cost be allowed for the project, regardless of facility type?

Response: The allowable unit cost (AUC) is developed for each state to represent the cost to construct all water, sewer, and solid waste facilities for a typical home. Allowing projects to use the full AUC regardless of facility type essentially allows twice the AUC to be spent at each home, as water facilities and sewer facilities are typically provided through separate projects. No change is proposed for the SDS Guide at this time, but as noted previously, the SFC Program intends to move toward the use of more local, actual cost data to establish AUCs.

41. Comment: Splitting the allowable unit cost evenly between water and wastewater facilities as indicated in Table B-1 appears arbitrary. Some IHS Areas much higher water costs than wastewater. Recommend allowing different splits.

Response: See response to #40 above. No change is proposed for the SDS Guide at this time, but the SFC Program intends to move toward the use of more local, actual cost data to establish AUCs.

The following comments were considered when developing Recommendation C: Needs Identification and Project Planning

42. Comment: The requirement of providing a cost estimate with an accuracy range of +/- 10% at the time of entering an SDS project is problematic and unnecessary. Recommend allowing greater uncertainty and a process to provide additional funding if estimates come up short.

Response: The planning and design effort required to list projects on SDS was reviewed with Area staff. No changes were made to the requirements for a project that is designated as Ready to Fund. The accuracy goal of +/-10% was determined to be necessary and attainable. See response to #43 below for additional detail on project planning requirements.

43. Comment: The requirement to update projects that are not in the fundable range every three years is an unreasonable burden. Recommend allowing update of infeasible projects and feasible projects that are DL 1 or 2 every 5 years.

Response: The planning and design effort required to list projects on SDS was reviewed with Area staff. A proposal was developed to create a separate tier of projects to accommodate those that do not have enough planning work to identify a solution within the accuracy goal of +/-25%, but the need is still recognized as a legitimate deficiency for reporting purposes. Projects in this tier will not have specific requirements for updating. The SDS Guide will be revised to reflect this updated project structure. Clarification has also been added for the use of negative points under the Other Considerations scoring category when projects are not considered ready by the Tribe.

44. Comment: Define fundable range as 125% of the previous year funding allocated through SDS, not the total including contributions from all parties.

Response: The planning and design effort required to list projects on SDS was reviewed with Area staff. See response to #43 above. Using both IHS Regular and contributed funds to determine the potential funding range ensures all projects with potential for funding are ready to fund.

The following comments will be clarified under Recommendation D: Area Specific Follow-up Requested

45. Comment: Request clarification of whether federally recognized Tribes that are located inside the jurisdictional boundary of another federally recognized Tribe are eligible to submit projects and attach priority scoring to those projects.

Response: This issue is specific to one IHS Area, and it was discussed with Area staff. The SFC Program consults annually with each Tribe to develop the inventory of sanitation deficiencies. Tribes may submit their own projects or agree to be represented by a duly authorized tribal organization; SFC Program staff will work with any of these arrangements. Area staff will follow up with Tribes that have particular concerns.

46. Comment: The Operation and Maintenance (O&M) capability score currently reflects the ability of the O&M organization, but should also consider the operability of any specific project (i.e. the operational cost of projects and the financial ability of the organization to take them on).

Response: This comment was reviewed with Area staff. The O&M score is not designed to change based on the specific project. If there are unusual circumstances where a project is created in SDS that the tribal utility is unable/unwilling to support if constructed, but the Tribe still wants the project on

the list to represent the need, then negative points should be applied under the Other Considerations scoring category to prevent the project from being funded.

Category 3: Recommendations that conflict with the SFC Program's statutory requirements and/or fundamental policy decisions

47. Comment: There is no basis in P.L. 86-121 or P.L. 94-437 (as amended) to exclude Indian homes from eligibility if they are in communities of more than 10,000 people and less than 50% tribal members. The IHCA states that it is in the interest of the U.S. that all Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems and sanitary sewage disposal systems as soon as possible.

Response: IHS does not exclude Indian homes from eligibility if they are in communities of more than 10,000 and/or less than 50% eligible members. IHS can provide on-site improvements for these homes (e.g. a septic tank/drainfield system or a water service line to connect to a community water main). An agency's interpretation of its authorizing statutes is inherently authorized and necessary for the administration of those statutes. IHS's longstanding interpretation of the relevant statutes is reasonable and supported by the statutory objectives as well as the purpose for which its appropriations are provided.

48. Comment: Projects should not be eliminated from consideration of funding because they are not an existing deficiency or predicted to fail immediately. Recommend adding threatened infrastructure as a category for eligible funding.

Response: See response to #6 above.

49. Comment: Section 4.h.(2) discusses the non-eligibility of predictive needs. Consideration should be made for critical components of a tribal sanitation system, which would be catastrophic to continuity of service or the risk of public health should failure occur.

Response: See response to #6 above.

50. Comment: Septic system failures, in many cases, are non-predictive by specific households. However, trending data for the typical number of failures per year for a tribe should be available and could be used to predict an anticipated need. Although this would be inconsistent with the SDS HITS approach of defined homes by project, it seems that for septic system replacement projects, an exception is warranted.

Response: Predicting septic failures cannot be an eligible need specifically because the need cannot be tied to specific homes. IHS reports the existing need to Congress in terms of projects that serve specific homes.

51. Comment: As written in the SDS Guide, the requirement to obtain prorated contributions for all ineligible units could leave critical projects stalled for an indefinite period. Consideration should be given to allowing some percentage of ineligible units to be served with IHS funds as "incidental service" within the project scope.

Response: Since the inception of the IHS SFC Program nearly 60 years ago, the IHS has consulted with and encouraged the participation of Tribes, States, other federal agencies, local governments, non-profits and other potential stakeholders in all phases of SFC projects. Collaborative sanitation projects

among IHS, Tribes, project participants, contributors and other stakeholders is the original tenet for the SFC program. All SFC projects are collaborative projects initiated by tribal request and requiring participation by, contributions from, and coordination among, the stakeholders. This approach helps ensure that communities are jointly engaged in the development of projects and that the limited funds appropriated for the Program expressly benefit Tribal homes in need of sanitation improvements. Advance planning prior to the appropriation of federal resources is essential to ensure prorated contributions for all ineligible units are received/confirmed prior to the allocation of federal funds.

52. Comment: Current restrictions on non-residential users are too restrictive. Recommend allowing additional administrative offices, schools, clinics/health facilities and other similar facilities be included as eligible in conjunction with nearby homes.

Response: See response to #51 above. There are a variety of ways that contributions can be provided: direct funding from the users, from a third-party funding agency (e.g. EPA), through in-kind contributions of materials and/or services to support the project, or others. Advance planning prior to the appropriation of federal resources is essential to ensure prorated contributions for all ineligible units are received/confirmed prior to the allocation of federal funds. Additional detail has been added to the SDS Guide to clarify these opportunities for contributions.

53. Comment: In some cases, the Equivalent Dwelling Unit (EDU) approach may not truly represent the cost to serve the ineligible units. As an example, there may be no need to upsize a water main replacement of a failing line based on the added demand of the ineligible units, making the project cost the same regardless of whether all the units are eligible or not.

Response: There may not be an incremental cost associated with improving service to ineligible system users, but since the ineligible users have the same need, and the project is addressing their need, there is a resulting requirement to fund the "pro-rata cost of improvements in these communities" per the Criteria Document (Ch. 5, Section V).

54. Comment: Opposed to IHS decision to implement the FY2018 SFC appropriation using the premise that some communities are "non-Indian". Reference 25 USC 1632 language that it is the interest/policy of the U.S. that all Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems and sanitary sewage disposal systems as soon as possible. Requiring communities to identify sources of funds for "ineligible costs" places significant regulatory burden on our ability to address the sanitation crisis in our native communities.

Response: See response to #51 above. Indian communities are defined as those that have >50% AI/AN population. The percentage of American Indians or Alaska Natives residing in the community determines the type of facilities that the SFC Program can provide but does not relate to whether ineligible homes and buildings must contribute a pro-rata share to the project. Contributions are required to fund the pro-rata cost of improvements for ineligible homes and buildings in all cases.

55. Comment: Requiring contributions for non-Indian/non-residential users in Indian communities conflicts with P.L. 86-121, which allows "Indian communities" to be served. Remote communities do not have the resources to provide contributions. IHS should provide the full cost of facilities in these communities.

Response: See responses to #51 and #52 above. The SFC Program can work with a variety of funding partners and can assist communities with identifying potential sources of contributions. Advance planning prior to the appropriation of federal resources is essential to ensure prorated contributions

for all ineligible units are received/confirmed prior to the allocation of federal funds. The contribution requirement is premised on and consistent with 42 U.S.C. § 2004a(3).

56. Comment: In Table 4, under the category for "Likely Health Impact", the guidance makes reference to the EPA SDWA public notification rules. Recommend making those public notification rules a standing practice for all levels of Health Impact when appropriate.

Response: The SFC Program has no authority to require Tribes to publicly notify communities of their deficiencies. However, SFC staff will continue to work in partnership with Tribes and local communities to identify and address deficiencies.

57. Comment: Some IHS Areas deduct contributions toward eligible costs from the total eligible costs, then divide by the number of eligible homes being served. This gives a lower unit cost, resulting in a higher capital cost score. This method allows staff to adequately establish more comparable costs geographically. Recommend continuing with this process.

Response: Procedures for establishing capital cost scoring are set by the Area. The practice described here is different than what the SDS Guide recommends but isn't precluded. No change to the SDS Guide is necessary.

58. Comment: Utilizing an average unit cost as a basis for capital cost point scoring is unrealistic. Recommend allowing an Area-specific scoring structure.

Response: See response to #34 above. No changes are proposed for the SDS Guide at this time, but mechanisms will be established to facilitate the gathering of necessary cost data to support Area-specific scoring structures.

59. Comment: Homes with surfacing septic tank effluent are categorized as "DL3". Even though IHS recognizes the effluent as "partially treated" sewage, the high amount of pathogens should cause concern and be prioritized as a "DL4" given the primary removal of pathogens occurs in the soil and not the septic tank.

Response: The deficiency level category is an infrastructure-focused category. It speaks to the condition of the facilities that provide water, sewer, and solid waste service. In that context, the lack of those facilities is the highest priority (DL 4 for a sewer-only project). If a home has an existing system that is not functioning properly, and effluent is surfacing, then that system is "inadequate" and should be classified as a DL 3 according to the IHClA.

60. Comment: Recommend that water systems that do not comply with the primary standards of the Safe Drinking Water Act should be categorized as a DL4.

Response: See response to #59 above. The IHClA states that the lack of facilities is the highest priority (DL 4 for a water-only project). An existing water supply system that is not in compliance with the requirements of the Safe Drinking Water act has an inadequate or partial water supply that does not comply with applicable water supply laws and should be classified as a DL 3 according to the IHClA.

61. Comment: In Appendix E, S3.3 should indicate sewer system "surcharges" of untreated sewage as systems will not always "discharge" – based on system size and grade.

Response: Surcharges of manholes/collection lines are a DL 2 capital improvement issue if they are not otherwise surfacing or backing up into homes.

62. Comment: Section 6b discusses how design standards relate to deficiency level assignments. Consideration should be given to the potential impact of not meeting the design standard prior to the next SDS update. As an example, if adopted design standards require a second well for all systems, a system being operated on only one well should be a DL3 since the potential loss of the system's lone water source would be a catastrophic event that would interrupt continuity of service over a prolonged period and create a public health risk (hence the reason for the design standard to exist).

Response: The proposed approach in this comment is not consistent with the statutory language for deficiency levels. DL 3 conditions apply for inadequate facilities that currently do not comply with applicable water supply and pollution control laws.

63. Comment: The deficiency level assignment should account for the high impact of meeting new regulatory standards that existing facilities were never designed to meet, potentially qualifying as a new unmet need.

Response: See response to #59 above. Facilities that currently do not comply with applicable water supply and pollution control laws are categorized as a DL 3 per the IHCIA.

64. Comment: The lack of a fully functional washeteria should be defined as a DL 5, as should any project aimed at improving, rehabilitating, or replacing an existing washeteria.

Response: Project deficiency levels are based on the specific impact a project will have on a sanitation deficiency. A project that repairs a washeteria is not going to resolve the DL 5 issue in that community, as the community will still be without a piped water/sewer system when the project is complete. Therefore, the project receives a DL classification based on the deficiency being addressed.

65. Comment: When a water system experiences high secondary MCL exceedances (e.g. iron and manganese), the water cannot be used for consumption or household use. As an example, one local town had iron and manganese concentrations of 50+ ppm. Recommend a DL3 as the minimum for a system that does not meet standards whether they are primary or secondary.

Response: Secondary standards are not health-based standards and are not required to be met under the national primary drinking water regulations. As such, they cannot be considered a compliance issue for "applicable water supply and pollution control laws" (the language for DL 3 under the IHCIA).

66. Comment: Areas should have flexibility to set their own eligibility criteria, but this should not be allowed to disproportionately affect the allocation of funds.

Response: Eligibility criteria are established at the national SFC Program level to ensure an equitable and consistent approach for allocating funds and addressing sanitation deficiencies across all AI/AN homes and communities, as required by the IHCIA and P.L. 86-121.

67. Comment: Create a mechanism to allow a statewide project with an annual estimate of the number of individual homes to be served using Regular funds (for scattered sites in varied urban and non-Native communities).

Response: There is no restriction on creating a "statewide project" that serves existing homes with sanitation facilities with known locations. However, predictive or estimated needs are not eligible bases for funding projects.

68. Comment: IHS Areas should have discretion to develop their own eligibility and priority criteria so as to better align with the unique environments they serve.

Response: See response to #66 above.

69. Comment: IHS policies and practices result in underestimating the true level of need in the SDS. Recommend treating cost for all dwellings that are occupied by or that primarily serve AI/ANs as eligible, and revise reporting guides and tools to fully describe the deficiencies and level of need.

Response: See response to #51 above. IHS annually reports to Congress the sanitation need for AI/AN homes in the form of projects, in accordance with the IHCI A.

70. Comment: The IHS Regular funding allocation methodology should be re-evaluated to expedite delivery of funds and maximize tribal control.

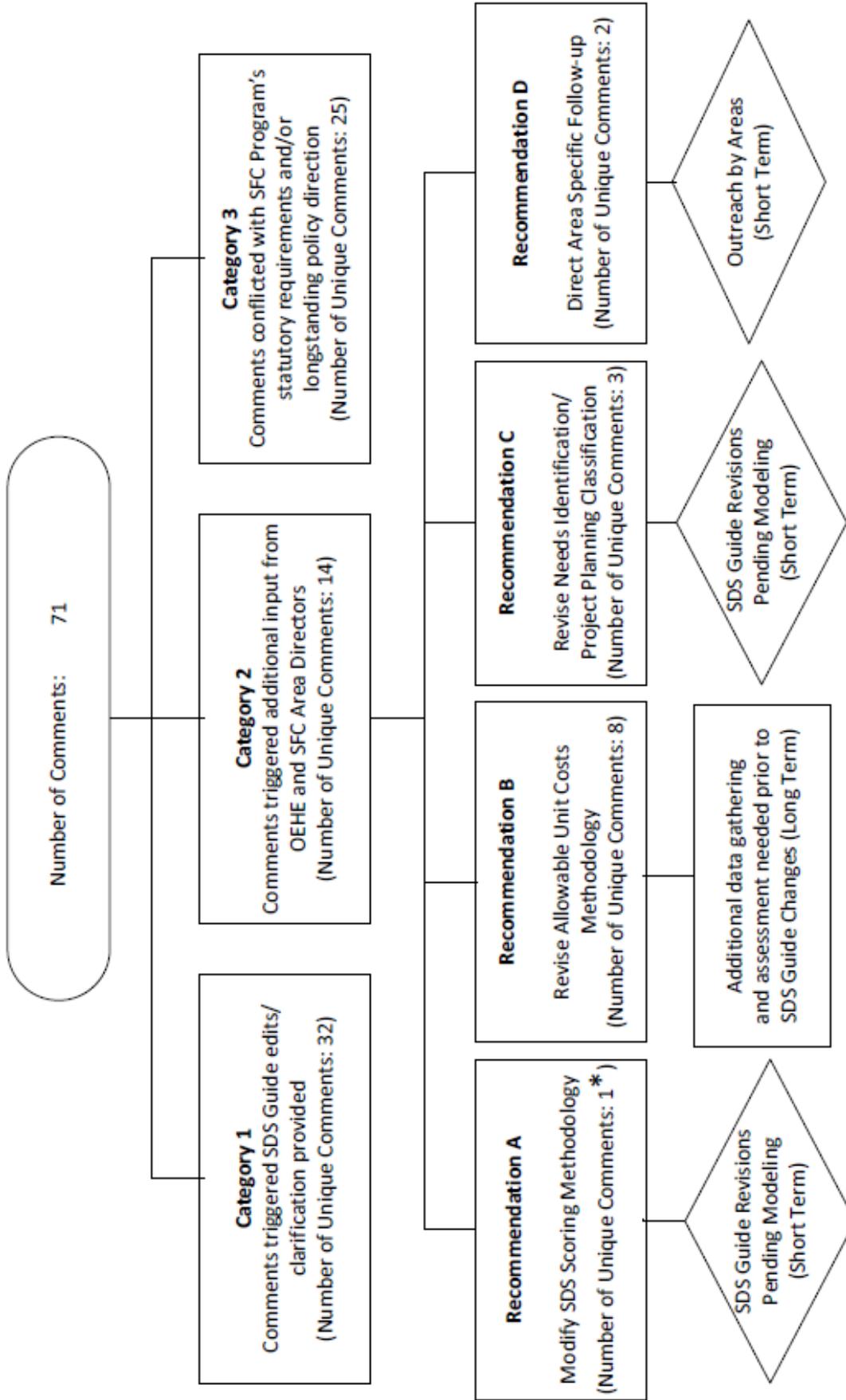
Response: The funding allocation methodology is not changing as a result of the updates to the SDS Guide.

71. The proposed guideline is not tailored for Tribal Self-Governance delivery of the SFC Program. Recommend allowing Area-specific O&M scoring, Area-specific health impact scoring, remove the requirement for solid waste contributions in Native communities, allow Areas to establish how local tribal priority points are assigned, provide a range of additional positive points for Areas to prioritize projects, and include energy-related projects that make systems more affordable.

Response: There is already flexibility in the SDS Guide for Areas and Self-Governance Tribes to establish policies for some of these issues. In accordance with IHCI A the SDS is intended to report sanitation facility needs based on a set of consistent eligibilities and criteria. The proposed SDS Guide requires Areas to augment the national SDS Guide with Area-specific guidelines for the topics listed in Section 4i.

DATE: May 10, 2019

Figure 1: SDS Guide Tribal Consultation Comment Summary and Actions Taken (December 11, 2018)



* Similar recommendation not included in count from May 15, 2018 GAO Report titled *Drinking Water and Wastewater Infrastructure Opportunities Exist to Enhance Federal Agency Needs Assessment and Coordination on Tribal Projects*.