IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

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RADM Michael D. Weahkee
Acting Director
Indian Health Service
5600 Fishers Lane, Mail Stop: 08E86
Rockville, MD 20857

RE: Sanitation Deficiency System (SDS) Guide Tribal Consultation

Dear RADM Weahkee:

On behalf of the Tribal Self-Governance Advisory Committee (TSGAC), we thank you for the opportunity to comment on the proposed updates to the Indian Health Service (IHS) *Sanitation Deficiency System (SDS) - A Guide for Reporting Sanitation Deficiencies for American Indian and Alaska Native Homes and Communities* (commonly known as the "SDS Guide").

While the TSGAC agrees with several of the key updated SDS Guide elements, we have concerns in several areas and offer the following comments and suggestions:

1. The SDS Guide is based upon the *Criteria for Sanitation Facilities Construction Program* document. That document was created in 1999 and last updated in 2003. Due to the age of the document it contains no references to Title V. Updating the SDS Guide without first updating the Criteria document may be premature. The Sanitation Facilities Construction Program should put a priority on updating the Criteria document and submit it for Tribal consultation as soon as possible.
2. *Deficiencies for Department of Housing and Urban Development Homes*. While there is a clear prohibition on serving new homes constructed with grants by the housing programs of the Department of Housing and Urban Development, the SDS guidance adds additional prohibitions for homes constructed under the Section 184 loan guarantee program where the home is not solely titled in the name of the occupant. This seems to be in disagreement with the Office of General Counsel opinion dated 11/20/1961 which states in part: *"The terms "Indian homes, communities and lands" are not defined in the statute and their meaning must therefore be reasonably determined by the Service, having in mind the scope and purposes of the statute. As we have previously advised you this Act is to be broadly and liberally construed for the accomplishment of its purposes."*

   The opinion goes on to say, *"Accordingly it is our view that domestic facilities may be provided for, and transferred to, the occupants of Indian homes even if they do not own the home or the land on which it is constructed"* Additionally, the opinion gives two instances where the home may be Indian-occupied but either owned by the Indian Tribe or a nonprofit organization. In both cases the opinion finds that the provision of sanitation facilities is allowable with certain caveats.

In light of this we believe that homes constructed with Section 184 loan guarantees should be eligible for inclusion in SDS regardless if the title was solely in the name of the occupant, the Tribally Designated Housing Entity or a combination of the two.

3. *SDS Eligibility and Reporting.* There are several areas in the eligibility section of the SDS guidance that are of concern, which impact certain Areas more than others and in which all Areas may not agree on a proposed solution. For example: the Alaska Area has a major issue with requiring a pro rata contribution for the incidental benefit for buildings that IHS deems ineligible for core sanitation projects in Indian communities. While Alaska agrees with the *Communities with Varying Eligibility* limitation of eligibility to communities under 10,000, other Areas strongly oppose that requirement, feeling that the *Communities with Varying Eligibility* section (Section 4(g)) that disallows service to communities with populations over 10,000 and Tribal membership under 50% is unduly restrictive, given that there is no population limit within the public law. In fact, the Indian Health Care Improvement Act (IHCIA) states that "it is in the interest of the United States, and it is the policy of the United States, that **all** Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems as soon as possible."

   The best, and easiest, solution to address these issues is to allow each Area to set its own eligibility criteria, as long as the criteria are in accordance with federal law and regulations. This would allow each Area to address its priority issues and would also be consistent with the tenets of tribal self-governance, which does not require that tribes follow IHS policy, only federal law and regulations. Under this recommendation, the funding for each Area would continue to be distributed according to the national methodology. Areas would implement their respective eligibility criteria after funding was received from that distribution. There is longstanding precedent for this in the Purchased and Referred Care program, in which two IHS Areas have established their own eligibility and funding criteria.

4. *Exceptions.* Section 4(h) allows the listing of projects which may not be eligible for IHS funding provided the costs are coded as ineligible, yet when there are no eligible costs associated with a project it is excluded by IHS Headquarters from the SDS list. Perhaps some additional clarification could be added to this section on the mechanism to add projects that may be ineligible for IHS funding but can still be funded by other agencies such as EPA.

5. *Project Classification - Primary Infrastructure Category.* Section 6(h) does not contain a category for water supply infrastructure. Is this an oversight or will it be included in another listed classification?

6. *Capital Cost.* Section 7(d). GAO recommendation # 3 states: *The Director of IHS should reassess the point distribution across the Sanitation Deficiency System scoring factors as part of its program guidelines update, in light of trade-offs between funding projects that address the most severe sanitation deficiencies and projects that meet other needs*. If IHS desires to comply with this recommendation then it would be appropriate to assess if the current capital cost scoring mechanism is contributing to lower Deficiency Level and Health Impact projects being funded ahead of those with higher DL and HI scores. A greater emphasis on DL and HI scores and a smaller emphasis on the remaining factors would help to alleviate the situation.

7. *Local Tribal Priority*. Section 7(e). A clarification should be made regarding whether or not all federally recognized tribes are eligible to submit projects and attach priority points to those projects, even though the tribe may be located within the jurisdiction of another tribe.

8. *Total Score/Tiebreakers*. We recommend involving the Area's Tribal Advisory Committee in the decision making process on how to break projects with tied scores and not leave the decision solely to the Area SFC Director.

9. *Ready-to-Fund.* Since the December 2017 draft of the SDS Guidance, the language for Ready-to-Fund (RTF) projects has changed to require "completed design" rather than "preliminary design". The Preliminary Engineering Report (PER) is currently in use for SDS projects and was designed with achieving RTF status in mind. Because the phrase "completed design" could be construed as a term-of-art and potentially exclude use of a PER, we recommend updating this section to simply require a PER and using neither completed nor preliminary design terminology.

10. *Appendix B.* In Appendix B, a reservation of authority for the SFC Director appears: "The indices and methodology used to develop the total allowable cost figures may be modified at the discretion of Director of the Division of Sanitation Facilities Construction." We are concerned that this could result in changes to allowable unit costs that do not follow the SDS guide standards. When changes in indices or methodology need to occur, SFC should consult with tribes prior to making alterations, rather than exercising unilateral authority.

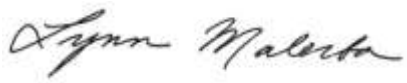
11. *Appendix E*. There are several issues that we have with the Deficiency Level (DL) descriptions in Appendix E. Public Law 94-437 defines a Deficiency Level 4 as: *an Indian tribe or community with a sanitation system which lacks either a <u>safe</u> water supply system or a sewage disposal system.* We strongly believe that the wording in this section is critically important. IHS's longstanding interpretation of this section is that homes with water or sewer systems which were considered unsafe are DL4. This would include homes that did not comply with the primary drinking water standards of the Safe Drinking Water Act. We agree with that longstanding interpretation.

    The new interpretation is that these homes are DL3, because the home *does not comply with applicable water supply and pollution control laws.* There are many instances where a home's water supply may not comply with water supply laws, yet the water is safe to drink. For example, a water system that lacks adequate pressure or does not meet current design standards. However, when water does not comply with the primary standards of the Safe Drinking Water Act, it should be categorized as a DL4. Also in Appendix E, homes with water sources that produce less than 5 gallons per capita per day are listed as DL4. Homes with water sources that produce less than 30 gallons per capita per day are listed as DL3. Homes with water sources that produce as little as 31 gallons per capita per day are not found to have a deficiency. These are figures from the World Health Organization and give minimum water supply guidelines for undeveloped countries. The average home in the United States uses around 300 gallons per day, and IHS should endeavor to see that Tribal homes are served at the same levels as the rest of the United States. Another example from Appendix E, homes with surfacing septic tank effluent are categorized as DL3. Even though IHS defines this as "partially treated" sewage, the high amount of pathogens in septic tank effluent should cause concern and be a priority by categorizing these projects as DL4. The primary removal of pathogens occurs in the soil and not the septic tank.

Finally, the TSGAC requests 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.

In closing, we thank you for the opportunity to participate in the consultation process. We look forward to working with you on this critical issue as we all endeavor to raise physical, mental, social, and spiritual health of American Indians and Alaska Natives to the highest level. If you have any questions or would like to discuss these comments, please contact me at lmalerba@moheganmail.com.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe of Connecticut
Chairwoman, IHS TSGAC

cc: Jennifer Cooper, Director, Office of Tribal Self-Governance, IHS
TSGAC Members and Technical Workgroup