



23rd NAVAJO NATION COUNCIL LEGISLATION SPONSORSHIP WITHDRAWAL

I, Walter Phelps, Primary
Sponsor of proposed legislation hereby withdraw my
sponsorship of the proposed legislation. The legislation
tracking number is 0299-18.

If there are any co-sponsors, they may re-sponsor the same
bill by beginning a new legislation.

SPONSOR SIGNATURE:

Walter Phelps

DATE:

9/27/18

LEGISLATIVE SUMMARY SHEET

Tracking No. 0299-18

DATE: September 4, 2018

TITLE OF RESOLUTION: AN ACTION RELATING TO RESOURCES AND DEVELOPMENT COMMITTEE AND NAABIK'ÍYÁTI' COMMITTEE; COMMENTING ON THE INDIAN HEALTH SERVICES SANITATION DEFICIENCY SYSTEM (SDS) - A GUIDE FOR REPORTING SANITATION DEFICIENCIES FOR AMERICAN INDIAN AND ALASKA NATIVE HOMES AND COMMUNITIES

PURPOSE: The purpose of this resolution is to provide comments on the Indian Health Services Sanitation Deficiency System Guide.

This written summary does not address recommended amendments as may be provided by the standing committees. The Office of Legislative Counsel requests each Council Delegate to review each proposed resolution in detail.

5-DAY BILL HOLD PERIOD: Navy
Website Posting Time/Date: 5:30pm 9/15/18
Posting End Date: 9/16/2018
Eligible for Action: 9/11/2018

Resources & Development Committee
Thence
Naa'bik'iyáti' Committee

PROPOSED STANDING COMMITTEE RESOLUTION
23rd NAVAJO NATION COUNCIL—FOURTH YEAR, 2018

INTRODUCED BY



Primary Sponsor

TRACKING NO. 0299-18

AN ACTION

RELATING TO RESOURCES AND DEVELOPMENT COMMITTEE AND
NAABIK'ÍYÁTI' COMMITTEE; COMMENTING ON THE INDIAN HEALTH
SERVICES SANITATION DEFICIENCY SYSTEM (SDS) - A GUIDE FOR
REPORTING SANITATION DEFICIENCIES FOR AMERICAN INDIAN AND
ALASKA NATIVE HOMES AND COMMUNITIES

WHEREAS:

- A. The Navajo Nation established the Resources and Development Committee (“RDC”) as a Navajo Nation Council standing committee and as such empowered RDC with oversight of land, environmental protection and cultural resources and authority to review and recommend resolutions to the Naabik'iyáti Committee and Navajo Nation Council to accomplish or impact the Committee purpose. See 2 N.N.C. §§ 164 (A)(9), 500 (C), 501 (B)(4)(a) (2015); See also CO-45-12.
- B. The Navajo Nation established the Naabik'iyáti' Committee as a Navajo Nation Council standing committee and as such empowered Naabik'iyáti' Committee to coordinate with all committees, Chapters, branches and entities concerned with all Navajo appearances and testimony before Congressional committees, and departments of the United States government. See 2 N.N.C. §§ 164 (A)(9), 700 (A), 701 (A)(8) (2015); See also CO-45-12.
- C. The Navajo Nation has a government-to-government relationship with the United States of America, Treaty of 1868, Aug. 12, 1868, 15 Stat. 667.

1 D. The Acting Director of the Indian Health Services is conducting tribal consultation on
2 the Sanitation Deficiency System (“SDS”) Guide and has extended the comment
3 period to September 14, 2018. The SDS Guide is used to collect data and report the
4 current sanitation deficiencies affecting American Indian and Alaska Native homes
5 and communities.

6 E. The Navajo Nation provides the following comments on the Sanitation Deficiency
7 System Guide as stated in the attached **Exhibit A**.

8
9 **THEREFORE, BE IT RESOLVED:**


10 A. The Navajo Nation hereby provides the comments on the Sanitation Deficiency
11 System Guide as stated in the attached **Exhibit A**.

12 B. The Navajo Nation hereby authorizes the President of the Navajo Nation, and the
13 Navajo Nation Washington Office, the Speaker of the Navajo Nation Council and
14 their designees, to advocate the Navajo Nation’s position and comments on the
15 Sanitation Deficiency System Guide.



MEMORANDUM

TO : Whom It May Concern

FROM : 
Honorable Walter Phelps
23rd Navajo Nation Council

DATE : August 31, 2018

SUBJECT : PUBLIC COMMENT ON I.H.S. S.D.S. POLICY

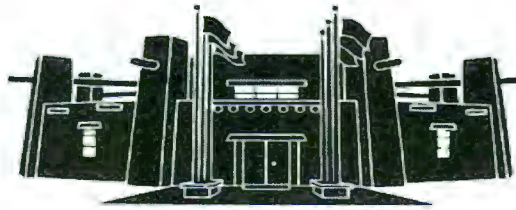
The Indian Health Services (I.H.S.), Office of Environmental Health & Engineering (O.E.H.E.) administers funds allocated by Congress under P.L. 86-121.

The P.L. 86-121 funds is authorized by Congress to provide funding for infrastructure such or clean potable water, sewer systems, lagoons, solid waste facilities and etc.

Since the implementation, the I.H.S. has developed an “in-house administrative policy” referred to as the Sanitation Deficiency System (S.D.S.). This policy was intended as an administrative mechanism of scoring and qualifying proposed projects requested by tribal communities. However, along the way the S.D.S. seems to have evolved into an official policy document and mandated on all incoming tribal requests. The S.D.S. as applied by I.H.S. – O.E.H.E. now discourages otherwise viable projects worthy of funding based on need. Need meaning isolation, poor and/or contaminated water quality, etc. Now the S.D.S only prioritizes projects which are low cost and if cost is prohibitive the project score is determined as “infeasible”.


This policy is discriminatory in many aspects and should not be used as a mandatory tool.

Cc: Files



MEMORANDUM

TO: Honorable Walter Phelps
23rd Navajo Nation Council Delegate

FROM: 
Candace French, Attorney
Office of Legislative Counsel

DATE: September 4, 2018

RE: AN ACTION RELATING TO RESOURCES AND DEVELOPMENT COMMITTEE AND NAABIK'ÍYÁTI' COMMITTEE; COMMENTING ON THE INDIAN HEALTH SERVICES SANITATION DEFICIENCY SYSTEM (SDS) - A GUIDE FOR REPORTING SANITATION DEFICIENCIES FOR AMERICAN INDIAN AND ALASKA NATIVE HOMES AND COMMUNITIES

Per your request, attached is the above-reference proposed resolution and associated legislative summary sheet. Based on existing law, the resolution drafted is legally sufficient. However, as with all legislation, the proposed resolution is subject to review by the courts in the event of a challenge.

The Office of Legislative Counsel recommends the appropriate standing committee(s) reviews based on the standing committees powers outlined in 2 N.N.C. §§ 301, 401, 501, 601, and 701. Nevertheless, "the Speaker of the Navajo Nation Council shall introduce [the proposed resolution] into the legislative process by assigning it to the respective oversight committee(s) of the Navajo Nation Council having authority over the matters for proper consideration. 2 N.N.C. § 164(A)(5).

Please review the proposed resolution to ensure it is drafted to your satisfaction. If you approve, please sign as "Primary Sponsor" and submit it to the Office of Legislative Services where the proposed resolution will be given a tracking number and referred to the Office of the Speaker. If the proposed legislation is unacceptable to you, please contact me at the Office of Legislative Counsel and advise me of the changes you would like to make to the proposed resolution.

THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW PUBLICATION



LEGISLATION NO: _0299-18_

SPONSOR: Walter Phelps

TITLE: An Action Relating To Resources And Development Committee And NAABIK'YATI' Committee; Commenting On The Indian Health Services Sanitation Deficiency System (SDS) – A Guide For Reporting Sanitation Deficiencies For American Indian And Alaska Native Homes And Communities

Date posted: September 5, 2018 at 5:30 PM

Digital comments may be e-mailed to comments@navajo-nsn.gov

Written comments may be mailed to:

Executive Director
Office of Legislative Services
P.O. Box 3390
Window Rock, AZ 86515
(928) 871-7586

Comments may be made in the form of chapter resolutions, letters, position papers, etc. Please include your name, position title, address for written comments; a valid e-mail address is required. Anonymous comments will not be included in the Legislation packet.

Please note: This digital copy is being provided for the benefit of the Navajo Nation chapters and public use. Any political use is prohibited. All written comments received become the property of the Navajo Nation and will be forwarded to the assigned Navajo Nation Council standing committee(s) and/or the Navajo Nation Council for review. Any tampering with public records are punishable by Navajo Nation law pursuant to 17 N.N.C. §374 *et. seq.*

**THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW SUMMARY**

LEGISLATION NO.: 0299-18

SPONSOR: Honorable Walter Phelps

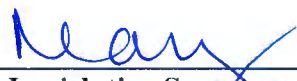
TITLE: An Action Relating to Resources And Development Committee And NAABIK'IYATI' Committee; Commenting On The Indian Health Services Sanitation Deficiency System (SDS) – A Guide For Reporting Sanitation Deficiencies For American Indian And Alaska Native Homes And Communities

Posted: September 5, 2018 at 5:30 PM

5 DAY Comment Period Ended: September 10, 2018

Digital Comments received:

| | |
|------------------------------|-------------|
| Comments Supporting | <i>None</i> |
| Comments Opposing | <i>None</i> |
| Inconclusive Comments | <i>None</i> |



**Legislative Secretary II
Office of Legislative Services**

9/11/2018 8:15am
Date/Time

**RESOURCES AND DEVELOPMENT COMMITTEE
23rd NAVAJO NATION COUNCIL**

FOURTH YEAR 2018

COMMITTEE REPORT

Mr. Speaker,

The **RESOURCES AND DEVELOPMENT COMMITTEE** to whom has been assigned:

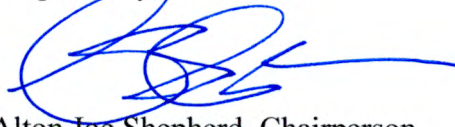
Legislation # 0299-18: An Action Relating to Resources and Development Committee and Naabik'Iyati Committee; Commenting on the Indian Health Services Sanitation Deficiency System (SDS) – A Guide For Reporting Sanitation Deficiencies for American Indian and Alaska Native Homes and Communities.
Sponsor: Walter Phelps

Has had it under consideration and reports a **DO PASS** with one amendment;

Delete Exhibit "A" and insert the attached as the new **Exhibit "A"** for submission to the federal agency.

And thereafter referred the legislation to Naabik'Iyati Committee.

Respectfully submitted,



Alton Joe Shepherd, Chairperson
Resource and Development Committee of
the 23rd Navajo Nation Council

Date: September 12, 2018 - Regular Meeting

Meeting Location: Navajo Nation Council Chambers, Window Rock, Arizona

MAIN MOTION: Jonathan Perry S: Benjamin Bennett V: 3-0-1 (CNV)

YEAS: Benjamin Bennett, Jonathan Perry and Walter Phelps

NOT VOTING: Leonard Pete (Temporarily stepped out of the meeting)

EXCUSED: Davis Filfred

AMENDMENT # 1

MOTION: Jonathan Perry Second: Walter Phelps Vote: 3-0-1 (CNV)

YEAS: Benjamin Bennett, Jonathan Perry and Walter Phelps

NOT VOTING: Leonard Pete

EXCUSED: Davis Filfred

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 we agree with several of the key updated SDS Guide elements, the Resources and Development Committee of the Navajo Nation Council has 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 were 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 and 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 safe 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 US 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.
12. The area known as the Former Bennett Freeze (FBF), is an area of the Navajo Nation once placed under a development ban on approximately 1.5 million acres. The Federal Government placed the ban in order to promote negotiations over a land dispute between the Navajo and the Hopi tribes. The freeze on development included a ban on basic home repairs such as fixing roofs, building houses, constructing gas and water lines, and repairing roads. The ban affected numerous Navajo people and families and continues to affect the growing number of Navajo people residing in the FBF area through a continued lack of habitable housing, electricity, and running water. The SDS Guide should make special considerations to tribal lands and areas recovering from detrimental federal actions such as the FBF area.

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.

RESOURCES AND DEVELOPMENT COMMITTEE

**Regular Meeting
September 12, 2018**

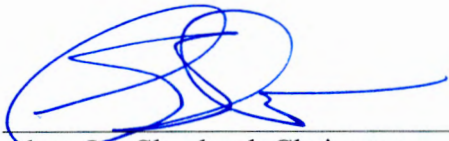
**ROLL CALL
VOTE TALLY SHEET:**

Legislation # 0299-18: An Action Relating to Resources and Development Committee and Naabik'Iyati Committee; Commenting on the Indian Health Services Sanitation Deficiency System (SDS) – A Guide For Reporting Sanitation Deficiencies for American Indian and Alaska Native Homes and Communities. *Sponsor: Walter Phelps*

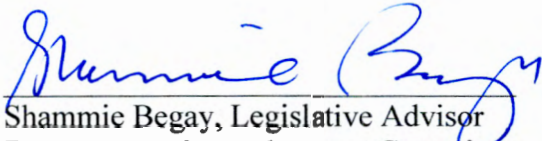
MAIN MOTION: Jonathan Perry S: Benjamin Bennett V: 3-0-1 (CNV)
YEAS: Benjamin Bennett, Jonathan Perry and Walter Phelps
NOT VOTING: Leonard Pete (Temporarily stepped out of the meeting)
EXCUSED: Davis Filfred

AMENDMENT # 1

MOTION: Jonathan Perry Second: Walter Phelps Vote: 3-0-1 (CNV)
YEAS: Benjamin Bennett, Jonathan Perry and Walter Phelps
NOT VOTING: Leonard Pete
EXCUSED: Davis Filfred



Alton Joe Shepherd, Chairperson
Resources and Development Committee



Shammie Begay, Legislative Advisor
Resources and Development Committee