NORTH DAKOTA ADMINISTRATIVE CODE

Supplements 194 through 197

August 1995
September 1995
October 1995
November 1995

Prepared by the Legislative Council staff
for the
Administrative Rules Committee

TABLE OF CONTENTS

TITLE 4

Office of Management and Budget

OCTOBER 1995

CHAPTER 4-06-01

4-06-01-01. Records disposition process - Records retention schedules. The ~~office of management and budget, state records management~~ information services division, will provide each county, city, and park district office with a records retention schedule. The records retention schedules identify and describe record series for each office and provide retention periods based upon the fiscal, legal, administrative, and archival value of the records. ~~Each~~ Upon request, each county, city, and park district office will receive a records disposal report annually to outline exact disposal procedures for records which can be destroyed.

History: Effective January 1, 1988; amended effective October 1, 1995.
General Authority: NDCC 54-46-12
Law Implemented: NDCC 54-46-12

CHAPTER 4-06-02

4-06-02-01. Procedures to modify records retention schedules. ~~The office of management and budget, state records management division, will provide in a records management program manual procedures to add, change, or delete record series on records retention schedules. This procedure must be utilized by any county office to add, change, or delete record series on county office records retention schedules.~~ The following procedures must be used by county, city, and park district offices to modify their records retention schedules:

1. Adding records series to retention schedule.

   a. The office shall complete all parts of the record series description with the exception of the record control number, legal value, fiscal value, and historical value.

   b. The office shall send the completed record series description to information services division. The records management task force shall appraise the record series for legal, fiscal, and historical value.

   c. A records retention schedule must be returned to the office for department approval. The director shall sign the departmental approval section of the records retention schedule and return it to information services division.

   d. Information services division shall obtain approval of the records retention schedule from the records management task force.

   e. The new record series must be included on the next records disposal report for the office. The office shall receive an updated records retention schedule with descriptions from information services division.

2. Deleting records series from retention schedule.

   a. The office shall complete the following sections of the record series description:

      (1) Department, division, and location.

      (2) Record series title. A description is not necessary.

      (3) Record control number.

      (4) Mark "DELETE FROM SCHEDULE" under the record series title and include one of the following explanations:

         (a) All records have been destroyed.

(b) All records have been transferred to the state archives.

(c) All records have been transferred, with the name of the receiving office.

(5) Name and telephone number of the person completing the record series description.

(6) Date the record series description was completed.

b. The office shall send the completed record series description to information services division.

c. A records retention schedule must be sent to the office for department approval. The director shall sign the departmental approval section of the records retention schedule and return it to information services division.

d. The record series may no longer be included on the records disposal report for the office. The office shall receive an updated records retention schedule with descriptions from information services division.

3. Changing record series on a retention schedule.

a. Information services division must be notified when any of the following facts about a record series change:

(1) The title or description.

(2) The administrative, legal, fiscal, or historical value.

(3) The record becomes or is no longer the original record.

(4) The record becomes or is no longer confidential.

b. The following steps must be used to change an existing record series description:

(1) The office shall complete the following sections of the record series description:

(a) Department, division, and location.

(b) Record series title. A description is not necessary, unless this is the area to be changed.

(c) Record control number.

(d) Any portion of the form that is to be changed.

(e) Name and telephone number of the person completing the record series description.

(f) Date the record series description was completed.

(2) The office shall send the completed record series description to information services division.

(3) A records retention schedule shall be sent to the office for department approval. The director must sign the departmental approval section of the records retention schedule and return it to information services division.

(4) Information services division shall obtain appropriate appraisal and approval from the records management task force.

(5) The updated record series must be included on the records disposal report for the office. The office shall receive an updated records retention schedule with descriptions from information services division.

History: Effective January 1, 1988; amended effective October 1, 1995.
General Authority: NDCC 54-46-12
Law Implemented: NDCC 54-46-12

CHAPTER 4-06-03

4-06-03-01. Records disposal procedures. Each county, city, and park district office will dispose of records as designated in the records disposal report. All nonconfidential records may be disposed of by landfill or recycling. All confidential records must be shredded or burned.

Record series must not be disposed of prior to the time approved by the ~~office of management and budget, state records management~~ information services division. If a situation warrants early disposal of a record, the county, city, or park district officer may petition the ~~office of management and budget, state records management~~ information services division, for an early disposal of that series.

~~The office of management and budget, state records management division, will provide, in a records management program manual, procedures to utilize for early disposal of record series in any manner not listed on county office records retention schedules.~~ The following procedures must be used by county, city, and park district offices to complete a records disposal.

1. Initial records disposal.

   a. Information services division shall provide the office with a records disposal report that identifies all record series located in the office.

   b. The office shall complete the following items on the records disposal request:

      (1) Department name, address, city, zip code, department approval by the department head or records coordinator, date, and telephone number.

      (2) The storage location of the records.

      (3) The size and volume, in linear inches, of the records to be disposed.

      (4) The record control number from the records disposal report, the title of the record series being disposed, the inclusive dates of the record series, and the total retention period according to the retention schedule. Each record series must be listed.

      (5) Mark the M/F column if the records are being disposed after microfilming.

c. The office shall send the completed records disposal request to information services division.

d. Information services division shall assign a request control number to the records disposal request, review the request, indicate the appropriate action on the records disposal authorization, and return the records disposal request to the office.

e. The office shall destroy the records approved for disposal. The disposal must be completed by the approved method and must be certified by the person disposing the documents. If the record series is confidential, the disposal must be witnessed by one other person. If any record series are to be transferred to the state archives, the records disposal request and the records disposal authorization must accompany the documents being transferred.

f. When the certificate of disposal and certificate of transfer sections have been completed upon disposal or transfer of the records, the office shall detach and file the pink copy from both the records disposal request and the records disposal authorization.

g. The office shall send the remaining copies of all pages of the records disposal request and records disposal authorization to information services division.

h. Information services division shall retain a copy of the request and authorization forms in its files. The state archivist shall also receive a copy of the request and authorization forms.

2. Annual records disposal. After completion of the initial records disposal, the office may utilize an ongoing disposal of obsolete records in compliance with the retention limits established by the records retention schedule.

a. Information services division shall provide the office with an annual records disposal report specifying the exact disposal instructions for each records series retained in the office.

b. The office shall dispose of all records that have satisfied their retention requirements as specified in the disposal report.

c. Records must be disposed in the method approved on the records retention schedule and records disposal report. All nonconfidential records may be disposed of by landfill or recycling. Confidential records must be shredded or

burned. Records identified as archival must be transferred to the state archives.

d. The office shall verify that the information contained on the records disposal report is still current. Any discrepancies must be corrected. New record series must be added and existing record series may be deleted or changed as needed.

e. The office shall complete the certification-schedule review and records disposal and return the certification with the records disposal report to information services division.

3. Early records disposal.

a. The office shall complete the following areas of the records disposal request and send it to information services division:

(1) Department, address, city, and zip code.

(2) Record control number.

(3) Record title.

(4) Inclusive dates of the record series, including the dates of the records for which early disposal is requested.

(5) Total retention, meaning the approved retention period from the records retention schedule.

(6) An explanation in the area beneath each record title of the reason early disposal of that record series is requested.

(7) The department head signs the departmental approval section of the request and completes the date, title, and telephone number.

b. Information services division shall assign a request control number and obtain approval from the records management task force.

c. Information services division shall return the records disposal request and authorization to the office.

d. The office shall then destroy the records approved for disposal. This disposition must be done in an approved manner and must be certified by the person disposing of the documents. If the record series are confidential, the disposal must be witnessed by one other person. If any

records are to be transferred to the state archives, the records disposal request and the records disposal authorization should accompany the documents being transferred.

e. When the certificate of disposal and certificate of transfer sections have been completed upon disposal or transfer of the records, the office shall detach and file the pink copy from both the records disposal request and the records disposal authorization.

f. The office shall send the remaining copies of all pages of the records disposal request and records disposal authorization to information services division.

g. Information services division shall retain a copy of the request and authorization forms in its files. The state archivist shall also receive a copy of the request and authorization forms.

History: Effective January 1, 1988; amended effective October 1, 1995.
General Authority: NDCC 54-46-12
Law Implemented: NDCC 54-46-12

CHAPTER 4-06-04

4-06-04-01. Transfer of records to state archives. ~~The office of management and budget, state records management division, will provide, in a records management program manual, procedures for the transfer to the state archives of records determined to be of archival value. This procedure must be utilized by any county office to transfer all archival record series listed on county office records retention schedules. The county office will contact the state archives when ready to transfer records. Arrangements will be made to have the records retrieved within sixty days. The state archivist shall complete a certification for archival transfer and shall send it to the state records management division after all records have been transferred.~~ The following procedure must be used by any county, city, or park district office to transfer records with archival value to the state archives.

1. Records designated for transfer to the state archives on the records disposal report must be placed in boxes.

2. The state archives shall provide records boxes upon request. Offices that furnish their own containers must use sturdy, uniform-size records boxes, such as Banker's boxes or R-Kive boxes.

3. Records must not be removed from file folders and the existing arrangement of files must not be changed. Boxes must be packed to allow easy removal of files. The office should not stuff boxes or pile extra files horizontally on top of vertical files. File folders may be stacked horizontally if there are not enough to fill the box properly. A box must contain only one record series unless the series is too small to fill a box properly.

4. File inventories, indexes, keys, or other finding aids must be included with the records.

5. All boxes must be labeled in the lower left corner on the front of the box in ink to mark the record series title, records control number from the records retention schedule, and the box number. The file numbers, serial numbers, or alphabetical designations must also be included on the box.

6. The office must contact the state archives when ready to transfer records.

7. Confidential records remain on confidential status when transferred to the state archives. These records are not open for public inspection, except as provided by law.

8. The state archives shall verify on the records disposal report that records requested for transfer have been transferred.

9. The state archivist shall complete a certification for archival transfer and shall send it to the information services division after all records have been transferred. The office shall sign the certificate of disposal section before the forms are returned to information services division.

History: Effective January 1, 1988; amended effective October 1, 1995.
General Authority: NDCC 54-46-12
Law Implemented: NDCC 54-46-12

STAFF COMMENT: Chapters 4-06-05 and 45-06-06 contain all new material but are not underscored so as to improve readability.

CHAPTER 4-06-05
RECORDS CATALOGING

Section
4-06-05-01 Records Cataloging

4-06-05-01. Records cataloging. County, city, or park district offices shall use the North Dakota subject classification system for maintenance of records in subject filing systems.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-12
Law Implemented: NDCC 54-46-12

CHAPTER 4-06-06
REPRODUCTION

Section
4-06-06-01 Reproduction

4-06-06-01. Reproduction. County, city, or park district offices shall follow the guidelines and standards established in the most recent edition of "Standards for Microfilming North Dakota Public Records".

History: Effective October 1, 1995.
General Authority: NDCC 54-46-12
Law Implemented: NDCC 54-46-12

STAFF COMMENT: Article 4-09 contains all new material but is not underscored to improve readability.

ARTICLE 4-09

STATE RECORDS MANAGEMENT

CHAPTER 4-09-01
DEFINITIONS

4-09-01-01. Definitions. Terms used in this article have the same meaning as in North Dakota Century Code section 54-46-02 and for purposes of this article:

1. "Archival records" means those noncurrent public records that are no longer essential to the functioning of the agency of origin and which the state archivist determines to have permanent value for research, reference, or other use appropriate to document the organization, function, policies, and transactions of government.

2. "Confidential record" means a record expressly identified as confidential by law.

3. "Information services division" means the information services division of the office of management and budget.

4. "Nonrecord material" means library and museum material made or acquired and preserved solely for reference and exhibition

purposes, extra copies of documents retained only for convenience of reference, and stocks of publications and of processed documents.

5. "North Dakota subject classification system" means the filing classification system based on subjects created specifically for use in North Dakota state agencies.

6. "Permanent record" means a record with long-lasting administrative, fiscal, or legal value.

7. "Processed document" includes the following:

   a. Brochures or informational pamphlets for distribution.

   b. Rough drafts of letters and memorandums.

   c. Dictation machine tapes, mechanical records, and data tapes which have been transcribed into typewritten or other printed form.

8. "Record inventory" means a complete listing and analysis of all record series maintained by a department or division.

9. "Record series" means a group of related records arranged under a single filing system or kept together as a unit because they deal with a particular subject, result from the same activity, or have a special form (i.e., maps or tapes).

10. "Records management task force" includes the state archivist, state auditor, attorney general, and state records administrator or their designees.

11. "Records retention schedule" means a document that identifies the length of time a record must be retained in active and inactive storage and authorizes the transfer and disposition of all records of a department or division.

12. "Standards for microfilming North Dakota public records" means the manual of standards published and available at information services division for microfilming the records of North Dakota state agencies.

13. "State records administrator" means the director of the office of management and budget or an individual designated by the director.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-10
Law Implemented: NDCC 54-46-10

CHAPTER 4-09-02
RECORDS MANAGEMENT PROGRAM IMPLEMENTATION PROCESS

4-09-02-01. Records management program implementation process. The procedure for implementing a records management program within an executive branch agency begins with the appointment of a records coordinator who is delegated the authority to establish and maintain the records management program. Upon request, information services division shall provide the legislative and judicial branches of state government with records retention schedules and an annual records disposal report. Information services division shall advise and assist the coordinator in the following steps to implement a records management program.

1. A comprehensive records inventory and an analysis of the existing records management program must be completed.

2. Information services division shall submit a written report to the agency head listing each record series found in the agency and any recommendations for the improved maintenance of all records located within an agency. Nonrecord material must not be included on the inventory or retention schedule.

3. A record series description must be completed for each record series identified on the records inventory.

4. The record series descriptions must be submitted to information services division for review and appraisal by the records management task force.

5. A records retention schedule must be developed by information services division based on retention period recommendations from the agency and the records management task force.

6. The records retention schedule must be approved by the agency and the records management task force. This schedule provides guidelines for the disposition process.

7. The initial records disposal must be completed by the agency.

8. Information services division shall provide the agency with an annual records disposal report listing:

   a. All record series located within the agency;

   b. The dates of the records to be transferred to inactive storage;

c. The dates of the records to be microfilmed;

d. The dates of the records to be disposed; and

e. The method of disposal.

9. The North Dakota subject classification system should be implemented to assist the agency with the filing and retrieving of its records.

10. Information services division shall conduct periodic audits in all state agencies that have implemented a records management program.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-10
Law Implemented: NDCC 54-46-04

CHAPTER 4-09-03
PROCEDURE TO MODIFY RECORDS RETENTION SCHEDULES

4-09-03-01. Procedure to modify records retention schedules. The following procedures must be used by state agencies to modify their records retention schedules.

1. **Adding records series to retention schedule.**

   a. The agency shall complete all parts of the record series description with the exception of the record control number, legal value, fiscal value, and historical value.

   b. The agency shall send the completed record series description to information services division. The records management task force shall appraise the record series for legal, fiscal, and historical value.

   c. A records retention schedule must be returned to the agency for department approval. The agency head shall sign the departmental approval section of the records retention schedule and return it to information services division.

   d. Information services division shall obtain approval of the records retention schedule from the records management task force.

   e. The new record series must be included on the next records disposal report for the agency. The agency shall receive an updated records retention schedule with descriptions from information services division.

2. **Deleting records series from retention schedule.**

   a. The agency shall complete the following sections of the record series description:

      (1) Department, division, and location.

      (2) Record series title. A description is not necessary.

      (3) Record control number.

      (4) Mark "DELETE FROM SCHEDULE" under the record series title and include one of the following explanations:

(a) All records have been destroyed.

(b) All records have been transferred to the state archives.

(c) All records have been transferred and name the receiving state agency or division.

(5) Name and telephone number of the person completing the record series description.

(6) Date the record series description was completed.

b. The agency shall send the completed record series description to information services division.

c. A records retention schedule must be sent to the agency for department approval. The agency head shall sign the departmental approval section of the records retention schedule and return it to information services division.

d. The record series shall no longer be included on the records disposal report for the agency. The agency shall receive an updated records retention schedule with descriptions from information services division.

3. **Changing record series on a retention schedule.**

a. Information services division must be notified when any of the following facts about a record series change:

(1) The title or description.

(2) The administrative, legal, fiscal, or historical value.

(3) The record becomes or is no longer the original record.

(4) The record becomes or is no longer confidential.

b. The following steps must be used to change an existing record series description:

(1) The agency shall complete the following sections of the record series description:

(a) Department, division, and location.

(b) Record series title. A description is not necessary, unless this is the area to be changed.

(c) Record control number.

(d) Any portion of the form that is to be changed.

(e) Name and telephone number of the person completing the record series description.

(f) Date the record series description was completed.

(2) The agency shall send the completed record series description to information services division.

(3) A records retention schedule must be sent to the agency for department approval. The agency head shall sign the departmental approval section of the records retention schedule and return it to information services division.

(4) Information services division shall obtain appropriate appraisal and approval from the records management task force.

(5) The updated record series must be included on the records disposal report for the agency. The agency shall receive an updated records retention schedule with descriptions from information services division.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-10
Law Implemented: NDCC 54-46-04

CHAPTER 4-09-04
RECORDS DISPOSAL PROCEDURES

4-09-04-01. Records disposal procedures. Each executive branch state agency shall dispose of records designated on the annual records disposal report. All nonconfidential records must be disposed by landfill or recycling. All confidential records must be shredded or burned.

Record series may not be disposed of prior to the time approved by information services division. If a situation warrants early disposal of a record, the state agency may petition information services division for an early disposal of that series.

The following procedures must be used by state agencies to complete a records disposal:

1. **Initial records disposal.**

    a. Information services division shall provide the agency with a records disposal report that identifies all record series located in the agency.

    b. The agency shall complete the following items on the records disposal request:

        (1) Department name, address, city, zip code, department approval by the department head or records coordinator, date, and telephone number.

        (2) The storage location of the records.

        (3) The size and volume, in linear inches, of the records to be disposed.

        (4) The record control number from the records disposal report, the title of the record series being disposed, the inclusive dates of the record series, and the total retention period according to the retention schedule. Each record series must be listed.

        (5) Mark the M/F column if the records are being disposed after microfilming.

c. The agency shall send the completed records disposal request to information services division.

d. Information services division shall assign a request control number to the records disposal request, review the request, indicate the appropriate action on the records disposal authorization, and return the records disposal request to the agency.

e. The agency shall destroy the records approved for disposal. The disposal must be completed by the approved method and must be certified by the person disposing of the documents. If the record series is confidential, the disposal must be witnessed by one other person. If any record series are to be transferred to the state archives, the records disposal request and the records disposal authorization must accompany the documents being transferred.

f. When the certificate of disposal and certificate of transfer sections have been completed upon disposal or transfer of the records, the agency shall detach and file the pink copy from both the records disposal request and the records disposal authorization.

g. The agency shall send the remaining copies of all pages of the records disposal request and records disposal authorization to information services division.

h. Information services division shall retain a copy of the request and authorization forms in its files. The state archivist shall also receive a copy of the request and authorization forms.

2. **Annual records disposal.** After completion of the initial records disposal, the agency may utilize an ongoing disposal of obsolete records in compliance with the retention limits established by the records retention schedule.

a. Information services division shall provide the agency with an annual records disposal report specifying the exact disposal instructions for each records series retained in the agency.

b. The agency shall dispose of all records that have satisfied their retention requirements as specified in the disposal report.

c. Records must be disposed of in the method approved on the records retention schedule and records disposal report. All nonconfidential records may be disposed of by landfill or recycling. Confidential records must be shredded or

burned. Records identified as archival must be transferred to the state archives.

d. The agency shall verify that the information contained on the records disposal report is still current. Any discrepancies must be corrected. New record series must be added and existing record series may be deleted or changed as needed.

e. The agency shall complete the certification-schedule review and records disposal and return the certification with the records disposal report to information services division.

3. **Early records disposal.**

a. The agency shall complete the following areas of the records disposal request and send it to information services division:

(1) Department, address, city, and zip code.

(2) Record control number.

(3) Record title.

(4) Inclusive dates of the record series, including the dates of the records for which early disposal is requested.

(5) Total retention, meaning the approved retention period from the records retention schedule.

(6) Explain in the area beneath each record title the reason early disposal of that record series is requested.

(7) The department head shall sign the departmental approval section of the request and complete the date, title, and telephone number.

b. Information services division shall assign a request control number and obtain approval from the records management task force.

c. Information services division shall return the records disposal request and authorization to the agency.

d. The agency shall then destroy the records approved for disposal. This disposition must be done in an approved manner and must be certified by the person disposing of the documents. If the record series are confidential, the disposal must be witnessed by one other person. If any

records are to be transferred to the state archives, the records disposal request and the records disposal authorization should accompany the documents being transferred.

e. When the certificate of disposal and certificate of transfer sections have been completed upon disposal or transfer of the records, the agency shall detach and file the pink copy from both the records disposal request and the records disposal authorization.

f. The agency shall send the remaining copies of all pages of the records disposal request and records disposal authorization to information services division.

g. Information services division shall retain a copy of the request and authorization forms in its files. The state archivist shall also receive a copy of the request and authorization forms.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-10
Law Implemented: NDCC 54-46-04

CHAPTER 4-09-05
RECORDS CATALOGING

4-09-05-01. Records cataloging. State agencies shall use the North Dakota subject classification system for maintenance of records in subject filing systems.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-10
Law Implemented: NDCC 54-46-04

CHAPTER 4-09-06
REPRODUCTION

4-09-06-01. Reproduction. State agencies must follow the guidelines and standards established in the most recent edition of "Standards for Microfilming North Dakota Public Records".

History: Effective October 1, 1995.
General Authority: NDCC 54-46.1-06
Law Implemented: NDCC 54-46.1-06

CHAPTER 4-09-07
TRANSFER OF RECORDS TO STATE ARCHIVES

4-09-07-01. Transfer of records to state archives. The following procedure must be used to transfer records with archival value to the state archives.

1. Records designated for transfer to the state archives on the records disposal report must be placed in boxes.

2. The state archives shall provide records boxes upon request. State agencies that furnish their own containers must use sturdy, uniform-size records boxes, such as Banker's boxes or R-Kive boxes.

3. Records must not be removed from file folders and the existing arrangement of files must not be changed. Boxes must be packed to allow easy removal of files. The state agency should not stuff boxes or pile extra files horizontally on top of vertical files. File folders may be stacked horizontally if there are not enough to fill the box properly. A box must contain only one record series unless the series is too small to fill a box properly.

4. File inventories, indexes, keys, or other finding aids must be included with the records.

5. All boxes must be labeled in the lower left corner on the front of the box in ink to mark the record series title, records control number from the records retention schedule, and the box number. The file numbers, serial numbers, or alphabetical designations must also be included on the box.

6. The state agency must contact the state archives when ready to transfer records.

7. Confidential records must remain on confidential status when transferred to the state archives. These records are not open for public inspection, except as provided by law.

8. The state archives shall verify on the records disposal report that records requested for transfer have been transferred.

9. The state archivist shall complete a certification for archival transfer and shall send it to the information services division after all records have been transferred.

The state agency must sign the certificate of disposal section before the forms are returned to information services division.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-10
Law Implemented: NDCC 54-46-04

CHAPTER 4-09-08
DEPARTMENT OF HUMAN SERVICES AND COUNTY SOCIAL SERVICE RECORD RETENTION

4-09-08-01. Department of human services and county social service record retention. Department of human services and county social service records must be retained according to the established record retention schedules, and thereafter may be disposed of by the method indicated on the record retention schedules.

History: Effective October 1, 1995.
General Authority: NDCC 54-46-13
Law Implemented: NDCC 54-46-13

STAFF COMMENT: Article 4-10 contains all new material but is not underscored to improve readability.

ARTICLE 4-10

FORMS MANAGEMENT

CHAPTER 4-10-01
DEFINITIONS

4-10-01-01. Definitions. Throughout this article:

1. "Form" means any document designed to record information and containing blank spaces and which may contain headings, captions, boxes, or other printed or written devices to guide the entry and interpretation of the information.

2. "Forms audit" means the process by which information services division collects each form used by an agency to review the use of established standards in forms design.

3. "Information services division" means the information services division of the office of management and budget.

4. "State agency" or "agency" means any department, office, commission, board, or other unit, however designated, of the executive branch of state government.

5. "State forms manager" means the director of the office of management and budget or an individual designated by the director.

6. "State form numbering system" means the system maintained by information services division to record the assignment of numbers to state forms.

History: Effective October 1, 1995.
General Authority: NDCC 54-44.6-08
Law Implemented: NDCC 54-44.6-08

CHAPTER 4-10-02
APPROVAL OF FORMS

4-10-02-01. Approval of forms. The use of established standards for forms layout and design will be analyzed and approved through the forms audit process of each state agency. Information services division shall analyze the forms, advise the agency of recommendations, and assist the agency with any recommended revisions.

History: Effective October 1, 1995.
General Authority: NDCC 54-44.6-08
Law Implemented: NDCC 54-44.6-06

CHAPTER 4-10-03
STATE FORM NUMBERING SYSTEM

4-10-03-01. State form numbering system. Information services division maintains a central numbering system for all state forms. Agency forms coordinators are responsible to see that their agency uses the state form numbering system for indexing, inventorying, and identifying their forms. The state form number must be part of the title block on state forms.

The agency forms coordinator shall notify information services division when a form becomes obsolete and the state form number must be retired.

History: Effective October 1, 1995.
General Authority: NDCC 54-44.6-08
Law Implemented: NDCC 54-44.6-04

CHAPTER 4-10-04
ANNUAL FORMS INVENTORY REPORT

4-10-04-01. Annual forms inventory report. Information services division shall distribute an annual forms inventory report to each state agency. The report lists all forms maintained and used by that agency. The forms coordinator for the agency shall update the inventory and return the list to information services division.

History: Effective October 1, 1995.
General Authority: NDCC 54-44.6-08
Law Implemented: NDCC 54-44.6-04

CHAPTER 4-10-05
STANDARDS

4-10-05-01. Standards. The following forms design standards must be used for all forms:

1. **Title block.**

   a. All forms must be identified with a title block that contains the title of the form, name of the agency, state form number, and edition date of the form.

   b. The title block must be placed in the upper left corner of the form, whenever possible.

   c. The great seal of North Dakota or agency logo must be part of the title block.

   d. If the great seal of North Dakota is not used, the words "North Dakota" must be included in the name of the agency in the title block.

   e. Forms must not be printed or reproduced on letterhead.

2. **Paper and ink.**

   a. The standard size paper for forms is eight and one-half inches [21.59 centimeters] by eleven inches [27.94 centimeters] and sizes that can be cut from that size with a minimum of waste.

   b. Black ink and white paper must be used for forms that will be microfilmed.

3. **Captions.**

   a. Captions must be brief, clear, and concise.

   b. A caption must only cover one item.

   c. Forms must be designed in a box format with upper left captions.

   d. Type size must be eight-point or larger, where appropriate.

e. Type must be in lowercase with only appropriate capitalization.

4. **Spaces.**

a. Standard vertical spacing (throw) on forms is three boxes (lines) per inch [2.54 centimeters].

b. Standard horizontal spacing (pitch) on forms is determined through forms analysis and designed to fit the data to be gathered and the method or equipment used with the form.

5. **Appearance.**

a. All forms must have a professional appearance with:

(1) No decorations or embellishments;

(2) No more than two type styles on a form; and

(3) Shading or screening not used for decorative purposes.

b. Forms must be easy to read and complete.

History: Effective October 1, 1995.
General Authority: NDCC 54-44.6-08
Law Implemented: NDCC 54-44.6-04

TITLE 13

Banking and Financial Institutions, Department of

AUGUST 1995

CHAPTER 13-02-06

13-02-06-01.1. Notification. Upon notification to the commissioner, a bank may establish a customer electronic funds transfer center that dispenses cash, items of cash value, transfers between accounts, or allows customer account inquiry.

History: Effective August 1, 1995.
General Authority: NDCC 6-01-04, 6-03-02(8)
Law Implemented: NDCC 6-03-02(8)

13-02-06-04. Application for electronic funds transfer center to commissioner required - Contents of application. A customer electronic funds transfer center that accepts deposits may not be established, used, or shared by a bank until thirty days after the bank has sent to the commissioner written application for the proposed establishment or use of such center. The application shall describe with regard to such center:

1. The location.

2. A general description of the area where located, e.g., shopping center, supermarket, department store, etc., and the manner of installation at that location.

3. The manner of operation, including whether the center is on direct line, or indirect by other procedures, and describing such procedures.

4. The kinds of transactions that will be performed.

5. Whether the center will be manned, and if so, by whose employee.

6. The manufacturer of the equipment to be used and, if owned, the purchase price or, if leased, the lease terms and payments and the name of the lessor.

7. Consumer protection procedures, including the disclosure of rights and liabilities of consumers and protection against wrongful or accidental disclosure of confidential information.

8. The distance from the nearest banking house, paying and receiving station, or facility, and from the nearest similar center of the applicant bank.

9. The distance from the nearest banking house, paying and receiving station, or facility, and the nearest similar center of another bank, and the name of such other bank or banks within the city or town in which the center is to be established.

10. Insurance and the security provisions protecting the center and its users.

History: Amended effective October 1, 1991; August 1, 1995.
General Authority: NDCC 6-01-04, 6-03-02(8)
Law Implemented: NDCC 6-03-02(8)

13-02-06-06. Approval by commissioner required - Investigation. Before establishing a customer electronic funds transfer center that accepts deposits, the establishing bank must receive the approval of the commissioner. The commissioner's investigation upon an application to establish a customer electronic funds transfer center shall include a review of the applicant bank's capital structure.

History: Amended effective October 1, 1991; August 1, 1995.
General Authority: NDCC 6-01-04, 6-03-02(8)
Law Implemented: NDCC 6-03-02(8)

NOVEMBER 1995

CHAPTER 13-02-08

LOANS TO EXECUTIVE OFFICERS AND CLOSELY HELD INTERESTS

[Repealed effective August 1, 1995]

CHAPTER 13-02-12

13-02-12-05. Application content. In addition to the information required by North Dakota Century Code section 6-08.3-02, the application must contain the following:

1. List of existing shareholders of the bank to be acquired;

2. List of proposed shareholders of the bank to be acquired;

3. Copy of stock purchase agreement;

4. List of shareholders who own or control more than ten percent or more of the stock of the applicant;

5. List of shareholders who own or control more than ten percent or more of the stock of the North Dakota bank holding company;

6. Proposed buy-sell agreements of acquirers, if any;

7. Proposed members of the board of directors for the bank to be acquired;

8. Proposed executive officers of the bank to be acquired;

9. Pro forma balance sheet of the bank holding company;

10. If any debt is to be incurred by the applicant or the bank holding company to be acquired, statements of annual financial projections of the holding company to the date the debt is fully amortized;

11. Three annual pro forma financial statements of the bank to be acquired;

12. Proposed tax allocation agreements;

13. Proposed trade area;

14. Three most recent annual federal reserve Y-6 or Y-9 reports of the reciprocating state bank holding company;

15. Proposed organizational chart for the bank holding company and all its subsidiaries after acquisition; and

16. Dollar amount of developmental loans by classification and total loans held by each of the applicant's subsidiaries.

The board or the commissioner may return an application whenever it is determined that the application fails to address in a prima facie manner the requirements of North Dakota Century Code section 6-08.3-02

and this chapter. When an application is so returned by the board or the commissioner, it does not constitute a filing of an application for the purposes of North Dakota Century Code section 6-08.3-10.

Any information requested by the board or commissioner under North Dakota Century Code section 6-08.3-02 must be submitted to the board no later than ten days after the date that the information is requested unless an extension of time is granted by the board or the commissioner. Repealed effective September 29, 1995.

History: Effective August 1, 1991.
General Authority: NDCC 6-01-04, 6-08.3-02
Law Implemented: NDCC 6-08.3-02

13-02-12-06. Confidential material. Information provided to the public as requested under North Dakota Century Code section 6-08.3-10 must be made available to the public in a manner consistent with North Dakota Century Code section 6-01-07.1 and federal law. Repealed effective September 29, 1995.

History: Effective August 1, 1991.
General Authority: NDCC 6-01-04, 6-08.3-10
Law Implemented: NDCC 6-08.3-10

13-02-12-07. Notice and publication.

1. **Notice.** The applicant shall cause to be published a notice of the proposed acquisition or organization of a bank. The notice must include the following:

   a. Name of precreating state bank holding company proposing to acquire or organize a North Dakota bank;

   b. Name and address of bank to be acquired or organized;

   c. Notice that opportunity for public comment may be directed to the state banking board;

   d. Notice of the availability of obtaining a copy of the application and where copies of the application can be obtained.

   e. Date public comments are to be submitted by;

   f. Description of the number of shares to be acquired in relation to the outstanding shares; and

   g. Any other information deemed by the board or commissioner as necessary to provide adequate notice.

2. Publication. Upon filing an application, the applicant shall cause the notice to be published for two successive weeks in the official newspaper of the county where the proposed acquisition and any of its stations or banking houses are located or where the proposed organization of the bank is to be located. The applicant shall also send by certified mail a copy of the notice to all commercial banks doing business within those counties. Repealed effective September 29, 1995.

History: Effective August 1, 1991.
General Authority: NDCC 6-01-04, 6-08.3-10
Law Implemented: NDCC 6-08.3-10

13-02-12-09. Undue concentration of resources or substantial lessening of competition. For the purpose of determining whether an undue concentration of resources or substantial lessening of competition will result, the application must disclose how the acquisition will not result in an undue concentration of resources or substantial lessening of competition when the reciprocating bank holding company controls another bank, paying and receiving station, or banking house or office in the acquired bank's trade area. The application must include a map of the acquired bank's trade area and must also include a schedule of total deposits of each commercial bank, thrift institution, or credit union within the acquired bank's trade area. Repealed effective September 29, 1995.

History: Effective February 1, 1994.
General Authority: NDCC 6-01-04, 6-08.3-03, 6-08.3-07
Law Implemented: NDCC 6-08.3-03, 6-08.3-07

STAFF COMMENT: Chapter 13-02-20 contains all new material but is not underscored so as to improve readability.

CHAPTER 13-02-20
LOANS SECURED PRIMARILY BY REAL ESTATE

13-02-20-01. Scope. This chapter applies to loans that are dependent primarily upon real estate security.

History: Effective November 1, 1995.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-05

13-02-20-02. Definitions.

1. "Construction loan" means an extension of credit for the purpose of erecting or rehabilitating buildings or other structures, including any infrastructure necessary for development.

2. "Extension of credit" or "loan" means the total amount of any loan, line of credit, or other legally binding lending commitment with respect to real property; and the total amount, based on the amount of consideration paid, of any loan, line of credit, or other legally binding lending commitment acquired by a lender by purchase, assignment, or otherwise.

3. "Improved property loan" means an extension of credit secured by one of the following types of real property:

   a. Farmland, ranchland, or timberland committed to ongoing management and agricultural production;

   b. One-to-four family residential property that is not owner-occupied;

c. Residential property containing five or more individual dwelling units;

d. Completed commercial property; or

e. Other income-producing property that has been completed and is available for occupancy and use, except income-producing owner-occupied one-to-four family residential property.

4. "Land development loan" means an extension of credit for the purpose of improving unimproved real property prior to the erection of structures. The improvement of unimproved real property may include laying placement of sewers, water pipes, utility cables, streets, and other infrastructure necessary for future development.

5. "Loan origination" means the time of inception of the obligation to extend credit, or when the last event or prerequisite, controllable by the lender, occurs causing the lender to become legally bound to fund an extension of credit.

6. "Loan-to-value" or "loan-to-value ratio" means the percentage or ratio that is derived at the time of loan origination by dividing an extension of credit by the total value of the property or properties, securing or being improved by the extension of credit, plus the amount of any readily marketable collateral or other acceptable collateral that secures the extension of credit. The total amount of all senior liens on or interests in such property or properties should be included in determining the loan-to-value ratio. When mortgage insurance or collateral is used in the calculation of the loan-to-value ratio, and such mortgage insurance or collateral is later released or replaced, the loan-to-value ratio should be recalculated.

7. "One-to-four family residential property" means property containing fewer than five individual dwelling units, including manufactured homes permanently affixed to the underlying property.

8. "Other acceptable collateral" means any collateral in which the lender has a perfected security interest, that has a quantifiable value, and is accepted by the letter in accordance with safe and sound lending practices. Other acceptable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral. Other acceptable collateral includes unconditional irrevocable standby letters of credit for the benefit of the lender.

9. "Owner-occupied" means, when used in conjunction with the term one-to-four family residential property, that the owner of the

underlying real property occupies at least one unit of the real property as a principal residence of the owner.

10. "Readily marketable collateral" means insured deposits, financial instruments, and bullion in which the lender has a perfected interest. Financial instruments and bullion must be saleable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions, on an auction or similarly available daily bid and ask price market. Readily marketable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral.

11. "Value" means an opinion or estimate, set forth in an appraisal or evaluation, whichever may be appropriate, of the market value of real property prepared in accordance with North Dakota Century Code section 6-03-05. For loans to purchase an existing property, the term "value" means the lesser of the actual acquisition cost or the estimate of value.

History: Effective November 1, 1995.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-05

13-02-20-03. Loan-to-value limitations. Except as provided in this section and section 13-02-20-04:

1. Loans secured by raw land may not exceed a sixty-five percent loan-to-value ratio.

2. Loans made for land development may not exceed a seventy-five percent loan-to-value ratio.

3. Construction loans for commercial, multifamily, condominiums, cooperatives, and other nonresidential property may not exceed an eighty percent loan-to-value ratio.

4. Construction loans for one-to-four family residential real property may not exceed an eighty-five percent loan-to-value ratio.

5. Improved property loans may not exceed an eighty-five percent loan-to-value ratio.

6. Owner-occupied one-to-four family and home equity loans may not exceed a ninety percent loan-to-value ratio. However, such loans may exceed the ninety percent loan-to-value limit provided the amount above this limitation is government guaranteed, or has an appropriate credit enhancement in the

form of either mortgage insurance or readily marketable collateral.

History: Effective November 1, 1995.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-05

13-02-20-04. Excluded transactions. The loan-to-value ratios established in this chapter do not apply to loans that are insured or guaranteed, or where there is a commitment to insure or guarantee, in part or in full, or conditionally, by the United States, its instrumentalities, this state, or its instrumentalities.

History: Effective November 1, 1995.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-05

13-02-20-05. Exceptions. Exceptions may be made for the consideration of loan requests from credit worthy borrowers. However, any exceptions from the loan-to-value limits should not exceed, when aggregated with all other loans in excess of the loan-to-value limits, one hundred percent of total equity capital and reserves.

History: Effective November 1, 1995.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-05

TITLE 30

Game and Fish Department

NOVEMBER 1995

CHAPTER 30-04-02

30-04-02-16. Glass beverage containers or kegs prohibited. No person may use or possess glass beverage containers or kegs on any state wildlife management area. Any person who violates this section is guilty of a noncriminal offense and shall pay a fifty dollar fee.

History: Effective November 1, 1995.
General Authority: NDCC 20.1-11-05
Law Implemented: NDCC 20.1-11-05

30-05-01-07. Placement of regulatory signs, markers, buoys, and other warning or marking devices. Upon written approval of the director of the game and fish department, regulatory signs, markers, buoys, or other warning or marking devices may be placed near or in the waters of this state as may be necessary for safety or recreation. Any person violating the restrictions on a sign, marker, buoy, or other warning or marking device is guilty of a noncriminal offense and shall pay a thirty-five dollar fee.

History: Effective November 1, 1995.
General Authority: NDCC 20.1-13-12, 20.1-13-14
Law Implemented: NDCC 20.1-13-12, 20.1-13-14

TITLE 33

State Department of Health

AUGUST 1995

CHAPTER 33-15-01

33-15-01-04. Definitions. As used in this article, except as otherwise specifically provided or where the context indicates otherwise, the following words shall have the meanings ascribed to them in this section:

1. "Act" means North Dakota Century Code chapter 23-25.

2. "Air contaminant" means any solid, liquid, gas, or odorous substance or any combination thereof.

3. "Air pollution" means the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or may be injurious to human health, welfare, or property, animal or plant life, or which unreasonably interferes with the enjoyment of life or property.

4. "Ambient air" means the surrounding outside air.

5. "ASME" means the American society of mechanical engineers.

6. "Control equipment" means any device or contrivance which prevents or reduces emissions.

7. "Department" means the North Dakota state department of health and consolidated laboratories.

8. "Emission" means a release of air contaminants into the ambient air.

9. "Existing" means equipment, machines, devices, articles, contrivances, or installations which are in being on or before July 1, 1970, unless specifically designated within this article; except that any existing equipment, machine, device, contrivance, or installation which is altered, repaired, or rebuilt after July 1, 1970, must be reclassified as "new" if such alternation, rebuilding, or repair results in the emission of an additional or greater amount of air contaminants.

10. "Federally enforceable" means all limitations and conditions which are enforceable by the administrator of the United States environmental protection agency including those requirements developed pursuant to title 40, Code of Federal Regulations, parts 60 and 61, requirements within any applicable state implementation plan, any permit requirements established pursuant to title 40, Code of Federal Regulations, 52.21 or under regulations approved pursuant to title 40, Code of Federal Regulations, part 51, subpart I, including operating permits issued under a United States environmental protection agency-approved program that is incorporated into the state implementation plan and expressly requires adherence to any permit issued under such program.

11. "Fuel burning equipment" means any furnace, boiler apparatus, stack, or appurtenances thereto used in the process of burning fuel or other combustible material for the primary purpose of producing heat or power by indirect heat transfer.

12. "Fugitive emissions" means solid airborne particulate matter, fumes, gases, mist, smoke, odorous matter, vapors, or any combination thereof generated incidental to an operation process procedure or emitted from any source other than through a well-defined stack or chimney.

13. "Garbage" means putrescible animal and vegetable wastes resulting from the handling, preparation, cooking, and consumption of food, including wastes from markets, storage facilities, handling, and sale of produce and other food products.

14. "Hazardous waste" has the same meaning as given by chapter 33-24-02.

15. "Heat input" means the aggregate heat content of all fuels whose products of combustion pass through a stack or stacks. The heat input value to be used shall be the equipment manufacturer's or designer's guaranteed maximum input, whichever is greater.

~~15.~~ 16. "Incinerator" means any article, machine, equipment, device, contrivance, structure, or part of a structure used for the

destruction of garbage, rubbish, or other wastes by burning or to process salvageable material by burning.

17. "Industrial waste" means solid waste that is not a hazardous waste regulated under North Dakota Century Code chapter 23-20.3, generated from the combustion or gasification of municipal waste and from industrial and manufacturing processes. The term does not include municipal waste or special waste.

18. "Infectious waste" means waste that is listed in subdivisions a through g. Ash from incineration and residues from disinfection processes are not infectious waste once the incineration or the disinfection has been completed.

    a. Cultures and stocks. Cultures and stocks of infectious agents and associated biologicals, including cultures from medical and pathological laboratories; cultures and stocks of infectious agents from research and industrial laboratories; wastes from the production of biologicals; discarded live and attenuated vaccines; and culture dishes and devices used to transfer, inoculate, and mix cultures.

    b. Pathological waste. Human pathological waste, including tissues, organs, and body parts and body fluids that are removed during surgery or autopsy, or other medical procedures, and specimens of body fluids and their containers.

    c. Human blood and blood products. Liquid waste human blood; products of blood; items saturated or dripping with human blood; or items that were saturated or dripping with human blood that are now caked with dried human blood, including serum, plasma, and other blood components, and their containers.

    d. Sharps. Sharps that have been used in animal or human patient care or treatment or in medical, research, or industrial laboratories, including hypodermic needles, syringes (with or without the attached needle), pasteur pipettes, scalpel blades, blood vials, needles with attached tubing, and culture dishes, regardless of presence of infectious agents. Also included are other types of broken or unbroken glassware that were in contact with infectious agents, such as used slides and cover slips.

    e. Animal waste. Contaminated animal carcasses, body parts, and bedding of animals that were known to have been exposed to infectious agents during research including research in veterinary hospitals, production of biological, or testing of pharmaceuticals.

f. Isolation waste. Biological waste and discarded materials contaminated with blood, excretion, exudates, or secretions from humans who are isolated to protect others from highly communicable diseases, or isolated animals known to be infected with highly communicable diseases.

g. Unused sharps. Unused, discarded sharps, hypodermic needles, suture needles, and scalpel blades.

~~16.~~ 19. "Inhalable particulate matter" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers. Also known as PM_{10}.

~~17.~~ 20. "Installation" means any property, real or personal, including, but not limited to, processing equipment, manufacturing equipment, fuel burning equipment, incinerators, or any other equipment, or construction, capable of creating or causing emissions.

~~18.~~ 21. "Multiple chamber incinerator" means any article, machine, equipment, contrivance, structure, or part of a structure used to ~~dispose--of~~ burn combustible refuse ~~by-burning~~, consisting of ~~three~~ two or more refractory lined combustion furnaces in series physically separated by refractory walls, interconnected by gas passage ports or ducts and employing adequate parameters necessary for maximum combustion of the material to be burned.

22. "Municipal waste" means solid waste that includes garbage, refuse, and trash generated by households, motels, hotels, and recreation facilities, by public and private facilities, and by commercial, wholesale, and private and retail businesses. The term does not include special waste or industrial waste.

~~19.~~ 23. "New" means equipment, machines, devices, articles, contrivances, or installations built or installed on or after July 1, 1970, unless specifically designated within this article, and installations existing at said stated time which are later altered, repaired, or rebuilt and result in the emission of an additional or greater amount of air contaminants.

~~20.~~ 24. "Opacity" means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

~~21.~~ 25. "Open burning" means the burning of any matter in such a manner that the products of combustion resulting from the burning are emitted directly into the ambient air without passing through an adequate stack, duct, or chimney.

~~22.~~ 26. "Particulate matter" means any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than one hundred micrometers.

~~23.~~ 27. "Particulate matter emissions" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air.

~~24.~~ 28. "Person" means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this state, any other state or political subdivision or agency thereof and any legal successor, representative agent, or agency of the foregoing.

~~25.~~ 29. "Pesticide" includes (a) any agent, substance, or mixture of substances intended to prevent, destroy, control, or mitigate any insect, rodent, nematode, predatory animal, snail, slug, bacterium, weed, and any other form of plant or animal life, fungus, or virus, that may infect or be detrimental to persons, vegetation, crops, animals, structures, or households or be present in any environment or which the department may declare to be a pest, except those bacteria, fungi, protozoa, or viruses on or in living man or other animals; (b) any agent, substance, or mixture of substances intended to be used as a plant regulator, defoliant, or desiccant; and (c) any other similar substance so designated by the department, including herbicides, insecticides, fungicides, nematocides, molluscacides, rodenticides, lampreycides, plant regulators, gametocides, post-harvest decay preventatives, and antioxidants.

~~26.~~ 30. "PM_{10}" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers.

~~27.~~ 31. "PM_{10} emissions" means finely divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air.

~~28.~~ 32. "Premises" means any property, piece of land or real estate, or building.

~~29.~~ 33. "Process weight" means the total weight of all materials introduced into any specific process which may cause emissions. Solid fuels charged will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not.

~~30.~~ 34. "Process weight rate" means the rate established as follows:

a. For continuous or longrun steady state operations, the total process weight for the entire period of continuous operation or for a typical portion thereof, divided by the number of hours of such period or portion thereof.

b. For cyclical or batch operations, the total process weight for a period that covers a complete operation or an integral number of cycles, divided by the hours of actual process operation during such a period. Where the nature of any process or operation or the design of any equipment is such as to permit more than one interpretation of this definition, the interpretation that results in the minimum value for allowable emission shall apply.

~~31.~~ 35. "Public nuisance" means any condition of the ambient air beyond the property line of the offending person which is offensive to the senses, or which causes or constitutes an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

36. "Radioactive waste" means solid waste containing radioactive material and subject to the requirements of article 33-10.

~~32.~~ 37. "Refuse" means any ~~combustible-waste-material~~ municipal waste, trade waste, rubbish, or garbage ~~containing-carbon-in--a--free or--combined--state~~, exclusive of industrial waste, special waste, radioactive waste, hazardous waste, and infectious waste.

~~33.~~ 38. "Rubbish" means nonputrescible solid wastes consisting of both combustible and noncombustible wastes. Combustible rubbish includes paper, rags, cartons, wood, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, cans, dust, metal furniture and like materials which will not burn at ordinary incinerator temperatures (one thousand six hundred to one thousand eight hundred degrees Fahrenheit [1144 degrees Kelvin to 1255 degrees Kelvin]).

~~34.~~ 39. "Salvage operation" means any operation conducted in whole or in part for the salvaging or reclaiming of any product or material.

~~35.~~ 40. "Smoke" means small gasborne particles resulting from incomplete combustion, consisting predominantly, but not exclusively, of carbon, ash, and other combustible material, that form a visible plume in the air.

~~36.~~ 41. "Source" means any property, real or personal, or person contributing to air pollution.

~~37.~~ 42. "Source operation" means the last operation preceding emission which operation (a) results in the separation of the air contaminant from the process materials or in the conversion of the process materials into air contaminants, as in the case of combustion fuel; and (b) is not an air pollution abatement operation.

43. "Special waste" means solid waste that is not a hazardous waste regulated under North Dakota Century Code chapter 23-20.3 and includes waste generated from energy conversion facilities; waste from crude oil and natural gas exploration and production; waste from mineral and or mining, beneficiation, and extraction; and waste generated by surface coal mining operations. The term does not include municipal waste or industrial waste.

~~38.~~ 44. "Stack or chimney" means any flue, conduit, or duct arranged to conduct emissions.

~~39.~~ 45. "Submerged fill pipe" means any fill pipe the discharge opening of which is entirely submerged when the liquid level is six inches [15.24 centimeters] above the bottom of the tank; or when applied to a tank which is loaded from the side, means any fill pipe the discharge opening of which is entirely submerged when the liquid level is one and one-half times the fill pipe diameter in inches [centimeters] above the bottom of the tank.

~~40.~~ 46. "Standard conditions" means a dry gas temperature of sixty-eight degrees Fahrenheit [293 degrees Kelvin] and a gas pressure of fourteen and seven-tenths pounds per square inch absolute [101.3 kilopascals].

~~41.~~ 47. "Trade waste" means solid, liquid, or gaseous waste material resulting from construction or the conduct of any business, trade, or industry, or any demolition operation, including wood, wood containing preservatives, plastics, cartons, grease, oil, chemicals, and cinders.

48. "Trash" means refuse commonly generated by food warehouses, wholesalers, and retailers which is comprised only of nonrecyclable paper, paper products, cartons, cardboard, wood, wood scraps, and floor sweepings and other similar materials. Trash may not contain more than five percent by volume of each of the following: plastics, animal and vegetable materials, or rubber and rubber scraps. Trash must be free of grease, oil, pesticides, yard waste, scrap tires, infectious waste, and similar substances.

~~42.~~ 49. "Volatile organic compounds" means any compounds of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions. This includes any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: methane; ethane; methylene chloride (dichloromethane); 1, 1, 1-trichloroethane (methyl chloroform); 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane

(FC-23); 1,2-dichloro 1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro 2,2-dichloroethane (HCFC-123); 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro 1-fluoroethane (HCFC-141b); 1-chloro 1,1-difluoroethane (HCFC-142b); 2-chloro - 1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); and perfluorocarbon compounds which fall into these classes:

a. Cyclic, branched, or linear, completely fluorinated alkanes;

b. Cyclic, branched, or linear, completely fluorinated ethers with no unsaturations;

c. Cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations; and

d. Sulfur containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

For purposes of determining compliance with emission limits, volatile organic compounds will be measured by the test methods in title 40, Code of Federal Regulations, part 60, appendix A, as applicable. Where such a method also measures compounds with negligible photochemical reactivity, these negligibly reactive compounds may be excluded as volatile organic compounds if the amount of such compounds is accurately quantified, and such exclusion is approved by the department.

As a precondition to excluding these compounds as volatile organic compounds or at any time thereafter, the department may require an owner or operator to provide monitoring or testing methods and results demonstrating, to the satisfaction of the enforcement authority, the amount of negligibly reactive compounds in the source's emissions.

~~43.~~ 50. "Waste classification" means the seven classifications of waste as defined by the incinerator institute of America and American society of mechanical engineers.

History: Amended effective October 1, 1987; January 1, 1989; June 1, 1990; June 1, 1992; March 1, 1994; December 1, 1994; August 1, 1995.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-05-03. Incinerators.

1.--General-provisions.

a.--This-section-applies-to-any-incinerator-used-to-dispose-of refuse-or-other-wastes-by-burning-and--the--processing--of salvageable-material-by-burning.

b.--The--burning--capacity--of--an--incinerator--shall--be-the manufacturer's-or-designer's-guaranteed--maximum--rate--or such--other-rate-as-may-be-determined-by-the-department-in accordance-with-good-engineering-practices.---In--case--of conflict,--the--determination-made-by-the-department-shall govern.

2.--Restriction---of---emissions---of---particulate---matter--from incinerators.

a.--No---person---shall---cause--or--permit--the--emission--of particulate-matter--from--the--stack--or--chimney--of--any incinerator--in--excess-of-the-amount-shown-in-table-5-for the-refuse-burning-rate-allocated-to-such-incinerator.

b.--All--new--incinerators-and-all-existing-incinerators-to-be modified-to-meet-the--requirements--of--this--section--and which--are--to--burn--type--2,--3,--4,--5,--and-6-waste-as classified-by-the-incinerator-institute-of-America-must-be equipped--with-auxiliary-fuel-burners-of-such-capacity-and design--as--to--assure--a--temperature--in--the--secondary combustion--chamber--of-at-least-one-thousand-five-hundred degrees-Fahrenheit-[1088-degrees-Kelvin]-for-a-minimum--of three-tenths-second-retention-time.

c.--No--incinerator--shall--be--used-for-the-burning-of-refuse unless-such-incinerator-is-a-multiple-chamber-incinerator. Existing--incinerators--which--are--not--multiple--chamber incinerators-may-be-altered,-modified,-or-rebuilt--as--may be---necessary---to---meet---this--requirement.---All--new incinerators--shall--be--multiple--chamber---incinerators, provided-that-the-department-may-approve-any-other-kind-of incinerator-if-it-finds--in--advance--of--construction--or installation--that--such--other--kind--of--incinerator--is equally-effective-for-purposes-of-air-pollution-control.

Existing--incinerators--burning--type--2--and-type-3-waste which-are-not-multiple-chamber--incinerators--and--do--not otherwise--meet-the-requirements-of-subdivision-a-shall-be modified-or--rebuilt--in--compliance--with--this--section. Existing--incinerators--burning--type--4,--5,--or--6-waste

require the specific approval of the department. Incinerators handling any garbage and organic waste must have auxiliary fuel burners that maintain a minimum temperature of one thousand five hundred degrees Fahrenheit [1088 degrees Kelvin] for a minimum of three-tenths second retention time.

Table 5.

Maximum Allowable Rates of
Emission of Particulate Matter From
Incinerators

Refuse Burning Rate (R)	Allowable Emission Rate (E)	Refuse Burning Rate (R)	Allowable Emission Rate (E)
lb/hr	lb/hr	kg/hr	kg/hr
10	0.041	4.54	0.019
50	0.174	22.68	0.079
300	0.873	136.08	0.396
700	1.87	317.51	0.850
1,000	2.58	453.59	1.17
1,500	3.38	681.39	1.53
3,500	5.97	1,587.57	2.71
8,000	10.39	3,628.72	4.71
25,000	22.29	11,339.75	10.10
100,000	56.42	45,359.00	25.57

Interpolation of the data in this table for refuse burning rates up to 1,000 lb/hr [453.59 kg/hr] shall be accomplished by the use of the equations:

$$E = -0.00515 \cdot R^{0.90} \quad \text{(English units)}$$

$$E = -0.00476 \cdot R^{0.90} \quad \text{(Metric units)}$$

and interpolation and extrapolation of the data for refuse burning rates in excess of 1,000 lb/hr [453.59 kg/hr] shall be accomplished by the use of the equations:

$$E = -0.0252 \cdot R^{0.67} \quad \text{(English units)}$$

$$E = -0.0194 \cdot R^{0.67} \quad \text{(Metric units)}$$

~~where--E--=--allowable--emission--rate--in--lb/hr-[kg/hr]-and-R-=-refuse burning-rate-in-lb/hr-[kg/hr].~~ Repealed effective August 1, 1995.

History: ~~Amended-effective-October-1,-1987;-June-1,-1992.~~
General Authority: ~~NDCC-23-25-03~~
Law Implemented: ~~NDCC-23-25-03~~

33-15-05-03.1. Infectious waste incinerators.

1. Applicability.

   a. A modification or reconstruction, as defined in chapter 33-15-12, of an incinerator for infectious waste which existed on August 1, 1995, must meet the same standards as a new incinerator for infectious waste.

   b. As used in this section, "new incinerator" means an incinerator, the construction for which has not been approved by the department prior to August 1, 1995.

2. Existing infectious waste incinerators. This subsection applies to an owner or operator of an incinerator for infectious waste of any design capacity existing on August 1, 1995.

   a. Prohibited wastes. No industrial waste, special waste, radioactive waste, hazardous waste, or any other solid waste may be burned in an incinerator designed for infectious waste unless the incinerator's performance, design, and operating standards for those solid wastes are also met. Other solid waste that represents a potential public health problem may be incinerated when approved in advance by the department.

   b. Design. Each incinerator for infectious waste must be equipped with two or more chambers and with auxiliary fuel burners, designed to assure a temperature in the secondary combustion chamber or zone of at least one thousand five hundred degrees Fahrenheit [815 degrees Celsius] for a minimum of three-tenths-second retention time.

   c. Waste charging.

      (1) Wastes may not be introduced into the combustion chamber of an existing incinerator for infectious waste until the auxiliary fuel burners in the primary and secondary combustion chambers or zones have operated for a minimum of fifteen minutes or until the temperature in the secondary combustion chamber or zone has reached the operating temperature required by subdivision b.

(2) No owner or operator may cause an incinerator for infectious waste to be charged at a rate greater than one hundred percent of design capacity.

d. Operator training. The owner or operator of an incinerator for infectious waste shall provide both written and oral instructions for each operator in the proper operation of the incinerator.

e. Recordkeeping and reporting.

(1) The owner or operator of an incinerator for infectious waste shall keep a log indicating the dates and approximate quantities of infectious waste received from an onsite source, and from each offsite source, including the transporter. The log must be kept and maintained for a minimum period of three years from the date waste is received.

(2) An owner or operator of an incinerator for infectious waste shall record in the log any operational error or failure of one-hour or more duration of combustion equipment, emission control equipment, monitoring equipment, or waste charging equipment.

(3) When requested by the department, the owner or operator of an incinerator for infectious waste shall provide a summary of the daily operation of the incinerator.

f. Malfunctions. An owner or operator of an incinerator for infectious waste shall immediately halt all waste charging of the incinerator when a malfunction of combustion equipment, emission control equipment, monitoring equipment, or waste charging equipment occurs. Waste charging may not resume until the malfunction has been corrected or the department approves the operation of the incinerator while the malfunction is occurring.

3. New infectious waste incinerators. In addition to subdivisions a, d, e, and f of subsection 2, this subsection applies to a new incinerator for infectious waste.

a. Design. Each new incinerator for infectious waste must be equipped with a primary combustion chamber or zone which provides complete combustion of solid waste and a secondary combustion chamber or zone which provides turbulent mixing. Auxiliary fuel burners are required in all chambers. The department may approve an alternate design provided the design achieves the performance requirements of this section.

b. Operating temperature. Each new incinerator for infectious waste must maintain the flue gas temperature in the secondary combustion chamber or zone at one thousand eight hundred degrees Fahrenheit [982 degrees Celsius] or greater for a minimum of one-second retention time.

c. Opacity. No owner or operator of a new incinerator for infectious waste may allow to be discharged into the atmosphere any air contaminant which exhibits an opacity greater than ten percent except that a maximum of twenty percent opacity is permissible for not more than one 6-minute period per hour.

d. Waste charging.

(1) Wastes may not be introduced into the combustion chamber of a new incinerator for infectious waste until the temperature in the secondary combustion chamber or zone has reached at least ninety percent of the operating temperature required by subdivision b.

(2) The waste charging system must be designed to prevent overcharging to assure complete combustion. No owner or operator may cause an incinerator for infectious waste to be charged at a rate greater than one hundred percent of design capacity.

e. Stack height. Each new incinerator for infectious waste must be equipped with a stack for the discharge of flue gases of sufficient height to prevent ambient concentrations of air contaminants greater than allowed by chapter 33-15-02. The minimum stack height is forty feet [12.2 meters] unless it is demonstrated that a stack height less than forty feet [12.2 meters] will meet the standards of chapter 33-15-02. The department may require taller stacks when it is necessary to meet the standards of chapter 33-15-02.

f. Monitoring. Each new incinerator for infectious waste must be equipped with a continuous temperature monitor, with readout, to monitor the temperature of the gases exiting the secondary combustion chamber or zone.

g. Other requirements. The department may impose one or more of the requirements under subsection 4 on the owner or operator of a new incinerator for infectious waste burning less than ten thousand pounds [4535 kilograms] of infectious waste per week based on factors such as emission rates and site circumstances.

4. New large infectious waste incinerators. In addition to subdivisions a, d, e, and f of subsection 2 and subsection 3,

this subsection applies to a new incinerator for infectious waste burning ten thousand pounds [4535 kilograms] or more of infectious waste per calendar week.

a. Particulate matter. No owner or operator of a new incinerator for infectious waste may allow the discharge into the atmosphere of any gases which contain particulate matter in excess of fifteen thousandths grains per dry standard cubic foot corrected to seven percent oxygen (dry volume basis).

b. Hydrogen chloride. No owner or operator of a new incinerator for infectious waste may allow the discharge into the atmosphere of any gases which contain hydrogen chloride in excess of twenty-five parts per million corrected to seven percent oxygen (dry volume basis) or in excess of ten percent of the potential hydrogen chloride emissions (ninety percent reduction) by weight or volume, whichever is less stringent.

c. Carbon monoxide. No owner or operator of a new incinerator for infectious waste may allow the discharge into the atmosphere of carbon monoxide in excess of one hundred parts per million corrected to seven percent oxygen (dry volume basis) over any one-hour period.

d. Furans and dioxins. No owner or operator of a new incinerator for infectious waste may allow the discharge into the atmosphere of dioxin or furan emissions that exceed sixty grains per billion dry standard cubic feet, corrected to seven percent oxygen, as measured by EPA reference method 23. The department may require a more stringent emission limitation based on factors such as facility design, stack height, waste charging rate, waste characteristics, or site circumstances.

e. Other air contaminants. The department may establish emission limits for other air contaminants which may be emitted from the incinerator in accordance with section 33-15-02-04.

f. Waste charging.

(1) The waste charging system of a new incinerator must be designed to prevent disruption of the combustion process as waste is charged.

(2) The waste charging system of a new incinerator for infectious waste must include an interlock preventing or automatically stopping any charging if the temperature in the secondary combustion chamber or zone drops below one thousand eight hundred degrees

Fahrenheit [982 degrees Celsius] for any continuous fifteen-minute period.

g. Monitoring.

(1) An owner or operator of a new incinerator for infectious waste shall install, calibrate, operate, and maintain instruments for continuously monitoring and recording the operating parameters for carbon monoxide and for temperature of gases exiting the secondary combustion chamber or zone. Flames from burners must not impinge upon the sensors.

(2) The department may periodically require an audit of monitoring instruments to ensure the proper function of the instruments and compliance with the performance standards of this section.

(3) When requested by the department, the owner or operator of an incinerator for infectious waste shall provide summaries of the continuous emission and operating data.

h. Performance testing.

(1) An owner or operator of a new incinerator for infectious waste shall conduct performance tests showing compliance with the requirements of this article, with permit conditions and with subdivision b of subsection 3 and subdivisions a through g of this subsection within one hundred eighty days of initial startup or within sixty days of reaching maximum capacity, whichever comes first. The performance tests must be conducted in accordance with protocol established by this article or by the department. The owner or operator must give the department at least thirty days' written notice prior to performance testing, and safe, adequate testing facilities must be provided.

(2) The department may require subsequent performance tests, in order to demonstrate compliance with emission standards and other requirements, as provided by paragraph 1, to be conducted by the owner or operator of a new or upgraded existing incinerator for infectious waste.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-04, 23-25-04.1

33-15-05-03.2. Refuse incinerators.

1. Applicability.

a. The owner or operator of an incinerator of any design capacity for refuse, except trash and refuse derived fuel, must comply with 40 CFR part 60, subpart Ea, which is incorporated by reference in chapter 33-15-12.

b. Beginning August 1, 1996, no owner or operator of an incinerator for refuse may incinerate materials of any type or form which are recyclable, unless the owner demonstrates to the department that recycling for a waste material is not reasonably available. Documents subject to state or federal privacy regulations may be incinerated when no other acceptable method of disposal is reasonably available.

c. Beginning August 1, 1997, each existing incinerator for trash must meet the same standards as a new incinerator for trash.

d. As used in this section, "new incinerator" means an incinerator, the construction for which has not been approved by the department prior to August 1, 1995.

2. Existing trash incinerators. This subsection applies to an owner or operator of an incinerator for trash of any design capacity existing on August 1, 1995.

a. Prohibited waste. No infectious waste, radioactive waste, hazardous waste, special waste, industrial waste, or any other solid waste may be burned in an incinerator designed for trash unless the incinerator's performance, design, and operating standards for those solid wastes are also met.

b. Operator training. The owner or operator of an incinerator for trash shall provide both written and oral instructions for each operator in the proper operation of the incinerator.

c. Recordkeeping and reporting.

(1) The owner or operator of an incinerator for trash shall keep a log indicating the dates and approximate quantities of waste received from an onsite source, and from each offsite source, including the transporter. The log shall be kept and maintained for a minimum period of three years from the date waste is received.

(2) An owner or operator of an incinerator for trash shall record in the log any operational error or failure of one-hour or more duration of combustion

equipment, emission control equipment, waste charging equipment, or monitoring equipment.

(3) When requested by the department, the owner or operator of an incinerator for trash shall provide a summary of the daily burning and hours of operation.

d. Malfunctions. An owner or operator of an incinerator for trash shall immediately halt all waste charging of an incinerator when a malfunction of combustion equipment, emission control equipment, monitoring equipment, or waste charging equipment occurs. Waste charging may not resume until the malfunction has been corrected or the department approves the operation of the incinerator while the malfunction is occurring.

3. New trash incinerators. In addition to subsection 2, this subsection applies to an owner or operator of a new incinerator for trash.

a. Design. Each new incinerator for trash must be equipped with a primary combustion chamber or zone which provides complete combustion of solid waste and a secondary combustion chamber or zone which provides turbulent mixing. Auxiliary fuel burners are required in all chambers. The department may approve an alternate design provided the design achieves the performance requirements of this section.

b. Opacity. No owner or operator of a new incinerator for trash may allow to be discharged into the atmosphere any air contaminant which exhibits an opacity greater than ten percent except that a maximum of twenty percent opacity is permissible for not more than one 6-minute period per hour.

c. Operating temperature. Each new incinerator for trash shall maintain the flue gas temperature in the secondary combustion chamber or zone at one thousand five hundred degrees Fahrenheit [815 degrees Celsius] or greater for a minimum of one-half-second retention time.

d. Monitoring. Each new incinerator for trash shall be equipped with a continuous temperature monitor, with readout, to monitor the temperature of the gases exiting the secondary combustion chamber or zone.

e. Stack height. Each new incinerator for trash shall be equipped with a stack for the discharge of flue gases of sufficient height to prevent ambient concentrations of air contaminants greater than allowed by chapter 33-15-02. The minimum stack height is forty feet [12.2 meters] unless it is demonstrated that a stack height less than

forty feet [12.2 meters] will meet the standards of chapter 33-15-02. The department may require taller stacks when it is necessary to meet the standards of chapter 33-15-02.

f. Waste charging.

(1) The waste charging system for a new incinerator for trash must be designed to prevent disruption of the combustion process as waste is charged.

(2) The waste charging system must be designed to prevent overcharging to assure complete combustion. No owner or operator may cause an incinerator for trash to operate at a load greater than one hundred percent of design capacity.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-04, 23-25-04.1

33-15-05-03.3. Other waste incinerators.

1. Salvage incinerators. The owner or operator of a new incinerator for salvage of materials of any design capacity shall comply with standards of subsections 2 and 3 of section 33-15-05-03.1. No industrial waste, radioactive waste, hazardous waste, or infectious waste may be burned in a salvage incinerator, unless specifically approved by the department. The department may impose one or more of the requirements of subsection 4 of section 33-15-05-03.1 on the owner or operator of a new incinerator for salvage of materials based on factors such as waste charging rate, quantity or type of emissions, material being salvaged, or site circumstances.

2. Air curtain destructors. The department may require construction, operational, and recordkeeping standards and procedures for air curtain destructors based upon factors such as characteristics and quantities of materials to be destroyed by burning and site location.

3. Industrial waste and special waste incinerators. The department may require construction, operational, emission, monitoring, recordkeeping, and reporting standards and procedures for incinerators of industrial waste based upon factors such as characteristics and quantities of the industrial waste and site location.

4. Crematoriums.

a. No owner or operator of combustion units operated as a human or animal crematorium or in an animal farm operation for animal disposal may burn any other type or form of materials or solid waste unless specifically approved by the department.

b. No owner or operator of a crematorium may allow to be discharged into the atmosphere any air contaminant, which exhibits an opacity greater than ten percent except that a maximum of twenty percent is permissible for not more than one 6-minute period per hour.

c. A crematorium constructed and operated after August 1, 1995, must be equipped with two or more chambers and with auxiliary fuel burners, designed to assure a temperature in a secondary chamber of at least one thousand eight hundred degrees Fahrenheit [982 degrees Celsius] for a minimum of one-second retention time.

d. Monitoring. Each new crematorium must be equipped with a continuous temperature monitor, with readout, to monitor the temperature of the gases exiting the secondary combustion chamber or zone.

e. General. The department may establish additional construction, operational, emission, monitoring, recordkeeping, and reporting standards and procedures for crematoriums based upon factors such as quantities of material charged, emissions, and site location.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-04, 23-25-04.1

CHAPTER 33-15-13

33-15-13-01.1. Scope. The subparts and appendices of title 40, Code of Federal Regulations, part 61, as they exist on ~~May~~ July 1, 1994, which are listed under section 33-15-13-01.2 are incorporated into this chapter by reference. Any changes to the emission standard are listed below the title of the standard.

History: Effective June 1, 1992; amended effective March 1, 1994; December 1, 1994; August 1, 1995.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-13-01.2. Emission standards.

Subpart A - General provisions.

*61.02 - The definition of administrator is deleted and replaced with the following:

Administrator means the department except for those duties that cannot be delegated by the United States environmental protection agency. For those duties that cannot be delegated, administrator means the department and the administrator of the United States environmental protection agency.

The following definition is added:

"Waiver of compliance" means a permit to operate with a compliance schedule.

*Sections 61.07 and 61.08 are deleted in their entirety and replaced with the following:

Application for permit to construct. The owner or operator of any new source to which a standard prescribed under these subparts is applicable, prior to the date on which construction or modification is planned to commence, shall apply for and receive a permit to construct as provided in section 33-15-14-02. For those sources on which construction or modification has commenced and initial startup has not occurred prior to the effective date of a standard of this chapter, the owner or operator shall apply for a permit to construct within thirty days after the effective date of the standard.

Neither the submission of an application for a permit to construct nor the administrator's approval of construction or modification shall:

(1) Relieve an owner or operator of legal responsibility for compliance with any applicable provisions of this chapter or of any other applicable federal, state, or local requirement; or

(2) Prevent the administrator from implementing or enforcing this chapter or taking any other action under this article.

*61.09(b) is deleted in its entirety.

*61.11(f) is deleted in its entirety and replaced with the following:

(f) The granting of a permit under this section does not abrogate the department's authority under section 33-15-01-06 and subsection 9 of section 33-15-14-02, and subsection 6 of section 33-15-14-03.

*61.16 is deleted in its entirety and replaced with the following:

Availability of information.

a. Emission data provided to, or otherwise obtained by, the department in accordance with the provisions of this chapter must be available to the public.

b. Any records, reports, or information, other than emission data, provided to, or otherwise obtained by, the department in accordance with the provisions of this chapter must be available to the public, except that upon a showing satisfactory to the department by any person that such records, reports, or information, or particular part thereof (other than emission data), if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the department will consider such records, reports, or information, or particular part thereof, confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such records, reports, or information, or particular part thereof, may be disclosed to other officers, employees, or authorized representatives of the state and federal government concerned with carrying out the provisions of North Dakota Century Code chapter 23-25 or when relevant in any proceeding under North Dakota Century Code chapter 23-25.

*61.17 is deleted in its entirety.

Subpart C - National emission standard for beryllium.

Subpart D - National emission standard for beryllium rocket motor firing.

Subpart E - National emission standard for mercury.

Subpart F - National emission standard for vinyl chloride.

Subpart G - [Reserved]

Subpart I - National emission standards for radionuclide emissions from facilities licensed by the nuclear regulatory commission and federal facilities not covered by subpart H.

Subpart J - National emission standard for equipment leaks (fugitive emission sources) of benzene.

Subpart L - National emission standard for benzene emissions from coke byproduct recovery plants.

Subpart N - National emission standard for inorganic arsenic emissions from glass manufacturing plants.

Subpart O - National emission standard for inorganic arsenic emissions from primary copper smelters.

Subpart P - National emission standard for inorganic arsenic emissions from arsenic trioxide and metallic arsenic production facilities.

Subpart S - [Reserved]

Subpart U - [Reserved]

Subpart V - National emission standard for equipment leaks (fugitive emission sources).

Subpart Y - National emission standard for benzene emissions from benzene storage vessels.

Subpart BB - National emission standard for benzene emissions from benzene transfer operations.

Subpart FF - National emission standard for benzene waste operations.

Appendix A - National emission standards for hazardous air pollutants, compliance status information.

Appendix B - Test methods.

Appendix C - Quality assurance procedures.

History: Effective June 1, 1992; amended effective March 1, 1994; August 1, 1995.
General Authority: NDCC 23-25-03~~,-23-25-04~~
Law Implemented: NDCC 23-25-03~~,-23-25-04~~

CHAPTER 33-15-14

33-15-14-01. Designated air contaminant sources. Pursuant to subsection 1 of North Dakota Century Code section 23-25-04, stationary sources within the following source categories are designated as air contaminant sources capable of causing or contributing to air pollution, either directly or indirectly.

1. The following chemical process facilities:

   a. Adipic acid.

   b. Ammonia.

   c. Ammonium nitrate.

   d. Carbon black.

   e. Charcoal.

   f. Chlorine.

   g. Chlor-alkali manufacturing.

   h. Detergent and soap.

   i. Explosives (trinitrotoluene and nitrocellulose).

   j. Hydrochloric acid.

   k. Hydrofluoric acid.

   l. Nitric acid.

   m. Paint and varnish manufacturing.

   n. Phosphoric acid.

   o. Phthalic anhydride.

   p. Plastics manufacturing.

   q. Printing ink manufacturing.

   r. Sodium carbonate.

   s. Sulfur production and recovery.

   t. Sulfuric acid.

   u. Synthetic fibers.

v. Synthetic rubber.

w. Terephthalic acid.

x. Alcohol.

y. Cresylic acids.

z. Phenol.

aa. Polymer manufacturing and coating operations.

2. The following food and agricultural facilities:

a. Agricultural drying and dehydrating operations.

b. Ammonium nitrate.

c. Cheese whey drying and processing.

d. Coffee roasting.

e. Cotton ginning.

f. Feed, grain, and seed handling and processing.

g. Fermentation processes.

h. Fertilizers.

i. Fishmeal processing.

j. Meat smokehouses.

k. Orchard heaters.

l. Potato processing.

m. Rendering plants.

n. Starch manufacturing.

o. Sugarbeet processing.

3. The following metallurgical facilities:

a. Primary metals facilities:

(1) Aluminum ore reduction.

(2) Copper smelters.

(3) Ferroalloy production.

(4) Iron and steel mills.

(5) Lead smelters.

(6) Metallurgical coke manufacturing.

(7) Zinc.

b. Secondary metals facilities:

(1) Aluminum operations.

(2) Brass and bronze smelting.

(3) Ferroalloys.

(4) Ferrous foundries.

(5) Gray iron foundries.

(6) Lead smelting.

(7) Magnesium smelting.

(8) Nonferrous foundries.

(9) Steel foundries.

(10) Zinc processes.

c. Electrolytic plating operations.

4. The following mineral products facilities:

a. Asphalt roofing.

b. Asphaltic concrete plants.

c. Bricks and related clay refractories.

d. Calcium carbide.

e. Ceramic and clay processes.

f. Clay and fly ash sintering.

g. Coal cleaning.

h. Coal drying.

i. Coal mining.

j. Coal handling and processing.

k. Concrete batching.

l. Fiberglass manufacturing.

m. Frit manufacturing.

n. Glass manufacturing.

o. Gypsum manufacturing.

p. Leonardite mining, drying, and processing.

q. Lime manufacturing.

r. Mineral wool manufacturing.

s. Paperboard manufacturing.

t. Perlite manufacturing.

u. Phosphate rock preparation.

v. Portland cement manufacturing, bulk handling, and storage.

w. Rock, stone, gravel, and sand quarrying and processing.

x. Uranium mining, milling, and enrichment.

y. Calciners and dryers.

5. The following energy and fuel facilities:

a. Coal gasification.

b. Coal liquefaction.

c. Crude oil and natural gas production.

d. Fossil fuel steam electric plants.

e. Fuel conversion plants.

f. Natural gas processing.

g. Petroleum refining and petrochemical operations.

h. Petroleum storage (storage tanks and bulk terminals).

6. The following wood processing facilities:

a. Plywood veneer and layout operations.

b. Pulpboard manufacturing.

c. Wood pulping.

d. Sawmills.

e. Wood products manufacturing.

7. The following ~~gaseous,-liquid,-and-solid-waste-disposal~~ waste management units or facilities:

a. Afterburners.

b. Automobile body incinerators.

c. Conical burners.

d. Flares.

e. Gaseous and liquid organic compounds incinerators.

f. Industrial waste incinerators.

g. Open burning.

h. Open pit incinerators.

i. ~~Pathological~~ Infectious waste incinerators.

j. Refuse incinerators.

k. ~~Scrap-metal-salvage~~ Salvage incinerators.

l. Sewage sludge incinerators.

m. Wood waste incinerators.

n. Municipal waste combustors.

8. The following miscellaneous facilities:

a. Drycleaning and laundry operations.

b. Fuel burning equipment.

c. Internal combustion engines.

d. Surface coating operations.

e. Wastewater treatment plants.

f. Water cooling towers and water cooling ponds.

g. Stationary gas turbines.

h. Lead acid battery manufacturing.

i. Hydrocarbon contaminated soil remediation projects.

9. Any category of sources to which a federal standard of performance applies [40 CFR 60].

10. Any source which emits a contaminant subject to a national emission standard for hazardous air pollutants [40 CFR 61].

11. Any source which is subject to review under federal prevention of significant deterioration of air quality regulations [40 CFR 51.166].

12. Any source which is determined by the department to have an emission which affects state ambient air quality standards or the other provisions of chapter 33-15-02.

13. Any source subject to title V permitting requirements in section 33-15-14-06.

14. Any source to which a national emission standard for hazardous air pollutants for source categories [40 CFR 63] would apply.

15. Other sources subject to a standard or requirement under the Federal Clean Air Act as amended.

History: Amended effective October 1, 1987; March 1, 1994; August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04, 23-25-04.1, 28-32-01
Law Implemented: NDCC 23-25-04, 23-25-04.1

33-15-14-02. Permit to construct.

1. **Permit to construct required.** No construction, installation, or establishment of a new stationary source within a source category designated in section 33-15-14-01 may be commenced unless the owner or operator thereof shall file an application for, and receive, a permit to construct in accordance with this chapter. This requirement shall also apply to any source for which a federal standard of performance has been promulgated prior to such filing of an application for a permit to construct. A list of sources for which a federal standard has been promulgated, and the standards which apply to such sources, must be available at the department's offices.

   The initiation of activities that are exempt from the definition of construction, installation, or establishment in section 33-15-14-01.1, prior to obtaining a permit to construct, are at the owner's or operator's own risk. These activities have no impact on the department's decision to

issue a permit to construct. The initiation or completion of such activities conveys no rights to a permit to construct under this section.

2. **Application for permit to construct.**

   a. Application for a permit to construct a new installation or source must be made by the owner or operator thereof on forms furnished by the department.

   b. A separate application is required for each new installation or source subject to this chapter.

   c. Each application must be signed by the applicant, which signature shall constitute an agreement that the applicant will assume responsibility for the construction or operation of the new installation or source in accordance with this article and will notify the department, in writing, of the startup of operation of such source.

3. **Alterations to source.**

   a. The addition to or enlargement of or replacement of or alteration in any stationary source, already existing, which is undertaken pursuant to an approved compliance schedule for the reduction of emissions therefrom, shall be exempt from the requirements of this section.

   b. Any physical change in, or change in the method of operation of, a stationary source already existing which increases or may increase the emission rate or increase the ambient concentration by an amount greater than that specified in subdivision a of subsection 5 of section 33-15-14-02 of any pollutant for which an ambient air quality standard has been promulgated under this article or which results in the emission of any such pollutant not previously emitted must be considered to be construction, installation, or establishment of a new source, except that:

      (1) Routine maintenance, repair, and replacement may not be considered a physical change.

      (2) The following may not be considered a change in the method of operation:

         (a) An increase in the production rate, if such increase does not exceed the operating design capacity of the source and it is not limited by a permit condition.

         (b) An increase in the hours of operation if it is not limited by a permit condition.

(c) Changes from one operating scenario to another provided the alternative operating scenarios are identified and approved in a permit to operate.

(d) Trading of emissions within a facility provided:

[1] These trades have been identified and approved in a permit to operate; and

[2] The total facility emissions do not exceed the facility emissions cap established in the permit to operate.

(e) Trading and utilizing acid rain allowances provided compliance is maintained with all other applicable requirements.

4. **Submission of plans - Deficiencies in application.** As part of an application for a permit to construct, the department may require the submission of plans, specifications, siting information, emission information, descriptions and drawings showing the design of the installation or source, the manner in which it will be operated and controlled, the emissions expected from it, and the effects on ambient air quality. Any additional information, plans, specifications, evidence, or documentation that the department may require must be furnished upon request. Within twenty days of the receipt of the application, the department shall advise the owner or operator of the proposed source of any deficiencies in the application. In the event of a deficiency, the date of receipt of the application is the date upon which all requested information is received.

a. Determination of the effects on ambient air quality as may be required under this section must be based on the applicable requirements specified in the "Guideline on Air Quality Models (Revised)" (United States environmental protection agency, office of air quality planning and standards, Research Triangle Park, North Carolina 27711) as supplemented by the "North Dakota Guideline for Air Quality Modeling Analyses" (North Dakota state department of health and consolidated laboratories, division of environmental engineering). These documents are incorporated by reference.

b. Where an air quality impact model specified in the documents incorporated by reference in subdivision a is inappropriate, the model may be modified or another model substituted provided:

(1) Any modified or nonguideline model must be subject to notice and opportunity for public comment under subsection 6.

(2) The applicant must provide to the department adequate information to evaluate the applicability of the modified or nonguideline model. Such information must include, but is not limited to, methods like those outlined in the "Interim Procedures for Evaluating Air Quality Models (Revised)" (United States environmental protection agency, office of air quality planning and standards, Research Triangle Park, North Carolina 27711).

(3) Written approval from the department must be obtained for any modification or substitution.

(4) Written approval from the United States environmental protection agency must be obtained for any modification or substitution prior to the granting of a permit under this chapter.

5. **Review of application - Standard for granting permits to construct.** The department shall review any plans, specifications, and other information submitted in application for a permit to construct and from such review shall, within thirty days of the receipt of the completed application, make the following preliminary determinations:

a. Whether the proposed project will be in accord with this article, including whether the operation of any new stationary source at the proposed location will cause or contribute to a violation of any applicable ambient air quality standard. A new stationary source will be considered to cause or contribute to a violation of an ambient air quality standard when such source would, at a minimum, exceed the following significance levels at any locality that does not or would not meet the applicable ambient standard:

Contaminant	Averaging Time (hours)				
	Annual ($\mu g/m^3$)	24 ($\mu g/m^3$)	8 ($\mu g/m^3$)	3 ($\mu g/m^3$)	1 ($\mu g/m^3$)
SO_2	1.0	5		25	25
PM_{10}	1.0	5			
NO_2	1.0				25
CO			500		2000

b. Whether the proposed project will provide all known available and reasonable methods of emission control. Whenever a standard of performance is applicable to the source, compliance with this criterion will require provision for emission control which will, at least, satisfy such standards.

6. **Public participation - Final action on application.** This subsection shall apply only to those affected facilities designated under chapter 33-15-13, those that will be required to obtain a permit to operate under section 33-15-14-06, for sources which the department has determined to have a major impact on air quality, those for which a request for a public comment period has been received from the public, sources for which a significant degree of public interest exists regarding air quality issues, or those sources which desire a federally enforceable permit which limits their potential to emit. The department shall:

   a. Within ninety days of receipt of a complete application, make a preliminary determination concerning issuance of a permit to construct.

   b. Within ninety days of the receipt of the complete application, make available in at least one location in the county or counties in which the proposed project is to be located, a copy of its preliminary determinations and copies of or a summary of the information considered in making such preliminary determinations.

   c. Publish notice to the public by prominent advertisement, within ninety days of the receipt of the complete application, in the region affected, of the opportunity for written comment on the preliminary determinations. The public notice must include the proposed location of the source.

   d. Within ninety days of the receipt of the complete application, deliver a copy of the notice to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: The chief executive of the city and county; any comprehensive regional land use planning agency; and any state, federal land manager, or Indian governing body whose lands will be significantly affected by the source's emissions.

   e. Within ninety days of receipt of a complete application, provide a copy of the proposed permit and all information considered in the development of the permit and the public notice to the regional administrator of the United States environmental protection agency.

   f. Allow thirty days for public comment.

   g. Consider all public comments properly received, in making the final decision on the application.

   h. Allow the applicant to submit written responses to public comments received by the department. The applicant's

responses must be submitted to the department within twenty days of the close of the public comment period.

i. Take final action on the application within thirty days of the applicant's response to the public comments.

j. Provide a copy of the final permit, if issued, to the applicant, the regional administrator of the United States environmental protection agency and anyone who requests a copy.

For those sources subject to the requirements of chapter 33-15-15, the public participation procedures under subsection 5 of section 33-15-15-01 shall be followed.

7. **Denial of permit to construct.** If, after review of all information received, including public comment with respect to any proposed project, the department makes the determination of any one of subdivision a or b of subsection 5 in the negative, it shall deny the permit and notify the applicant, in writing, of the denial to issue a permit to construct.

   If a permit to construct is denied, the construction, installation, or establishment of the new stationary source shall be unlawful. No permit to construct or modify may be granted if such construction, or modification, or installation, will result in a violation of this article.

8. **Issuance of permit to construct.** If, after review of all information received, including public comment with respect to any proposed project, the department makes the determination of subdivision a or b of subsection 5 in the affirmative, the department shall issue a permit to construct. The permit may provide for conditions of operation as provided in subsection 9.

9. **Permit to construct - Conditions.** The department may impose any reasonable conditions upon a permit to construct, including conditions concerning:

   a. Sampling, testing, and monitoring of the facilities or the ambient air or both.

   b. Trial operation and performance testing.

   c. Prevention and abatement of nuisance conditions caused by operation of the facility.

   d. Recordkeeping and reporting.

   e. Compliance with applicable rules and regulations in accordance with a compliance schedule.

f. Limitation on hours of operation, production rate, processing rate, or fuel usage when necessary to assure compliance with this article.

The violation of any conditions so imposed may result in revocation or suspension of the permit or other appropriate enforcement action.

10. **Scope.**

a. The issuance of a permit to construct for any source does not affect the responsibility of an owner or operator to comply with applicable portions of a control strategy affecting the source.

b. A permit to construct shall become invalid if construction is not commenced within eighteen months after receipt of such permit, if construction is discontinued for a period of eighteen months or more; or if construction is not completed within a reasonable time. The department may extend the eighteen-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within eighteen months of the projected and approved commencement date. In cases of major construction projects involving long lead times and substantial financial commitments, the department may provide by a condition to the permit a time period greater than eighteen months when such time extension is supported by sufficient documentation by the applicant.

11. **Transfer of permit to construct.** To ensure the responsible owners or operators, or both, are identified, the holder of a permit to construct may not transfer such permit without prior approval of the department.

12. ~~Permit--to-construct-fees.--Any-construction,-installation,-or establishment-of-a-new-stationary-source-requiring-a-permit-to construct--under-subsections-1-and-3-of-section-33-15-14-02-is required-to-pay-a-permit-to-construct--application--processing fee--to--the--North--Dakota--state--department--of--health-and consolidated-laboratories.--A-nonrefundable-filing-fee-of--one hundred-fifty-dollars-plus-an-application-processing-fee-based on-actual-processing-costs,-including-computer-data-processing costs,--incurred-by-the-department-for-all-sources-which-would involve-a-major-analysis-the-cost-of-which--would--exceed--one hundred--fifty--dollars,-as-determined-by-the-department.--The applicant-is-subject--to--the--processing--fee--regardless--of whether-a-permit-to-construct-is-issued.--The-fee-must-be-paid on-the-following-basis:~~

~~a.--The--filing--fee--of--one--hundred--fifty--dollars-must-be submitted-with-the-permit-application.~~

~~b.--A-record-of-all-permit-to-construct-application-processing costs-incurred-must-be-maintained-by-the-department.~~

~~c.--Upon--request,--the--department,--in-consultation-with-the applicant,-will-prepare-an-estimate-of-the-processing--fee and---the--billing--schedule--that--will--be--utilized--in processing-the-application.--If-the-applicant-chooses,-the applicant--may--withdraw--the--application--at--this-point without-paying-any-processing-fees.~~

~~d.--After--final--determinations--on-the-application-have-been made,-a-final-statement-will--be--sent--to--the--applicant containing--the-remaining-actual-processing-costs-incurred by-the-department.~~

~~e.--Any--source--that--initiates--operation--under-a-permit-to construct-prior--to--receiving--a--permit--to--operate--is subject--to--the--fees--outlined-in-section-33-15-14-03-or 33-15-14-06,-whichever-is-applicable.~~ [Reserved]

13. **Exemptions.** A permit to construct is not required for the following stationary sources provided there is no federal requirement for a permit or approval for construction or operation and there is no applicable new source performance standard, or national emission standard for hazardous air pollutants.

    a. Maintenance, structural changes, or minor repair of process equipment, fuel burning equipment, control equipment, or incinerators which do not change capacity of such process equipment, fuel burning equipment, control equipment, or incinerators and which do not involve any change in the quality, nature, or quantity of emissions therefrom.

    b. Fossil fuel burning equipment, other than smokehouse generators, which meet all of the following criteria:

        (1) The aggregate heat input per unit does not exceed ten million British thermal units per hour.

        (2) The total aggregate heat input from all equipment does not exceed ten million British thermal units per hour.

        (3) The actual emissions, as defined in chapter 33-15-15, from all equipment do not exceed twenty-five tons [22.67 metric tons] per year of any air contaminant and the potential to emit any air contaminant for which an ambient air quality standard has been

promulgated in chapter 33-15-02 is less than one hundred tons [90.68 metric tons] per year.

c. Any single internal combustion engine with less than five hundred brake horsepower, or multiple engines with a combined brake horsepower rating less than five hundred brake horsepower.

d. Bench scale laboratory equipment used exclusively for chemical or physical analysis or experimentation.

e. Portable brazing, soldering, or welding equipment.

f. The following equipment:

(1) Comfort air-conditioners or comfort ventilating systems which are not designed and not intended to be used to remove emissions generated by or released from specific units or equipment.

(2) Water cooling towers and water cooling ponds unless used for evaporative cooling of process water, or for evaporative cooling of water from barometric jets or barometric condensers or used in conjunction with an installation requiring a permit.

(3) Equipment used exclusively for steam cleaning.

(4) Porcelain enameling furnaces or porcelain enameling drying ovens.

(5) Unheated solvent dispensing containers or unheated solvent rinsing containers of sixty gallons [227.12 liters] capacity or less.

(6) Equipment used for hydraulic or hydrostatic testing.

g. The following equipment or any exhaust system or collector serving exclusively such equipment:

(1) Blast cleaning equipment using a suspension of abrasive in water.

(2) Bakery ovens where the products are edible and intended for human consumption.

(3) Kilns for firing ceramic ware, heated exclusively by gaseous fuels, singly or in combinations, and electricity.

(4) Confection cookers where the products are edible and intended for human consumption.

(5) Drop hammers or hydraulic presses for forging or metalworking.

(6) Diecasting machines.

(7) Photographic process equipment through which an image is reproduced upon material through the use of sensitized radiant energy.

(8) Equipment for drilling, carving, cutting, routing, turning, sawing, planing, spindle sanding, or disc sanding of wood or wood products, which is located within a facility that does not vent to the outside air.

(9) Equipment for surface preparation of metals by use of aqueous solutions, except for acid solutions.

(10) Equipment for washing or drying products fabricated from metal or glass; provided, that no volatile organic materials are used in the process and that no oil or solid fuel is burned.

(11) Laundry dryers, extractors, or tumblers for fabrics cleaned with only water solutions of bleach or detergents.

h. Natural draft hoods or natural draft ventilators.

i. Containers, reservoirs, or tanks used exclusively for:

(1) Dipping operations for coating objects with oils, waxes, or greases, where no organic solvents are used.

(2) Dipping operations for applying coatings of natural or synthetic resins which contain no organic solvents.

(3) Storage of butane, propane, or liquefied petroleum or natural gas.

(4) Storage of lubricating oils.

(5) Storage of petroleum liquids except those containers, reservoirs, or tanks subject to the requirements of chapter 33-15-12.

j. Gaseous fuel-fired or electrically heated furnaces for heat treating glass or metals, the use of which does not involve molten materials.

k. Crucible furnaces, pot furnaces, or induction furnaces, with a capacity of one thousand pounds [453.59 kilograms] or less each, unless otherwise noted, in which no sweating or distilling is conducted, nor any fluxing conducted utilizing chloride, fluoride, or ammonium compounds, and from which only the following metals are poured or in which only the following metals are held in a molten state:

(1) Aluminum or any alloy containing over fifty percent aluminum; provided, that no gaseous chlorine compounds, chlorine, aluminum chloride, or aluminum fluoride are used.

(2) Magnesium or any alloy containing over fifty percent magnesium.

(3) Lead or any alloy containing over fifty percent lead, in a furnace with a capacity of five hundred fifty pounds [249.48 kilograms] or less.

(4) Tin or any alloy containing over fifty percent tin.

(5) Zinc or any alloy containing over fifty percent zinc.

(6) Copper.

(7) Precious metals.

l. Open burning activities within the scope of section 33-15-04-02.

m. Flares used to indicate some danger to the public.

n. Sources or alterations to a source which are of minor significance as determined by the department.

o. Oil and gas production facilities as defined in chapter 33-15-20 which are not a major source as defined in subdivision n of subsection 1 of section 33-15-14-06.

14. **Performance and emission testing.**

a. Emission tests or performance tests or both shall be conducted by the owner or operator of a facility and data reduced in accordance with the applicable procedure, limitations, standards, and test methods established by this article. Such tests must be conducted under the owner's or operator's permit to construct, and such permit is subject to the faithful completion of the test in accordance with this article.

b. All dates and periods of trial operation for the purpose of performance or emission testing pursuant to a permit to construct must be approved in advance by the department. Trial operation shall cease if the department determines, on the basis of the test results, that continued operation will result in the violation of this article. Upon completion of any test conducted under a permit to construct, the department may order the cessation of the operation of the tested equipment or facility until such time as a permit to operate has been issued by the department.

c. Upon review of the performance data resulting from any test, the department may require the installation of such additional control equipment as will bring the facility into compliance with this article.

d. Nothing in this article may be construed to prevent the department from conducting any test upon its own initiative, or from requiring the owner or operator to conduct any test at such time as the department may determine.

15. **Responsibility to comply.**

a. Possession of a permit to construct does not relieve any person of the responsibility to comply with this article.

b. The exemption of any stationary source from the requirements of a permit to construct by reason of inclusion in subsection 13 does not relieve the owner or operator of such source of the responsibility to comply with any other applicable portions of this article.

16. **Portable sources.** Sources which are designated to be portable and which are not subject to the requirements of chapter 33-15-15 are exempt from requirements to obtain a permit to construct. The owner or operator shall submit an application for a permit to operate prior to initiating operations.

17. **Registration of exempted stationary sources.** The department may require that the owner or operator of any stationary source exempted under subsection 13 shall register the source with the department within such time limits and on such forms as the department may prescribe.

18. **Extensions of time.** The department may extend any of the time periods specified in subsections 4, 5, and 6 of section 33-15-14-02 upon notification of the applicant by the department.

19. **Amendment of permits.** The department may, when the public interest requires or when necessary to ensure the accuracy of

the permit, modify any condition or information contained in the permit to construct. Modification shall be made only upon the department's own motion and the procedure shall, at a minimum, conform to any requirements of federal and state law. In the event that the modification would have a significant impact as defined in chapter 33-15-15, the department shall follow the procedures established in chapter 33-15-15. For those of concern to the public, the department will provide:

a. Reasonable notice to the public, in the area to be affected, of the opportunity for comment on the proposed modification, and the opportunity for a public hearing, upon request, as well as written public comment.

b. A minimum of a thirty-day period for written public comment, with the opportunity for a public hearing during that thirty-day period, upon request.

c. Consideration by the department of all comments received in its order for modification.

The department may require the submission of such maps, plans, specifications, emission information, and compliance schedules as it deems necessary prior to the issuance of an amendment. It is the intention of the department that this subsection shall apply only in those instances allowed by federal rules and regulations and only in those instances in which the granting of a variance pursuant to section 33-15-01-06 and enforcement of existing permit conditions are manifestly inappropriate.

History: Amended effective March 1, 1980; February 1, 1982; October 1, 1987; June 1, 1990; March 1, 1994; August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04, 23-25-04.1, 23-25-04.2
Law Implemented: NDCC 23-25-04, 23-25-04.1, 23-25-04.2

33-15-14-03. Minor source permit to operate.

1. **Permit to operate required.**

a. Except as provided in subdivisions c and d of this subsection, no person may operate or cause the routine operation of an installation or source designated in section 33-15-14-01 without applying for and obtaining, in accordance with this section, a permit to operate. Application for a permit to operate a new installation or source must be made at least thirty days prior to startup of routine operation. Those sources that received a permit to construct under section 33-15-14-02, need only submit a thirty-day prior notice of proposed startup to satisfy the requirement to apply for a permit to operate under this subdivision.

b. No person may operate or cause the operation of an installation or source in violation of any permit to operate, any condition imposed upon a permit to operate or in violation of this article.

c. Sources that are subject to the title V permitting requirements of section 33-15-14-06 are exempt from the requirements of this section except during the transitional period from a minor source permit to operate to a title V permit to operate. Existing sources shall comply with all the requirements of this section, except subsection 10 of section 33-15-14-03, until a title V permit to operate is issued. Fees for sources that meet the applicability requirements of section 33-15-14-06 shall be assessed based on ~~subsection 8 of section 33-15-14-06~~ section 33-15-23-04.

d. Sources that are exempt from the requirement to obtain a permit to construct under subsection 13 of section 33-15-14-02 are exempt from this section.

e. Sources which are subject to the title V permitting requirements in section 33-15-14-06 based solely on their potential to emit, may apply for a federally enforceable minor source permit to operate which would limit their potential to emit to a level below the title V permit to operate applicability threshold.

f. Permits which are issued under this section which do not conform to the requirements of this section, including public participation under subdivision a of subsection 5 of section 33-15-14-03, and the requirements of any United States environmental protection agency regulations may be deemed not federally enforceable by the United States environmental protection agency.

g. General permits: The department may issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other minor source permits to operate and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the department shall grant the conditions and terms of the general permit. Sources that would qualify for a general permit must apply to the department for coverage under the terms of the general permit or apply for an individual minor source permit to operate. Without repeating the public participation procedures under subsection 5 of section 33-15-14-03, the department may grant a source's request for authorization to operate under a general permit.

2. **Application for permit to operate.**

a. Application for a permit to operate must be made by the owner or operator thereof on forms furnished by the department.

b. Each application for a permit to operate must be accompanied by such performance tests results, information, and records as may be required by the department to determine whether the requirements of this article will be met. Such information may also be required by the department at any time when the source is being operated to determine compliance with this article.

c. Each application must be signed by the applicant, which signature shall constitute an agreement that the applicant will assume responsibility for the operation of the installation or source in accordance with this article.

3. **Standards for granting permits to operate.** No permit to operate may be granted unless the applicant shows to the satisfaction of the department that the source is in compliance with this article.

4. **Performance testing.** Before a permit to operate is granted, the applicant, if required by the department, shall conduct performance tests in accordance with methods and procedures required by this article or methods and procedures approved by the department. Such tests must be made at the expense of the applicant. The department may monitor such tests and may also conduct performance tests.

5. **Action on applications.**

a. Public participation: This subdivision is applicable to only those sources which apply for a federally enforceable minor source permit to operate which limits their potential to emit an air contaminant. The department shall:

(1) Within ninety days of receipt of a complete application:

(a) Make a preliminary determination concerning issuance of the permit to operate.

(b) Make available in at least one location in the county or counties in which the source is located, a copy of the proposed permit and copies of or a summary of the information considered in developing the permit.

(c) Publish notice to the public by prominent advertisement, in the region affected, of the opportunity for written comment on the proposed

permit. The public notice must include the proposed location of the source.

(d) Deliver a copy of the proposed permit and public notice to the chief executive of the city and county where the source is located; the regional land use planning agency; and any state or federal land manager, or Indian governing body whose lands will be significantly affected by the source's emissions.

(e) Provide a copy of the proposed permit, all information considered in the development of the permit and the public notice to the regional administrator of the United States environmental protection agency.

(2) Allow thirty days for public comment.

(3) Consider all public comments properly received, in making the final decision on the application.

(4) Allow the applicant to submit written responses to public comments received by the department. The applicant's responses must be submitted to the department within twenty days of the close of the public comment period.

(5) Take final action on the application within thirty days of the applicant's response to the public comments.

(6) Provide a copy of the final permit, if issued, to the applicant, the regional administrator of the United States environmental protection agency and anyone who requests a copy.

b. For those sources not subject to public participation under subdivision a of this subsection, the department shall act within thirty days after receipt of an application for a permit to operate a new installation or source, and within thirty days after receipt of an application to operate an existing installation or source, and shall notify the applicant, in writing, of the approval, conditional approval, or denial of the application.

c. The department shall set forth in any notice of denial the reasons for denial. A denial must be without prejudice to the applicant's right to a hearing before the department or for filing a further application after revisions are made to meet objections specified as reasons for the denial.

6. **Permit to operate - Conditions.** The department may impose any reasonable conditions upon a permit to operate. All emission limitations, controls, and other requirements imposed by conditions on the permit to operate must be at least as stringent as any applicable limitation or requirement contained in this article. Permit to operate conditions may include:

   a. Sampling, testing, and monitoring of the facilities or ambient air or both.

   b. Trial operation and performance testing.

   c. Prevention and abatement of nuisance conditions caused by operation of the facility.

   d. Recordkeeping and reporting.

   e. Compliance with applicable rules and regulations in accordance with a compliance schedule.

   f. Limits on the hours of operation of a source or its processing rate, fuel usage or production rate when necessary to assure compliance with this article.

7. **Suspension or revocation of permit to operate.**

   a. The department may suspend or revoke a permit to operate for violation of this article, violations of a permit condition or failure to respond to a notice of violation or any order issued pursuant to this article.

   b. Suspension or revocation of a permit to operate shall become final ten days after serving notice on the holder of the permit.

   c. A permit to operate which has been revoked pursuant to this article must be surrendered forthwith to the department.

   d. No person may operate or cause the operation of an installation or source if the department denies or revokes a permit to operate.

8. **Transfer of permit to operate.** The holder of a permit to operate may not transfer it without the prior approval of the department.

9. **Renewal of permit to operate.**

   a. Every permit to operate issued by the department after February 9, 1976, shall become void upon the fifth anniversary of its issuance. Applications for renewal of

such permits must be submitted ninety days prior to such anniversary date. The department shall approve or disapprove such application within ninety days. If a source submits a complete application for a permit renewal at least ninety days prior to the expiration date, the source's failure to have a minor source permit to operate is not a violation of this section until the department takes final action on the renewal application.

b. The department may amend permits issued prior to February 9, 1976, so as to provide for voidance upon the fifth anniversary of its issuance.

10. Minor source permit to operate fees.

a. The owner or operator of each installation subject to a permit issued under section 33-15-14-03 shall pay an annual permit fee based on the following table:

Classification	Annual Fee ($)
Designated	300
Monitor (CEMS or Ambient Site)	600/CEMS or site
Other	100
State	0
Exempt	0

The following criteria are used to classify sources for determining minor source annual fees:

Designated: A source that is designated for scheduled inspections and whose actual emissions of any air contaminant are less than one hundred tons [90.68 metric tons] per year and whose total annual emmissions of all air contaminants would exceed one hundred tons [90.68 metric tons] per year if control equipment was not operated.

Monitor: A charge in addition to the annual fee for any source operating a continuous emission monitor system (CEMS) or an ambient monitoring site.

Other: As designated by the department.

State: Any state owned installation.

Exempt: As designated by the department.

b. The following activities conducted by the department are not included in the annual costs and will be charged to affected sources based on the actual costs incurred by the department:

~~(1)--Observation--of--source--or-performance-specification testing,-or-both.~~

(1) Observation of source or performance specification testing, or both.

~~(2)--Audits--of--source--operated--ambient--air-monitoring networks.~~

(2) Audits of source operated ambient air monitoring networks.

~~An--accounting--of--the--actual--costs-incurred-under-this subdivision-will-accompany-the-notice-of-the-annual-permit fee.~~

~~c.--Annual--emissions--are-derived-using-representative-source test-data,-"compilation-of-air-pollution-emission--factors (AP-42)"-or-other-reliable-data.~~

~~d.--The--classification--of--"other"--and--"exempt"--shall--be designated-by-the-department-on-a-case-by-case-basis.~~

~~e.--The-department-shall-send-a-notice,-identifying-the-amount of-the-annual-permit-fee,-to-the-owner-or-operator-of-each affected--source.---The--fee--is--due--within--sixty--days following-receipt-of-such-notice.~~ [Reserved]

11. **Performance and emission testing.**

a. Emission tests or performance tests or both shall be conducted by the owner or operator of a facility and data reduced in accordance with the applicable procedure, limitations, standards, and test methods established by this article. Issuance of a minor source permit to operate is subject to the faithful completion of the test in accordance with this article.

b. All dates and periods of trial operation for the purpose of performance or emission testing pursuant to a permit to operate, must be approved in advance by the department. Trial operation shall cease if the department determines, on the basis of the test results, that continued operation will result in the violation of this article. Upon completion of any test conducted under a permit to construct, the department may order the cessation of the operation of the tested equipment or facility until such time as a permit to operate has been issued by the department.

c. Upon review of the performance data resulting from any test, the department may require the installation of such additional control equipment as will bring the facility into compliance with this article.

d. Nothing in this article may be construed to prevent the department from conducting any test upon its own initiative, or from requiring the owner or operator to conduct any test at such time as the department may determine.

12. **Responsibility to comply.**

a. Possession of a minor source permit to operate does not relieve any person of the responsibility to comply with this article.

b. The exemption of any stationary source from the requirements to obtain a minor source permit to operate does not relieve the owner or operator of such source of the responsibility to comply with any other applicable portions of this article.

13. **Portable sources.** Sources which are designed to be portable and which are operated at temporary jobsites across the state may not be considered a new source by virtue of location changes. One application for a permit to operate any portable source may be filed in accordance with this chapter, and subsequent applications are not required for each temporary jobsite. The permit to operate issued by the department shall be conditioned by such specific requirements as the department deems appropriate to carry out the provisions of sections 33-15-01-07 and 33-15-01-15.

14. **Registration of exempted stationary sources.** The department may require that the owner or operator of any stationary source exempted from the requirement to obtain a minor source permit to operate to register the source with the department within such time limits and on such forms as the department may prescribe.

15. **Extensions of time.** The department may extend any of the time periods specified in this section upon notification of the applicant by the department.

16. **Amendment of permits.** When the public interest requires or when necessary to ensure the accuracy of the permit, the department may modify any condition or information contained in a minor source permit to operate. Modification shall be made only upon the department's own motion and the procedure shall, at a minimum, conform to any requirements of federal and state law. In the event that the modification would have a significant impact as defined in chapter 33-15-15, the department shall follow the procedures established in chapter 33-15-15. For those of concern to the public, or modify a condition which limits the potential to emit of a source which possesses a federally enforceable permit, the department will provide:

a. Reasonable notice to the public, in the area to be affected, of the opportunity for comment on the proposed modification and the opportunity for a public hearing, upon request, as well as written public comment.

b. A minimum of a thirty-day period for written public comment with the opportunity for a public hearing during that thirty-day period, upon request.

c. Consideration by the department of all comments received.

The department may require the submission of such maps, plans, specifications, emission information, and compliance schedules as it deems necessary prior to the issuance of an amendment. It is the intention of the department that this subsection shall apply only in those instances allowed by federal rules and regulations and only in those instances in which the granting of a variance pursuant to section 33-15-01-06 and enforcement of existing permit conditions are manifestly inappropriate.

History: Amended effective February 1, 1982; October 1, 1987; March 1, 1994; August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04.1, 23-25-04.2
Law Implemented: NDCC 23-25-03, 23-25-04.1, 23-25-04.2

33-15-14-06. Title V permit to operate.

1. **Definitions.** For purposes of this section:

a. "Affected source" means any source that includes one or more affected units.

b. "Affected state" means any state that is contiguous to North Dakota whose air quality may be affected by a source subject to a proposed title V permit, permit modification, or permit renewal or which is within fifty miles [80.47 kilometers] of the permitted source.

c. "Affected unit" means a unit that is subject to any acid rain emissions reduction requirement or acid rain emissions limitation under title VI of the Federal Clean Air Act.

d. "Applicable requirement" means all of the following as they apply to emissions units at a source that is subject to requirements of this section (including requirements that have been promulgated or approved by the United States environmental protection agency through rulemaking at the time of issuance but have future-effective compliance dates):

(1) Any standard or other requirement provided for in the North Dakota state implementation plan approved or promulgated by the United States environmental protection agency through rulemaking under title I of the Federal Clean Air Act that implements the relevant requirements of the Federal Clean Air Act, including any revisions to that plan.

(2) Any term or condition of any permit to construct issued pursuant to this chapter.

(3) Any standard or other requirement under section 111 including section 111(d) of the Federal Clean Air Act.

(4) Any standard or other requirement under section 112 of the Federal Clean Air Act including any requirement concerning accident prevention under section 112(r)(7) of the Federal Clean Air Act.

(5) Any standard or other requirement of the acid rain program under title IV of the Federal Clean Air Act.

(6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Federal Clean Air Act.

(7) Any standard or other requirement governing solid waste incineration, under section 129 of the Federal Clean Air Act.

(8) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Federal Clean Air Act.

(9) Any standard or other requirement for tank vessels under section 183(f) of the Federal Clean Air Act.

(10) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Federal Clean Air Act.

(11) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Federal Clean Air Act, unless the administrator of the United States environmental protection agency has determined that such requirements need not be contained in a title V permit.

(12) Any national ambient air quality standard or increment or visibility requirement under part C of

title I of the Federal Clean Air Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Federal Clean Air Act.

e. "Designated representative" means a responsible natural person authorized by the owners and operators of an affected source and of all affected units at the source, as evidenced by a certificate of representation submitted in accordance with subpart B of 40 CFR 72, to represent and legally bind each owner and operator, as a matter of federal law, in matters pertaining to the acid rain program. Whenever the term "responsible official" is used in this section, or in any other regulations implementing title V of the Federal Clean Air Act, it shall be deemed to refer to the "designated representative" with regard to all matters under the acid rain program.

f. "Draft permit" means the version of a permit for which the department offers public participation or affected state review.

g. "Emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the title V permit to operate, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

h. "Emissions allowable under the permit" means a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

i. "Emissions unit" means any part or activity of a stationary source that emits or has the potential to emit any regulated air contaminant or any contaminant listed under section 112(b) of the Federal Clean Air Act. This term does not alter or affect the definition of unit for purposes of title IV of the Federal Clean Air Act.

j. "Environmental protection agency" or the "administrator" means the administrator of the United States environmental protection agency or the administrator's designee.

k. "Federal Clean Air Act" means the Federal Clean Air Act, as amended [42 U.S.C. 7401 et seq.] or the regulations promulgated thereunder, as they existed on May 1, 1993.

l. "Final permit" means the version of a title V permit issued by the department that has completed all review procedures required in this section.

m. "Fugitive emissions" are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

n. "General permit" means a title V permit to operate that meets the requirements of subdivision d of subsection 5.

o. "Major source" means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph 1 or 2. For the purposes of defining "major source", a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the contaminant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same major group (i.e., all have the same two-digit code) as described in the standard industrial classification manual, 1987.

(1) A major source under section 112 of the Federal Clean Air Act, which is defined as:

(a) For contaminants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, ten tons [9.07 metric tons] per year (tpy) or more of any hazardous air contaminant which has been listed pursuant to section 112(b) of the Federal Clean Air Act, twenty-five tons [22.67 metric tons] per year or more of any combination of such hazardous air contaminants, or such lesser quantity as the administrator of the United States environmental protection agency may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common

control, to determine whether such units or stations are major sources.

(b) For radionuclides, "major source" shall have the meaning specified by the administrator of the United States environmental protection agency by rule.

(2) A major stationary source of air contaminants, that directly emits or has the potential to emit, one hundred tons [90.68 metric tons] per year or more of any air contaminant (including any major source of fugitive emissions of any such contaminant, as determined by rule by the administrator of the United States environmental protection agency). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of this section, unless the source belongs to one of the following categories of stationary source:

(a) Coal cleaning plants (with thermal dryers).

(b) Kraft pulp mills.

(c) Portland cement plants.

(d) Primary zinc smelters.

(e) Iron and steel mills.

(f) Primary aluminum ore reduction plants.

(g) Primary copper smelters.

(h) Municipal incinerators capable of charging more than two hundred fifty tons [226.80 metric tons] of refuse per day.

(i) Hydrofluoric, sulfuric, or nitric acid plants.

(j) Petroleum refineries.

(k) Lime plants.

(l) Phosphate rock processing plants.

(m) Coke oven batteries.

(n) Sulfur recovery plants.

(o) Carbon black plants (furnace process).

(p) Primary lead smelters.

(q) Fuel conversion plants.

(r) Sintering plants.

(s) Secondary metal production plants.

(t) Chemical process plants.

(u) Fossil-fuel boilers (or combination thereof) totaling more than two hundred fifty million British thermal units per hour heat input.

(v) Petroleum storage and transfer units with a total storage capacity exceeding three hundred thousand barrels.

(w) Taconite ore processing plants.

(x) Glass fiber processing plants.

(y) Charcoal production plants.

(z) Fossil-fuel-fired steam electric plants of more than two hundred fifty million British thermal units per hour heat input.

(aa) All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Federal Clean Air Act, but only with respect to those air contaminants that have been regulated for that category.

p. "Permit modification" means a revision to a title V permit that meets the requirements of subdivision e of subsection 6.

q. "Permit program costs" means all reasonable (direct and indirect) costs required to develop and administer a permit program, under this section (whether such costs are incurred by the department or other state or local agencies that do not issue permits directly, but that support permit issuance or administration).

r. "Permit revision" means any permit modification or administrative permit amendment.

s. "Potential to emit" means the maximum capacity of a stationary source to emit any air contaminant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control

equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the administrator of the United States environmental protection agency and the department.

t. "Proposed permit" means the version of a permit that the department proposes to issue and forwards to the administrator of the United States environmental protection agency for review.

u. "Regulated air contaminant" means the following:

(1) Nitrogen oxides or any volatile organic compounds.

(2) Any contaminant for which a national ambient air quality standard has been promulgated.

(3) Any contaminant that is subject to any standard promulgated under section 111 of the Federal Clean Air Act.

(4) Any class I or II substance subject to a standard promulgated under or established by title VI of the Federal Clean Air Act.

(5) Any contaminant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Federal Clean Air Act, including sections 112(g), (j), and (r) of the Federal Clean Air Act, including the following:

(a) Any contaminant subject to requirements under section 112(j) of the Federal Clean Air Act. If the administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Federal Clean Air Act, any contaminant for which a subject source would be major shall be considered to be regulated on the date eighteen months after the applicable date established pursuant to section 112(e) of the Federal Clean Air Act; and

(b) Any contaminant for which the requirements of section 112(g)(2) of the Federal Clean Air Act have been met, but only with respect to the individual source subject to section 112(g)(2) of the Federal Clean Air Act requirement.

v. "Regulated contaminant" for fee calculation, which is used only for subsection 8, means any "regulated air contaminant" except the following:

(1) Carbon monoxide.

(2) Any contaminant that is a regulated air contaminant solely because it is a class I or II substance subject to a standard promulgated under or established by title VI of the Federal Clean Air Act.

(3) Any contaminant that is a regulated air contaminant solely because it is subject to a standard or regulation under section 112(r) of the Federal Clean Air Act.

w. "Renewal" means the process by which a permit is reissued at the end of its term.

x. "Responsible official" means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decisionmaking functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(a) The facilities employ more than two hundred fifty persons or have gross annual sales or expenditures exceeding twenty-five million dollars (in second quarter 1980 dollars).

(b) The delegation of authority to such representatives is approved in advance by the department.

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

(3) For a municipality, state, federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this section, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of the United States environmental protection agency).

(4) For affected sources:

(a) The designated representative insofar as actions, standards, requirements, or prohibitions under title IV of the Federal Clean Air Act or the regulations promulgated thereunder are concerned.

(b) The designated representative for any other purposes under this section.

y. "Section 502(b)(10) changes" are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

z. "Stationary source" means any building, structure, facility, or installation that emits or may emit any regulated air contaminant or any contaminant listed under section 112(b) of the Federal Clean Air Act.

aa. "Title V permit to operate or permit (unless the context suggests otherwise)" means any permit or group of permits covering a source that is subject to this section that is issued, renewed, amended, or revised pursuant to this section.

bb. "Title V source" means any source subject to the permitting requirements of this section, as provided in subsection 2.

2. **Applicability.**

a. This section is applicable to the following sources:

(1) Any major source.

(2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Federal Clean Air Act.

(3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Federal Clean Air Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of the Federal Clean Air Act.

(4) Any affected source.

(5) Any source in a source category designated by the administrator of the United States environmental protection agency.

b. The following source categories are exempt from the requirements of this section:

(1) All sources listed in subdivision a that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Federal Clean Air Act, are exempt from the obligation to obtain a title V permit until such time as the administrator of the United States environmental protection agency completes a rulemaking to determine how the program should be structured for nonmajor sources and the appropriateness of any permanent exemptions.

(2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or 112 of the Federal Clean Air Act after July 21, 1992, those the administrator of the United States environmental protection agency determines to be exempt from the requirement to obtain a title V source permit at the time that the new standard is promulgated.

(3) Any source listed as exempt from the requirement to obtain a permit under this section may opt to apply for a title V permit. Sources that are exempted by paragraphs 1 and 2 of this subdivision and which do not opt to apply for a title V permit to operate are subject to the requirements of section 33-15-14-03.

(4) The following source categories are exempted from the obligation to obtain a permit under this section.

(a) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR 60, subpart AAA - standards of performance for new residential wood heaters.

(b) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR 61, subpart M - national emission standard for hazardous air contaminants for asbestos, standard for demolition and renovation.

c. For major sources, the department will include in the permit all applicable requirements for all relevant emissions units in the major source.

For any nonmajor source subject to the requirements of this section, the department will include in the permit all applicable requirements applicable to the emissions units that cause the source to be subject to this section.

d. Fugitive emissions from a source subject to the requirements of this section shall be included in the permit application and the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

3. **Scope.** Nothing within this section shall relieve the owner or operator of a source of the requirement to obtain a permit to construct under section 33-15-14-02 or to comply with any other applicable standard or requirement of this article.

4. **Permit applications.**

a. Duty to apply. For each title V source, the owner or operator shall submit a timely and complete permit application in accordance with this subdivision.

(1) Timely application.

(a) A timely application for a source applying for a title V permit for the first time is one that is submitted within one year of the United States environmental protection agency approval of this rule or in accordance with the following schedule, whichever is earlier:

[1] The following designated air contaminant sources shall submit their initial application by February 1, 1995.

[a] Crude oil and natural gas production facilities.

[b] Natural gas processing facilities.

[c] Internal combustion engines used for natural gas transmission or distribution.

[d] Stationary gas turbines used for natural gas transmission or distribution.

[2] Except as provided in subparagraphs b, c, and d of this paragraph, all other applications shall be submitted by November 15, 1995.

(b) Title V sources required to meet the requirements under section 112(g) of the Federal Clean Air Act, or to have a permit to construct under section 33-15-14-02, shall file a complete application to obtain the title V permit or permit revision within twelve months after commencing operation. Where an existing title V permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation.

(c) For purposes of permit renewal, a timely application is one that is submitted at least six months, but not more than eighteen months, prior to the date of permit expiration.

(d) Applications for initial phase II acid rain permits shall be submitted to the department by January 1, 1996, for sulfur dioxide, and by January 1, 1998, for nitrogen oxides.

(2) Complete application. To be deemed complete, an application must provide all information required pursuant to subdivision c, except that applications for a permit revision need supply such information only if it is related to the proposed change. Information required under subdivision c must be sufficient to evaluate the subject source and its application and to determine all applicable requirements. A responsible official must certify the submitted information consistent with subdivision d. Unless the department determines that an application is not complete within sixty days of receipt of the application, such application shall be deemed to be complete, except as otherwise provided in paragraph 3 of subdivision a of subsection 6. If, while processing an application that has been determined or deemed to be complete, the department determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response. The source's ability to operate without a permit, as set forth in subdivision b of subsection 6, shall be in effect from the date the application is determined or deemed to be complete until the final permit is issued, provided that the applicant submits any requested additional information by the deadline specified by the department.

(3) Confidential information. If a source has submitted information to the department under a claim of confidentiality, the source must also submit a copy

of such information directly to the administrator of the United States environmental protection agency when directed to do so by the department.

b. Duty to supplement or correct application. Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

c. Standard application form and required information. All applications for a title V permit to operate shall be made on forms supplied by the department. Information as described below for each emissions unit at a title V source shall be included in the application. Emissions units or activities that have the potential to emit less than the following quantities of air contaminants need not be included in permit applications:

Particulate: 5 tons [4.54 metric tons] per year
Inhalable particulate: 5 tons [4.54 metric tons] per year
Sulfur dioxide: 10 tons [9.07 metric tons] per year
Hydrogen sulfide: 2.5 tons [2.27 metric tons] per year
Carbon monoxide: 25 tons [22.68 metric tons] per year
Nitrogen oxides: 10 tons [9.07 metric tons] per year
Ozone: 10 tons [9.07 metric tons] per year
Reduced sulfur compounds: 2.5 tons [2.27 metric tons] per year
Volatile organic compounds: 10 tons [9.07 metric tons] per year

This exemption does not apply to contaminants listed in section 112(b) of the Federal Clean Air Act.

However, for exempted activities or emissions units, a list of such activities or units must be included in the application. An applicant may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under ~~subsection 8~~ chapter 33-15-23. The application, shall, as a minimum, include the elements specified below:

(1) Identifying information, including company name and address (or plant name and address if different from the company name), owner's name and agent, and telephone number and names of plant site manager or contact.

(2) A description of the source's processes and products (by Standard Industrial Classification Code) including any associated with each alternate scenario identified by the source.

(3) The following emissions-related information:

(a) All emissions of contaminants for which the source is major, and all emissions of regulated air contaminants. A permit application shall describe all emissions of regulated air contaminants emitted from any emissions unit, except where such units are exempted under this subdivision.

(b) Identification and description of all points of emissions described in subparagraph a in sufficient detail to establish the basis for fees and applicability of requirements of the Federal Clean Air Act and this article.

(c) Emissions rates in tons per year and in such terms as are necessary to establish compliance with the applicable standard.

(d) Fuels, fuel use, raw materials, production rates, and operating schedules.

(e) Identification and description of air pollution control equipment and compliance monitoring devices or activities.

(f) Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated contaminants.

(g) Other information required by any applicable requirement including information related to stack height limitations developed pursuant to chapter 33-15-18.

(h) Calculations on which the information in subparagraphs a through g is based.

(4) The following air pollution control requirements:

(a) Citation and description of all applicable requirements; and

(b) Description of or reference to any applicable test method for determining compliance with each applicable requirement.

(5) Other specific information that may be necessary to implement and enforce other applicable requirements of the Federal Clean Air Act or of this article or to determine the applicability of such requirements.

(6) An explanation of any proposed exemptions from otherwise applicable requirements.

(7) Information that the department determines to be necessary to define alternative operating scenarios identified by the source or to define permit terms and conditions.

(8) A compliance plan for all title V sources that contains all the following:

(a) A description of the compliance status of the source with respect to all applicable requirements.

(b) A description as follows:

[1] For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

[2] For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

[3] For requirements for which the source is not in compliance at the time of permit issuance, a narrative description of how the source will achieve compliance with such requirements.

(c) A compliance schedule as follows:

[1] For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

[2] For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term shall satisfy this provision, unless a more

detailed schedule is expressly required by the applicable requirement.

[3] A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

(d) A schedule for submission of certified progress reports no less frequently than every six months for sources required to have a schedule of compliance to remedy a violation.

(e) The compliance plan content requirements specified in this paragraph shall apply and be included in the acid rain portion of a compliance plan for an affected source, except as specifically superseded by regulations promulgated under title IV of the Federal Clean Air Act with regard to the schedule and method or methods the source will use to achieve compliance with the acid rain emissions limitations.

(9) Requirements for compliance certification, including the following:

(a) A certification of compliance with all applicable requirements by a responsible official consistent with subdivision d and section 114(a)(3) of the Federal Clean Air Act;

(b) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods;

(c) A schedule for submission of compliance certifications during the permit term, to be

submitted annually, or more frequently if specified by the underlying applicable requirement; and

(d) A statement indicating the source's compliance status with any applicable enhanced monitoring and compliance certification requirements of the Federal Clean Air Act.

(10) The use of nationally standardized forms for acid rain portions of permit applications and compliance plans, as required by regulations promulgated under title IV of the Federal Clean Air Act.

d. Any application form, report, or compliance certification submitted pursuant to these rules shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this section shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

5. **Permit content.**

a. Standard permit requirements. Each permit issued under this section shall include, as a minimum, the following elements:

(1) Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.

(a) The permit must specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.

(b) The permit must state that, where an applicable requirement of the Federal Clean Air Act is more stringent than an applicable requirement of regulations promulgated under title IV of the Federal Clean Air Act, both provisions shall be incorporated into the permit and shall be enforceable by the administrator of the United States environmental protection agency and the department.

(c) Where the state implementation plan or this article allows a determination of an alternative emission limit at a title V source, equivalent

to that contained in the plan, to be made in the permit issuance, renewal, or significant modification process, and the department elects to use such process, any permit containing such equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.

(2) Permit duration. Each title V permit to operate shall expire upon the fifth anniversary of its issuance.

(3) Monitoring and related recordkeeping and reporting requirements.

(a) Each permit shall contain the following requirements with respect to monitoring:

[1] All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods promulgated pursuant to sections 504(b) or 114(a)(3) of the Federal Clean Air Act;

[2] Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to subparagraph c. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this item; and

[3] As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

(b) With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require, where applicable, the following:

[1] Records of required monitoring information that include the following:

[a] The date, place as defined in the permit, and time of sampling or measurements;

[b] The dates analyses were performed;

[c] The company or entity that performed the analyses;

[d] The analytical techniques or methods used;

[e] The results of such analyses; and

[f] The operating conditions as existing at the time of sampling or measurement;

[2] Retention of records of all required monitoring data and support information for a period of at least five years from the date of the monitoring sample, measurement, report, or application. Support information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

(c) With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:

[1] Submittal of reports of any required monitoring at least every six months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with subdivision d of subsection 4.

[2] Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The department shall define "prompt" in the permit

consistent with chapter 33-15-01 and the applicable requirements.

(4) A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under title IV of the Federal Clean Air Act or the regulations promulgated thereunder.

(a) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to title IV of the Federal Clean Air Act, or the regulations promulgated thereunder, provided that such increases do not require a permit revision under any other applicable requirement.

(b) No limit shall be placed on the number of allowances held by the source. The source may not, however, use allowances as a defense to noncompliance with any other applicable requirement.

(c) Any such allowance shall be accounted for according to the procedures established in regulations promulgated under title IV of the Federal Clean Air Act.

(5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.

(6) Provisions stating the following:

(a) The permittee must comply with all conditions of the title V permit. Any permit noncompliance constitutes a violation of the Federal Clean Air Act and this article and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(b) It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(c) The permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned

changes or anticipated noncompliance does not stay any permit condition.

(d) The permit does not convey any property rights of any sort, or any exclusive privilege.

(e) The permittee must furnish to the department, within a reasonable time, any information that the department may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. Upon request, the permittee must also furnish to the department copies of records required to be kept by the permit or, for information claimed to be confidential, the permittee must also furnish such records directly to the administrator of the United States environmental protection agency along with a claim of confidentiality.

(7) A provision to ensure that the source pays fees to the department consistent with the fee schedule approved pursuant to ~~subsection 8~~ chapter 33-15-23.

(8) Emissions trading. No permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit and the state implementation plan or this article.

(9) Terms and conditions for reasonably anticipated operating scenarios identified by the source in its application as approved by the department. Such terms and conditions:

(a) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the scenario under which it is operating;

(b) Shall extend the permit shield described in subdivision f to all terms and conditions under each such operating scenario; and

(c) Must ensure that the terms and conditions of each such alternative scenario meet all applicable requirements and the requirements of this section.

(10) Terms and conditions, if the permit applicant requests them, for the trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements, including this article and the state implementation plan, provide for trading such increases and decreases without a case-by-case approval of each emissions trade. Such terms and conditions:

(a) Shall include all terms required under subdivisions a and c to determine compliance;

(b) Shall extend the permit shield described in subdivision f to all terms and conditions that allow such increases and decreases in emissions; and

(c) Must meet all applicable requirements and requirements of this section.

(11) If a permit applicant requests it, the department shall issue permits that contain terms and conditions, including all terms required under subdivisions a and c to determine compliance, allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. The permit applicant shall include in its application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The department shall not be required to include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall also require compliance with all applicable requirements. The permittee shall supply written notification at least seven days prior to the change to the department and the administrator of the United States environmental protection agency and shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit. The permit shield described in subdivision f shall extend to terms and conditions that allow such increases and decreases in emissions.

b. Federally enforceable requirements.

(1) All terms and conditions in a title V permit, including any provisions designed to limit a source's potential to emit, are enforceable by the administrator of the United States environmental protection agency and citizens under the Federal Clean Air Act.

(2) Notwithstanding paragraph 1, the department shall specifically designate as not being federally enforceable under the Federal Clean Air Act any terms and conditions included in the permit that are not required under the Federal Clean Air Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of subsections 6 and 7, or of this subsection, other than those contained in this subdivision.

c. Compliance requirements. All title V permits shall contain the following elements with respect to compliance:

(1) Consistent with paragraph 3 of subdivision a, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. Any document, including reports, required by a title V permit shall contain a certification by a responsible official that meets the requirements of subdivision d of subsection 4.

(2) Inspection and entry requirements that require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow the department or an authorized representative to perform the following:

(a) Enter upon the permittee's premises where a title V source is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(b) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;

(c) Inspect at reasonable times any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(d) As authorized by the Federal Clean Air Act and this article, sample or monitor at reasonable times substances or parameters for the purpose

of assuring compliance with the permit or applicable requirements.

(3) A schedule of compliance consistent with paragraph 8 of subdivision c of subsection 4.

(4) Progress reports consistent with an applicable schedule of compliance and paragraph 8 of subdivision c of subsection 4 to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the department. Such progress reports shall contain the following:

(a) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones, or compliance were achieved; and

(b) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(5) Requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Permits shall include each of the following:

(a) The frequency, which is annually or such more frequent periods as specified in the applicable requirement or by the department, of submissions of compliance certifications;

(b) In accordance with paragraph 3 of subdivision a, a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices. The means for monitoring shall be contained in applicable requirements or United States environmental protection agency guidance;

(c) A requirement that the compliance certification include the following:

[1] The identification of each term or condition of the permit that is the basis of the certification;

[2] The compliance status;

[3] Whether compliance was continuous or intermittent;

[4] The methods used for determining the compliance status of the source, currently and over the reporting period consistent with paragraph 3 of subdivision a; and

[5] Such other facts as the department may require to determine the compliance status of the source;

(d) A requirement that all compliance certifications be submitted to the administrator of the United States environmental protection agency as well as to the department; and

(e) Such additional requirements as may be specified pursuant to sections 114(a)(3) and 504(b) of the Federal Clean Air Act.

(6) Such other provisions as the department may require.

d. General permits.

(1) The department may, after notice and opportunity for public participation provided under subdivision h of subsection 6, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other title V permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the department shall grant the conditions and terms of the general permit notwithstanding the shield provisions of subdivision f, the source shall be subject to enforcement action for operation without a title V permit to operate if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in regulations promulgated under title IV of the Federal Clean Air Act. The department is not required to issue a general permit in lieu of individual title V permits.

(2) Title V sources that would qualify for a general permit must apply to the department for coverage under the terms of the general permit or must apply for a title V permit to operate consistent with subsection 4. The department may, in the general permit, provide for applications which deviate from the requirements of subsection 4, provided that such applications meet the requirements of title V of the Federal Clean Air Act, and include all information necessary to determine qualification for, and to

assure compliance with, the general permit. Without repeating the public participation procedures required under subdivision h of subsection 6, the department may grant a source's request for authorization to operate under a general permit, but such a grant shall not be a final permit action for purposes of judicial review.

e. Temporary sources. The department may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. The operation must be temporary and involve at least one change of location during the term of the permit. No affected source shall be permitted as a temporary source. Permits for temporary sources shall include the following:

(1) Conditions that will assure compliance with all applicable requirements at all authorized locations;

(2) Requirements that the owner or operator notify the department at least ten days in advance of each change in location; and

(3) Conditions that assure compliance with all other provisions of this section.

f. Permit shield.

(1) Except as provided in this section, upon written request by the applicant, the department shall include in a title V permit to operate a provision stating that as of the date of permit issuance, the source is considered to be in compliance with any applicable requirements provided that:

(a) Such applicable requirements are included and are specifically identified in the permit; or

(b) The department, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(2) A title V permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

(3) Nothing in this subdivision or in any title V permit shall alter or affect the following:

(a) The provisions of section 303 of the Federal Clean Air Act (emergency orders), including the authority of the administrator of the United States environmental protection agency under that section;

(b) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(c) The applicable requirements of the acid rain program, consistent with section 408(a) of the Federal Clean Air Act; or

(d) The ability of the United States environmental protection agency to obtain information from a source pursuant to section 114 of the Federal Clean Air Act.

g. Emergency provision.

(1) An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the title V permit to operate, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) Effect of an emergency. An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of paragraph 3 are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(a) An emergency occurred and that the permittee can identify the causes of the emergency;

(b) The permitted facility was at the time being properly operated;

(c) During the period of the emergency the permittee took all reasonable steps to minimize levels of

emissions that exceeded the emission standards, or other requirements in the permit; and

(d) The permittee submitted notice of the emergency to the department within one working day of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of item 2 of subparagraph c of paragraph 3 of subdivision a of subsection 5. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement and the malfunction notification required under subdivision b of subsection 2 of section 33-15-01-13 when a threat to health and welfare would exist.

6. **Permit issuance, renewal, reopenings, and revisions.**

a. Action on application.

(1) A permit, permit modification, or renewal may be issued only if all of the following conditions have been met:

(a) The department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under subdivision d of subsection 5.

(b) Except for modifications qualifying for minor permit modification procedures under paragraphs 1 and 2 of subdivision e, the department has complied with the requirements for public participation under subdivision h;

(c) The department has complied with the requirements for notifying and responding to affected states under subdivision b of subsection 7;

(d) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this section; and

(e) The administrator of the United States environmental protection agency has received a copy of the proposed permit and any notices required under subdivisions a and b of subsection 7, and has not objected to issuance of the permit under subdivision c of subsection 7 within the time period specified therein.

(2) Except for applications received during the initial transitional period described in 40 CFR 70.4(b)(11) or under regulations promulgated under title IV or title V of the Federal Clean Air Act for the permitting of affected sources under the acid rain program, the department shall take final action on each permit application, including a request for permit modification or renewal, within eighteen months after receiving a complete application.

(3) The department shall provide notice to the applicant of whether the application is complete. Unless the department requests additional information or otherwise notifies the applicant of incompleteness within sixty days of receipt of an application, the application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in paragraphs 1 and 2 of subdivision e, a completeness determination is not required.

(4) The department shall provide a statement that sets forth the legal and factual basis for the draft permit conditions, including references to the applicable statutory or regulatory provisions. The department shall send this statement to the United States environmental protection agency and to any other person who requests it.

(5) The submittal of a complete application shall not affect the requirement that any source have a permit to construct under section 33-15-14-02.

b. Requirement for a permit.

(1) Except as provided in the following sentence, paragraphs 2 and 3, subparagraph e of paragraph 1 of subdivision e, and subparagraph e of paragraph 2 of subdivision e, no title V source may operate after the time that it is required to submit a timely and complete application under this section, except in compliance with a permit issued under this section. If a title V source submits a timely and complete application for permit issuance, including for

renewal, the source's failure to have a title V permit is not a violation of this section until the department takes final action on the permit application, except as noted in this subsection. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to paragraph 3 of subdivision a, and as required by paragraph 2 of subdivision a of subsection 4, the applicant fails to submit by the deadline specified in writing by the department any additional information identified as being needed to process the application. For timely and complete renewal applications for which the department has failed to issue or deny the renewal permit before the expiration date of the previous permit, all the terms and conditions of the permit, including the permit shield that was granted pursuant to subdivision f of subsection 5 shall remain in effect until the renewal permit has been issued or denied.

(2) A permit revision is not required for section 502(b)(10) changes provided:

(a) The changes are not modifications under chapters 33-15-12, 33-15-13, and 33-15-15 or title I of the Federal Clean Air Act.

(b) The changes do not exceed the emissions allowable under the title V permit whether expressed therein as a rate of emissions or in terms of total emissions.

(c) A permit to construct under section 33-15-14-02 has been issued, if required.

(d) The facility provides the department and the administrator of the United States environmental protection agency with written notification at least seven days in advance of the proposed change. The written notification shall include a description of each change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

The permit shield described in subdivision f of subsection 5 shall not apply to any change made pursuant to this paragraph.

(3) A permit revision is not required for changes that are not addressed or prohibited by the permit provided:

(a) Each such change shall meet all applicable requirements and shall not violate any existing permit term or condition.

(b) The source must provide contemporaneous written notice to the department and the administrator of the United States environmental protection agency of each such change, except for changes that qualify as insignificant under the provisions of subdivision c of subsection 4. Such written notice shall describe each such change, including the date, any change in emissions, contaminants emitted, and any applicable requirement that would apply as a result of the change.

(c) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air contaminant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

(d) The changes are not subject to any requirements under title IV of the Federal Clean Air Act.

(e) The changes are not modifications under chapters 33-15-12, 33-15-13, and 33-15-15 or any provision of title I of the Federal Clean Air Act.

(f) A permit to construct under section 33-15-14-02 has been issued, if required.

The permit shield described in subdivision f of subsection 5 shall not apply to any change made pursuant to this paragraph.

c. Permit renewal and expiration.

(1) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected state and the United States environmental protection agency review, that apply to initial permit issuance; and

(2) Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with subdivision b of subsection 6 and subparagraph c of paragraph 1 of subdivision a of subsection 4.

d. Administrative permit amendments.

(1) An "administrative permit amendment" is a permit revision that:

(a) Corrects typographical errors;

(b) Identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source;

(c) Requires more frequent monitoring or reporting by the permittee;

(d) Allows for a change in ownership or operational control of a source where the department determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the department;

(e) Incorporates into the title V permit the requirements from a permit to construct, provided that the permit to construct review procedure is substantially equivalent to the requirements of subsections 6 and 7 that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in subsection 5; or

(f) Incorporates any other type of change which the administrator of the United States environmental protection agency has approved as part of the approved title V operating permit program.

(2) Administrative permit amendments for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Federal Clean Air Act.

(3) Administrative permit amendment procedures. An administrative permit amendment may be made by the department consistent with the following:

(a) The department shall take no more than sixty days from receipt of a request for an administrative permit amendment to take final action on such request, and may incorporate such changes without providing notice to the public or affected states provided that it designates

any such permit revisions as having been made pursuant to this subdivision.

(b) The department shall submit a copy of the revised permit to the administrator of the United States environmental protection agency.

(c) The source may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request provided a permit to construct under section 33-15-14-02 has been issued, if required.

(4) The department may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in subdivision f of subsection 5 for administrative permit amendments made pursuant to subparagraph e of paragraph 1 of subdivision d which meet the relevant requirements of subsections 5, 6, and 7 for significant permit modifications.

e. Permit modification. A permit modification is any revision to a title V permit that cannot be accomplished under the provisions for administrative permit amendments under subdivision d of this subsection. A permit modification for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Federal Clean Air Act.

(1) Minor permit modification procedures.

(a) Criteria.

[1] Minor permit modification procedures may be used only for those permit modifications that:

[a] Do not violate any applicable requirement;

[b] Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

[c] Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

[d] Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include a federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I of the Federal Clean Air Act; and an alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Federal Clean Air Act;

[e] Are not modifications under chapters 33-15-12, 33-15-13, and 33-15-15 or any provision of title I of the Federal Clean Air Act; and

[f] Are not required to be processed as a significant modification.

[2] Notwithstanding item 1 of this subparagraph and subparagraph a of paragraph 2 of subdivision e, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in the state implementation plan, this article or in applicable requirements promulgated by the United States environmental protection agency.

(b) Application. An application requesting the use of minor permit modification procedures shall meet the requirements of subdivision c of subsection 4 and shall include the following:

[1] A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

[2] The source's suggested draft permit;

[3] Certification by a responsible official, consistent with subdivision d of

subsection 4, that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

[4] Completed forms for the department to use to notify the administrator of the United States environmental protection agency and affected states as required under subsection 7.

(c) United States environmental protection agency and affected state notification. Within five working days of receipt of a complete permit modification application, the department shall notify the administrator of the United States environmental protection agency and affected states of the requested permit modification. The department shall promptly send any notice required under paragraph 2 of subdivision b of subsection 7 to the administrator of the United States environmental protection agency.

(d) Timetable for issuance. The department may not issue a final permit modification until after the United States environmental protection agency forty-five-day review period or until the United States environmental protection agency has notified the department that the United States environmental protection agency will not object to issuance of the permit modification, whichever is first, although the department can approve the permit modification prior to that time. Within ninety days of the department's receipt of an application under minor permit modification procedures or fifteen days after the end of the administrator's forty-five-day review period under subdivision c of subsection 7, whichever is later, the department shall:

[1] Issue the permit modification as proposed;

[2] Deny the permit modification application;

[3] Determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or

[4] Revise the draft permit modification and transmit to the administrator the new

proposed permit modification as required by subdivision a of subsection 7.

(e) Source's ability to make change. A source may make the change proposed in its minor permit modification application only after it files such application and the department approves the change in writing. If the department allows the source to make the proposed change prior to taking action specified in items 1, 2, and 3 of subparagraph d, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions it seeks to modify. However, if the source fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(f) The permit shield under subdivision f of subsection 5 shall not extend to minor permit modifications.

(2) Group processing of minor permit modifications. Consistent with this paragraph, the department may modify the procedure outlined in paragraph 1 to process groups of a source's applications for certain modifications eligible for minor permit modification processing.

(a) Criteria. Group processing of modifications may be used only for those permit modifications:

[1] That meet the criteria for minor permit modification procedures under item 1 of subparagraph a of paragraph 1 of subdivision e; and

[2] That collectively are below the threshold level which is ten percent of the emissions allowed by the permit for the emissions unit for which the change is requested, twenty percent of the applicable definition of major source in subsection 1, or five tons [4.54 metric tons] per year, whichever is least.

(b) Application. An application requesting the use of group processing procedures shall meet the requirements of subdivision c of subsection 4 and shall include the following:

[1] A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs.

[2] The source's suggested draft permit.

[3] Certification by a responsible official, consistent with subdivision d of subsection 4, that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.

[4] A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under item 2 of subparagraph a of paragraph 2 of subdivision e.

[5] Certification, consistent with subdivision d of subsection 4, that the source has notified the United States environmental protection agency of the proposed modification. Such notification need only contain a brief description of the requested modification.

[6] Completed forms for the department to use to notify the administrator of the United States environmental protection agency and affected states as required under subsection 7.

(c) United States environmental protection agency and affected state notification. On a quarterly basis or within five business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under item 2 of subparagraph a of paragraph 2 of subdivision e, whichever is earlier, the department shall meet its obligation under paragraph 1 of subdivision a of subsection 7 and paragraph 1 of subdivision b of subsection 7 to notify the administrator of the United States environmental protection agency and affected states of the requested permit modifications. The department shall send any notice required under paragraph 2 of subdivision b of subsection 7 to the

administrator of the United States environmental protection agency.

(d) Timetable for issuance. The provisions of subparagraph d of paragraph 1 of subdivision e shall apply to modifications eligible for group processing, except that the department shall take one of the actions specified in items 1 through 4 of subparagraph d of paragraph 1 of subdivision e within one hundred eighty days of receipt of the application or fifteen days after the end of the administrator's forty-five-day review period under subdivision c of subsection 7, whichever is later.

(e) Source's ability to make change. The provisions of subparagraph e of paragraph 1 apply to modifications eligible for group processing.

(f) The permit shield under subdivision f of subsection 5 shall not extend to group processing of minor permit modifications.

(3) Significant modification procedures.

(a) Criteria. Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. Every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from making changes consistent with this subsection that would render existing permit compliance terms and conditions irrelevant.

(b) Significant permit modifications shall meet all requirements of this section, including those for applications, public participation, review by affected states, and review by the United States environmental protection agency, as they apply to permit issuance and permit renewal. The department shall complete review of significant permit modifications within nine months after receipt of a complete application.

f. Reopening for cause.

(1) Each issued permit shall include provisions specifying the conditions under which the permit will

be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(a) Additional applicable requirements under the Federal Clean Air Act become applicable to a major title V source with a remaining permit term of three or more years. Such a reopening shall be completed not later than eighteen months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended.

(b) Additional requirements, including excess emissions requirements, become applicable to an affected source under title IV of the Federal Clean Air Act or the regulations promulgated thereunder. Upon approval by the administrator of the United States environmental protection agency, excess emissions offset plans shall be deemed to be incorporated into the permit.

(c) The department or the United States environmental protection agency determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(d) The administrator of the United States environmental protection agency or the department determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists. Such reopening shall be made as expeditiously as practicable.

(3) Reopenings under paragraph 1 shall not be initiated before a notice of such intent is provided to the title V source by the department at least thirty days in advance of the date that the permit is to be reopened, except that the department may provide a shorter time period in the case of an emergency.

g. Reopenings for cause by the United States environmental protection agency.

(1) If the administrator of the United States environmental protection agency finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to subdivision f, within ninety days after receipt of such notification, the department shall forward to the United States environmental protection agency a proposed determination of termination, modification, or revocation and reissuance, as appropriate.

(2) The administrator of the United States environmental protection agency will review the proposed determination from the department within ninety days of receipt.

(3) The department shall have ninety days from receipt of the United States environmental protection agency objection to resolve any objection that the United States environmental protection agency makes and to terminate, modify, or revoke and reissue the permit in accordance with the administrator's objection.

(4) If the department fails to submit a proposed determination or fails to resolve any objection, the administrator of the United States environmental protection agency will terminate, modify, or revoke and reissue the permit after taking the following actions:

(a) Providing at least thirty days' notice to the permittee in writing of the reasons for any such action.

(b) Providing the permittee an opportunity for comment on the administrator's proposed action and an opportunity for a hearing.

h. Public participation. Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall be subject to procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:

(1) Notice shall be given by publication in a newspaper of general circulation in the area where the source is located or in a state publication designed to give general public notice; to persons on a mailing list developed by the department, including those who

request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public;

(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the department; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, and all other materials available to the department that are relevant to the permit decision; a brief description of the comment procedures required by this subsection; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing, unless a hearing has already been scheduled;

(3) The department shall provide such notice and opportunity for participation by affected states as is provided for by subsection 7;

(4) The department shall provide at least thirty days for public comment and shall give notice of any public hearing at least thirty days in advance of the hearing; and

(5) The department shall keep a record of the commenters and also of the issues raised during the public participation process. These records shall be available to the public.

7. **Permit review by the United States environmental protection agency and affected states.**

a. Transmission of information to the administrator.

(1) The department shall provide a copy of each permit application including any application for a permit modification (including the compliance plan), to the administrator of the United States environmental protection agency except that the applicant shall provide such information directly to the administrator of the United States environmental protection agency when directed to do so by the department. The department shall provide a copy of each proposed permit and each final title V permit to operate to the administrator of the United States environmental protection agency. To the extent practicable, the preceding information shall be

provided in computer-readable format compatible with the United States environmental protection agency's national data base management system.

(2) The department may waive the requirements of paragraph 1 and paragraph 1 of subdivision b for any category of sources (including any class, type, or size within such category) other than major sources upon approval by the administrator of the United States environmental protection agency.

(3) The department shall keep these records for at least five years.

b. Review by affected states.

(1) The department shall give notice of each draft permit to any affected state on or before the time that the notice to the public under subdivision h of subsection 6 is given, except to the extent paragraphs 1 and 2 of subdivision e of subsection 6 requires the timing of the notice to be different.

(2) As part of the submittal of the proposed permit to the administrator of the United States environmental protection agency (or as soon as possible after the submittal for minor permit modification procedures allowed under paragraphs 1 and 2 of subdivision e of subsection 6) the department shall notify the administrator of the United States environmental protection agency and any affected state in writing of any refusal by the department to accept all recommendations for the proposed permit that the affected state submitted during the public or affected state review period. The notice shall include the department's reasons for not accepting any such recommendation. The department is not required to accept recommendations that are not based on applicable requirements or the requirements of this section.

c. United States environmental protection agency objection: No permit for which an application must be transmitted to the administrator of the United States environmental protection agency under subdivision a shall be issued if the administrator of the United States environmental protection agency objects to its issuance in writing within forty-five days of receipt of the proposed permit and all necessary supporting information.

d. Public petitions to the administrator of the United States environmental protection agency. If the administrator of the United States environmental protection agency does not

object in writing under subdivision c, any person may petition the administrator of the United States environmental protection agency within sixty days after the expiration of the administrator's forty-five-day review period to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in subdivision h of subsection 6, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the administrator of the United States environmental protection agency objects to the permit as a result of a petition filed under this subdivision, the department shall not issue the permit until the United States environmental protection agency's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the forty-five-day review period and prior to the United States environmental protection agency objection. If the department has issued a permit prior to receipt of the United States environmental protection agency objection under this subdivision, the department may thereafter issue only a revised permit that satisfies the United States environmental protection agency's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

e. Prohibition on default issuance. The department shall issue no title V permit to operate, including a permit renewal or modification, until affected states and the United States environmental protection agency have had an opportunity to review the proposed permit as required under this subsection.

8. ~~Permit-to-operate-fees.~~

~~a.--The--owner-or-operator-of-each-installation-that-meets-the applicability-requirements-of-subsection-2--shall--pay--an annual--fee.---The--fee-is-determined-by-the-actual-annual emissions-of-regulated--contaminants.~~

~~b.--Effective---January-1,--1995,--the--annual--fee--shall--be assessed-at-a-rate--of--twenty-five--dollars--per--ton--of emissions--of--each--regulated--contaminant--identified-in section-112(b)-of-the-Federal-Clean-Air--Act.---All--other regulated-contaminants-will-be-assessed-a-fee-at-a-rate-of ten-dollars-per-ton.--The-minimum-fee-will-be-five-hundred dollars--per--source.--The-maximum-fee-will-be-one-hundred thousand-dollars-per-source.~~

~~c.--In--determining--the--amount--due,--that--portion--of--any regulated-contaminant-which-is-emitted-in-excess--of--four thousand--tons--[3628.74--metric--tons]--per--year-will-be exempt-from-the-fee-calculation.~~

~~d.--Each--boiler--with--a--heat-input-greater-than-two-hundred fifty-million-British--thermal--units--per--hour--will--be assessed--fees--on--an-individual-basis-and-independent-of the-fees-associated-with-the--rest--of--the--installation. The--four-thousand-tons-[3628.74-metric-tons]-per-year-cap referenced-in-subdivision-c-is-applied-to-each-boiler.~~

~~e.--Any-state-owned-facility-is-exempt-from-the-fee.~~

~~f.--The--fee--calculation--will--be--based--upon-actual-annual emissions-from-the-previous-calendar-year.~~

~~g.--The---fee---rates---and---the---limits--established--under subdivision-b-shall-be-adjusted--on--an--annual--basis--to account--for--any--increase--in--the--consumer-price-index published-by-the-department-of-labor,-as-of-the--close--of the--twelve-month--period-ending-on-August-thirty-first-of each-calendar-year.~~

~~h.--Any--source--issued-a-general-permit-under-this-section-is subject-to-the-minor-source-permit-to-operate--fees--under subsection-10-of-section-33-15-14-03.~~

~~i.--Any--source--that--qualifies--as--a-"small-business"-under section-507-of-the-Federal-Clean-Air-Act-may-petition--the department-to-reduce-or-exempt-any-fee-required-under-this section.--Sufficient--documentation--of--the--petitioner's financial--status--must--be--submitted-with-the-request-to allow-the-department-to-evaluate-the-request.~~

~~j.--The-department-shall-send-a-notice,-identifying-the-amount of-the-annual-permit-fee,-to-the-owner-or-operator-of-each affected--source.---The--fee--is--due--within--sixty--days following-receipt-of-such-notice.~~ [Reserved]

9. **Enforcement.**

The department may suspend, revoke, or terminate a permit for violations of this article, violation of any permit condition or for failure to respond to a notice of violation or any order issued pursuant to this article. A permit to operate which has been revoked or terminated pursuant to this article must be surrendered forthwith to the department. No person may operate or cause the operation of a source if the department denies, terminates, revokes, or suspends a permit to operate.

History: Effective March 1, 1994; amended effective December 1, 1994; August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04, 23-25-04.1, ~~23-25-04.2~~
Law Implemented: NDCC 23-25-03, 23-25-04, 23-25-04.1, ~~23-25-04.2~~ 23-25-10

CHAPTER 33-15-22

33-15-22-01. Scope. The subparts and appendices of title 40, Code of Federal Regulations, part 63, as they exist on ~~May~~ July 1, 1994, which are listed in section 33-15-22-03 are incorporated into this chapter by reference. Any changes to the emission standard are listed below the title of the standard.

History: Effective December 1, 1994; amended effective August 1, 1995.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-22-03. Emission standards.

Subpart A - General ~~provision~~ provisions. ~~[Reserved]~~

Subpart B - ~~[Reserved]~~ Requirements for control technology determinations for major sources in accordance with Clean Air Act sections 112(g) and 112(j).

Subpart C - List of hazardous air pollutants, petitions process, lesser quantity designations, source category list. [Reserved]

Subpart D - Regulations governing compliance extensions for early reductions of hazardous air pollutants.

~~Subpart E---[Reserved]~~

Subpart F - National emission standards for organic hazardous air pollutants from the synthetic organic chemical manufacturing industry.

Subpart G - National emission standards for organic hazardous air pollutants from synthetic organic chemical manufacturing industry for process vents, storage vessels, transfer operations, and wastewater.

Subpart H - National emission standards for organic hazardous air pollutants for equipment leaks.

Subpart I - National emission standards for organic hazardous air pollutants for certain processes subject to the negotiated regulation for equipment leaks.

Subpart L - National emission standards for coke oven batteries.

Appendix A to subpart L - Operating coke oven batteries as of April 1, 1992.

Subpart M - National perchloroethylene air emission standards for drycleaning facilities.

Appendix A to part 63 - Test methods.

Appendix B to part 63 - Sources defined for early reduction provisions authority: 42 U.S.C. 7401 et seq.

History: Effective December 1, 1994; amended effective August 1, 1995.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

STAFF COMMENT: Chapter 33-15-23 contains all new material but is not underscored so as to improve readability.

CHAPTER 33-15-23
FEES

33-15-23-01. Definitions. For purposes of this chapter:

1. "Major source" means any source that has been issued or is required by this article to obtain a title V permit to operate. This includes sources that have begun operation but have not yet applied for a title V permit to operate.

2. "Minor source" has the meaning given to it in section 33-15-14-01.1.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04
Law Implemented: NDCC 23-25-03, 23-25-04

33-15-23-02. Permit to construct fees. Any person constructing, installing, or establishing a new stationary source or altering an existing source which requires a permit to construct under subsections 1 and 3 of section 33-15-14-02 is required to pay a permit to construct application filing fee and a permit to construct processing fee to the state department of health.

1. **Application fee.** A nonrefundable filing fee of one hundred fifty dollars must be submitted with the permit application.

2. **Processing fee.** The applicant shall pay a processing fee based on actual processing costs, including computer data processing costs, incurred by the department for all sources which would involve a major analysis the cost of which would exceed one hundred fifty dollars as determined by the department. The following procedures and criteria will be utilized in establishing the fee:

   a. A record of all permit to construct application processing costs incurred must be maintained by the department.

b. Upon request, the department, in consultation with the applicant, will prepare an estimate of the processing fee and the billing schedule that will be utilized in processing the application. If the applicant chooses, the applicant may withdraw the application at this point without paying any processing fees.

c. After final determinations on the application have been made, a final statement will be sent to the applicant containing the remaining actual processing costs incurred by the department.

d. The applicant must pay the processing fee regardless of whether a permit to construct is issued, denied, or withdrawn.

e. Any source that initiates operation under a permit to construct prior to receiving a permit to operate is subject to the fees outlined in section 33-15-23-03 or 33-15-23-04, whichever is applicable.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04.2
Law Implemented: NDCC 23-25-03, 23-25-04.2

33-15-23-03. Minor source permit to operate fees.

1. The owner or operator of each installation subject to a permit issued under section 33-15-14-03 shall pay an annual permit fee based on the following table:

Classification	Annual Fee ($)
Designated	300
Monitor (CEMS or Ambient Site)	600/CEMS or Site
Other	100
State	0
Exempt	0

The following criteria are used to classify sources for determining minor source annual fees:

Designated: A source that is designated for scheduled inspections and whose actual emissions of any air contaminant are less than one hundred tons per year and whose total annual emissions of all air contaminants would exceed one hundred tons [90.68 metric tons] per year if control equipment was not operated.

Monitor: A charge in addition to the annual fee for

any source operating a continuous emission monitor system (CEMS) or an ambient monitoring site.

Other: As designated by the department.

State: Any state-owned installation.

Exempt: As designated by the department.

2. The following activities conducted by the department are not included in the annual costs and will be charged to affected sources based on the actual costs incurred by the department:

   a. Observation of source or performance specification testing, or both.

   b. Audits of source operated ambient air monitoring networks.

   An accounting of the actual costs incurred under this subdivision must accompany the notice of the annual permit fee.

3. Annual emissions are derived using representative source test data, "compilation of air pollution emission factors (AP-42)" or other reliable data.

4. The classification of "other" and "exempt" shall be designated by the department on a case-by-case basis.

5. The department shall send a notice, identifying the amount of the annual permit fee, to the owner or operator of each affected source. The fee is due within sixty days following receipt of such notice.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04.2
Law Implemented: NDCC 23-25-04.2

33-15-23-04. Major source permit to operate fees.

1. The owner or operator of each installation that meets the applicability requirements of subsection 2 of section 33-15-14-06 shall pay an annual fee. The fee is determined by the actual annual emissions of regulated contaminants. Fugitive emissions will be included in the fee calculation for sources that are required to count them when determining applicability under section 33-15-14-06.

2. Effective January 1, 1995, the annual fee shall be assessed at a rate of twenty-five dollars per ton of emissions of each regulated contaminant identified in section 112(b) of the

Federal Clean Air Act. All other regulated contaminants will be assessed a fee at a rate of ten dollars per ton. The minimum fee will be five hundred dollars per source. The maximum fee will be one hundred thousand dollars per source.

3. In determining the amount due, that portion of any regulated contaminant which is emitted in excess of four thousand tons [3628.74 metric tons] per year will be exempt from the fee calculation.

4. Each boiler with a heat input greater than two hundred fifty million British thermal units per hour will be assessed fees on an individual basis and independent of the fees associated with the rest of the installation. The four thousand ton [3628.74 metric ton] per year cap referenced in subsection 3 is applied to each boiler.

5. Any state-owned facility is exempt from the fee.

6. The fee calculation must be based upon actual annual emissions from the previous calendar year.

7. The fee must be calculated independently for each installation, facility, source, or unit which has been issued a separate permit to operate.

8. The fee rates and the limits established under subsection 2 must be adjusted on an annual basis to account for any increase in the consumer price index published by the department of labor, as of the close of the twelve-month period ending on August thirty-first of each calendar year.

9. Any source issued a general permit under section 33-15-14-06 is subject to the minor source permit to operate fees under section 33-15-23-03.

10. Any source that qualifies as a "small business" under section 507 of the Federal Clean Air Act may petition the department to reduce or exempt any fee required under this section. Sufficient documentation of the petitioner's financial status must be submitted with the request to allow the department to evaluate the request.

11. The department shall send a notice, identifying the amount of the annual permit fee, to the owner or operator of each affected source. The fee is due within sixty days following receipt of such notice.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04.2
Law Implemented: NDCC 23-25-04.2

33-15-23-05. Phase I substitution units. Substitution units, as defined in 40 CFR part 72, shall pay an annual administrative fee equal to one hundred thousand dollars per source. This fee must be adjusted on an annual basis to account for any increase in the consumer price index. The adjustment shall be made on August thirty-first of each year and shall be based on the department of labor's published change in the index.

History: Effective August 1, 1995.
General Authority: NDCC 23-25-03, 23-25-04.2
Law Implemented: NDCC 23-25-04.2

CHAPTER 33-20-02.1

33-20-02.1-01. Solid waste management permit required. Every person who treats or transports solid waste or operates a solid waste management unit or facility is required to have a valid permit issued by the department, unless the activity is an emergency, exemption, or exception as provided in this section.

1. If the department determines an emergency exists, it may issue an order citing the existence of such emergency and require that certain actions be taken as necessary to meet the emergency in accordance with the provisions of North Dakota Century Code section 23-29-10.

2. A solid waste management permit is not required for the following activities or facilities:

   a. Backyard composting of leaves, grass clippings, or wood chips;

   b. A collection point for parking lot or street sweepings;

   c. Collection sites for wastes collected and received in sealed plastic bags from such activities as periodic cleanup campaigns for cities, rights of way, or roadside parks;

   d. Places which receive one or more recyclable materials, excluding garbage, for storage or for processing after which the material is transported for resource recovery, disposal, or storage;

   e. Onsite incinerators used by hospitals, clinics, laboratories, or other similar facilities solely for incineration of commercial waste or infectious waste generated onsite;

   f. Rock and dirt fills that receive any combination of rock, dirt, or sand; and

   g. Surface impoundments for storage, handling, and disposal of oil and gas exploration and production wastes on a lease or area permitted through the North Dakota industrial commission under North Dakota Century Code section 38-08-04.

   h. The disposal into the mine spoils of the following wastes generated in the mining operation:

      (1) Rock, boulders, and dirt; and

(2) Trees and brush.

i. The disposal of the following mining operation wastes into areas designated in a surface coal mining permit issued by the North Dakota public service commission for such disposal:

(1) Inert waste from inspected farmsteads;

(2) Wood materials including pallets, lumber, lathe, cablespools, and fenceposts;

(3) Brick, concrete block, and cured concrete; and

(4) Plastic material and pipe.

3. A permit for the transportation of solid waste is not required by persons who:

a. Transport solely their own waste to a solid waste management unit or facility;

b. Transport waste entirely within a facility regulated under this article or entirely on their property; or

c. Transport a recyclable material other than used oil or scrap tires.

History: Effective December 1, 1992; amended effective October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-03.1-03. Permit application review and action.

1. The department will review the applications, plans, and specifications for solid waste transporters and for solid waste management facilities and information submitted as a result of the public notices.

2. Upon completion of the department's review, the application for permit will be approved, returned for clarification and additional information, or denied.

   a. The basis for approval must be an application which demonstrates compliance with this article and the North Dakota Century Code chapter 23-29.

   b. The basis for return must be an application which is procedurally or technically incomplete, inaccurate, or deficient in detail, or which precludes an orderly review and evaluation. If the application is returned, the applicant may resubmit an application, complete with all necessary information to satisfy deficiencies. If the applicant does not resubmit an application within six months, the department shall consider the application withdrawn, and any subsequent application must be considered a new application.

   c. The basis for denial must be an application which contains false, misleading, misrepresented, or substantially incorrect or inaccurate information; fails to demonstrate compliance with this article; proposes construction, installation, or operation of a solid waste management unit or facility which will result in a violation of any part of this article; or is made by an applicant for whom an environmental compliance background review reveals any of the circumstances listed in subsection 14 of North Dakota Century Code section 23-29-04.

3. If the department makes a preliminary determination to issue a permit for a solid waste management facility, the department shall prepare a draft permit. The draft permit will be available for public review and comment after the department publishes a notice of its intent to issue the permit. The public notice must be published in the official county newspaper in the county in which the solid waste management unit or facility is located and in a daily newspaper of general circulation in the area of the facility.

   a. Interested persons may submit written comments to the department on the draft permit within thirty days of the

final public notice. All written comments will be considered by the department in the formulation of its final determinations.

b. The department ~~shall~~ may hold a hearing if it determines there is significant public interest in holding such a hearing. Public notice for a hearing will be made in the same manner as for a draft permit. The hearing will be before the department and will be held at least fifteen days after the public notice has been published.

4. If, after review of all information received, the department approves the permit application, the department shall issue a permit. The department may impose reasonable conditions upon a permit.

5. If, after review of all information received, the department makes the determination to deny the permit, the applicant will be notified, in writing, of the denial. The department shall set forth in any notice of denial the reasons for denial. If the application is denied, the applicant may submit a new application, which will require a new public notice. A denial must be without prejudice to the applicant's right to a hearing before the department pursuant to North Dakota Century Code chapter 28-32.

History: Effective December 1, 1992; amended effective October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-04.1-02. General facility standards. An owner or operator of a solid waste management facility shall comply with these general facility standards:

1. All personnel involved in solid waste handling and in the facility operation or monitoring must be instructed in specific procedures to ensure compliance with the permit, the facility plans, and this article as necessary to prevent accidents and environmental impacts. Documentation of training, such as names, dates, description of instruction methods, and copies of certificates awarded, must be placed in the facility's operating record.

2. The solid waste management facility shall comply with the water protection provisions of chapter 33-20-13.

3. The solid waste management facility may not cause a discharge of pollutants into waters of the state unless such discharge is in compliance with requirements of the North Dakota pollutant discharge elimination system pursuant to chapter 33-16-01.

4. The solid waste management facility may not cause a violation of the ambient air quality standard or odor rules, article 33-15, at the facility boundary.

5. Suitable control measures must be taken whenever fugitive dust is a nuisance or exceeds the levels specified in article 33-15.

6. Open burning is prohibited except as allowed under article 33-15.

7. A permanent sign must be posted at the entrance of a facility, or at the entrance of a solid waste management unit used by a facility for wastes generated onsite, which indicates the following:

   a. The name of the facility;

   b. The permit number;

   c. The name and telephone number of the owner and the operator if different than the owner;

   d. The days and hours the facility is open for access;

   e. The wastes not accepted for disposal; and

f. Any restrictions for trespassing, burning, hauling, or nonconforming dumping.

8. The owner or operator of a facility shall periodically inspect solid waste managed at the facility, on a schedule proposed by the owner or operator and approved by the department, to control and reject unauthorized solid wastes as specified by this article, a permit, or a plan of operation.

9. All litter or windblown rubbish, trash, or garbage must be returned to collection containers or vehicles, to storage containers or areas, or to a solid waste management facility as soon as practicable.

History: Effective December 1, 1992; amended effective October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-04.1-08. ~~Resource~~ Treatment and resource **recovery facilities.** In addition to sections 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, and 33-20-04.1-05, the owner or operator of a facility which conducts treatment or resource recovery other than processing shall comply with these standards.

1. All liquids must be collected and treated to meet the water protection provisions of chapter 33-20-13.

2. Surface water must be diverted away from all open storage areas.

3. Solid waste must be confined to storage containers and areas specifically designed to store waste. Waste handling and storage systems must provide sufficient excess capacity to prevent nuisances, environmental impacts, or health hazards in the event of mechanical failure or unusual waste flows.

4. Resource recovery systems or facilities must be operated on first-in, first-out basis. Stored solid waste containing garbage may not be allowed to remain unprocessed for more than forty-eight hours unless adequate provisions are made to control flies, rodents, odors, or other environmental hazards or nuisances.

5. All solid waste, recovered materials, or residues must be controlled and stored in a manner that does not constitute a fire or safety hazard or a sanitary nuisance.

6. All residues from resource recovery systems or facilities must be handled and disposed according to this article.

7. All incinerators used for solid waste must be constructed and operated in compliance with article 33-15.

History: Effective December 1, 1992; amended effective October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-05.2, 23-29-07.9

33-20-04.1-09. General disposal standards.

1. In addition to sections 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, and 33-20-04.1-05, the standards of this section apply to all landfills, surface impoundments closed with solid waste in place, and land treatment units, unless otherwise indicated.

2. Construction and operation standards for solid waste management facilities regulated by this section:

   a. Every solid waste landfill or facility shall have and maintain, or have access to, equipment adequate for the excavation, compaction, covering, surface water management, and monitoring procedures required by approval plans and this article.

   b. Roads must be constructed and maintained to provide access to the facility. Access roads must be cleaned and decontaminated as necessary.

   c. There must be available an adequate supply of suitable cover material, which, if necessary, must be stockpiled and protected for winter operation.

   d. The final cover of all disposal facilities must be designed and constructed in a manner that ensures the quality and integrity of the hydraulic barrier and the protective vegetative cover.

   e. The working face or open area of a landfill must be limited in size to as small an area as practicable. Sequential partial closure must be implemented as necessary to keep the disposal area as small as practicable and to close filled areas in a timely manner.

   f. All disposal facilities shall identify, quantify, remove, stockpile, and maintain suitable plant growth material for later use in closure.

   g. Any recycling or salvage activity must be authorized by the owner or operator and must be in a separate area in a manner to avoid injury and interference with the landfill operation.

h. Vehicles, farm machinery, metal appliances, or other similar items brought to the facility for recycling may be stored temporarily in a separate area.

i. Vector control measures, in addition to the application of cover material, must be instituted whenever necessary to prevent the transmission of disease, prevent bird hazards to aircraft, and otherwise prevent and reduce hazards created by rats, flies, snakes, insects, birds, cats, dogs, and skunks.

j. All domestic animals must be excluded from the facility. Feeding of garbage to animals is prohibited.

k. All earthen material must be maintained onsite unless removal from the site is authorized by the department.

3. Construction and operation standards, excluding inert waste landfills.

a. The landfill must be designed and operated to prevent the run-on and runoff of surface waters resulting from a maximum flow of a twenty-five-year, twenty-four-hour storm.

b. Facilities receiving on average over twenty tons [18.2 metric tons] per day of solid waste shall make provisions for measuring all waste delivered to and disposed in the facility. Weight measurements are preferable; volume measurements (cubic yards) are acceptable.

c. Active areas of the landfill must be surveyed periodically to ensure that filling is proceeding in a manner consistent with the landfill design and that closure grades are not exceeded.

d. All run-on or runoff must be properly controlled to avoid its concentration on or in solid waste and to minimize infiltration into the waste material. Disposal shall avoid any areas within the facility where run-on or runoff accumulates.

e. Leachate removal systems must be operated and maintained to assure continued function according to the design efficiency. This shall include, where applicable:

(1) Flushing, inspection and, if necessary, repair of collection lines after placement of the first layer of waste in a landfill cell;

(2) Annual sampling and analysis of leachate for the parameters required under the ground water quality monitoring required under section 33-20-13-02;

(3) At minimum, semiannual monitoring of leachate head or elevations above the liner;

(4) Annual flushing of leachate collection lines to remove dirt and scale; and

(5) Inclusion of leachate removal system operation, inspection, and maintenance procedures in the operating record.

4. Closure standards, excluding land treatment units.

a. Closed solid waste management units may not be used for cultivated crops, heavy grazing, buildings, or any other use which might disturb the protective vegetative and soil cover.

b. All solid waste management units must be closed with a final cover designed to:

(1) Have a permeability less than or equal to the permeability of any bottom liner or natural subsoils present;

(2) Minimize precipitation run-on from adjacent areas;

(3) Minimize erosion and optimize drainage of precipitation falling on the landfill. The grade of slopes may not be less than three percent, nor more than fifteen percent, unless the permit applicant or permittee provides justification to show steeper slopes are stable and will not result in surface soil loss in excess of one-tenth of one percent per year for the first year and one-hundredth of one percent per year thereafter. In no instance may slopes exceed twenty-five percent; and

(4) Provide a surface drainage system which does not adversely affect drainage from adjacent lands.

c. The final cover must include six inches [15.2 centimeters] or more of suitable plant growth material which must be seeded with shallow rooted grass or native vegetation.

d. The department may allow, on a case-by-case basis, the use of closed inert waste landfill sites for certain beneficial uses that would not pose a threat to human health or the environment.

5. Postclosure standards for solid waste management facilities regulated by this section.

a. The owner or operator of a landfill or a surface impoundment closed with solid waste in place shall meet the following during the postclosure period:

(1) Maintain the integrity and effectiveness of the final cover, including making repairs to the cover to correct effects of settlement, subsidence, and other events, and preventing run-on and runoff from eroding or otherwise damaging the final cover;

(2) Maintain and operate the leachate collection system, if applicable;

(3) Monitor the ground water and maintain the ground water monitoring system, if applicable; and

(4) Operate and maintain the gas control system, if applicable.

b. The owner or operator of a municipal waste landfill, an industrial waste landfill, a special waste landfill, a surface impoundment closed with solid waste remaining in place, or a land treatment facility shall prepare and implement a written postclosure plan approved by the department as a part of the permitting process. The postclosure plan must address facility maintenance and monitoring activities for a postclosure period of thirty years.

(1) Postclosure includes appropriate: ground water monitoring; surface water monitoring; gas monitoring; and maintenance of the facility, facility structures, and ground water monitoring systems.

(2) The postclosure plan must: provide the name, address, and telephone number of the person or office to contact during the postclosure period; and project time intervals at which postclosure activities are to be implemented, identify postclosure cost estimates, and provide financial assurance mechanisms as required by chapter 33-20-14.

(3) The department may require an owner or operator to amend the postclosure plan, including an extension of the postclosure period, and implement the changes. If the permittee demonstrates that the facility is stabilized, the department may authorize the owner or operator to discontinue postclosure activities.

c. Following completion of the postclosure period, the owner or operator shall notify the department verifying that postclosure management has been completed in accordance with the postclosure plan.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-05.2, 23-29-07.9

33-20-05.1-02. Performance and design criteria. The owner or operator of an inert waste landfill shall comply with these design, construction, and operating standards.

1. Access to the facility must be controlled by lockable gates and a combination of fencing, natural barriers, or artificial barriers.

2. Disposal of the following solid waste into inert waste landfills is prohibited: agricultural waste, asbestos waste, municipal waste, commercial waste, industrial waste, special waste, regulated infectious waste, liquid solid waste, hazardous waste, and radioactive waste.

3. All wastes deposited at the site must be spread and periodically compacted to promote drainage of surface water.

4. All wastes must be covered at least two times per year with a minimum of six inches [15.2 centimeters] of suitable earthen material.

   a. The department may exempt the owner or operator of the landfill from this requirement based on the type and amount of waste received at the landfill and the site location.

   b. This requirement does not apply to monofills used solely for bottom ash from coal fired boilers.

5. Inert waste permits must be limited to an area no larger than necessary to properly conduct permitted inert waste disposal activities. The department shall take into consideration each applicant's operating needs and conditions when evaluating this requirement in order to best achieve the purposes of this chapter.

History: Effective December 1, 1992; amended effective August 1, 1993; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

CHAPTER 33-20-06.1

33-20-06.1-01. Applicability. The requirements of this chapter and of sections 33-20-01.1-08, 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, 33-20-04.1-05, and 33-20-04.1-09 apply to owners and operators of municipal waste landfills, except that the department may allow alternate performance and design criteria, as specified in subsections 2 and 3 of section 33-20-06.1-02, and it may waive section 33-20-04.1-03 for a municipal waste landfill receiving less than twenty tons [18.2 metric tons] per day based upon factors such as the site's climate, hydrogeology, topography, geology, ground water quality and location, and the type of wastes received. In addition to the requirements of this chapter, municipal solid waste landfills receiving on average more than five hundred tons [455 metric tons] per day shall comply with section 33-20-10-03, subsection 2 of section 33-20-10-04, and section 33-20-10-05.

History: Effective December 1, 1992; amended effective October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-06.1-03. Closure criteria. In addition to sections 33-20-04.1-05 and 33-20-04.1-09, at closure, an owner or operator shall cover an existing unit with a layer of compacted soil material having a thickness of eighteen inches [45.7 centimeters] or more and a hydraulic conductivity of 1×10^{-7} centimeters per second or less. The compacted layer must be free from cracks and extrusions of solid waste. A second layer of twelve inches [30.5 centimeters] or more of clay-rich soil material suitable for serving as a plant root zone must be placed over the compacted layer. At least six inches [15.2 centimeters] of suitable plant growth material must be placed over the covered landfill and the facility planted with adapted grasses. The total depth of final cover must be three feet [91.4 centimeters] or more, ~~or~~ as required to achieve subsection 3 of section 33-20-06.1-02.

History: Effective December 1, 1992; amended effective August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-10-05. Facility inspector. The owner or operator shall provide the funds necessary to employ an inspector for conducting onsite inspection services at the facility. The owner or operator shall provide funds by July thirty-first of each year for salary, wages, and operating expenses associated with employing an inspector for the facility.

History: Effective August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-01-22, 23-29-04

33-20-13-02. Ground water quality monitoring.

1. An owner or operator of a resource recovery unit, a land treatment unit, a surface impoundment, or a landfill, except an inert waste landfill, must incorporate a ground water monitoring system into the design of the facility. If the owner or operator demonstrates to the department that there is no potential for migration of solid waste constituents to the uppermost aquifer during the life of the solid waste management unit and the postclosure period, the department may suspend this requirement. The demonstration must be based upon factors such as the site characterization, the solid waste characteristics and constituents, the potential capacity of the unit or facility, and the physical, chemical, and biological processes affecting contaminant fate and transport.

2. Ground water monitoring systems must be designed to effectively detect the migration of contamination. At a minimum, a water quality monitoring system shall:

   a. Include one ground water monitoring well located upgradient of the solid waste management unit, and at least two wells located downgradient of the unit. The monitoring wells should be installed at appropriate locations and depths to yield ground water from the uppermost aquifer and all hydraulically connected aquifers below the solid waste management units on the facility;

   b. Represent the elevation of ground water in each well immediately prior to purging so that the owner or operator may determine the rate and direction of ground water flow each time ground water is sampled;

   c. Represent the quality of ground water that has not been affected by spills or leakage from solid waste management units;

   d. Represent the quality of ground water to ensure detection of contamination passing the compliance boundary;

   e. Ground water samples at municipal waste landfills must not be filtered prior to analysis; and

   f. The frequency and number of samples collected must be consistent with statistical procedures for evaluating ground water data. A minimum of four independent samples from each well must be collected for analysis during the first sampling event for establishing background data at upgradient (subdivision c) and downgradient

(subdivision d) wells, unless four or more sampling events occur prior to acceptance of solid waste by the facility. The monitoring frequency must be semiannual during the active life of the facility and during the postclosure period. The department may specify an alternate frequency for sampling based upon such factors as site hydrogeological characteristics, solid waste characteristics, evidence of a spill or leakage, or resource value of the aquifer.

3. Additional wells may be required in complicated hydrogeological settings or to define the extent of contamination detected.

4. A written ground water monitoring plan must be developed for approval by the department and implemented as part of the permitting process. The plan must include:

   a. Number and location of wells;

   b. Procedures for decontamination of drilling and sampling equipment;

   c. Procedures for sample collection;

   d. Sample analytical procedures;

   e. Chain of custody control;

   f. Parameters for analysis;

   g. Quality assurance or quality control procedures;

   h. A monitoring schedule;

   i. Data statistical methods and analysis procedures; and

   j. Reporting of a ~~statistical~~ statistically significant increase over a background value or of an exceedance of a maximum concentration limit or a water quality standard.

5. Ground water monitoring data obtained under this section must be analyzed within a reasonable period of time after completing sampling and laboratory analysis to determine whether or not a ~~statistical~~ statistically significant increase over background values or an exceedance of a maximum concentration limit or water quality standard has occurred for each parameter required in the monitoring plan or permit. Statistical methods must, as appropriate:

   a. Be appropriate for the distribution of the data and, if inappropriate for a normal theory test, be transformed or a distribution-free theory test must be used.

b. Control or correct for seasonal and spatial variability in the data.

c. Account for data below the limit of detection that can be reliably achieved by routine laboratory techniques, using the limit as the lowest concentration level for a chemical parameter which is below detection.

d. Be protective of human health and environmental resources.

History: Effective December 1, 1992; amended effective October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04, 23-33-05, 23-33-11, 61-28-04, 61-28-05
Law Implemented: NDCC 23-29-04, 23-33-05, 23-33-06, 23-33-08, 23-33-11, 61-28-04

33-20-13-05. ~~Remedial~~ Assessment monitoring, remedial **measures, and corrective action.**

1. Within ninety days of finding that a parameter has been detected at a statistically significant level exceeding the ground water standards established under sections 33-20-13-02 and 33-20-13-03, the owner or operator shall initiate an assessment of remedial measures. The assessment must:

   a. Be completed within a reasonable time period, unless otherwise specified by permit or the department;

   b. Include an evaluation of the nature and extent of the release of the constituents including pathways to human and environmental receptors;

   c. For municipal landfills, include ground water sampling and analysis for all parameters listed in appendix 1 of this chapter. The department may delete any of the appendix 1 parameters if it can be shown that the removed constituents are not reasonably expected to be in or derived from the waste within the leaking facility;

   d. Include an analysis of the effectiveness of potential remedial measures in meeting all requirements of subsection 2 and include the following:

      (1) The performance, reliability, ease of implementation, and potential impacts of each potential remedial measure;

      (2) The time required to begin and complete each potential remedial measure;

(3) The costs of implementation of each potential remedial measure; and

(4) The permit requirements or other environmental or public health requirements that may substantially affect implementation of each potential remedial measure; and

d. e. When requested by the department, the owner or operator must discuss results of the assessment of remedial measures, prior to selection of a corrective action remedy, in a public meeting with interested and affected persons.

2. Based on the results of the assessment of remedial measures conducted under subsection 1, the owner or operator must select a corrective action remedy within thirty days which, at minimum, meets the following standards:

a. Is protective of human health and environmental resources;

b. Attains the ground water protection standards under sections 33-20-13-02 and 33-20-13-03;

c. Controls the sources of release so as to reduce or eliminate, to the maximum extent practicable, further releases of constituents that may pose a threat to human health or environmental resources; and

d. Complies with this article and other applicable environmental statutes and rules.

3. When selecting a corrective action remedy under subsection 2, the owner or operator shall consider these factors:

a. The short-term and long-term effectiveness of the potential remedial measure considering:

(1) Magnitude of reducing exposure to constituents;

(2) Likelihood of further releases;

(3) Practical capability of technologies; and

(4) Time until the standards are achieved.

b. The ease or difficulty of implementing the potential remedial measure considering:

(1) Availability of equipment and specialists;

(2) Long-term management needs such as monitoring, operation, and maintenance; and

(3) Need to coordinate with and obtain necessary approvals or permits from other agencies.

c. The need for interim measures to control the sources of the release and to protect human health and environmental resources.

d. The schedules for initiating, conducting, and completing the potential remedial measure.

e. Practical capability of the owner or operator.

4. The owner or operator shall provide the department with a document fully describing the remedial measures assessment under subsection 1 and the selected corrective action remedy under subsections 2 and 3.

5. Upon selection of the corrective action remedy under subsection 2 and with the concurrence of the department, the owner or operator shall establish and implement the remedy.

a. During implementation, the owner or operator shall monitor the effectiveness of the remedy.

b. Implementation shall be considered complete when all actions and standards required to complete the remedy have been satisfied and approved by the department.

c. ~~The~~ Upon completion of a corrective action remedy, the owner or operator shall place in the operating record a certification that the corrective action remedy has been completed ~~in the operating record~~. Within fourteen days of completion of the certification, the owner or operator shall notify the department that the certification has been placed in the operating record.

History: Effective October 1, 1994; amended effective August 1, 1995.
General Authority: NDCC 23-29-04, 23-33-11, 61-28-04, 61-28-05
Law Implemented: NDCC 23-29-04, 23-33-02, 23-33-06, 23-33-08, 61-28-04

STAFF COMMENT: Appendix I to section 33-20-13-05 contains all new material but is not underscored so as to improve readability.

Appendix I to Section 33-20-13-05 - List of Hazardous Inorganic and Organic Constituents

Acenaphthene
Acenaphtylene
Acetone
Acetonitrile; Methyl cyanide
Acetophenone
2-Acetylaminofluorene; 2-AAF
Acrolein
Acrylonitrile
Aldrin
Allyl chloride
4-Aminobiphenyl
Anthracene
Antimony
Arsenic
Barium
Benzene
Benzol[a]anthracene; Benzanthracene
Benzo[b]fluoranthene
Benzo[k]fluoranthene
Benzo[ghi]perylene
Benzo[a]pyrene
Benzyl alcohol
Beryllium
alpha-BHC
beta-BHC
delta-BHC
gamma-BHC;Lindane
Bis(2-chloroethoxy)methane
Bis(2-chloroethyl)ether; Dichloroethyl ether
Bis-(2-chloro-1-methylethyl) ether; 2,2[1]-Dichlorodiisopropyl ether; DCIP
Bis-(2-ethylhexyl) phthalate
Bromochloromethane; Chloro-bromomethane
Bromodichloromethane; Dibromochloromethane
Bromoform; Tribromomethane
4-Bromophenyl phenyl ether
Butyl benzyl phthalate; Benzyl butyl phthalate
Cadmium
Carbon disulfide
p-Chloroaniline
Chlorobenzene
Chlorobenzilate
p-Chloro-m-cresol; 4-Chloro-3-methylphenol
Chloroethane; Ethyl chloride
Chloroform; Trichloromethane
2-Chloronaphthalene
2-Chlorophenol
4-Chlorophenyl phenyl ether
Chloroprene
Chromium
Chrysene
Cobalt
Copper
m-Cresol; 3-methylphenol
o-Cresol; 2-Methylphenol
p-Cresol; 4-Methylphenol
Cyanide
2,4-D; 2,4-Dichlorophenoxyacetic acid
4,4[1]-DDD
4,4[1]-DDE
4,4[1]-DDT
Diallate
Dibenz[a,h]anthracene
Dibenzofuran
Dibromochloromethane; Chlorodibromomethane
1,2-Dibromo-3-chloropropane; DBCP
1,2-Dibromoethane; Ethylene dibromide; EDB
Di-n-butyl phthalate
o-Dichlorobenzene; 1,2-Dichlorobenzene
m-Dichlorobenzene; 1,3-Dichlorobenzene
p-Dichlorobenzene; 1,4-Dichlorobenzene
3,3[1]-Dichlorobenzidine
trans-1,4-Dichloro-2-butene
Dichlorodifluoromethane; CFC 12
1,1-Dichloroethane; Ethyldidene chloride

Carbon tetrachloride
Chlordane
1,1-Dichloroethylene; 1,1-Dichloroethene; Vinylidene chloride
cis-1,2-Dichloroethylene; cis-1,2-Dichloroethene
trans-1,2-Dichloroethylene trans-1,2-Dichloroethene
2,4-Dichlorophenol
2,6-Dichlorophenol
1,2-Dichloropropane; Propylene dichloride
1,3-Dichloropropane; Trimethylene dichloride
2,2-Dichloropropane; Isopropylidene chloride
1,1-Dichloropropene
cis-1,3-Dichloropropene
trans-1,3-Dichloropropene
Dieldrin
Diethyl phthalate
0,0-Diethyl 0-2-pyrazinyl phosphorothioate; Thionazin
Dimethoate
p-(Dimethylamino)azobenzene
7,12-Dimethylbenz[a]anthracene
3,3[1]-Dimethylbenzidine
2,4-Dimethylphenol; m-Xylenol
Dimethyl phthalate
m-Dinitrobenzene
4,6-Dinitro-o-cresol 4,6-Dinitro-2 methylphenol
2,4-Dinitrophenol
2,4-Dinitrotoluene
2,6-Dinitrotoluene
Dinoseb; DNBP; 2-sec-Butyl-4,6-dinitrophenol
Di-n-octyl phthalate
Diphenylamine
Disulfoton
Endosulfan I
Endosulfan II
Endosulfan sulfate
Endrin
Endrin aldehyde
Ethylbenzene
Ethyl methacrylate
Ethyl methanesulfonate
Famphur
Fluoranthene
Fluorene
Heptachlor
Heptachlor epoxide
1,2-Dichloroethane; Ethylene dichloride
Hexachlorocyclopentadiene
Hexachloroethane
Hexachloropropene
2-Hexanone; Methyl butyl ketone
Indeno(1,2,3-cd)pyrene
Isobutyl alcohol
Isodrin
Isophorone
Isosafrole
Kepone
Lead
Mercury
Methacrylonitrile
Methapyrilene
Methoxychlor
Methyl bromide; Bromomethane
Methyl chloride; Chloromethane
3-Methylcholanthrene
Methyl ethyl ketone; MEK; 2-Butanon
Methyl iodide; Iodomethane
Methyl methacrylate
Methyl methanesulfonate
2-Methylnaphthalene
Methyl parathion; Parathion methyl
4-Methyl-2-pentanone; Methyl isobutyl ketone
Methylene bromide; Dibromomethane
Methylene chloride; Dichloromethane
Naphthalene
1,4-Naphthoquinone
1-Naphthylamine
2-Naphthylamine
Nickel
o-Nitroaniline; 2-Nitroaniline
m-Nitroaniline; 3-Nitroanile
p-nitroaniline; 4-Nitroaniline
Nitrobenzene
o-Nitrophenol; 2-Nitrophenol
p-Nitrophenol; 4-Nitrophenol
N-Nitrosodi-n-butylamine
N-Nitrosodiethylamine
N-Nitrosodimethylamine
N-Nitrosodiphenylamine
N-Nitrosodipropylamine; N-Nitroso-N-dipropylamine; Di-n-propylnitrosamine
N-Nitrosomethylethalamine
N-Nitrosopiperidine
N-Nitrosopyrrolidine
5-Nitro-o-toluidine
Parathion

Hexachlorobenzene
Hexachlorobutadiene
Pentachloronitrobenzene
Pentachlorophenol
Phenacetin
Phenanthrene
Phenol
p-Phenylenediamine
Phorate
Polychlorinated biphenyls; PCBs; Aroclors
Pronamide
Propionitrile; Ethyl cyanide
Pyrene
Safrole
Selenium
Silver
Silvex; 2,4,5-TP
Styrene
Sulfide
2,4,5-T; 2,4,5-Trichlorophenoxyacetic acid
1,2,4,5-Tetrachlorobenzene
1,1,1,2-Tetrachloroethane
1,1,2,2-Tetrachloroethane
Tetrachloroethylene; Tetrachloroethene; Perchloroethylene
Pentachlorobenzene
2,3,4,6-Tetrachlorophenol
Thallium
Tin
Toluene
o-Toluidine
Toxaphene
1,2,4-Trichlorobenzene
1,1,1-Trichloroethane; Methylchloroform
1,1,2-Trichloroethane
Trichloroethylene; Trichloroethene
Trichlorofluoromethane; CFC-11
2,4,5-Trichlorophenol
2,4,6-Trichlorophenol
1,2,3-Trichloropropane
0,0,0-Triethyl phosphorothioate
sym-Trinitrobenzene
Vanadium
Vinyl acetate
Vinyl chloride; Chloroethene
Xylene (total)
Zinc

History: Effective August 1, 1995.

CHAPTER 33-20-14

33-20-14-04. Implementation of financial assurance for closure and postclosure.

1. The closure plan and postclosure plan required by this article must specify the financial assurance mechanisms required by this chapter and, if a reserve account, trust fund, surety bond, or insurance policy, the methods and schedules for funding the mechanisms.

2. Publicly owned solid waste disposal facilities shall comply with the following:

   a. Closure and postclosure financial assurance funds must be generated for each facility as indicated in the closure and postclosure plans;

   b. Each facility owner or operator must establish a procedure with the trustee of the financial assurance mechanism for notification of nonpayment of funds to be sent to the department; and

   c. Each owner or operator shall file with the department no later than August thirty-first of each succeeding year an annual report of the financial assurance mechanism established for closure and postclosure activities.

3. Privately owned solid waste disposal facilities shall comply with the following:

   a. Each owner or operator shall file with the department ~~within ninety days~~ no later than August thirty-first of each succeeding year an annual audit of the financial assurance mechanisms established for closure and postclosure activities; and

   b. Annual audits must be conducted by a certified public accountant licensed in the state and must be filed with the department no later than ~~March~~ August thirty-first of each year for the previous calendar year, including each year of the postclosure period.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994; August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-14-07. Specific requirements of mechanisms for financial assurance.

1. **Trust fund.** A trust fund must satisfy the requirements of this subsection.

   a. The trustee must be an entity which has authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

   b. Payments into the trust fund must be made annually over the initial permit or over the remaining life of the solid waste management unit or facility, whichever is shorter. This is the pay-in period.

   c. The first payment into the trust fund must equal or exceed the current cost estimate for closure or postclosure, whichever is applicable, divided by the number of years defined in subdivision b. The amount of subsequent payments must be determined by the following formula:

$$\text{Next payment} = \frac{CE - CV}{Y}$$

      Where CE is the current cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

   d. The initial payment into the trust fund must be made for new or expanded facilities before the initial receipt of solid waste or for existing facilities before the effective date as provided by subsection 1 of section 33-20-14-01.

   e. If an owner or operator establishes a trust fund after having used one or more alternative mechanisms specified in section 33-20-14-03, the initial payment into the trust fund must equal or exceed the amount that the fund would contain if the fund were established initially and annual payments made according to subdivision c.

   f. The owner or operator, or other person authorized to conduct closure or postclosure care may request reimbursement from the trustee for these expenses. Requests for reimbursement will be approved by the trustee only if sufficient funds are remaining in the trust fund.

2. **Surety bond.** A surety bond guaranteeing payment or performance must satisfy to the requirements of this subsection.

   a. The penal sum of the bond must be in an amount equal to or greater than the current closure or postclosure cost estimate, whichever is applicable.

b. Under the terms of the bond, the surety must become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

c. The owner or operator must establish a standby trust fund that meets the requirement of subsection 1, except for payment provisions in subdivisions b, c, and d.

d. Payments made under the terms of the bond must be deposited by the surety into the standby trust fund. Payments from the trust fund must be approved by the trustee.

e. Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the department one hundred twenty days or more in advance of the cancellation. If the surety cancels the bond, the owner or operator must obtain alternate financial assurance.

3. **Letter of credit.** A letter of credit must satisfy the requirements of this subsection.

a. The issuing institution of a letter of credit must have authority to issue letters of credit and its operations must be regulated and examined by a federal or state agency.

b. A letter from the owner or operator, referring to the letter of credit by number, issuing institution, and date and including the name and address of the solid waste management unit or facility and the amount of funds assured, must be provided with the letter of credit to the department.

c. The letter of credit must be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for closure or postclosure care, whichever is applicable. The letter of credit must provide that the expiration date will be automatically extended for a period of one year unless the issuing institution has canceled the letter of credit by sending notice of cancellation to the owner or operator and to the department one hundred twenty days or more in advance of the cancellation. If the letter of credit is canceled by the issuing institution, the owner or operator must obtain alternate financial assurance.

4. **Insurance.** Insurance must satisfy the requirements of this subsection.

a. The insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer in one or more states.

b. The insurance policy must guarantee that funds will be available to close the solid waste management unit or facility whenever closure occurs or to provide postclosure care whenever the postclosure period begins, whichever is applicable. The policy must also guarantee that, once closure or postclosure care begins, the insurer will be responsible for paying out funds to the owner or operator or other person authorized to conduct closure or postclosure care up to an amount equal to the face amount of the policy.

c. The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure or postclosure care, whichever is applicable. The term face amount means the total amount the insurer is obligated to pay under the policy.

d. Each insurance policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer.

e. The insurance policy must provide that the insurer may not cancel, terminate, or fail to renew the policy, except for failure to pay the premium. The automatic renewal of the policy must provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay a premium, the insurer may cancel the policy by sending notice of cancellation by certified mail to the owner or operator and to the department one hundred twenty days or more in advance of cancellation. If the insurer cancels the policy, the owner or operator must obtain alternate financial assurance.

5. **Financial test and corporate guarantee.** A financial test or corporate guarantee must satisfy the requirements of this subsection.

a. For the financial test, the owner or operator must have:

(1) A ratio of current assets to current liabilities greater than one and five-tenths, or a current rating for the owner's or operator's most recent bond issuance of AAA, AA, A, or A BBB as issued by Standard and Poor's or Aaa, Aa, A, or A Baa as issued by Moody's; and

(2) Net working capital and tangible net worth each at least four times the sum of the current cost

estimates for closure or postclosure, whichever is applicable; and

(3) Tangible net worth of at least two million dollars; and

(4) Assets located in the United States amounting to at least four times the current cost estimates for closure or postclosure care, whichever is applicable.

b. To demonstrate the financial test, the owner or operator must submit the following items to the department in a letter which transmits:

(1) A copy of an independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest fiscal year; and

(2) A report from an independent certified public accountant to the owner or operator stating that:

(a) The accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, yearend financial statements for the latest fiscal year; and

(b) In connection with that procedure, no matters came to lead the accountant to believe that specified data should be adjusted.

c. After initial submission of the items in subdivision b, the owner or operator must send updated information to the department ~~within--ninety--days~~ no later than August thirty-first of each succeeding fiscal year. This information must consist of all items specified in subdivision b.

d. If the owner or operator no longer meets the requirements of subdivision a, the owner or operator must send notice by certified mail to the department within ninety days and establish alternate financial assurance within one hundred twenty days.

e. The department may disallow use of the financial test on the basis of qualification in the opinion expressed by the certified public accountant in the accountant's report on examination of owner's or operator's statements. An adverse opinion or a disclaimer of opinion may be cause for disallowance. The owner or operator shall provide alternate financial assurance within thirty days after notification of the disallowance.

f. An owner or operator may meet the requirements of this subsection by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator ~~or~~, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a substantial business relationship with the owner or operator. The guarantor must meet the requirements of subdivisions a through e and a certified copy of the guarantee must accompany the items in subdivision b. The terms of the guarantee must provide that:

(1) Guarantor will complete closure or postclosure care, whichever is applicable, if the owner or operator fails to do so; and

(2) The corporate guarantee will remain in effect unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the department; and

(3) Guarantor will provide alternate financial assurance within ninety days if the corporate guarantee is canceled and if the owner or operator fails to provide approved alternate financial assurance.

History: Effective October 1, 1994; amended effective August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-16

33-20-16-05. Term and renewal of certificates. Certificates expire each year on June thirtieth. The holder must reapply for renewal of an expired certificate and pay the renewal fee by ~~August~~ July first. To be eligible for renewal, each certified operator must attend at least one departmentally approved training course every three years.

History: Effective December 1, 1992; amended effective August 1, 1995.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07.9

CHAPTER 33-20-18

33-20-18-01. Solid waste management fund.

1. Any political subdivision may apply for a loan or grant from the solid waste management fund.

2. The loan or grant application must be submitted to the department and include the following:

   a. The political entity applying for the grant or loan.

   b. The purpose of the grant or loan application:

      (1) Market development.

      (2) Waste reduction.

      (3) Resource recovery.

      (4) Recycling.

      (5) Planning.

   c. ~~Certification--by--the--district-that~~ A description of how the proposed project is consistent with the district solid waste management plan.

   d. A description of the work plan, implementation procedures, and schedule.

   e. Identification of the amount of grant or loan requested and a cost analysis of the entire project.

   f. Progress reporting schedule.

History: Effective April 1, 1992; amended effective August 1, 1995.
General Authority: NDCC 23-29-04, 23-29-07.5
Law Implemented: NDCC 23-29-04, 23-29-07.5

SEPTEMBER 1995

CHAPTER 33-15-11

33-15-11-04. Preplanned abatement strategies plans.

1. Any person responsible for the operation of a source of air contaminants as set forth in table 7 shall prepare abatement strategies plans for reducing the emission of air contaminants during periods of an air pollution alert, air pollution warning, and air pollution emergency. Abatement strategies plans shall be designed to reduce or eliminate emissions of air contaminants in accordance with the objectives set forth in table 7.

2. Any person responsible for the operation of a source of air contaminants not set forth under subsection 1 shall, when requested by the department, in writing, prepare abatement strategies plans for reducing the emission of air contaminants during periods of an air pollution alert, air pollution warning, and air pollution emergency. Abatement strategies plans shall be designed to reduce or eliminate emissions of air contaminants in accordance with the objectives set forth in table 7.

3. Abatement strategies plans as required under subsections 1 and 2 shall be in writing and identify the sources of air contaminants, the approximate amount of reduction of air contaminants, and a brief description of the manner in which the reduction will be achieved during an air pollution alert, air pollution warning, and air pollution emergency.

4. During a condition of air pollution alert, air pollution warning, and air pollution emergency, abatement strategies

plans as required by subsections 1 and 2 shall be made available on the premises to any person authorized to enforce the provisions of applicable rules and regulations.

5. Abatement strategies plans as required by subsections 1 and 2 shall be submitted to the department upon request within thirty days of the receipt of such request; such abatement strategies plans shall be subject to review and approval by the department. If, in the opinion of the department an abatement strategies plan does not effectively carry out the objectives as set forth in table 7, the department may disapprove it, state the reasons for disapproval, and order the preparation of an amended abatement strategies plan within the time period specified in the order.

History: Amended effective January 1, 1989.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-25-02

Table 6.

Air Pollution Episode Criteria

1. Air pollution forecast:

   An internal watch by the department shall be actuated by a national weather service advisory that an atmospheric stagnation advisory is in effect or the equivalent local forecast of a stagnant atmospheric condition.

2. Air pollution alert:

   The alert level is that concentration of contaminants at which first stage control actions are to begin. An alert will be declared when any one of the following levels is reached at any monitoring site:

   SO_2-800 µg/m3 (0.3 ppm), 24-hour average.

   PM_{10} - 350 µg/m3, 24-hour average.

   CO-17 mg/m3 (15 ppm), 8-hour average.

   Ozone (O_3) - 400 µg/m3 (0.2 ppm), 1-hour average.

   NO_2 - 1,130 µg/m3 (0.6 ppm), 1-hour average; 282 µg/m3 (0.15 ppm), 24-hour average.

   In addition to the levels listed for the above pollutants, meteorological conditions are such that pollutant concentrations can be expected to remain at the above levels for twelve or more hours or increase, or in the case of ozone, the situation is likely to recur within the next twenty-four hours unless control actions are taken.

3. Air pollution warning:

   The warning level indicates that air quality is continuing to degrade and that additional control actions are necessary. A warning will be declared when any one of the following levels is reached at any monitoring site:

   SO_2 - 1,600 µg/m3 (0.6 ppm), 24-hour average.

   PM_{10} - 420 µg/m3, 24-hour average.

   CO-34 mg/m3 (30 ppm), 8-hour average.

   Ozone (O_3) - 800 µg/m3 (0.4 ppm), 1-hour average.

NO_2 - 2,260 µg/m3 (1.2 ppm), 1-hour average; 565 µg/m3 (0.3 ppm), 24-hour average.

In addition to the levels listed for the above pollutants, meteorological conditions are such that pollutant concentrations can be expected to remain at the above levels for twelve or more hours or increase, or in the case of ozone, the situation is likely to recur within the next twenty-four hours unless control actions are taken.

4. Air pollution emergency:

The emergency level indicates that air quality is continuing to degrade toward a level of significant harm to the health of persons and that the most stringent control actions are necessary. An emergency will be declared when any one of the following levels is reached at any monitoring site:

SO_2 - 2,100 µg/m3 (0.8 ppm), 24-hour average.

PM_{10} - 500 µg/m3, 24-hour average.

CO-46 mg/m3 (40 ppm), 8-hour average.

Ozone (O_3) - 1,000 µg/m3 (0.5 ppm), 1-hour average.

NO_2 - 3,000 µg/m3 (1.6 ppm), 1-hour average; 750 µg/m3 (0.4 ppm), 24-hour average.

In addition to the levels listed for the above pollutants, meteorological conditions are such that pollutant concentrations can be expected to remain at the above levels for twelve or more hours or increase, or in the case of ozone, the situation is likely to recur within the next twenty-four hours unless control actions are taken.

5. Termination:

Once declared, any status reached by application of these criteria will remain in effect until the criteria for that level are no longer met. At such time, the next lower status will be assumed.

Table 7.

Abatement Strategies Emission Reduction Plans

Air Pollution Alert Level

Part A. General

1. There shall be no open burning by any persons of tree waste, vegetation, refuse, or debris in any form.

2. The use of incinerators for the disposal of any form of solid waste shall be limited to the hours between twelve noon and four p.m.

3. Persons operating fuel-burning equipment which requires boiler lancing or soot blowing shall perform such operations only between the hours of twelve noon and four p.m.

4. Persons operating motor vehicles should eliminate all unnecessary operations.

Part B. Source Curtailment

Any person responsible for the operation of a source of air contaminants listed below shall take all required control actions for this alert level.

Source of Air Contaminants	Control Action
1. Coal or oil-fired electric power generating facilities.	a. Substantial reduction by utilization of fuels having low ash and sulfur content. b. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing and soot blowing. c. Substantial reduction by diverting electric power generation to facilities outside of alert area.
2. Coal and oil-fired process steam generating facilities.	a. Substantial reduction by utilization of fuels having low ash and sulfur

	content.
	b. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing and soot blowing.
	c. Substantial reduction of steam load demands consistent with continuing plant operations.
3. Manufacturing industries of the following classifications: Primary metals industry. Petroleum refining operations. Chemical industries. Mineral processing industries. Grain industry. Paper and allied products. Other energy and fuel facilities.	a. Substantial reduction of air contaminants from manufacturing operations by curtailing, postponing, or deferring production and all operations.
	b. Maximum reduction by deferring trade waste disposal operations which emit solid particles, gas vapors and malodorous substances.
	c. Maximum reduction of heat load demands by processing.
	d. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing or soot blowing.

Air Pollution Warning Level

Part A. General

1. There shall be no open burning by any persons of tree waste, vegetation, refuse, or debris in any form.

2. The use of incinerators for the disposal of any form of solid waste or liquid waste shall be prohibited.

3. Persons operating fuel-burning equipment which requires boiler lancing or soot blowing shall perform such operations only between the hours of twelve noon and four p.m.

4. Persons operating motor vehicles must reduce operations by the use of car pools and increased use of public transportation and elimination of unnecessary operation.

Part B. Source Curtailment

Any person responsible for the operation of a source of air contaminants listed below shall take all required control actions for this warning level.

Source of Air Contaminants	Control Action
1. Coal or oil-fired electric power generating facilities.	a. Maximum reduction by utilization of fuels having lowest ash and sulfur content.
	b. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing and soot blowing.
	c. Maximum reduction by diverting electric power generation to facilities outside of warning area.
2. Coal and oil-fired process steam generating facilities.	a. Maximum reduction by utilization of fuels having the lowest available ash and sulfur content.
	b. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing and soot blowing.
	c. Making ready for use a plan of action to be taken if an emergency develops.
3. Manufacturing industries which require considerable lead time for shutdown including the following classifications:	a. Maximum reduction of air contaminants from manufacturing operations by, if necessary, assuming reasonable

Petroleum refining. Chemical industries. Primary metals industries. Glass industries. Paper and allied products. Other energy and fuel facilities.	economic hardships by postponing production and allied operation. b. Maximum reduction by deferring trade waste disposal operations which emit solid particles, gases, vapors, or malodorous substances. c. Maximum reduction of heat load demands for processing. d. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing or soot blowing.
4. Manufacturing industries which require relatively short lead times for shut-down including the following classifications: Primary metals industries. Chemical industries. Grain industry. Mineral processing industries.	a. Elimination of air contaminants from manufacturing operations by ceasing, curtailing, postponing, or deferring production and allied operations to the extent possible without causing injury to persons or damage to equipment. b. Elimination of air contaminants from ~~trade~~ industrial waste disposal ~~process~~ which ~~emit~~ emits solid particles, gases, vapors, or malodorous substances. c. Maximum reduction of heat load demands for processing. d. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing or soot blowing.

Air Pollution Emergency Level

Part A. General

1. There shall be no open burning by any persons of tree waste, vegetation, refuse, or debris in any form.

2. The use of incinerators for the disposal of any form of solid or liquid waste shall be prohibited.

3. All places of employment described below shall immediately cease operations:

   a. Mining and quarrying of nonmetallic minerals.

   b. All construction work except that which must proceed to avoid emergent physical harm.

   c. All manufacturing establishments except those required to have in force an air pollution emergency abatement strategies plan.

   d. All wholesale trade establishments; i.e., places of business primarily engaged in selling merchandise to retailers, or industrial, commercial, institutional or professional users, or to other wholesalers, or acting as agents in buying merchandise for or selling merchandise to such persons or companies, except those engaged in the distribution of drugs, surgical supplies and food.

   e. All offices of local, county and state government including authorities, joint meetings, and other public bodies excepting such agencies which are determined by the chief administrative officer of local, county, or state government, authorities, joint meetings and other public bodies to be vital for public safety and welfare and the enforcement of the provisions of this order.

   f. All retail trade establishments except pharmacies, surgical supply distributors, and stores primarily engaged in the sale of food.

   g. Banks, credit agencies other than banks, securities and commodities brokers, dealers, exchanges and services; offices of insurance carriers, agents and brokers, real estate offices.

   h. Wholesale and retail laundries, laundry services and cleaning and dyeing establishments; photographic studios; beauty shops, barber shops, shoe repair shops.

   i. Advertising offices; consumer credit reporting, adjustment and collection agencies; duplicating, addressing,

blueprinting; photocopying, mailing, mailing list and stenographic services; equipment rental services, commercial testing laboratories.

j. Automobile repair, automobile services, garages.

k. Establishments rendering amusement and recreational services including motion picture theaters.

l. Elementary and secondary schools, colleges, universities, professional schools, junior colleges, vocational schools, and public and private libraries.

4. All commercial and manufacturing establishments not included in this order will institute such actions as will result in maximum reduction of air contaminants from their operation by ceasing, curtailing, or postponing operations which emit air contaminants to the extent possible without causing injury to persons or damage to equipment.

5. The use of motor vehicles is prohibited except in emergencies with the approval of local police or state highway patrol.

Part B. Source Curtailment

Any person responsible for the operation of a source of air contaminants listed below shall take all required control actions for this emergency level.

Source of Air Contaminants	Control Action
1. Coal or oil-fired electric power generating facilities.	a. Maximum reduction by utilization of fuels having lowest ash and sulfur content. b. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing or soot blowing. c. Maximum reduction by diverting electric power generation to facilities outside of emergency area.
2. Coal and oil-fired process steam	a. Maximum reduction by reducing heat and steam

generating facilities.	demands to absolute necessities consistent with preventing equipment damage. b. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing and soot blowing. c. Taking the action called for in the abatement strategies plan for the emergency level.
3. Manufacturing industries of the following classifications: Primary metals industries. Petroleum refining. Chemical industries. Mineral processing industries. Grain industry. Paper and allied products. Other energy and fuel facilities.	a. Elimination of air contaminants from manufacturing operations by ceasing, curtailing, postponing, or deferring production and allied operations to the extent possible without causing injury to persons or damage to equipment. b. Elimination of air contaminants from trade waste disposal processes which emit solid particles, gases, vapors, or malodorous substances. c. Maximum reduction of heat load demands for processing. d. Maximum utilization of midday (twelve noon to four p.m.) atmospheric turbulence for boiler lancing or soot blowing.

NOVEMBER 1995

CHAPTER 33-03-23

33-03-23-01. Definitions. As used in this article, except as otherwise specifically provided or where the context indicates otherwise:

1. "Committee" means the health care data committee established in accordance with North Dakota Century Code chapter 23-01.1.

2. "Comprehensive health association of North Dakota members" means those insurance companies who are participating members in the North Dakota comprehensive health association as determined by the insurance commissioner under North Dakota Century Code section 26.1-08-03.

3. "Council" means the state health council as established under North Dakota Century Code section 23-01-02.

4. "Data supplier" means any insurer, nonprofit health service corporation, health maintenance organization, insured or self-funded ~~employer~~ group health ~~insurance~~ plan ~~regulated by the North Dakota insurance department~~, or state agency which ~~the committee requires to provide data~~ pays for health benefits or provider services, health data clearinghouse, community health information network, or health care provider cooperative.

5. "Department" means the North Dakota state department of health ~~and consolidated laboratories~~.

6. "Diagnosis-related group" (DRG) means the categorizations established by the health care financing administration for

the purposes of hospital payment and any subsequent similar set of categorizations so established.

7. "Group health plan" means an employee welfare benefit plan providing medical care as defined in 26 U.S.C. § 213(d), to participants or beneficiaries directly or through insurance, reimbursement, or otherwise.

8. "HCFA-1500" means the health care financing administration form 1500 or successor forms.

~~8.~~ 9. "Health maintenance organization" means any health maintenance organization certified by the North Dakota insurance department.

~~9.~~ 10. "Health professional data" means any claims for inpatient, outpatient, or ambulatory medical or surgical services or other services normally submitted to the third party payer on HCFA-1500 or successor forms or other forms specified by the committee.

~~10.~~ 11. "Hospital data" means any claims for inpatient, outpatient, or ambulatory surgical services or other services normally submitted to the third-party payer on form ~~UB-82~~ UB-92 or a ~~revised form~~ successor forms.

~~11.~~ 12. "Insurers" means any insurance company licensed to do business in North Dakota by the insurance department.

~~12.~~ 13. "Provider" means a person, agency, or organization which is engaged in the provision of health care ~~or nursing home care~~ services to the public.

~~13.~~ 14. ~~"UB-82"~~ "UB-92" means the health care financing administration form ~~UB-82~~ UB-92 or successor forms.

History: Effective April 1, 1988; amended effective October 1, 1992; November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-04

33-03-23-02. Requests for data. The committee may require data suppliers and agencies of state government to provide certain data and information.

1. The committee shall establish uniform formats for the different types of data for use by data suppliers in providing hospitalization data, health professional data, nursing home data, health maintenance organization data, and other types of data as the committee finds necessary.

2. Data required to be submitted must be provided to the committee in the format established or, if the data supplier requests in writing, in a format which is technically equivalent and which supplies all of the necessary information. Third-party payers who cannot meet these reporting specifications and third-party payers who ~~determine~~ demonstrate that it is not economically feasible to report in accordance with these specifications shall request in writing approval to report the data in a specific, alternative form. These requests must be submitted to and approved in writing by the department.

3. Data requests must be specific regarding the time period covered, data elements to be provided, and the form and format in which the data is to be provided.

4. Hospital data required to be provided must be limited to those data elements provided for on the health care financing administration form ~~UB-82~~ UB-92 (or replacement form) using the current definitions developed by the North Dakota uniform billing committee, and, as specified by the health care data committee, other data commonly collected in the course of billing and obtaining reimbursement of claims.

5. Health professional data required to be provided must be limited to those data elements provided for on the health care financing administration form 1500 or successor form or other forms specified by the health care data committee, and, as specified by that committee other data commonly collected in the course of billing and obtaining reimbursement of claims.

6. Data must be provided within ~~forty-five~~ sixty days of the committee's request for data. A fifteen-day extension of time for providing data may be granted if the data ~~source~~ supplier adequately justifies the delay.

7. Prior to collecting hospital data or health professional data from any data supplier, the data supplier must be provided an exact format for reporting data and an explicit description of each data item to be reported. Descriptions of data elements shall include specifications in terms of form location, definitions and alternate specifications, and definitions for those data suppliers that do not maintain the exact ~~UB-82~~ UB-92 data as described in the North Dakota uniform billing procedures manual, or for data elements not provided for in the HCFA-1500 medicare carriers manual (as revised). Those data suppliers that maintain similar elements shall report the comparable data elements that they maintain and a detailed code structure for each element to the department.

8. Data must be collected at least annually but not more often than quarterly from the following data suppliers:

a. Those comprehensive health association of North Dakota members, including health maintenance organizations, found by the North Dakota ~~insurance~~ commissioner of insurance to be subject to an assessment of one percent or more as a participating member of the comprehensive health association of North Dakota, and any data supplier whose annual written premium is 0.5 percent or more of the total annual written premiums for individual or for group medical and major medical policies, as determined by the latest survey or census of insurance carriers conducted by the North Dakota commissioner of insurance, and any data supplier whose annual written premium for hospital-surgical expense coverage is one million dollars or more as determined by the latest survey or census of the North Dakota commissioner of insurance.

b. The committee may request, but may not require, that self-funded ~~employer~~ group health plans submit claims data.

c. State agencies that have paid any claims for hospital or health professional services during the calendar year, including medicare and medicaid data in the possession of the agency.

9. The committee shall require that the data suppliers include a contract identifier number for contracts or plans paid for or subsidized by the North Dakota public employees retirement system or the comprehensive health insurance association of North Dakota and for those employer groups who have requested in writing that the department retain a contract identifier number.

10. The committee shall require that the data suppliers include identification codes for hospitals, health professionals, clinics, and patients.

11. Data must be collected at least annually, but not more often than quarterly, from the department of human services regarding basic care, intermediate care, and skilled nursing care provided in long-term care facilities located in this state. The data must include medicare and medicaid claims for these facilities as collected by the department of human services.

12. Data must be supplied in the mode of transmission specified by the committee.

History: Effective April 1, 1988; amended effective October 1, 1992; November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02, 23-01.1-04

33-03-23-03. Prepublication review. Prior to publication of any reports required by statute, the committee shall allow data suppliers and providers an opportunity to review the data to be published and comment.

Data reports and analyses which are to be made available to the general public and which identify specific providers or which are solely derived from the records of a specific data supplier are subject to the following prepublication review procedures:

1. ~~Data~~ Prior to the publication of any reports required by statute, data, information, analyses, or reports relating to individual providers must be submitted to or available to the provider ~~prior to publication~~ for verification of the accuracy of the information contained in the report. In the event that the provider finds a discrepancy between the data available to the provider and the information contained in the draft report, the provider may submit information substantiating or refuting the draft report. Hospital data and nursing home data will be submitted to each hospital or nursing home identified. Health professional data will be available onsite at the department, and onsite at the licensing or certifying authority of the health professional or available at locations determined by the committee.

2. If the committee has not received the provider's response in writing within thirty days of the mailing date of the draft report, the committee shall assume that the data contained in the report has been verified and shall proceed with publication.

3. If the provider responds within thirty days of the mailing date of the draft report that the information is incorrect and provides documentation that an error has occurred, the committee may accept the documentation and revise the draft report correspondingly or it may reject the documentation as inadequate and proceed with publication.

   The committee shall notify the provider of its decision.

4. The provider may appeal the decision of the committee pursuant to North Dakota Century Code chapter 28-32.

5. Providers may have their data-specific comments published as an appendix to final reports.

History: Effective April 1, 1988; amended effective October 1, 1992; November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02

33-03-23-05. Confidentiality. Individual patient confidentiality shall be protected.

1. The committee shall adopt such procedures as it finds necessary for the protection of patient confidentiality provided that in no case shall data that specifically identify a patient by name or that could be used to identify a patient by name be released to the public, data researchers, or employers. Any provider that is identified in the claims data submitted to the committee may be identified by name and code number in the tabulations released by the committee.

2. The committee may enter into agreements with data users, researchers, and employers for the release of data in other than final published form. The committee shall establish within these agreements appropriate safeguards regarding the release of such data so that individual patients will not be identified. ~~The agreements shall prohibit the public re-release of provider specific data by data users, researchers, and employers.~~

History: Effective April 1, 1988; amended effective October 1, 1992; November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-05

33-03-23-06. Accessibility and cost of reports. The committee shall make certain information available to the public, providers, data suppliers, researchers, and state agencies.

1. The committee shall direct and the department shall produce an annual report comparing the cost of hospitalization by hospital and for those diagnosis-related groups selected by the committee by diagnosis-related group.

2. The committee shall direct and the department shall produce an annual report comparing the fees of health professionals providing services identified by the committee.

3. Any person, organization, governmental agency, or other entity may request special tabulations of the ~~UB-82~~ UB-92 data or HCFA-1500 data or data from other forms as specified by the committee that are reported to the department, or direct access to a machine-readable, final data set prepared and maintained by the department. The final data set must include the exact list of data elements specified by the committee. All requests must be made in writing to the department. The written request must include the name, address, telephone number, employer, or organizational affiliation, and a detailed description of the data or tabulations being requested.

4. With the exception of those analyses, reports, and projects undertaken pursuant to section 33-03-23-08, no special tabulations may be produced by the department until all editing and updating of the data for the year to be included in the tabulations have been completed, and the data set is determined to be the final corrected data set.

5. When a request for special tabulations or computer tapes is received by the department that would include identification of a specific provider or facility in the special tabulations or on the requested computer tapes, the provider or facility must be notified by the department that data including the provider identification are being released. The notification must consist of a copy of the completed request form filed with the department and a cover letter indicating the anticipated date that the data shall be provided. If a request for special tabulations is received requesting statewide information or information on multiple providers or facilities, then notice as specified in this subsection must be provided to the organization representing that type of provider or facility. As used in this subsection, "facility" means a clinic, hospital, freestanding surgical center, or any other type of health care facility.

6. All direct and indirect costs associated with the fulfillment of special requests including staff time, computer time, copying costs, and supplies must be borne by the requester.

History: Effective April 1, 1988; amended effective October 1, 1992; November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02, 23-01.1-06

33-03-23-07. Maintenance of data. All data reported to the committee in response to the committee's requests for necessary data must be maintained for five years. A diagnosis-specific subset of the hospitalization claims data set ~~(UB-82)~~ (UB-92) and health professional claims data set (HCFA-1500 or data set from other forms specified by the committee) must be maintained for a period of not less than ten years.

History: Effective April 1, 1988; amended effective October 1, 1992; November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02

33-03-23-08. Interagency agreements.

1. The committee shall maintain memoranda of understanding with the department of human services, the workers compensation bureau, the public employees retirement system, the office of the ~~insurance~~ commissioner of insurance, and any other state

agency which the committee deems to have access to or authority over, or both, significant health care and nursing home data resources, for the sharing of information, data, data processing resources, and expertise.

2. These memoranda of understanding must contain provisions regarding the security and storage of data and data processing media, patient confidentiality, release restrictions, and the routine uses of the data reports to be produced, but shall not exempt any state agency that is a data supplier from full compliance with all the requirements imposed on data suppliers under this chapter.

History: Effective April 1, 1988; amended effective November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02

33-03-23-08.1. Resale of data. None of the data files may be copied and resold in the form they were received by the requester for any amount greater than the reasonable cost of making a copy of the data file. However, a requester may sell reports derived or created from a data file, if the requester has made significant changes in the selection, coordination, or arrangement of the information in the data file, indicating sufficient originality to permit the requester to obtain a copyright for its reconfiguration of the information in the data file.

History: Effective November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02

33-03-23-09. Civil penalty. Failure of a data supplier to respond to a request for data as set forth in this chapter shall constitute a violation subject to a civil penalty not to exceed five hundred dollars per day of violation. Procedures for the determination of a violation, assessment, and appeal of a penalty are governed by North Dakota Century Code chapter 28-32.

History: Effective April 1, 1988; amended effective November 1, 1995.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-07

TITLE 45

Insurance Commissioner

OCTOBER 1995

STAFF COMMENT: Chapter 45-03-07.1 contains all new material but is not underscored so as to improve readability.

CHAPTER 45-03-07.1
CREDIT FOR REINSURANCE MODEL REGULATION

45-03-07.1-01. Credit for reinsurance - Reinsurer licensed in this state. Pursuant to North Dakota Century Code section 26.1-31.2-01,

the commissioner shall allow credit for reinsurance ceded by a domestic insurance to assuming insurers that were licensed in this state as of the date of the ceding insurer's statutory financial statement.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-02. Credit for reinsurance - Accredited reinsurers.

1. Pursuant to North Dakota Century Code section 26.1-31.2-01, the commissioner shall allow credit for reinsurance ceded by a domestic insurer to an assuming insurer that is accredited as a reinsurer in this state as of the date of the ceding insurer's statutory financial statement. An accredited reinsurer is one which:

   a. Files a properly executed form AR-1 as evidence of its submission to this state's jurisdiction and to this state's authority to examine its books and records;

   b. Files with the commissioner a certified copy of a letter or a certificate of authority or of compliance as evidence that it is licensed to transact insurance or reinsurance in at least one state, or, in the case of a United States branch of an alien assuming insurer, is entered through and licensed to transact insurance or reinsurance in at least one state;

   c. Files annually with the commissioner a copy of its annual statement filed with the insurance department of its state of domicile or, in the case of an alien assuming insurer, with the state through which it is entered and in which it is licensed to transact insurance or reinsurance, and a copy of its most recent audited financial statement; and

   d. Maintains a surplus as regards policyholders in an amount not less than twenty million dollars and whose accreditation has not been denied by the commissioner within ninety days of its submission or, in the case of companies with a surplus as regards policyholders of less than twenty million dollars, whose accreditation has been approved by the commissioner.

2. If the commissioner determines that the assuming insurer has failed to meet or maintain any of these qualifications, the commissioner may upon written notice and hearing revoke the accreditation. Credit may not be allowed a domestic ceding

insurer with respect to reinsurance ceded after January 1, 1996, if the assuming insurer's accreditation has been denied or revoked by the commissioner after notice and hearing.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-03. Credit for reinsurance - Reinsurer domiciled and licensed in another state.

1. Pursuant to North Dakota Century Code section 26.1-31.2-01, the commissioner shall allow credit for reinsurance ceded by a domestic insurer to an assuming insurer that as of the date of the ceding insurer's statutory financial statement:

   a. Is domiciled and licensed in, or, in the case of a United States branch of an alien assuming insurer, is entered through and licensed in, a state that employs standards regarding credit for reinsurance substantially similar to those applicable under North Dakota Century Code chapter 26.1-31.2 and this chapter;

   b. Maintains a surplus as regards policyholders in an amount not less than twenty million dollars; and

   c. Files a properly executed form AR-1 with the commissioner as evidence of its submission to this state's authority to examine its books and records.

2. The provisions of this section relating to surplus as regards policyholders do not apply to reinsurance ceded and assumed pursuant to pooling arrangements among insurers in the same holding company system. As used in this section, "substantially similar" standards means credit for reinsurance standards which the commissioner determines equal or exceed the standards of North Dakota Century Code chapter 26.1-31.2 and this chapter.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-04. Credit for reinsurance - Reinsurers maintaining trust funds.

1. Pursuant to North Dakota Century Code section 26.1-31.2-01, the commissioner shall allow credit for reinsurance ceded by a domestic insurer to an assuming insurer that, as of the date of the ceding insurer's statutory financial statement, maintains a trust fund in an amount prescribed in this section

in a qualified United States financial institution as defined in North Dakota Century Code section 26.1-31.2-03, for the payment of the valid claims of its United States policyholders and ceding insurers, their assigns and successors in interest. The assuming insurer shall report annually to the commissioner substantially the same information as that required to be reported on the national association of insurance commissioners annual statement form by licensed insurers, to enable the commissioner to determine the sufficiency of the trust fund.

2. The following requirements apply to the following categories of assuming insurer:

   a. The trust fund for a single assuming insurer must consist of funds in trust in an amount not less than the assuming insurer's liabilities attributable to business written in the United States, and in addition, a trusteed surplus of not less than twenty million dollars.

   b. The trust fund for a group, including incorporated and individual unincorporated underwriters, must consist of funds in trust in an amount not less than the group's aggregate liabilities attributable to business written in the United States and, in addition, the group shall maintain a trusteed surplus of which one hundred million dollars must be held jointly for the benefit of the United States ceding insurers of any member of the group. The incorporated members of the group may not be engaged in any business other than underwriting as a member of the group and must be subject to the same level of solvency regulation and control by the group's domiciliary regulator as are the unincorporated members. The group shall make available to the commissioner annual certifications by the group's domiciliary regulator and its independent public accountants of the solvency of each underwriter member of the group.

   c. The trust fund for a group of incorporated insurers under common administration, whose members possess aggregate policyholders surplus of ten billion dollars, calculated and reported in substantially the same manner as prescribed by the annual statement instructions and accounting practices and procedures manual of the national association of insurance commissioners, and which has continuously transacted an insurance business outside the United States for at least three years immediately prior to making application for accreditation, must consist of funds in trust in an amount not less than the assuming insurers' liabilities attributable to business ceded by United States ceding insurers to any members of the group pursuant to reinsurance contracts issued in the name of such group and, in addition, the group shall maintain a

joint trusteed surplus of which one hundred million dollars shall be held jointly for the benefit of United States ceding insurers of any member of the group. The group shall file a properly executed form AR-1 as evidence of the submission to this state's authority to examine the books and records of any of its members and shall certify that any member examined will bear the expense of any such examination. The group shall make available to the commissioner annual certifications by the members' domiciliary regulators and their independent public accountants of the solvency of each member of the group.

3. The trust shall be established in a form approved by the commissioner and complying with North Dakota Century Code section 26.1-31.2-01 and this section. The trust instrument must provide that:

   a. Contested claims shall be valid and enforceable out of funds in trust to the extent remaining unsatisfied thirty days after entry of the final order of any court of competent jurisdiction in the United States.

   b. Legal title to the assets of the trust shall be vested in the trustee for the benefit of the grantor's United States policyholders and ceding insurers, their assigns and successors in interest.

   c. The trust shall be subject to examination as determined by the commissioner.

   d. The trust shall remain in effect for as long as the assuming insurer, or any member or former member of a group of insurers, shall have outstanding obligations under reinsurance agreements subject to the trust.

   e. No later than February twenty-eighth of each year, the trustees of the trust shall report to the commissioner in writing setting forth the balance in the trust and listing the trust's investments at the preceding yearend, and shall certify the date of termination of the trust, if so planned, or certify that the trust shall not expire prior to the next following December thirty-first.

   f. No amendment to the trust shall be effective unless reviewed and approved in advance by the commissioner.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-05. Credit for reinsurance required by law. Pursuant to North Dakota Century Code section 26.1-31.2-01, the commissioner

shall allow credit for reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of subsections 1, 2, 3, and 4 of North Dakota Century Code section 26.1-31.2-01, but only with respect to the insurance of risks located in jurisdictions where such reinsurance is required by the applicable law or regulation of that jurisdiction. As used in this section, "jurisdiction" means any state, district, or territory of the United States and any lawful national government.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-06. Reduction from liability for reinsurance ceded to an unauthorized assuming insurer. Pursuant to North Dakota Century Code section 26.1-31.2-02, the commissioner shall allow a reduction from liability for reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of North Dakota Century Code section 26.1-31.2-01 in an amount not exceeding the liabilities carried by the ceding insurer. Such reduction must be in the amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the exclusive benefit of the ceding insurer, under a reinsurance contract with such assuming insurer as security for the payment of obligations thereunder. Such security must be held in the United States subject to withdrawal solely by, and under the exclusive control of, the ceding insurer or, in the case of a trust, held in a qualified United States financial institution as defined in North Dakota Century Code section 26.1-31.2-03. This security may be in the form of any of the following:

1. Cash.

2. Securities listed by the securities valuation office of the national association of insurance commissioners and qualifying as admitted assets.

3. Clean, irrevocable, unconditional, and "evergreen" letters of credit issued or confirmed by a qualified United States institution, as defined in North Dakota Century Code section 26.1-31.2-03, effective no later than December thirty-first of the year for which filing is being made, and in the possession of the ceding company on or before the filing date of its annual statement. Letters of credit meeting applicable standards of issuer acceptability as of the dates of their issuance or confirmation, notwithstanding the issuing or confirming institution's subsequent failure to meet applicable standards of issuer acceptability, continue to be acceptable as security until their expiration, extension, renewal, modification, or amendment, whichever occurs first.

4. Any other form of security acceptable to the commissioner.

An admitted asset or a reduction from liability for reinsurance ceded to an unauthorized assuming insurer under subsections 1, 2, and 3 of section 45-03-07.1-06 shall be allowed only when the requirements of sections 45-03-07.1-07, 45-03-07.1-08, and 45-03-07.1-09 are met.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-07. Trust agreements qualified under section 45-03-07.1-06.

1. As used in this section:

   a. "Beneficiary" means the entity for whose sole benefit the trust has been established and any successor of the beneficiary by operation of law. If a court of law appoints a successor in interest to the named beneficiary, then the named beneficiary includes and is limited to the court-appointed domiciliary receiver including conservator, rehabilitator, or liquidator.

   b. "Grantor" means the entity that has established a trust for the sole benefit of the beneficiary. When established in conjunction with a reinsurance agreement, the grantor is the unlicensed, unaccredited assuming insurer.

   c. "Obligations", as used in subdivision k of subsection 2 means:

      (1) Reinsured losses and allocated loss expenses paid by the ceding company, but not recovered from the assuming insurer;

      (2) Reserves for reinsured losses reported and outstanding;

      (3) Reserves for reinsured losses incurred but not reported; and

      (4) Reserves for allocated reinsured loss expenses and unearned premiums.

2. Required conditions:

   a. The trust agreement must be entered into between the beneficiary, the grantor, and a trustee which shall be a qualified United States financial institution as defined in North Dakota Century Code section 26.1-31.2-03.

   b. The trust agreement must create a trust account into which assets must be deposited.

c. All assets in the trust account must be held by the trustee at the trustee's office in the United States, except that a bank may apply for the commissioner's permission to use a foreign branch office of such bank as trustee for trust agreements established pursuant to this section. If the commissioner approves the use of such foreign branch office as trustee, then its use must be approved by the beneficiary in writing and the trust agreement must provide that the written notice described in paragraph 1 of subdivision d must also be presentable, as a matter of legal right, at the trustee's principal office in the United States.

d. The trust agreement must provide that:

(1) The beneficiary shall have the right to withdraw assets from the trust account at any time, without notice to the grantor, subject only to written notice from the beneficiary to the trustee;

(2) No other statement or document is required to be presented in order to withdraw assets, except that the beneficiary may be required to acknowledge receipt of withdrawn assets;

(3) It is not subject to any conditions or qualifications outside of the trust agreement; and

(4) It shall not contain references to any other agreements or documents except as provided for under subdivision k.

e. The trust agreement must be established for the sole benefit of the beneficiary.

f. The trust agreement must require the trustee to:

(1) Receive assets and hold all assets in a safe place;

(2) Determine that all assets are in such form that the beneficiary, or the trustee upon direction by the beneficiary, may whenever necessary negotiate any such assets, without consent or signature from the grantor or any other person or entity;

(3) Furnish to the grantor and the beneficiary a statement of all assets in the trust account upon its inception and at intervals no less frequent than the end of each calendar quarter;

(4) Notify the grantor and the beneficiary within ten days of any deposits to or withdrawals from the trust account;

(5) Upon written demand of the beneficiary, immediately take any and all steps necessary to transfer absolutely and unequivocably all right, title, and interest in the assets held in the trust account to the beneficiary and deliver physical custody of the assets to the beneficiary; and

(6) Allow no substitutions or withdrawals of assets from the trust account, except on written instructions from the beneficiary, except that the trustee may, without the consent of but with notice to the beneficiary, upon call or maturity of any trust asset, withdraw such asset upon condition that the proceeds are paid into the trust account.

g. The trust agreement must provide that at least thirty days, but not more than forty-five days, prior to termination of the trust account, written notification of termination must be delivered by the trustee to the beneficiary.

h. The trust agreement must be made subject to and governed by the laws of the state in which the trust is established.

i. The trust agreement must prohibit invasion of the trust corpus for the purpose of paying compensation to, or reimbursing the expenses of, the trustee.

j. The trust agreement must provide that the trustee is liable for its own negligence, willful misconduct, or lack of good faith.

k. Notwithstanding other provisions of this chapter, when a trust agreement is established in conjunction with a reinsurance agreement covering risks other than life, annuities, and accident and health, where it is customary practice to provide a trust agreement for a specific purpose, such a trust agreement, notwithstanding any other conditions in this chapter, may provide that the ceding insurer shall undertake to use and apply amounts drawn upon the trust account, without diminution because of the insolvency of the ceding insurer or the assuming insurer, for the following purposes:

(1) To pay or reimburse the ceding insurer for the assuming insurer's share under the specific reinsurance agreement regarding any losses and allocated loss expenses paid by the ceding insurer, but not recovered from the assuming insurer, or for unearned premiums due to the ceding insurer if not otherwise paid by the assuming insurer;

(2) To make payment to the assuming insurer of any amounts held in the trust account that exceed one hundred two percent of the actual amount required to fund the assuming insurer's obligations under the specific reinsurance agreement; or

(3) Where the ceding insurer has received notification of termination of the trust account and where the assuming insurer's entire obligations under the specific reinsurance agreement remain unliquidated and undischarged ten days prior to the termination date, to withdraw amounts equal to the obligations and deposit those amounts in a separate account, in the name of the ceding insurer in any qualified United States financial institution as defined in North Dakota Century Code section 26.1-31.2-03 apart from its general assets, in trust for such uses and purposes specified in paragraphs 1 and 2 as may remain executory after such withdrawal and for any period after the termination date.

1. The reinsurance agreement entered into in conjunction with the trust agreement may, but need not, contain the provisions required by paragraph 2 of subdivision a of subsection 4, so long as these required conditions are included in the trust agreement.

3. Permitted conditions:

a. The trust agreement may provide that the trustee may resign upon delivery of a written notice of resignation, effective not less than ninety days after receipt by the beneficiary and grantor of the notice and that the trustee may be removed by the grantor by delivery to the trustee and the beneficiary of a written notice of removal, effective not less than ninety days after receipt by the trustee and the beneficiary of the notice, provided that no such resignation or removal shall be effective until a successor trustee has been duly appointed and approved by the beneficiary and the grantor and all assets in the trust have been duly transferred to the new trustee.

b. The grantor may have the full and unqualified right to vote any shares of stock in the trust account and to receive from time to time payments of any dividends or interest upon any shares of stock or obligations included in the trust account. Any such interest or dividends must be either forwarded promptly upon receipt to the grantor or deposited in a separate account established in the grantor's name.

c. The trustee may be given authority to invest, and accept substitutions of, any funds in the account, provided that

no investment or substitution may be made without prior approval of the beneficiary, unless the trust agreement specifies categories of investments acceptable to the beneficiary and authorizes the trustee to invest funds and to accept substitutions which the trustee determines are at least equal in market value to the assets withdrawn and that are consistent with the restrictions in paragraph 2 of subdivision a of subsection 4.

d. The trust agreement may provide that the beneficiary may at any time designate a party to which all or part of the trust assets are to be transferred. Such transfer may be conditioned upon the trustee receiving, prior to or simultaneously, other specified assets.

e. The trust agreement may provide that, upon termination of the trust account, all assets not previously withdrawn by the beneficiary, with written approval by the beneficiary, must be delivered over to the grantor.

4. Additional conditions applicable to reinsurance agreements:

a. A reinsurance agreement, which is entered into in conjunction with a trust agreement and the establishment of a trust account, may contain provisions that:

(1) Require the assuming insurer to enter into a trust agreement and to establish a trust account for the benefit of the ceding insurer, and specifying what the agreement is to cover;

(2) Stipulate that assets deposited in the trust account must be valued according to their current fair market value and must consist only of cash, United States legal tender, certificates of deposit issued by a United States bank and payable in United States legal tender, and investments of the types permitted by North Dakota Century Code title 26.1 or any combination of the above, provided that such investments are issued by an institution that is not the parent, subsidiary, or affiliate of either the grantor or the beneficiary. The reinsurance agreement may further specify the types of investments to be deposited. Where a trust agreement is entered into in conjunction with a reinsurance agreement covering risks other than life, annuities, and accident and health, then the trust agreement may contain the provisions required by this paragraph in lieu of including such provisions in the reinsurance agreement;

(3) Require the assuming insurer, prior to depositing assets with the trustee, to execute assignments or

endorsements in blank, or to transfer legal title to the trustee of all shares, obligations or any other assets requiring assignments, in order that the ceding insurer, or the trustee upon the direction of the ceding insurer, may whenever necessary negotiate these assets without consent or a signature from the assuming insurer or any other entity;

(4) Require that all settlements of account between the ceding insurer and the assuming insurer be made in cash or its equivalent; and

(5) Stipulate that the assuming insurer and the ceding insurer agree that the assets in the trust account, established pursuant to the provisions of the reinsurance agreement, may be withdrawn by the ceding insurer at any time, notwithstanding any other provisions in the reinsurance agreement, and shall be utilized and applied by the ceding insurer or its successors in interest by operation of law, including without limitation any liquidator, rehabilitator, receiver, or conservator of such company, without diminution because of insolvency on the part of the ceding insurer or the assuming insurer, only for the following purposes:

(a) To reimburse the ceding insurer for the assuming insurer's share of premiums returned to the owners of policies reinsured under the reinsurance agreement because of cancellations of such policies;

(b) To reimburse the ceding insurer for the assuming insurer's share of surrenders and benefits or losses paid by the ceding insurer pursuant to the provisions of the policies reinsured under the reinsurance agreement;

(c) To fund an account with the ceding insurer in an amount at least equal to the deduction, for reinsurance ceded, from the ceding insurer liabilities for policies ceded under the agreement. The account must include amounts for policy reserves, claims and losses incurred, including losses incurred but not reported, loss adjustment expenses, and unearned premium reserves; and

(d) To pay any other amounts the ceding insurer claims are due under the reinsurance agreement.

b. The reinsurance agreement may also contain provisions that:

(1) Give the assuming insurer the right to seek approval from the ceding insurer to withdraw from the trust account all or any part of the trust assets and transfer those assets to the assuming insurer, provided:

(a) At the time of withdrawal, the assuming insurer shall replace the withdrawn assets with other qualified assets having a market value equal to the market value of the assets withdrawn so as to maintain at all times the deposit in the required amount; or

(b) After withdrawal and transfer, the market value of the trust account is no less than one hundred two percent of the required amount.

The ceding insurer may not unreasonably or arbitrarily withhold its approval.

(2) Provide for:

(a) The return of any amount withdrawn in excess of the actual amounts required for subparagraphs a, b, and c of paragraph 5 of subdivision a, or in the case of subparagraph d of paragraph 5 of subdivision a, any amounts that are subsequently determined not to be due; and

(b) Interest payments, at a rate not in excess of the prime rate of interest, on the amounts held pursuant to subparagraph c of paragraph 5 of subdivision a.

(3) Permit the award by any arbitration panel or court of competent jurisdiction of:

(a) Interest at a rate different from that provided in subparagraph b of paragraph 2;

(b) Court or arbitration costs;

(c) Attorney's fees; and

(d) Any other reasonable expenses.

c. A trust agreement may be used to reduce any liability for reinsurance ceded to an unauthorized assuming insurer in financial statements required to be filed with the department in compliance with this chapter when established on or before the date of filing of the financial statement of the ceding insurer. Further, the reduction for the existence of an acceptable trust account

may be up to the current fair market value of acceptable assets available to be withdrawn from the trust account at that time, but such reduction must be no greater than the specific obligations under the reinsurance agreement that the trust account was established to secure.

d. Any trust agreement or underlying reinsurance agreement in existence prior to October 1, 1995, will continue to be acceptable until January 1, 1996, at which time the agreements will have to be in full compliance with this chapter for the trust agreement to be acceptable.

e. The failure of any trust agreement to specifically identify the beneficiary as defined in subsection 1 may not be construed to affect any actions or rights which the commissioner may take or possess pursuant to the provisions of the laws of this state.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-08. Letters of credit qualified under section 45-03-07.1-06.

1. The letter of credit must be clean, irrevocable, and unconditional and issued or confirmed by a qualified United States financial institution as defined in North Dakota Century Code section 26.1-31.2-03. The letter of credit must contain an issue date and date of expiration and stipulate that the beneficiary need only draw a sight draft under the letter of credit and present it to obtain funds and that no other document need be presented. The letter of credit must also indicate that it is not subject to any condition or qualifications outside of the letter of credit. In addition, the letter of credit itself may not contain reference to any other agreements, documents, or entities, except as provided in subdivision a of subsection 9. As used in this section, "beneficiary" means the domestic insurer for whose benefit the letter of credit has been established and any successor of the beneficiary by operation of law. If a court of law appoints a successor in interest to the named beneficiary, then the named beneficiary includes and is limited to the court-appointed domiciliary receiver, including conservator, rehabilitator, or liquidator.

2. The heading of the letter of credit may include a boxed section that contains the name of the applicant and other appropriate notations to provide a reference for the letter of credit. The boxed section must be clearly marked to indicate that such information is for internal identification purposes only.

3. The letter of credit must contain a statement to the effect that the obligation of the qualified United States financial institution under the letter of credit is in no way contingent upon reimbursement with respect thereto.

4. The term of the letter of credit must be for at least one year and must contain an "evergreen clause" that prevents the expiration of the letter of credit without due notice from the issuer. The "evergreen clause" must provide for a period of no less than thirty days' notice prior to expiry date or nonrenewal.

5. The letter of credit must state whether it is subject to and governed by the laws of this state or the uniform customs and practice for documentary credits of the international chamber of commerce, publication 400, and all drafts drawn thereunder must be presentable at an office in the United States of a qualified United States financial institution.

6. If the letter of credit is made subject to the uniform customs and practice for documentary credits of the international chamber of commerce, publication 400, then the letter of credit must specifically address and make provision for an extension of time to draw against the letter of credit in the event that one or more of the occurrences specified in article 19 of publication 400 occur.

7. The letter of credit must be issued or confirmed by a qualified United States financial institution authorized to issue letters of credit, pursuant to North Dakota Century Code section 26.1-31.2-03.

8. If the letter of credit is issued by a qualified United States financial institution authorized to issue letters of credit, other than a qualified United States financial institution as described in subsection 7, then the following additional requirements must be met:

   a. The issuing qualified United States financial institution shall formally designate the confirming qualified United States financial institution as its agent for the receipt and payment of the drafts; and

   b. The "evergreen clause" must provide for thirty days' notice prior to expiry date for nonrenewal.

9. Reinsurance agreement provisions.

   a. The reinsurance agreement in conjunction with which the letter of credit is obtained may contain provisions that:

(1) Require the assuming insurer to provide letters of credit to the ceding insurer and specify what they are to cover.

(2) Stipulate that the assuming insurer and ceding insurer agree that the letter of credit provided by the assuming insurer pursuant to the provisions of the reinsurance agreement may be drawn upon at any time, notwithstanding any other provisions in the agreement, and shall be utilized by the ceding insurer or its successors in interest only for one or more of the following reasons:

(a) To reimburse the ceding insurer for the assuming insurer's share of premiums returned to the owners of policies reinsured under the reinsurance agreement on account of cancellations of such policies;

(b) To reimburse the ceding insurer for the assuming insurer's share of surrenders and benefits or losses paid by the ceding insurer under the terms and provisions of the policies reinsured under the reinsurance agreement;

(c) To fund an account with the ceding insurer in an amount at least equal to the deduction, for reinsurance ceded, from the ceding insurer's liabilities for policies ceded under the agreement, such amount shall include amounts for policy reserves, claims and losses incurred, and unearned premium reserves; and

(d) To pay any other amounts the ceding insurer claims are due under the reinsurance agreement.

(3) All of the provisions of this subdivision should be applied without diminution because of insolvency on the part of the ceding insurer or assuming insurer.

b. Nothing contained in subdivision a precludes the ceding insurer and assuming insurer from providing for:

(1) An interest payment, at a rate not in excess of the prime rate of interest, on the amounts held pursuant to subparagraph c of paragraph 2 of subdivision a; or

(2) The return of any amounts drawn down on the letters of credit in excess of the actual amounts required for the above or, in the case of subparagraph d of paragraph 2 of subdivision a, any amounts that are subsequently determined not to be due.

c. When a letter of credit is obtained in conjunction with a reinsurance agreement covering risks other than life, annuities, and health, where it is customary practice to provide a letter of credit for a specific purpose, then the reinsurance agreement, in lieu of paragraph 2 of subdivision a, may require that the parties enter into a trust agreement that may be incorporated into the reinsurance agreement or be a separate document.

10. A letter of credit may not be used to reduce any liability for reinsurance ceded to an unauthorized assuming insurer in financial statements required to be filed with the department unless an acceptable letter of credit with the filing ceding insurer as beneficiary has been issued on or before the date of filing of the financial statement. Further, the reduction for the letter of credit may be up to the amount available under the letter of credit but no greater than the specific obligation under the reinsurance agreement that the letter of credit was intended to secure.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-09. Other security. A ceding insurer may take credit for unencumbered funds withheld by the ceding insurer in the United States subject to withdrawal solely by the ceding insurer and under its exclusive control.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-10. Reinsurance contract. Credit will not be granted to a ceding insurer for reinsurance effected with assuming insurers meeting the requirements of sections 45-03-07.1-01, 45-03-07.1-02, 45-03-07.1-03, 45-03-07.1-04, and 45-03-07.1-06 or otherwise in compliance with North Dakota Century Code section 26.1-31.2-01 after October 1, 1995, unless the reinsurance agreement:

1. Includes a proper insolvency clause; and

2. Includes a provision pursuant to North Dakota Century Code section 26.1-31.2-01 whereby the assuming insurer, if an unauthorized assuming insurer, has submitted to the jurisdiction of an alternative dispute resolution panel or court of competent jurisdiction within the United States, has agreed to comply with all requirements necessary to give such court or panel jurisdiction, has designated an agent upon whom

service of process may be effected, and has agreed to abide by the final decision of such court or panel.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

45-03-07.1-11. Contracts affected. All new and renewal reinsurance transactions entered into after October 1, 1995, must conform to the requirements of the Act and this chapter if credit is to be given to the ceding insurer for such reinsurance.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-31.2-04
Law Implemented: NDCC 26.1-31.2

FORM AR-1
CERTIFICATE OF ASSUMING INSURER

I, _____, _____
(name of officer) (title of officer)

of _____, the assuming insurer
(name of assuming insurer)

under a reinsurance agreement(s) with one or more insurers domiciled in _____, hereby
(name of state)

certify that _____ ("Assumin
Insurer"): (name of assuming insurer)

1. Submits to the jurisdiction of any court of competent jurisdiction in _____
(ceding insurer's state of domicile)
for the adjudication of any issues arising out of the reinsurance agreement(s), agrees to comply with all requirements necessary to give such court jurisdiction, and will abide by the final decision of such court or any appellate court in the event of an appeal. Nothing in this paragraph constitutes or should be understood to constitute a waiver of Assuming Insurer's rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. This paragraph is not intended to conflict with or override the obligation of the parties to the reinsurance agreements(s) to arbitrate their disputes if such an obligation is created in the agreement(s).

2. Designates the Insurance Commissioner of _____
(ceding insurer's state of domicile)
as its lawful attorney upon whom may be served any lawful process in any action, suit or proceeding arising out of the reinsurance agreement(s) instituted by or on behalf of the ceding insurer.

3. Submits to the authority of the Insurance Commissioner of _____ to examine its books and records and
(ceding insurer's state of domicile)
agrees to bear the expense of any such examination.

4. Submits with this form a current list of insurers domiciled in _____ (ceding insurer's state of domicile) reinsured by Assuming Insurer and

undertakes to submit additions to or deletions from the list to the Insurance Commissioner at least once per calendar quarter.

Dated: _____

_____
(name of assuming insurer)

BY: _____
(name of officer)

_____
(title of officer)

STAFF COMMENT: Chapter 45-03-07.2 contains all new material but is not underscored so as to improve readability.

CHAPTER 45-03-07.2
LIFE AND HEALTH REINSURANCE AGREEMENTS

45-03-07.2-01. Scope. This chapter applies to all domestic life and accident and health insurers and to all other licensed life and accident and health insurers that are not subject to a substantially similar rule in their domiciliary state. This chapter applies to licensed property and casualty insurers with respect to their accident and health business. This chapter does not apply to assumption reinsurance, yearly renewable term reinsurance, or certain nonproportional reinsurance such as stop loss or catastrophe reinsurance.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-01-08
Law Implemented: NDCC 26.1-02-20

45-03-07.2-02. Accounting requirements.

1. An insurer subject to this chapter, for reinsurance ceded, does not reduce any liability or establish any asset in any financial statement filed with the insurance department if, by the terms of the reinsurance agreement, in substance or effect, any of the following conditions exist:

   a. Renewal expense allowances provided or to be provided to the ceding insurer by the reinsurer, in any accounting period, are not sufficient to cover anticipated allocable renewal expenses of the ceding insurer on the portion of the business reinsured, unless a liability is established for the present value of the shortfall, using assumptions equal to the applicable statutory reserve basis on the business reinsured. Those expenses include commissions, premium taxes, and direct expenses including billing, valuation, claims, and maintenance expected by the company at the time the business is reinsured.

   b. The ceding insurer can be deprived of surplus or assets at the reinsurer's option or automatically upon the

occurrence of some event, such as the insolvency of the ceding insurer, except that termination of the reinsurance agreement by the reinsurer for nonpayment of reinsurance premiums or other amounts due, such as modified coinsurance reserve adjustments, interest and adjustments on funds withheld, and tax reimbursements, may not be considered to be such a deprivation of surplus or assets.

c. The ceding insurer shall reimburse the reinsurer for negative experience under the reinsurance agreement, except that neither offsetting experience refunds against current and prior years' losses under the agreement nor payment by the ceding insurer of an amount equal to the current and prior years' losses under the agreement upon voluntary termination of in-force reinsurance by the ceding insurer must be considered a reimbursement to the reinsurer for negative experience. Voluntary termination does not include situations where termination occurs because of unreasonable provisions which allow the reinsurer to reduce its risk under the agreement. An example of such a provision is the right of the reinsurer to increase reinsurance premiums or risk and expense charges to excessive levels forcing the ceding company to prematurely terminate the reinsurance treaty.

d. At specific points in time scheduled in the agreement, the ceding insurer must terminate or automatically recapture all or part of the reinsurance ceded.

e. The reinsurance agreement involves the possible payment by the ceding insurer to the reinsurer of amounts other than from income realized from the reinsured policies. For example, it is improper for a ceding company to pay reinsurance premiums, or other fees or charges to a reinsurer which are greater than the direct premiums collected by the ceding company.

f. The treaty does not transfer all of the significant risk inherent in the business being reinsured. The following table identifies for a representative sampling of products or type of business, the risks that are considered to be significant. For products not specifically included, the risks determined to be significant must be consistent with this table.

Risk categories:

(a) Morbidity.

(b) Mortality.

(c) Lapse. This is the risk that a policy will voluntarily terminate prior to the recoupment of

a statutory surplus strain experienced at issue of the policy.

(d) Credit quality. This is the risk that invested assets supporting the reinsured business will decrease in value. The main hazards are that assets will default or that there will be a decrease in earning power. It excludes market value declines due to changes in interest rate.

(e) Reinvestment. This is the risk that interest rates will fall and funds reinvested, coupon payments or moneys received upon asset maturity or call, will, therefore, earn less than expected. If asset durations are less than liability durations, the mismatch will increase.

(f) Disintermediation. This is the risk that interest rates rise and policy loans and surrenders increase or maturing contracts do not renew at anticipated rates of renewal. If asset durations are greater than the liability durations, the mismatch will increase. Policyholders will move their funds into new products offering higher rates. The company may have to sell assets at a loss to provide for these withdrawals.

\+ - Significant 0 - Insignificant

RISK CATEGORY	a	b	c	d	e	f
Health insurance - long-term care insurance and long-term disability insurance	+	0	+	+	+	0
Immediate annuities	0	+	0	+	+	0
Single premium deferred annuities	0	0	+	+	+	+
Flexible premium deferred annuities	0	0	+	+	+	+
Guaranteed interest contracts	0	0	0	+	+	+
Other annuity deposit business	0	0	+	+	+	+
Single premium whole life	0	+	+	+	+	+
Traditional non-par	0	+	+	+	+	+

permanent						
Traditional non-par term	0	+	+	0	0	0
Traditional par permanent	0	+	+	+	+	+
Traditional par term	0	+	+	0	0	0
Adjustable premium permanent	0	+	+	+	+	+
Indeterminate premium permanent	0	+	+	+	+	+
Universal life flexible premium	0	+	+	+	+	+
Universal life fixed premium	0	+	+	+	+	+
Universal life fixed premium, dump-in premiums allowed	0	+	+	+	+	+

g. (1) The credit quality, reinvestment, or disintermediation risk is significant for the business reinsured and the ceding company does not, other than for the classes of business excepted in paragraph 2, either transfer the underlying assets to the reinsurer or legally segregate the assets in a trust or escrow account or otherwise establish a mechanism satisfactory to the commissioner which legally segregates, by contract or contract provision, the underlying assets.

(2) Notwithstanding the requirements of paragraph 1, the assets supporting the reserves for the following classes of business and any classes of business which do not have a significant credit quality, reinvestment, or disintermediation risk may be held by the ceding company without segregation of the assets:

(a) Health insurance - Long-term care insurance and long-term disability insurance.

(b) Traditional non-par permanent.

(c) Traditional par permanent.

(d) Adjustable premium permanent.

(e) Indeterminate premium permanent.

(f) Universal life fixed premium, no dump-in premiums allowed.

The associated formula for determining the reserve interest rate adjustment must use a formula that reflects the ceding company's investment earnings and incorporates all realized and unrealized gains and losses reflected in the statutory statement. The following is an acceptable formula:

$$\text{Rate} = \frac{2\ (I + CG)}{X + Y - I - CG}$$

Where: I is the net investment income.

CG is capital gains less capital losses.

X is the current year cash and invested assets plus investment income due and accrued less borrowed money.

Y is the same as X but for the prior year.

h. Settlements are made less frequently than quarterly or payments due from the reinsurer are not made in cash within ninety days of the settlement date.

i. The ceding insurer is required to make representations or warranties not reasonably related to the business being reinsured.

j. The ceding insurer is required to make representations or warranties about future performance of the business being reinsured.

k. The reinsurance agreement is entered into for the principal purpose of producing significant surplus aid for the ceding insurer, typically on a temporary basis, while not transferring all of the significant risks inherent in the business reinsured and, in substance or effect, the expected potential liability to the ceding insurer remains basically unchanged.

2. Notwithstanding subsection 1, an insurer subject to this rule, with the prior approval of the commissioner, may take the reserve credit or establish the asset as the commissioner may deem consistent with North Dakota Century Code title 26.1 or the North Dakota Administrative Code, including actuarial

interpretations or standards adopted by the insurance department.

3. a. Agreements entered into after October 1, 1995, which involve the reinsurance of business issued prior to October 1, 1995, along with any subsequent amendments thereto, shall be filed by the ceding company with the commissioner within thirty days from its date of execution. Each filing shall include data detailing the financial impact of the transaction. The ceding insurer's actuary who signs the financial statement actuarial opinion with respect to valuation of reserves shall consider this chapter and any applicable actuarial standards of practice when determining the proper credit in financial statements filed with this department. The actuary should maintain adequate documentation and be prepared upon request to describe the actuarial work performed for inclusion in the financial statements and to demonstrate that the work conforms to this chapter.

b. Any increase in surplus net of federal income tax resulting from arrangements described in subdivision a must be identified separately on the insurer's statutory financial statement as a surplus item, aggregate write-ins for gains and losses in surplus in the capital and surplus account, page 4 of the annual statement, and recognition of the surplus increase as income shall be reflected on a net of tax basis in the "reinsurance ceded" line, page 4 of the annual statement as earnings emerge from the business reinsured.

[For example, on the last day of calendar year N, company XYZ pays a $20 million initial commission and expense allowance to company ABC for reinsuring an existing block of business. Assuming a 34 percent tax rate, the net increase in surplus at inception is $13.2 million ($20 million - $6.8 million) which is reported on the "Aggregate write-ins for gains and losses in surplus" line in the Capital and Surplus account. $6.8 million (34 percent of $20 million) is reported as income on the "Commissions and expense allowances on reinsurance ceded" line of the Summary of Operations.

At the end of year N+1 the business has earned $4 million. ABC has paid $.5 million in profit and risk charges in arrears for the year and has received a $1 million experience refund. Company ABC's annual statement would report $1.65 million (66 percent of ($4 million - $1 million - $.5 million) up to a maximum of $13.2 million) on the "Commissions and expense allowance on reinsurance ceded" line of the Summary of Operations, and -$1.65 million on the "Aggregate write-ins for gains and

losses in surplus" line of the Capital and Surplus account. The experience refund would be reported separately as a miscellaneous income item in the Summary of Operations.]

History: Effective October 1, 1995.
General Authority: NDCC 26.1-01-08
Law Implemented: NDCC 26.1-02-20

45-03-07.2-03. Written agreements.

1. A reinsurance agreement or amendment to any agreement may not be used to reduce any liability or to establish any asset in any financial statement filed with the department, unless the agreement, amendment, or a binding letter of intent has been duly executed by both parties no later than the as of date of the financial statement.

2. In the case of a letter of intent, a reinsurance agreement or an amendment to a reinsurance agreement must be executed within a reasonable period of time, not exceeding ninety days from the execution date of the letter of intent, in order for credit to be granted for the reinsurance ceded.

3. The reinsurance agreement must contain provisions that provide that:

   a. The agreement constitutes the entire agreement between the parties with respect to the business being reinsured thereunder and that there are no understandings between the parties other than as expressed in the agreement; and

   b. Any change or modification to the agreement is null and void unless made by amendment to the agreement and signed by both parties.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-01-08
Law Implemented: NDCC 26.1-02-20

45-03-07.2-04. Existing agreements. Insurers subject to this chapter shall reduce to zero by December 31, 1995, any reserve credits or assets established with respect to reinsurance agreements entered into prior to October 1, 1995, which, under this chapter would not be entitled to recognition of the reserve credits or assets; provided, however, that the reinsurance agreements must have been in compliance with laws or rules in existence immediately preceding October 1, 1995.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-01-08
Law Implemented: NDCC 26.1-02-20

45-03-15-03. Diskette filing. Every insurance company operating in more than one state shall file all annual and quarterly statements on diskette with the national association of insurance commissioners.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

STAFF COMMENT: Chapter 45-03-19 contains all new material but is not underscored so as to improve readability.

CHAPTER 45-03-19
ACTUARIAL OPINION AND MEMORANDUM REGULATION

45-03-19-01. Scope. This chapter applies to all life insurance companies and fraternal benefit societies doing business in this state and to all life insurance companies and fraternal benefit societies that are authorized to reinsure life insurance, annuities, or accident and health insurance business in this state. This chapter is applicable to all annual statements filed with the office of the commissioner on or after October 1, 1995. Except with respect to companies that are exempted under section 45-03-19-04, a statement of opinion on the adequacy of the reserves and related actuarial items based on an asset adequacy analysis in accordance with section 45-03-19-06, and a supporting memorandum in accordance with section 45-03-19-07, are required each year. Any company so exempted shall file a statement of actuarial opinion under section 45-03-19-05. Notwithstanding any other provision of this section, the commissioner may require any company otherwise exempt under this chapter to submit a statement of actuarial opinion and to prepare a supporting memorandum in accordance with sections 45-03-19-06 and 45-03-19-07 if, in the opinion of the commissioner, an asset adequacy analysis is necessary with respect to the company.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

45-03-19-02. Definitions.

1. "Actuarial standards board" means the board established by the American academy of actuaries to develop and promulgate standards of actuarial practice.

2. "Annual statement" means the statement required by North Dakota Century Code section 26.1-03-07 to be filed annually by the company with the office of the commissioner.

3. "Appointed actuary" means any individual who is appointed or retained in accordance with subsection 3 of section 45-03-19-03 to provide the actuarial opinion and supporting memorandum as required by North Dakota Century Code section 26.1-35-01.1.

4. "Asset adequacy analysis" means an analysis that meets the standards and other requirements referred to in subsection 4 of section 45-03-19-03. It may take many forms, including cash flow testing, sensitivity testing, or applications of risk theory.

5. "Company" means a life insurance company, fraternal benefit society, or reinsurer subject to the provisions of this chapter.

6. "Noninvestment grade bonds" means bonds designated as classes 3, 4, 5, or 6 by the national association of insurance commissioners securities valuation office.

7. "Qualified actuary" means any individual who meets the requirements in subsection 2 of section 45-03-19-03.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

45-03-19-03. General requirements.

1. Submission of statement of actuarial opinion.

   a. There must be included on or attached to page one of the annual statement for each year beginning 1995 the statement of an appointed actuary, entitled "statement of actuarial opinion", setting forth an opinion relating to reserves and related actuarial items held in support of policies and contracts, in accordance with section 45-03-19-06. However, any company exempted under section 45-03-19-04 from submitting a statement of actuarial opinion in accordance with section 45-03-19-06 shall include on or attach to page one of the annual statement a statement of actuarial opinion rendered by an appointed actuary in accordance with section 45-03-19-05.

b. If in the previous year a company provided a statement of actuarial opinion in accordance with section 45-03-19-05, and in the current year fails the exemption criteria of subdivisions a, b, or e of subsection 3 of section 45-03-19-04 to again provide an actuarial opinion in accordance with section 45-03-19-05, the statement of actuarial opinion in accordance with section 45-03-19-06 is not required until August first following the date of the annual statement. In this instance, the company shall provide a statement of actuarial opinion in accordance with section 45-03-19-05 with appropriate qualification noting the intent to subsequently provide a statement of actuarial opinion in accordance with section 45-03-19-06.

c. In the case of a statement of actuarial opinion required to be submitted by a foreign or alien company, the commissioner may accept the statement of actuarial opinion filed by the company with the insurance supervisory regulator of another state if the commissioner determines that the opinion reasonably meets the requirements applicable to a company domiciled in this state.

d. Upon written request by the company, the commissioner may grant an extension of the date for submission of the statement of actuarial opinion.

2. A "qualified actuary" is an individual who:

a. Is a member in good standing of the American academy of actuaries;

b. Is qualified to sign statements of actuarial opinion for life and health insurance company annual statements in accordance with the American academy of actuaries qualification standards for actuaries signing the statements;

c. Is familiar with the valuation requirements applicable to life and health insurance companies;

d. Has not been found by the commissioner, or if so found, has subsequently been reinstated as a qualified actuary, following appropriate notice and hearing to have:

(1) Violated any provision of, or any obligation imposed by, the insurance law or other law in the course of the actuary's dealings as a qualified actuary;

(2) Been found guilty of fraudulent or dishonest practices;

(3) Demonstrated incompetency, lack of cooperation, or untrustworthiness to act as a qualified actuary;

(4) Submitted to the commissioner during the past five years, pursuant to this chapter, an actuarial opinion or memorandum that the commissioner rejected because it did not meet the provisions of this chapter including standards set by the actuarial standards board; or

(5) Resigned or been removed as an actuary within the past five years as a result of acts or omissions indicated in any adverse report on examination or as a result of failure to adhere to generally acceptable actuarial standards; and

e. Has not failed to notify the commissioner of any action taken by any commissioner of any other state similar to that under subdivision d.

3. An "appointed actuary" is a qualified actuary who is appointed or retained to prepare the statement of actuarial opinion required by this chapter, either directly by or by the authority of the board of directors through an executive officer of the company. The company shall give the commissioner timely written notice of the name and title and, in the case of a consulting actuary, the name of the firm and manner of appointment or retention of each person appointed or retained by the company as an appointed actuary and shall state in the notice that the person meets the requirements set forth in subsection 2. Once notice is furnished, no further notice is required with respect to that person, provided that the company gives the commissioner timely written notice in the event the actuary ceases to be appointed or retained as an appointed actuary or to meet the requirements set forth in subsection 2. If any person appointed or retained as an appointed actuary replaces a previously appointed actuary, the notice shall so state and give the reasons for replacement.

4. The asset adequacy analysis required by this chapter:

a. Must conform to the standards of practice as promulgated from time to time by the actuarial standards board and on any additional standards under this chapter, which standards are to form the basis of the statement of actuarial opinion in accordance with section 45-03-19-06.

b. Must be based on methods of analysis as are deemed appropriate for the purposes by the actuarial standards board.

5. Liabilities to be covered.

a. Under authority of North Dakota Century Code section 26.1-35-01.1, the statement of actuarial opinion shall apply to all in-force business on the statement date

regardless of when or where issued, for example, reserves of exhibits 8, 9, and 10, and claim liabilities in exhibit 11, part I and equivalent items in the separate account statement or statements.

b. If the appointed actuary determines as the result of asset adequacy analysis that a reserve should be held in addition to the aggregate reserve held by the company and calculated in accordance with methods set forth in North Dakota Century Code sections 26.1-35-02, 26.1-35-05, 26.1-35-06, 26.1-35-09, and 26.1-35-10, the company shall establish the additional reserve.

c. For years ending prior to December 31, 1997, the company may, in lieu of establishing the full amount of the additional reserve in the annual statement for that year, set up an additional reserve in an amount not less than the following:

(1) December 31, 1995 - The additional reserve divided by three.

(2) December 31, 1996 - Two times the additional reserve divided by three.

d. Additional reserves established under subdivision b or c and deemed not necessary in subsequent years may be released. Any amounts released must be disclosed in the actuarial opinion for the applicable year. The release of the reserves would not be deemed an adoption of a lower standard of valuation.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

45-03-19-04. Required opinions.

1. In accordance with North Dakota Century Code section 26.1-35-01.1, every company doing business in this state shall annually submit the opinion of an appointed actuary as provided for by this chapter. The type of opinion submitted must be determined by the provisions set forth in this section and must be in accordance with the applicable provisions in this chapter.

2. For purposes of this chapter, companies must be classified as follows based on the admitted assets as of the end of the calendar year for which the actuarial opinion is applicable:

a. Category A consists of those companies whose admitted assets do not exceed twenty million dollars.

b. Category B consists of those companies whose admitted assets meet or exceed twenty million dollars but do not exceed one hundred million dollars.

c. Category C consists of those companies whose admitted assets meet or exceed one hundred million dollars but do not exceed five hundred million dollars.

d. Category D consists of those companies whose admitted assets meet or exceed five hundred million dollars.

3. Exemption eligibility tests.

a. Beginning in 1995, any category A company that meets all of the following criteria is eligible for exemption from submission of a statement of actuarial opinion in accordance with section 45-03-19-06 for the year in which these criteria are met. The ratios in paragraphs 1, 2, and 3 must be calculated based on amounts as of the end of the calendar year for which the actuarial opinion is applicable.

(1) The ratio of the sum of capital and surplus to the sum of cash and invested assets is at least equal to .10.

(2) The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is less than .30.

(3) The ratio of the book value of the noninvestment grade bonds to the sum of capital and surplus is less than .50.

(4) The examiner team for the national association of insurance commissioners has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or the company has resolved the first or second priority status to the satisfaction of the commissioner of the state of domicile and the commissioner has so notified the chair of the national association of insurance commissioners life and health actuarial task force and the national association of insurance commissioners staff and support office.

b. Beginning in 1995, any category B company that meets all of the following criteria is eligible for exemption from submission of a statement of actuarial opinion in

accordance with section 45-03-19-06 for the year in which the criteria are met. The ratios in paragraphs 1, 2, and 3 must be calculated based on amounts as of the end of the calendar year for which the actuarial opinion is applicable.

(1) The ratio of the sum of capital and surplus to the sum of cash and invested assets is at least equal to .07.

(2) The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is less than .40.

(3) The ratio of the book value of the noninvestment grade bonds to the sum of capital and surplus is less than .50.

(4) The examiner team for the national association of insurance commissioners has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or the company has resolved the first or second priority status to the satisfaction of the commissioner of the state of domicile and the commissioner has so notified the chair of the national association of insurance commissioners life and health actuarial task force and the national association of insurance commissioners staff and support office.

c. Any category A or category B company that meets all of the criteria set forth in subdivisions a or b, whichever is applicable, is exempted from submission of a statement of actuarial opinion in accordance with section 45-03-19-06 unless the commissioner specifically indicates to the company that the exemption is not to be taken.

d. Beginning in 1995, any category A or category B company that is not exempted under subdivision c must be required to submit a statement of actuarial opinion in accordance with section 45-03-19-06 for the year for which it is not exempt.

e. Any category C company that, after submitting an opinion in accordance with section 45-03-19-06 meets all of the following criteria is not required, unless required in accordance with subdivision f, to submit a statement of actuarial opinion in accordance with section 45-03-19-06 more frequently than every third year. Any category C

company that fails to meet all of the following criteria for any year shall submit a statement of actuarial opinion in accordance with section 45-03-19-06 for that year. The ratios in paragraphs 1, 2, and 3 must be calculated based on amounts as of the end of the calendar year for which the actuarial opinion is applicable.

(1) The ratio of the sum of capital and surplus to the sum of cash and invested assets is at least equal to .05.

(2) The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is less than .50.

(3) The ratio of the book value of the noninvestment grade bonds to the sum of the capital and surplus is less than .50.

(4) The examiner team for the national association of insurance commissioners has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or the company has resolved the first or second priority status to the satisfaction of the commissioner of the state of domicile and the commissioner has so notified the chair of the national association of insurance commissioners life and health actuarial task force and the national association of insurance commissioners staff and support office.

f. Any company that is not required by this section to submit a statement of actuarial opinion in accordance with section 45-03-19-06 for any year shall submit a statement of actuarial opinion in accordance with section 45-03-19-05 for that year unless as provided for by section 45-03-19-01 the commissioner requires a statement of actuarial opinion in accordance with section 45-03-19-06.

4. Every category D company shall submit a statement of actuarial opinion in accordance with section 45-03-19-06 for each year beginning in 1995.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

45-03-19-05. Statement of actuarial opinion not including an asset adequacy analysis.

1. The statement of actuarial opinion required by this section must consist of a paragraph identifying the appointed actuary and the appointed actuary's qualifications; a regulatory authority paragraph stating that the company is exempt pursuant to this chapter from submitting a statement of actuarial opinion based on an asset adequacy analysis and that the opinion, which is not based on an asset adequacy analysis, is rendered in accordance with section 45-03-19-05; a scope paragraph identifying the subjects on which the opinion is to be expressed and describing the scope of the appointed actuary's work; and an opinion paragraph expressing the appointed actuary's opinion as required by North Dakota Century Code section 26.1-35-01.1.

2. The following language provided is that which in typical circumstances would be included in a statement of actuarial opinion in accordance with this section. The language may be modified as needed to meet the circumstances of a particular case, but the appointed actuary should use language that clearly expresses a professional judgment. However, in any event the opinion must retain all pertinent aspects of the language provided in section 45-03-19-05.

   a. The opening paragraph should indicate the appointed actuary's relationship to the company. For a company actuary, the opening paragraph of the actuarial opinion should read as follows:

      "I, [name of actuary], am [title] of [name of company] and a member of the American Academy of Actuaries. I was appointed by, or by the authority of, the Board of Directors of said insurer to render this opinion as stated in the letter to the commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health companies."

      For a consulting actuary, the opening paragraph of the actuarial opinion should contain a sentence such as:

      "I, [name and title of actuary], a member of the American Academy of Actuaries, am associated with the firm of [insert name of consulting firm]. I have been appointed by, or by the authority of, the Board of Directors of [name of company] to render this opinion as stated in the letter to the commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and

am familiar with the valuation requirements applicable to life and health insurance companies."

b. The regulatory authority paragraph should include a statement such as the following: "Said company is exempt pursuant to Chapter [insert designation] of the [name of state] Insurance Department from submitting a statement of actuarial opinion based on an asset adequacy analysis. This opinion, which is not based on an asset adequacy analysis, is rendered in accordance with Section 45-03-19-05."

c. The scope paragraph should contain a sentence such as the following: "I have examined the actuarial assumptions and actuarial methods used in determining reserves and related actuarial items listed below, as shown in the annual statement of the company, as prepared for filing with state regulatory officials, as of December 31, [ ]."

The paragraph should list items and amounts with respect to which the appointed actuary is expressing an opinion. The list should include:

(1) Aggregate reserve and deposit funds for policies and contracts included in exhibit 8;

(2) Aggregate reserve and deposit funds for policies and contracts included in exhibit 9;

(3) Deposit funds, premiums, dividend, and coupon accumulations and supplementary contracts not involving life contingencies included in exhibit 10; and

(4) Policy and contract claims--liability end of current year included in exhibit 11, part I.

d. If the appointed actuary has examined the underlying records, the scope paragraph should also include the following:

"My examination included such review of the actuarial assumptions and actuarial methods and of the underlying basic records and such tests of the actuarial calculations as I considered necessary."

e. If the appointed actuary has not examined the underlying records, but has relied upon listings and summaries of policies in force prepared by the company or a third party, the scope paragraph should include a sentence such as one of the following:

"I have relied upon listings and summaries of policies and contracts and other liabilities in force prepared by [name and title of company officer certifying in-force records] as certified in the attached statement. (See accompanying affidavit by a company officer.) In other respects my examination included review of the actuarial assumptions and actuarial methods and such tests of the actuarial calculations as I considered necessary."

or

"I have relied upon [name of accounting firm] for the substantial accuracy of the in-force records inventory and information concerning other liabilities, as certified in the attached statement. In other respects my examination included review of the actuarial assumptions and actuarial methods and such tests of the actuarial calculations as I considered necessary."

The statement of the person certifying shall follow the form indicated by subdivision j of subsection 2.

f. The opinion paragraph should include the following:

"In my opinion the amounts carried in the balance sheet on account of the actuarial items identified above:

1. Are computed in accordance with presently accepted actuarial standards that specifically relate to the opinion required under this section;

2. Are based on actuarial assumptions that produce reserves at least as great as those called for in any contract provision as to reserve basis and method, and are in accordance with all other contract provisions;

3. Meet the requirements of the Insurance Law and chapters of the state of [state of domicile] and are at least as great as the minimum aggregate amounts required by the state in which this statement is filed.

4. Are computed on the basis of assumptions consistent with those used in computing the corresponding items in the annual statement of the preceding yearend with any exceptions as noted below; and

5. Include provision for all actuarial reserves and related statement items that ought to be established.

The actuarial methods, considerations, and analyses used in forming my opinion conform to the appropriate compliance guidelines as promulgated by the Actuarial Standards Board, which standards form the basis of this statement of opinion."

g. The concluding paragraph should document the eligibility for the company to provide an opinion as provided by this section. It must include the following:

"This opinion is provided in accordance with North Dakota Administrative Code Section 45-03-19-05. As such it does not include an opinion regarding the adequacy of reserves and related actuarial items when considered in light of the assets which support them.

Eligibility for North Dakota Administrative Code Section 45-03-19-05 is confirmed as follows:

1. The ratio of the sum of capital and surplus to the sum of cash and invested assets is [insert amount], which equals or exceeds the applicable criterion based on the admitted assets of the company (subsection 3 of section 45-03-19-04).

2. The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is [insert amount], which is less than the applicable criteria based on the admitted assets of the company (subsection 3 of section 45-03-19-04).

3. The ratio of the book value of the noninvestment grade bonds to the sum of capital and surplus is [insert amount], which is less than the applicable criteria of .50.

4. To my knowledge, the NAIC Examiner Team has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable or the company has resolved the first or second priority status to the satisfaction of the commissioner of the state of domicile.

5. To my knowledge there is not a specific request from any commissioner requiring an asset adequacy analysis opinion.

_____

Signature of Appointed Actuary

_____

Address of Appointed Actuary

_____

Telephone Number of Appointed Actuary"

h. If there has been any change in the actuarial assumptions from those previously employed, that change should be described in the annual statement or in a paragraph of the statement of actuarial opinion, and the reference in paragraph 4 of subdivision f to consistency should read as follows:

> ". . . with the exception of the change described on Page [ ] of the annual statement (or in the preceding paragraph)."

The adoption for new issues or new claims or other new liabilities of an actuarial assumption which differs from a corresponding assumption used for prior new issues or new claims or other new liabilities is not a change in actuarial assumptions within the meaning of this paragraph.

i. If the appointed actuary is unable to form an opinion, the appointed actuary shall refuse to issue a statement of actuarial opinion. If the appointed actuary's opinion is adverse or qualified, the appointed actuary shall issue an adverse or qualified actuarial opinion explicitly stating the reasons for the opinion. This statement should follow the scope paragraph and precede the opinion paragraph.

j. If the appointed actuary does not express an opinion as to the accuracy and completeness of the listings and summaries of policies in force, there should be attached to the opinion the statement of a company officer or accounting firm who prepared the underlying data similar to the following:

> "I [name of officer], [title] of [name and address of company or accounting firm], hereby affirm that the listings and summaries of policies and contracts in force as of December 31, [ ], prepared for and submitted to [name of appointed actuary], were prepared under my direction and, to the best of my

knowledge and belief, are substantially accurate and complete.

_____

Signature of the Officer of the Company or Accounting Firm

_____

Address of the Officer of the Company or Accounting Firm

_____

Telephone Number of the Officer of the Company or Accounting Firm"

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

45-03-19-06. Statement of actuarial opinion based on an asset adequacy analysis.

1. The statement of actuarial opinion submitted in accordance with this section must consist of:

   a. A paragraph identifying the appointed actuary and the appointed actuary's qualifications (see subdivision a of subsection 2).

   b. A scope paragraph identifying the subjects on which an opinion is to be expressed and describing the scope of the appointed actuary's work, including a tabulation delineating the reserves and related actuarial items which have been analyzed for asset adequacy and the method of analysis (see subdivision b of subsection 2), and identifying the reserves and related actuarial items covered by the opinion which have not been so analyzed.

   c. A reliance paragraph describing those areas, if any, where the appointed actuary has deferred to other experts in developing data, procedures or assumptions, for example, anticipated cash flows from currently owned assets, including variation in cash flows according to economic scenarios (see subdivision c of subsection 2), supported by a statement of each expert in the form prescribed by subsection 5.

   d. An opinion paragraph expressing the appointed actuary's opinion with respect to the adequacy of the supporting assets to mature the liabilities (see subdivision f of subsection 2).

e. One or more additional paragraphs will be needed in individual company cases as follows:

(1) If the appointed actuary considers it necessary to state a qualification of the appointed actuary's opinion.

(2) If the appointed actuary must disclose the method of aggregation for reserves of different products or lines of business for asset adequacy analysis.

(3) If the appointed actuary must disclose reliance upon any portion of the assets supporting the asset valuation reserve (AVR), interest maintenance reserve (IMR), or other mandatory or voluntary statement reserves for asset adequacy analysis.

(4) If the appointed actuary must disclose an inconsistency in the method of analysis or basis of asset allocation used at the prior opinion date with that used for this opinion.

(5) If the appointed actuary must disclose whether additional reserves of the prior opinion date are released as of this opinion date, and the extent of the release.

(6) If the appointed actuary chooses to add a paragraph briefly describing the assumptions which form the basis for the actuarial opinion.

2. The following paragraphs are to be included in the statement of actuarial opinion in accordance with this section. Language is that which in typical circumstances should be included in a statement of actuarial opinion. The language may be modified as needed to meet the circumstances of a particular case, but the appointed actuary should use language that clearly expresses the appointed actuary's professional judgment. However, in any event the opinion must retain all pertinent aspects of the language provided in this section.

a. The opening paragraph should generally indicate the appointed actuary's relationship to the company and the qualifications to sign the opinion. For a company actuary, the opening paragraph of the actuarial opinion should read as follows:

"I, [name], am [title] of [insurance company name] and a member of the American Academy of Actuaries. I was appointed by, or by the authority of, the Board of Directors of said insurer to render this opinion as stated in the letter to the commissioner dated [insert date]. I meet the Academy qualification

standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health insurance companies."

For a consulting actuary, the opening paragraph should contain a sentence such as:

"I, [name], a member of the American Academy of actuaries, am associated with the firm of [name of consulting firm]. I have been appointed by, or by the authority of, the Board of Directors of [name of company] to render this opinion as stated in the letter to the commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health insurance companies."

b. The scope paragraph should include a statement such as the following:

"I have examined the actuarial assumptions and actuarial methods used in determining reserves and related actuarial items listed below, as shown in the annual statement of the company, as prepared for filing with state regulatory officials, as of December 31, 19[ ]. Tabulated below are those reserves and related actuarial items which have been subjected to asset adequacy analysis.

Asset Adequacy Tested Amounts Reserves and Liabilities					
Statement Item	Formula Reserves (1)	Additional Actuarial Reserves (a) (2)	Analysis Method (b)	Other Amount (3)	Total Amount (1)+(2)+(3) (4)
Exhibit 8 A Life Insurance					
B Annuities					
C Supplementary Contracts Involving Life Contingencies					
D Accidental Death Benefit					
E Disability - Active					
F Disability - Disabled					
G Miscellaneous					
Total (Exhibit 8, Item 1, Page 3)					
Exhibit 9 A Active Life Reserve					
B Claim Reserve					
Total (Exhibit 9, Item 2, Page 3)					
Exhibit 10 1 Premiums and Other Deposit Funds					
1.1 Policyholder Premiums (Page 3, Line 10.1)					
1.2 Guaranteed Interest Contracts (Page 3, Line 10.2)					
1.3 Other Contract Deposit Funds (Page 3, Line 10.3)					
2 Supplementary Contracts Not Involving Life Contingencies (Page 3, Line 3)					
3 Dividend and Coupon Accumulations (Page 3, Line 5)					
Total Exhibit 10					
Exhibit 11, Part 1 1 Life (Page 3, Line 4.1)					
2 Health (Page 3, Line 4.2)					

Total Exhibit II, Part 1					
Separate Accounts (Page 3, Line 27)					
TOTAL RESERVES					

IMR (Page ___, Line ___)	
AVR (Page ___, Line ___)	(c)

Notes:

(a) **The additional actuarial reserves are the reserves established under subdivisions b and c of subsection 5 of section 45-03-19-03.**

(b) **The appointed actuary should indicate the method of analysis, determined in accordance with the standards for asset adequacy analysis referred to in subsection 4 of section 45-03-19-03, by means of symbols which should be defined in footnotes to the table.**

(c) **Allocated amount.**

c. If the appointed actuary has relied on other experts to develop certain portions of the analysis, the reliance paragraph should include a statement such as the following:

> "I have relied on [name], [title] for [e.g., anticipated cash flows from currently owned assets, including variations in cash flows according to economic scenarios] and, as certified in the attached statement, . . ."
>
> or
>
> "I have relied on personnel as cited in the supporting memorandum for certain critical aspects of the analysis in reference to the accompanying statement."

Such a statement of reliance on other experts should be accompanied by a statement by each of the experts of the form prescribed by subsection 5.

d. If the appointed actuary has examined the underlying asset and liability records, the reliance paragraph should also include the following:

> "My examination included such review of the actuarial assumptions and actuarial methods and of the underlying basic asset and liability records and such tests of the actuarial calculations as I considered necessary."

e. If the appointed actuary has not examined the underlying records, but has relied upon listings and summaries of policies in force or asset records prepared by the company or a third party, the reliance paragraph should include a sentence such as:

> "I have relied upon listings and summaries [of policies and contracts, of asset records] prepared by [name and title of company officer certifying in-force records] as certified in the attached statement. In other respects my examination included such review of the actuarial assumptions and actuarial methods and such tests of the actuarial calculations as I considered necessary."
>
> or
>
> "I have relied upon [name of accounting firm] for the substantial accuracy of the in-force records inventory and information concerning other liabilities, as certified in the attached statement.

In other respects my examination included review of the actuarial assumptions and actuarial methods and tests of the actuarial calculations as I considered necessary."

Such a section must be accompanied by a statement by each person relied upon of the form prescribed by subsection 5.

f. The opinion paragraph should include the following:

"In my opinion the reserves and related actuarial values concerning the statement items identified above:

1. Are computed in accordance with presently accepted actuarial standards consistently applied and are fairly stated, in accordance with sound actuarial principles.

2. Are based on actuarial assumptions which produce reserves at least as great as those called for in any contract provision as to reserve basis and method, and are in accordance with all other contract provisions.

3. Meet the requirements of the Insurance Law and chapter of the State of [state of domicile] and are at least as great as the minimum aggregate amounts required by the state in which this statement is filed.

4. Are computed on the basis of assumptions consistent with those used in computing the corresponding items in the annual statement of the preceding yearend (with any exceptions noted below).

5. Include provision for all actuarial reserves and related statement items which ought to be established.

The reserves and related items, when considered in light of the assets held by the company with respect to the reserves and related actuarial items including the investment earnings on the assets, and the considerations anticipated to be received and retained under the policies and contracts, make adequate provision, according to presently accepted actuarial standards of practice, for the anticipated cash flows required by the contractual obligations and related expenses of the company.

The actuarial methods, considerations, and analyses used in forming my opinion conform to the appropriate Standards of Practice as promulgated by the Actuarial Standards Board, which standards form the basis of this statement of opinion.

This opinion is updated annually as required by statute. To the best of my knowledge, there have been no material changes from the applicable date of the annual statement to the date of the rendering of this opinion which should be considered in reviewing this opinion.

The impact of unanticipated events subsequent to the date of this opinion is beyond the scope of this opinion. The analysis of asset adequacy portion of this opinion should be viewed recognizing that the company's future experience may not follow all the assumptions used in the analysis.

_____

Signature of Appointed Actuary

_____

Address of Appointed Actuary

_____

Telephone Number of Appointed Actuary"

3. The adoption for new issues or new claims or other new liabilities of an actuarial assumption which differs from a corresponding assumption used for prior new issues or new claims or other new liabilities is not a change in actuarial assumptions within the meaning of this section.

4. If the appointed actuary is unable to form an opinion, then the appointed actuary shall refuse to issue a statement of actuarial opinion. If the appointed actuary's opinion is adverse or qualified, then the appointed actuary shall issue an adverse or qualified actuarial opinion explicitly stating the reasons for the opinion. This statement should follow the scope paragraph and precede the opinion paragraph.

5. If the appointed actuary does not express an opinion as to the accuracy and completeness of the listings and summaries of policies in force or asset oriented information, there must be attached to the opinion the statement of a company officer or accounting firm who prepared the underlying data similar to the following:

"I [name of officer], [title], of [name of company or accounting firm], hereby affirm that the listings and summaries of policies and contracts in force as of

December 31, 19[ ], and other liabilities prepared for and submitted to [name of appointed actuary] were prepared under my direction and, to the best of my knowledge and belief, are substantially accurate and complete.

_____

Signature of the Officer of the Company or Accounting Firm

_____

Address of the Officer of the Company or Accounting Firm

_____

Telephone Number of the Officer of the Company or Accounting Firm"

or

"I, [name of officer], [title] of [name of company, accounting firm, or security analyst], hereby affirm that the listings, summaries, and analyses relating to data prepared for and submitted to [name of appointed actuary] in support of the asset-oriented aspects of the opinion were prepared under my direction and, to the best of my knowledge and belief, are substantially accurate and complete.

_____

Signature of the Officer of the Company, Accounting Firm, or the Security Analyst

_____

Address of the Officer of the Company, Accounting Firm, or the Security Analyst

_____

Telephone Number of the Officer of the Company, Accounting Firm, or the Security Analyst"

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

45-03-19-07. Description of actuarial memorandum including an asset adequacy analysis.

1. General.

   a. In accordance with North Dakota Century Code section 26.1-35-01.1, the appointed actuary shall prepare a memorandum to the company describing the analysis done in support of the opinion regarding the reserves under a

section 45-03-19-06 opinion. The memorandum must be made available for examination by the commissioner upon the commissioner's request but must be returned to the company after the examination and may not be considered a record of the insurance department or subject to automatic filing with the commissioner.

b. In preparing the memorandum, the appointed actuary may rely on, and include as a part of the appointed actuary's own memorandum, memoranda prepared and signed by other actuaries who are qualified within the meaning of subsection 2 of section 45-03-19-03, with respect to the areas covered in the memoranda, and so state in their memoranda.

c. If the commissioner requests a memorandum and no memorandum exists or if the commissioner finds that the analysis described in the memorandum fails to meet the standards of the actuarial standards board or the standards and requirements of this chapter, the commissioner may designate a qualified actuary to review the opinion and prepare the supporting memorandum as is required for review. The reasonable and necessary expense of the independent review must be paid by the company but must be directed and controlled by the commissioner.

d. The reviewing actuary shall have the same status as an examiner for purposes of obtaining data from the company and the workpapers and documentation of the reviewing actuary shall be retained by the commissioner, provided, however, that any information provided by the company to the reviewing actuary and included in the workpapers must be considered as material provided by the company to the commissioner and must be kept confidential to the same extent as is prescribed by law with respect to other material provided by the company to the commissioner pursuant to the statute governing this chapter. The reviewing actuary may not be an employee of a consulting firm, or have been personally involved, with the preparation of any prior memorandum or opinion for the insurer pursuant to this chapter for any one of the current year or the preceding three years.

2. When an actuarial opinion under section 45-03-19-06 is provided, the memorandum must demonstrate that the analysis has been done in accordance with the standards for asset adequacy referred to in subsection 4 of section 45-03-19-03 and any additional standards under this chapter. It must specify:

a. For reserves:

(1) Product descriptions including market description, underwriting, and other aspects of a risk profile and the specific risks the appointed actuary deems significant.

(2) Source of liability in force.

(3) Reserve method and basis.

(4) Investment reserves.

(5) Reinsurance arrangements.

b. For assets:

(1) Portfolio descriptions, including a risk profile disclosing the quality, distribution, and types of assets.

(2) Investment and disinvestment assumptions.

(3) Source of asset data.

(4) Asset valuation bases.

c. Analysis basis:

(1) Methodology.

(2) Rationale for inclusion or exclusion of different blocks of business and how pertinent risks were analyzed.

(3) Rationale for degree of rigor in analyzing different blocks of business.

(4) Criteria for determining asset adequacy.

(5) Effect of federal income taxes, reinsurance, and other relevant factors.

d. Summary of results.

e. Conclusions.

3. The memorandum must include a statement:

"Actuarial methods, considerations, and analyses used in the preparation of this memorandum conform to the appropriate Standards of Practice as promulgated by the Actuarial Standards Board, which standards form the basis for this memorandum."

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

45-03-19-08. Additional considerations for analysis.

1. For the asset adequacy analysis for the statement of actuarial opinion provided in accordance with section 45-03-19-06, reserves and assets may be aggregated by either of the following methods:

   a. Aggregate the reserves and related actuarial items, and the supporting assets, for different products or lines of business, before analyzing the adequacy of the combined assets to mature the combined liabilities. The appointed actuary must be satisfied that the assets held in support of the reserves and related actuarial items so aggregated are managed in such a manner that the cash flows from the aggregated assets are available to help mature the liabilities from the blocks of business that have been aggregated.

   b. Aggregate the results of asset adequacy analysis of one or more products or lines of business, the reserves for which prove through analysis to be redundant, with the results of one or more products or lines of business, the reserves for which prove through analysis to be deficient. The appointed actuary must be satisfied that the asset adequacy results for the various products or lines of business for which the results are so aggregated:

      (1) Are developed using consistent economic scenarios; or

      (2) Are subject to mutually independent risks, that is, the likelihood of events impacting the adequacy of the assets supporting the redundant reserves is completely unrelated to the likelihood of events impacting the adequacy of the assets supporting the deficient reserves.

   In the event of any aggregation, the actuary shall disclose in the actuary's opinion that the reserves were aggregated on the basis of subdivision a, paragraph 1 of subdivision b, or paragraph 2 of subdivision b, whichever is applicable, and describe the aggregation in the supporting memorandum.

2. The appointed actuary shall analyze only those assets held in support of the reserves which are the subject for specific analysis, hereafter called "specified reserves". A particular asset or portion thereof supporting a group of specified reserves cannot support any other group of specified reserves. An asset may be allocated over several groups of specified reserves. The annual statement value of the assets held in support of the reserves shall not exceed the annual statement value of the specified reserves, except as provided in subsection 3. If the method of asset allocation is not consistent from year to year, the extent of its inconsistency should be described in the supporting memorandum.

3. An appropriate allocation of assets in the amount of the interest maintenance reserve (IMR), whether positive or negative, must be used in any asset adequacy analysis. Analysis of risks regarding asset default may include an appropriate allocation of assets supporting the asset valuation reserve (AVR); these asset valuation reserve assets may not be applied for any other risks with respect to reserve adequacy. Analysis of these and other risks may include assets supporting other mandatory or voluntary reserves available to the extent not used for risk analysis and reserve support. The amount of the assets used for the asset valuation reserve must be disclosed in the table of reserves and liabilities of the opinion and in the memorandum. The method used for selecting particular assets or allocated portions of assets must be disclosed in the memorandum.

4. For the purpose of performing the asset adequacy analysis required by this chapter, the qualified actuary is expected to follow standards adopted by the actuarial standards board, nevertheless, the appointed actuary must consider in the analysis the effect of at least the following interest rate scenarios:

   a. Level with no deviation.

   b. Uniformly increasing over ten years at a half percent per year and then level.

   c. Uniformly increasing at one percent per year over five years and then uniformly decreasing at one percent per year to the original level at the end of ten years and then level.

   d. An immediate increase of three percent and then level.

   e. Uniformly decreasing over ten years at a half percent per year and then level.

   f. Uniformly decreasing at one percent per year over five years and then uniformly increasing at one percent per

year to the original level at the end of ten years and then level.

g. An immediate decrease of three percent and then level.

For these and other scenarios which may be used, projected interest rates for a five-year treasury note need not be reduced beyond the point where the five-year treasury note yield would be at fifty percent of its initial level. The beginning interest rates may be based on interest rates for new investments as of the valuation date similar to recent investments allocated to support the product being tested or be based on an outside index, such as treasury yields, of assets of the appropriate length on a date close to the valuation date. Whatever method is used to determine the beginning yield curve and associated interest rates should be specifically defined. The beginning yield curve and associated interest rates should be consistent for all interest rate scenarios.

5. The appointed actuary shall retain on file, for at least seven years, sufficient documentation so that it will be possible to determine the procedures followed, the analyses performed, the bases for assumptions and the results obtained.

History: Effective October 1, 1995.
General Authority: NDCC 26.1-35-01.1
Law Implemented: NDCC 26.1-35-01.1

STAFF COMMENT: Chapter 45-03-20 contains all new material but is not underscored so as to improve readability.

CHAPTER 45-03-20
MODEL RULE REQUIRING ANNUAL AUDITED FINANCIAL REPORTS

45-03-20-01. Purpose and scope. The purpose of this chapter is to improve the North Dakota insurance department's surveillance of the financial condition of insurers by requiring an annual examination by independent certified public accountants of the financial statements reporting the financial position and the results of operations of insurers. Every insurer, as defined in section 45-03-20-02, is subject to this chapter. Insurers having direct premiums written in this state of less than one million dollars in any calendar year and less than one thousand policyholders or certificate holders of directly written policies nationwide at the end of the calendar year are exempt from this chapter for that year, unless the commissioner makes a specific finding that compliance is necessary for the commissioner to carry out statutory responsibilities, except that insurers having assumed premiums pursuant to contracts or treaties of reinsurance of one million dollars or more will not be so exempt. Foreign or alien insurers filing audited financial reports in another state, pursuant to the other state's requirement of audited financial reports which has been found by the commissioner to be substantially similar to the requirements herein, are exempt from this chapter if:

1. A copy of the audited financial repot, report on significant deficiencies in internal controls, and the accountant's letter of qualifications which are filed with another state are filed with the commissioner in accordance with the filing dates specified in sections 45-03-20-03, 45-03-20-10, and 45-03-20-11, respectively.

2. A copy of any notification of adverse financial condition report filed with another state is filed with the commissioner within the time specified in section 45-03-20-09.

This chapter may not prohibit, preclude, or in any way limit the commissioner of insurance from ordering or conducting or performing examinations of insurers under the rules and regulations of the North Dakota department of insurance and the practices and procedures of the North Dakota department of insurance.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-02. Definitions.

1. "Accountant" and "independent certified public accountant" mean an independent certified public accountant or accounting firm in good standing with the American institute of certified public accountants and in all states in which they are licensed to practice.

2. "Audited financial report" means and includes those items specified in section 45-03-20-04.

3. "Insurer" means a licensed insurer as defined in North Dakota Century Code chapter 26.1-02.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-03. Filing and extensions for filing of annual audited financial reports. All insurers shall have an annual audit by an independent certified public accountant and shall file an audited financial report with the commissioner on or before June first for the year ended December thirty-first immediately preceding. The commissioner may require an insurer to file an audited financial report earlier than June first with ninety days' advance notice to the insurer.

Extensions of the June first filing date may be granted by the commissioner for thirty-day periods upon showing by the insurer and its independent certified public accountant the reasons for requesting an

extension and determination by the commissioner of good cause for an extension. The request for extension must be submitted in writing not less than ten days prior to the due date in sufficient detail to permit the commissioner to make an informed decision with respect to the requested extension.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-04. Contents of annual audited financial report. The annual audited financial report must report the financial position of the insurer as of the end of the most recent calendar year and the results of its operations, cash flows, and changes in capital and surplus for the year then ended in conformity with statutory accounting practices prescribed, or otherwise permitted, by the department of insurance of the state of domicile.

The annual audited financial report must include the following:

1. Report of independent certified public accountant.

2. Balance sheet reporting admitted assets, liabilities, capital, and surplus.

3. Statement of operations.

4. Statement of cash flows.

5. Statement of changes in capital and surplus.

6. Notes to financial statements. These notes must be those required by the appropriate national association of insurance commissioners annual statement instructions and any other notes required by generally accepted accounting principles and must also include:

   a. A reconciliation of differences, if any, between the audited statutory financial statements and the annual statement filed pursuant to North Dakota Century Code section 26.1-03-07 with a written description of the nature of these differences.

   b. A summary of ownership and relationships of the insurer and all affiliated companies.

7. The financial statements included in the audited financial report must be prepared in a form and using language and groupings substantially the same as the relevant sections of the annual statement of the insurer filed with the commissioner, and the financial statement must be comparative,

presenting the amounts as of December thirty-first of the current year and the amounts as of the immediately preceding December thirty-first. However, in the first year in which an insurer is required to file an audited financial report, the comparative data may be omitted.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-05. Designation of independent certified public accountant. Each insurer required by this chapter to file an annual audited financial report within sixty days after becoming subject to the requirement, shall register with the commissioner in writing the name and address of the independent certified public accountant or accounting firm, generally referred to in this chapter as the "accountant", retained to conduct the annual audit under this chapter. Insurers not retaining an independent certified public accountant on October 1, 1995, shall register the name and address of their retained certified public accountants not less than six months before the date when the first audited financial report is to be filed.

The insurer shall obtain a letter from the accountant and file a copy with the commissioner stating that the accountant is aware of the provisions of the insurance code and the rules and regulations of the insurance department of the state of domicile that relate to accounting and financial matters and affirming that the accountant will express an opinion on the financial statements in terms of their conformity to the statutory accounting practices prescribed or otherwise permitted by that department, specifying the exceptions as the accountant may believe appropriate.

If an accountant who was the accountant for the immediately preceding filed audited financial report is dismissed or resigns, the insurer shall within five business days notify the department of this event. The insurer shall also furnish the commissioner with a separate letter within ten business days of the above notification stating whether in the twenty-four months preceding the event there were any disagreements with the former accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure; which disagreements, if not resolved to the satisfaction of the former accountant, would have caused the accountant to make reference to the subject matter of the disagreement in connection with the accountant's opinion. The disagreements required to be reported in response to this section include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this section are those that occur at the decisionmaking level, that is between personnel of the insurer responsible for presentation of its financial statements and personnel of the accounting firm responsible for rendering its report. The insurer shall also in writing request the former accountant to furnish a letter addressed to the insurer stating

whether the accountant agrees with the statements contained in the insurer's letter and, if not, stating the reasons for which the accountant does not agree; and the insurer shall furnish the responsive letter from the former accountant to the commissioner together with its own.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-06. Qualifications of independent certified public accountant.

1. The commissioner shall not recognize any person or firm as a qualified independent certified public accountant which is not in good standing with the American institute of certified public accountants and in all states in which the accountant is licensed to practice.

2. Except as otherwise provided herein, an independent certified public accountant must be recognized as qualified as long as the independent certified public accountant conforms to the standards of the independent certified public accountant's profession, as contained in the code of professional ethics of the American institute of certified public accountants and rules and regulations and code of ethics and rules of professional conduct of the North Dakota board of accountancy, or similar code.

3. A partner or other person responsible for rendering a report may not act in that capacity for more than seven consecutive years. Following any period of service, the person must be disqualified from acting in that or a similar capacity for the same company or its insurance subsidiaries or affiliates for a period of two years. An insurer may make application to the commissioner for relief from the above rotation requirement on the basis of unusual circumstances. The commissioner may consider the following factors in determining if the relief should be granted:

   a. Number of partners, expertise of the partners, or the number of insurance clients in the currently registered firm;

   b. Premium volume of the insurer; or

   c. Number of jurisdictions in which the insurer transacts business.

The requirements of this subsection become effective October 1, 1997.

4. The commissioner shall not recognize as a qualified independent certified public accountant, nor accept any annual audited financial report, prepared in whole or in part by, any natural person who:

   a. Has been convicted of fraud, bribery, a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sections 1961-1968, or any dishonest conduct or practices under federal or state law;

   b. Has been found to have violated the insurance laws of this state with respect to any previous reports submitted under this chapter; or

   c. Has demonstrated a pattern or practice of failing to detect or disclose material information in previous reports filed under the provisions of this chapter.

5. The commissioner may hold a hearing to determine whether a certified public accountant is qualified and, considering the evidence presented, may rule that the accountant is not qualified for purposes of expressing an opinion on the financial statements in the annual audited financial report made pursuant to this chapter and require the insurer to replace the accountant with another whose relationship with the insurer is qualified within the meaning of this chapter.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-07. Consolidated or combined audits. An insurer may make written application to the commissioner for approval to file audited consolidated or combined financial statements in lieu of separate annual audited financial statements if the insurer is part of a group of insurance companies which utilizes a pooling or one hundred percent reinsurance agreement that affects the solvency and integrity of the insurer's reserves and the insurer cedes all of its direct and assumed business to the pool. In such cases, a columnar consolidating or combining worksheet must be filed with the report, as follows:

1. Amounts shown on the consolidated or combined audited financial report must be shown on the worksheet.

2. Amounts for each insurer subject to this section must be stated separately.

3. Noninsurance operations may be shown on the worksheet on a combined or individual basis.

4. Explanations of consolidating and eliminating entries must be included.

5. A reconciliation must be included of any differences between the amounts shown in the individual insurer columns of the worksheet and comparable amounts shown on the annual statements of the insurers.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-08. Scope of examination and report of independent certified public accountant. Financial statements furnished under section 45-03-20-04 must be examined by an independent certified public accountant. The examination of the insurer's financial statements must be conducted in accordance with generally accepted auditing standards. Consideration should also be given to other procedures illustrated in the financial condition examiner's handbook promulgated by the national association of insurance commissioners as the independent certified public accountant deems necessary.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-09. Notification of adverse financial condition. The insurer required to furnish the annual audited financial report shall require the independent certified public accountant to report, in writing, within five business days to the board of directors or its audit committee any determination by the independent certified public accountant that the insurer has materially misstated its financial condition as reported to the commissioner as of the balance sheet date currently under examination or that the insurer does not meet the minimum capital and surplus requirement of the North Dakota insurance statute as of that date. An insurer who has received a report under this section shall forward a copy of the report to the commissioner within five business days of receipt of the report and shall provide the independent certified public accountant making the report with evidence of the report being furnished to the commissioner. If the independent certified public accountant fails to receive the evidence within the required five-business-day period, the independent certified public accountant shall furnish to the commissioner a copy of its report within the next five business days.

An independent public accountant is not liable in any manner to any person for any statement made in connection with this section if the statement is made in good faith in compliance with this section.

If the accountant, subsequent to the date of the audited financial report filed under this chapter, becomes aware of facts that might have

affected the accountant's report, the department notes the obligation of the accountant to take action as prescribed in volume 1, section AU 561 of the professional standards of the American institute of certified public accountants.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-10. Report on significant deficiencies in internal controls. In addition to the annual audited financial statements, each insurer shall furnish the commissioner with a written report prepared by the accountant describing significant deficiencies in the insurer's internal control structure noted by the accountant during the audit. SAS No. 60, communication of internal control structure matters noted in an audit, AU section 325 of the professional standards of the American institute of certified public accountants, requires an accountant to communicate significant deficiencies known as "reportable conditions" noted during a financial statement audit to the appropriate parties within an entity. No report should be issued if the accountant does not identify significant deficiencies. If significant deficiencies are noted, the written report must be filed annually by the insurer with the department within sixty days after the filing of the annual audited financial statements. The insurer is required to provide a description of remedial actions taken or proposed to correct significant deficiencies, if the actions are not described in the accountant's report.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-11. Accountant's letter of qualifications. The accountant shall furnish the insurer in connection with, and for inclusion in, the filing of the annual audited financial report, a letter stating:

1. That the accountant is independent with respect to the insurer and conforms to the standards of the accountant's profession as contained in the code of professional ethics and pronouncements of the American institute of certified public accountants and the rules of professional conduct of the North Dakota board of accountancy, or similar code.

2. The background and experience in general, and the experience in audits of insurers of the staff assigned to the engagement and whether each is an independent certified public accountant. Nothing within this chapter may be construed as prohibiting the accountant from utilizing the staff as deemed appropriate where use is consistent with the standards prescribed by generally accepted auditing standards.

3. That the accountant understands the annual audited financial report and the accountant's opinion thereon will be filed in compliance with this chapter and that the commissioner will be relying on this information in the monitoring and regulation of the financial position of insurers.

4. That the accountant consents to the requirements of section 45-03-20-12 and that the accountant consents and agrees to make available for review by the commissioner, the commissioner's designee, or the commissioner's appointed agent, the workpapers, as defined in section 45-03-20-12.

5. A representation that the accountant is properly licensed by an appropriate state licensing authority and is a member in good standing in the American institute of certified public accountants.

6. A representation that the accountant is in compliance with the requirements of section 45-03-20-06.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-12. Definition, availability, and maintenance of certified public accountant workpapers. Workpapers are the records kept by the independent certified public accountant of the procedures followed, the tests performed, the information obtained, and the conclusions reached pertinent to the independent certified public accountant's examination of the financial statements of an insurer. Workpapers, accordingly, may include audit planning documentation, work programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents, and schedules or commentaries prepared or obtained by the independent certified public accountant in the course of the accountant's examination of the financial statements of an insurer and which support the accountant's opinion thereof.

Every insurer required to file an audited financial report under this chapter, shall require the accountant to make available for review by department examiners, all workpapers prepared in the conduct of the accountant's examination and any communications related to the audit between the accountant and the insurer, at the offices of the insurer, at the insurance department, or at any other reasonable place designated by the commissioner. The insurer shall require that the accountant retain the audit workpapers and communications until the insurance department has filed a report on examination covering the period of the audit but no longer than seven years from the date of the audit report.

In the conduct of the aforementioned periodic review by the department examiners, it must be agreed that photocopies of pertinent audit workpapers may be made and retained by the department. Such

reviews by the department examiners must be considered investigations and all working papers and communications obtained during the course of the investigations must be afforded the same confidentiality as other examination workpapers generated by the department.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

45-03-20-13. Exemptions and effective dates. Upon written application of any insurer, the commissioner may grant an exemption from compliance with this chapter if the commissioner finds, upon review of the application, that compliance with this chapter would constitute a financial or organizational hardship upon the insurer. An exemption may be granted at any time and from time to time for a specified period or periods. Within ten days from a denial of an insurer's written request for an exemption from this chapter, the insurer may request in writing a hearing on its application for an exemption. Such hearing must be held in accordance with the rules and regulations of the North Dakota department of insurance pertaining to administrative hearing procedures.

Domestic insurers retaining a certified public accountant on October 1, 1995, who qualify as independent shall comply with this chapter for the year ending December 31, 1996, and each year thereafter unless the commissioner permits otherwise.

Domestic insurers not retaining a certified public accountant on October 1, 1995, who qualify as independent may meet the following schedule for compliance unless the commissioner permits otherwise:

1. As of December 31, 1996, file with the commissioner:
   a. Report of independent certified public accountant.
   b. Audited balance sheet.
   c. Notes to audited balance sheet.
2. For the year ending December 31, 1996, and each year thereafter, the insurers shall file with the commissioner all reports required by this chapter.

Foreign insurers shall comply with this chapter for the year ending December 31, 1996, and each year thereafter, unless the commissioner permits otherwise.

History: Effective October 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-03-07, 26.1-03-11.1

TITLE 50

Medical Examiners, Board of

NOVEMBER 1995

CHAPTER 50-02-05

50-02-05-02. Requirements for licensure by reciprocity or endorsement. Graduates of foreign medical schools who have a license from another state will not be licensed in North Dakota by either reciprocity or endorsement unless licensure was secured by passing the federation licensing examination, or the United States medical licensing examination, and the candidate has fulfilled other North Dakota licensure requirements. However, those applicants seeking licensure by either reciprocity or endorsement who have passed a written examination in another state before the advent of the federation licensing examination may be considered on an individual basis. ~~They may also be required to pass component II of the federation licensing examination.~~

History: Amended effective December 1, 1988; November 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-21

50-02-05-06. FLEX examination requirements. ~~Any person wishing to write the federation licensing examination in this state must meet the following requirements:~~

~~1. Satisfactory completion of one year of internship or residency training in a United States hospital approved by the American medical association or a Canadian hospital approved by the Canadian medical association. An applicant participating in the American medical association approved fifth pathway program must also have completed one year of supervised clinical training in the United States.~~

2.--Possession--of--a--standard-educational-commission-for-foreign medical-graduates-certificate--where--required--for--licensure under-these-rules.

3.--Payment-of-the-applicable-examination-fee. Repealed effective November 1, 1995.

History: Amended-effective-February-1,-1988.
General Authority: NDCC-28-32-02
Law Implemented: NDCC-43-17-18(4)

CHAPTER 50-02-06

50-02-06-05. Consideration for licensure. Consideration for licensure will be given to those candidates who, in addition to meeting the other licensing requirements, have successfully passed the federation licensing examination with-a-score-of-seventy-five-or-better, and-met-the-other-statutory-qualifications, or the United States medical licensing examination.

History: Amended effective December 1, 1988; November 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-18

CHAPTER 50-02-07

50-02-07-06. Annual registration - Good standing required. No application-for-annual-registration-shall-be-granted,-nor-shall-the--fee therefor--be--accepted,--from--a--licensed--physician--whose--license-to practice-medicine-has-been-revoked-or--canceled--by--another--state,--or whose--license--to--practice-in-another-state-is-conditioned-by-terms-of probation,-or-may-be-affected-by--pending--disciplinary--proceedings--in another--state,--until-the-applicant-appears-personally-before-the-board and-demonstrates-that-annual-registration-is-consistent-with-the--public interest. Repealed effective November 1, 1995.

History: Effective--November-1,--1982;--amended--effective--February-1, 1985.
General Authority: NDCC-28-32-02
Law Implemented: NDCC-43-17-18(6),-43-17-31(9)

CHAPTER 50-02-11

50-02-11-01. Eligibility for examination. To be eligible for parts I and II of NBME (national board of medical examiners licensing examination) or for steps 1 and 2 of USMLE (United States medical licensing examination), the applicant must be in one of the following categories:

1. A medical student officially enrolled in, or a graduate of, a United States or Canadian medical school accredited by the liaison committee on medical education (LCME).

2. A medical student officially enrolled in, or a graduate of, a United States osteopathic medical school accredited by the American osteopathic association (AOA).

3. A medical student officially enrolled in, or a graduate of, a foreign medical school and eligible for examination by the educational commission for foreign medical graduates (ECFMG) for its certificate.

To be eligible for NBME part III or USMLE step 3, the applicant must (a) have obtained the MD degree or the DO degree; (b) have completed successfully both parts I and II or steps 1 and 2 or part I and step 2 or step 1 and part II or FLEX component 1; (c) if a graduate of a foreign medical school, be certified by the ECMFG or have successfully completed a fifth pathway program; and (d) have completed, or be near completion of, at least one postgraduate training year in a program of graduate medical education accredited by the accreditation council for graduate medical education or the American osteopathic association.

History: Effective November 1, 1993; amended effective November 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-18

50-02-11-04. Examination combinations acceptable. Any applicant who has successfully completed part I (NBME) or step 1 (USMLE) plus part II or step 2 plus part III or step 3; or FLEX component 1 plus step 3; or part I or step 1, plus part II or step 2, plus FLEX component 2 shall be deemed to have successfully completed a medical licensure examination as required by subsection 4 of North Dakota Century Code section 43-17-18, if such combination of testing was completed before January 1, 2000.

History: Effective November 1, 1993; amended effective November 1, 1995.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-18

CHAPTER 50-03-01

50-03-01-09. Number of assistants under physician's supervision limited. No physician may ~~have under the physician's supervision~~ act as primary supervising physician for more than two physician assistants currently qualified under section 50-03-01-02, unless compelling reasons are presented to and approved by the board.

History: Amended effective July 1, 1988; November 1, 1993; November 1, 1995.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-02(10)

CHAPTER 50-03-03

50-03-03-03. Certification requirement exemption. Any person possessing emergency medical services skills over and above those ~~found in the emergency medical technician basic national standard training curriculum~~ defined by the North Dakota state department of health as basic life support skills may perform those skills only if under the direction of a physician who has assumed responsibility for the services of that person through a written statement on file with the office of the board of medical examiners. That person must have met the training requirements of the North Dakota state department of health for such skills.

History: Effective February 1, 1985; amended effective November 1, 1995.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-02(10)

TITLE 75

Department of Human Services

OCTOBER 1995

CHAPTER 75-02-02.1

AGENCY SYNOPSIS: New North Dakota Administrative Code chapter 75-02-01.1, Aid to Families with Dependent Children and the repeal of North Dakota Administrative Code chapter 75-02-01, Aid to Families with Dependent Children.

A public hearing was conducted on April 10, 1995, in Bismarck, concerning proposed new North Dakota Administrative Code chapter 75-02-01.1, Aid to Families with Dependent Children, and the repeal of North Dakota Administrative Code chapter 75-02-01, Aid to Families with Dependent Children. The rules were proposed as interim final rules effective March 1, 1995.

Proposed new chapter 75-02-01.1, Aid to Families with Dependent Children, is a general update of rules governing the program. The existing rules have not been substantially modified since October 1981, and the program has since seen numerous changes on a federal level. The proposed new chapter, in addition to a general update, includes details previously found only in federal law or in the department's policy manuals. It includes provisions related to the Aid to Families with Dependent Children - Unemployed Parent program, to intentional program violations, and to the Job Opportunities and Basic Skills (JOBS) program.

The provisions related to the Aid to Families with Dependent Children - Unemployed Parent program allow a qualifying family to receive benefits for up to six months in a 12-month period, provided the principal wage earner in that family participates in required job search and work programs.

The provisions relating to intentional program violations establish periods of disqualification that may be imposed on members of participating families who can be shown to have intentionally violated program requirements.

The provisions relating to the Job Opportunities and Basic Skills (JOBS) program identify the individuals required to participate, describe all program components, and establish limitations on those program components. They also describe the process by which an employability plan is developed for a participating individual.

The proposed repeal of North Dakota Administrative Code chapter 75-02-01, Aid to Families with Dependent Children, is necessary due to the adoption of its replacement, chapter 75-02-01.1.

STAFF COMMENT: Chapter 75-02-01.1 contains all new material but is not underscored so as to improve readability.

CHAPTER 75-02-01.1
AID TO FAMILIES WITH DEPENDENT CHILDREN

75-02-01.1-22	Disqualifying Transfers
75-02-01.1-23	Social Security Numbers
75-02-01.1-24	Eligibility for Aliens
75-02-01.1-25	Ineligibility Due to Participation in Strikes
75-02-01.1-26	Limitation on Benefits to Pregnant Women
75-02-01.1-27	Age of Parent - Effect on Eligibility
75-02-01.1-28	Assignment of Right to Support
75-02-01.1-29	Good Cause for Failure or Refusal to Cooperate in Obtaining Support or Establishing Paternity
75-02-01.1-30	Basic Requirements
75-02-01.1-31	Determining Membership of the Assistance Unit
75-02-01.1-32	Combined Supplemental Security Income and Aid to Families With Dependent Children Households
75-02-01.1-33	Recipients Living Out of State
75-02-01.1-34	Grant Amount in Whole Dollars
75-02-01.1-35	Benefits Less Than Ten Dollars
75-02-01.1-36	Income Described
75-02-01.1-37	Excluded Income
75-02-01.1-38	Gross Income Test
75-02-01.1-39	Budgeting Process
75-02-01.1-40	Income Considerations
75-02-01.1-41	Earned Income Considerations
75-02-01.1-42	Disregarded Income
75-02-01.1-43	Lump Sums Received by a Member of Assistance Unit
75-02-01.1-44	Deductions for Voluntary or Required Payments of Current Support
75-02-01.1-45	Deduction for Work-Related Dependent Care
75-02-01.1-46	Good Cause for Refusing or Terminating Employment
75-02-01.1-47	Unearned Income Considerations
75-02-01.1-48	Reinstatement Following Suspension or Case Closing
75-02-01.1-49	Computing Payment for First and Second Months of Eligibility
75-02-01.1-50	Computing Payment for Months Following the Second Month of Eligibility
75-02-01.1-51	Computing Payment Where Individuals are Added to the Assistance Unit
75-02-01.1-52	Computing Payments Where Individuals Leave the Assistance Unit
75-02-01.1-53	Computing Payment Where Stepparent or Alien Parent Income is Deemed
75-02-01.1-54	Computing Benefits When an Individual's Needs are Deleted From the Grant
75-02-01.1-55	Computing Payment for a Child in Boarding School
75-02-01.1-56	Budgeting in Unusual Circumstances
75-02-01.1-57	Essential Services
75-02-01.1-58	Catastrophic Events

75-02-01.1-59	Medical Insurance Premiums
75-02-01.1-60	Child Restraint Systems
75-02-01.1-61	Unrestricted Payment of Benefits - Exceptions
75-02-01.1-62	Payee
75-02-01.1-63	Making Payment - Correcting Overpayments and Underpayments
75-02-01.1-64	Intentional Program Violation - Disqualification Penalties
75-02-01.1-65	Job Opportunities and Basic Skills Program - Definitions
75-02-01.1-66	Job Opportunities and Basic Skills Program - Basic Requirement
75-02-01.1-67	Job Opportunities and Basic Skills Program - Participation Requirements in Households Receiving Unemployed Parent Benefits
75-02-01.1-68	Job Opportunities and Basic Skills Program - Components
75-02-01.1-69	Job Opportunities and Basic Skills Program - Tribal Program
75-02-01.1-70	Job Opportunities and Basic Skills Program - Exemptions From Participation
75-02-01.1-71	Job Opportunities and Basic Skills Program - Referral
75-02-01.1-72	Job Opportunities and Basic Skills Program - Orientation, Assessment, and Employability Planning
75-02-01.1-73	Job Opportunities and Basic Skills Program - Supportive Services
75-02-01.1-74	Job Opportunities and Basic Skills Program - Educational Activities Related to Secondary Education, Basic and Remedial Education, or Education in English Proficiency
75-02-01.1-75	Job Opportunities and Basic Skills Program - Job Skills Training
75-02-01.1-76	Job Opportunities and Basic Skills Program - Job Readiness Activities
75-02-01.1-77	Job Opportunities and Basic Skills Program - Job Search
75-02-01.1-78	Job Opportunities and Basic Skills Program - Job Development and Job Placement Activities
75-02-01.1-79	Job Opportunities and Basic Skills Program - Postsecondary Education
75-02-01.1-80	Job Opportunities and Basic Skills Program - Self-Initiated Education Activity
75-02-01.1-81	Job Opportunities and Basic Skills Program - Community Work Experience Program
75-02-01.1-82	Job Opportunities and Basic Skills Program - Alternate Work Experience
75-02-01.1-83	Job Opportunities and Basic Skills Program - On-The-Job Training
75-02-01.1-84	Job Opportunities and Basic Skills Program -

75-02-01.1-01. Definitions. For the purposes of this chapter:

1. "Aid to families with dependent children" means a program administered under North Dakota Century Code chapter 50-09 and title IV-A of the Social Security Act [42 U.S.C. 601 et seq.].

2. "Applicant" means an individual who is seeking a benefit under this chapter.

3. "Asset" means any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.

4. "Assistance unit" means an individual or group of related individuals within a household whose needs are recognized in a grant of benefits through aid to families with dependent children, including the parents of any dependent child and all brothers and sisters of any dependent child, whether by whole blood, half-blood, or adoption, but not including:

   a. Any child, parent of an eligible dependent child, or other caretaker relative who:

      (1) Receives supplemental security income benefits;

      (2) Is an alien who does not meet citizen and alienage requirements;

      (3) Is an alien and is ineligible for aid to families with dependent children benefits because of the application of sponsor-to-alien deeming;

      (4) Is ineligible for aid to families with dependent children benefits as the result of the imposition of a sanction; or

      (5) Was eligible for aid to families with dependent children benefits, but who became ineligible due to the receipt of lump sum income, provided that at least one dependent child, not ineligible due to the receipt of lump sum income, remains in the household.

b. Roomers and boarders; or

c. Household members who are not legal dependents of a member of the assistance unit.

5. "Base month" means the month, immediately before the processing month, about which the income and circumstances of the assistance unit are evaluated to determine the amount of any aid to families with dependent children to be paid during the benefit month.

6. "Benefit month" means the calendar month immediately following the processing month.

7. "Bona fide funeral arrangement" means a written agreement between a member of the assistance unit and a funeral service practitioner, licensed funeral establishment, or cemetery association whereby the contractor promises to provide burial services or merchandise to a member of the assistance unit in exchange for funds paid by a member of the assistance unit, but does not mean any contract of insurance.

8. "Burial plot" means a conventional gravesite, mausoleum, or any other repository customarily and traditionally used for the bodily remains of a deceased individual.

9. "Caretaker relative" means the relative so designated by the assistance unit who:

a. Lives with an eligible dependent child;

b. Is a pregnant woman, caretaker relative to no dependent child, in the last trimester of her pregnancy; or

c. Lives with a dependent child, under age eighteen and receiving supplemental security income benefits, who is the last child in the home.

10. "Child support agency" means any entity created by a county agency or any combination of county agencies, in execution of the county agency's duties under subsection 5 of North Dakota Century Code section 50-09-03.

11. "County agency" means the county social service board.

12. "Department" means the North Dakota department of human services.

13. "Dependent child" means a needy child:

a. Who lives in the home of a relative by birth, marriage, or adoption;

b. Who has been deprived of parental support or care by reason of:

(1) The continued absence of a parent from the home, other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States;

(2) The death of a parent;

(3) The unemployment of the parent who is the principal wage earner; or

(4) The physical or mental incapacity of a parent; and

c. Who is:

(1) Under the age of eighteen; or

(2) Under the age of nineteen and a full-time student in a secondary school or the equivalent (secondary school) level in a vocational school, or technical school, if, before the end of the calendar month in which the student attains age nineteen, the student may reasonably be expected to complete the program of such school.

14. "Earned income" means income currently received as wages, salaries, commissions, or profits from activities in which an individual or family is engaged through either employment or self-employment. There must be an appreciable amount of personal involvement and effort, on the part of the individual or family, for income to be considered "earned".

15. "Eligible caretaker relative" means a caretaker relative who:

a. If, related to an eligible dependent child as a brother or sister, is not under sixteen years of age;

b. If deprivation of parental support or care is by reason of the unemployment of the parent who is the principal wage earner or incapacity of a parent, is the unemployed or incapacitated parent or the eligible dependent child's other parent (but not stepparent);

c. If deprivation of parental support or care is by reason of the death or continued absence of a parent, is the eligible dependent child's other parent (but not stepparent);

d. Is not a recipient of supplemental security income benefits; and

e. Is in financial need; or

f. Is a pregnant woman, caretaker relative to no other dependent child, who or whose husband is incapacitated.

16. "Family" includes an individual or group of related individuals within a household whose needs are recognized in a grant of benefits through aid to families with dependent children, the parents of any dependent child and all brothers and sisters of any dependent child, whether by whole blood, half-blood, or adoption, any child, parent of an eligible dependent child, or other caretaker relative who receives supplemental security income benefits. Family includes an alien who does not meet citizen and alienage requirements, an alien who is ineligible for aid to families with dependent children benefits because of the application of sponsor-to-alien deeming, an individual who is ineligible for aid to families with dependent children benefits as the result of the imposition of a sanction, an individual who was eligible for aid to families with dependent children benefits, but who became ineligible due to the receipt of lump sum income, or an individual who is a household member who is a legal dependent of a member of the assistance unit, but does not include roomers and boarders.

17. "Full calendar month" means the period that begins at midnight on the last day of the previous month and ends at midnight on the last day of the month under consideration.

18. "Full-time student" means a student who:

a. If in a secondary school, is enrolled in classes which, if completed, will earn the student four or more units of credit;

b. If in a vocational or technical school under state operation, a college, or a university, is enrolled in classes which, if completed, will earn the student twelve or more semester hours of credit during a regular term or six or more semester hours of credit during a summer term at an educational facility operating on a semester system, or twelve or more quarter hours of credit at an educational facility operating on a quarter system; or

c. If in a private vocational or technical school, is enrolled in classes which, according to a written statement from school officials, constitutes full-time enrollment.

19. "Ineligible caretaker relative" means a caretaker relative who is not an eligible caretaker relative.

20. "Living in the home of a relative" means a circumstance that arises when a relative assumes and continues responsibility for the day-to-day care and control of a child in a place of residence maintained by the relative (whether one or more) as the relative's own home. It includes situations in which the child or the relative requires medical treatment that requires a special living arrangement. It also includes situations, provided that the child is not absent from the home for a full calendar month, when the child:

    a. Physically resides in the home, but is under the jurisdiction of a court and is receiving probation services or protective supervision;

    b. Receives education while in an educational boarding arrangement in another community, including the Anne Carlsen school-hospital, if needed specialized services or facilities are unavailable in the home community or if transportation problems make school attendance near home difficult or impossible;

    c. Receives physical or speech therapy at Camp Grassick during the summer months;

    d. Receives special education at the school for the deaf or school for the blind, whether as a day student or a boarding student, except that a boarding student's needs are limited to those maintenance items that are not provided by the school; or

    e. Receives education at a federal boarding school in another community, provided that the child was not placed in that setting following removal from the child's home by court order following a determination that the child was abused, neglected, or deprived, except that the child is entitled to a clothing and personal needs allowance only if that allowance is made available for the child's use on a regular basis.

21. "Make an assistance payment" means, in the context of two-month retrospective budgeting, an activity that occurs on the date the department deposits an assistance payment check in the United States mail.

22. "Monthly income" means income from any source, either earned or unearned, which is computed and reduced to monthly units for the purpose of determining eligibility and benefits. Income may be received weekly, monthly, intermittently, or annually, but is computed and considered monthly.

23. "Needy" means:

a. An assistance unit, otherwise eligible under this chapter, whose countable income, less any applicable disregards, is less than the income identified in the basic requirements table for a family of the size and composition of the assistance unit;

b. An unwed parent or pregnant woman, resident of the Oppen Home, with an income of less than forty-five dollars per month; or

c. A child resident of a boarding school with an income of less than forty-five dollars per month.

24. "Nonlegally responsible relative" means a relative who is not the child's parent.

25. "Parent" means the child's mother or father, whether by birth or adoption, but does not mean:

a. An individual whose parental rights have been terminated with respect to that child; or

b. A stepparent.

26. "Part-time student" means an individual enrolled in a secondary school, vocational school, technical school, college, or university who is not a full-time student.

27. "Principal wage earner" means the parent in a two-parent household who earned the greater amount of verified income over the twenty-four-month period immediately preceding the month when application was made for benefits under the aid to families with dependent children program for unemployed parents; or, if both parents have earned identical amounts of income or no income in that twenty-four-month period, the parent so designated by the county agency.

28. "Processing month" means the month, immediately after the base month, and immediately before the benefit month, in which the county agency determines eligibility for, and the amount of, any aid to families with dependent children to be paid during the benefit month.

29. "Prospective budgeting" means:

a. The determination, made only with respect to the initial month of eligibility and the month immediately after the initial month of eligibility, based on the county agency's best estimate of the income and circumstances of the assistance unit in those months, of the amount of any grant of assistance in two months; and

b. The determination, made in all months, based on the county agency's best estimate of the income and circumstances of the assistance unit, of whether the income and circumstances anticipated for the benefit month, and the month immediately following the benefit month, will cause the assistance unit to be eligible in those two months.

30. "Recipient" means an individual who receives a benefit under this chapter.

31. "Regulation", as used in 45 CFR 205.10(a)(4)(i)(B) and (a)(15), includes any written statement of federal or state law or policy, including federal and state constitutions, statutes, regulations, rules, policy manuals or directives, policy letters or instructions, and relevant controlling decisions of federal or state courts.

32. "Relative by birth, marriage, or adoption" means an individual related to the dependent child by birth, whether by blood or half-blood, by marriage including a marriage that has been terminated by death or divorce, or by adoption, as father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, or first cousin.

33. "Retrospective budgeting" means a determination, made by the county agency during the processing month, based on income and circumstances of the assistance unit, during the base month, of the amount of any grant of assistance in the benefit month.

34. "Standard employment expense allowance" means the amount required by federal law to be first disregarded from the earned income of any child, relative applying for benefits under this chapter, or other individual whose needs are taken into account in determining eligibility under this chapter, but whose earned income is not required to be wholly disregarded as the income of a child who is a full-time student or a part-time student who is not a full-time employee.

35. "Stepparent" means a person, ceremonially married to a parent of a child, but who is not also a parent of that child by either birth or adoption.

36. "Supplemental security income" means a program administered under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].

37. "The Act" means the Social Security Act [42 U.S.C. 301 et seq.].

38. "Title II" means title II of the Social Security Act [42 U.S.C. 401 et seq.].

39. "Title IV-A" means title IV-A of the Social Security Act [42 U.S.C. 610 et seq.].

40. "Title IV-D" means title IV-D of the Social Security Act [42 U.S.C. 651 et seq.].

41. "Unearned income" means income which is not earned income.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-02. Application.

1. All individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so, without delay.

2. An application is a written request made by an individual desiring assistance under the aid to families with dependent children program, or by a proper individual seeking such assistance on behalf of another individual, to a county agency. A proper individual means any individual of sufficient maturity and understanding to act responsibly on behalf of the applicant.

3. An application must be in writing and signed on a prescribed application form.

4. A prescribed application form must be signed by the applicant if the applicant is physically and mentally able to do so. An application made on behalf of an applicant adjudged incompetent by a court must be signed by the guardian.

5. Information concerning eligibility requirements, available services, and the rights and responsibilities of applicants and recipients must be furnished to all who require it.

6. The date of application is the date of the request, provided the signed and completed application is returned to the county agency within ten days of the date of request, and is otherwise the date the signed and completed application is returned to the county agency.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-03. Applicant's or guardian's duty to establish eligibility. It is the responsibility of the applicant or guardian of the applicant for aid to families with dependent children to provide

information sufficient to establish the eligibility of each individual for whom assistance is requested, including the furnishing of a social security number, and the establishment of age, identity, residence, citizenship, medical and social information to be used for any necessary incapacity determination, and financial eligibility.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-04. Verification. While eligibility for aid to families with dependent children is determined in large measure on information supplied by the applicant or recipient, aspects of eligibility that must be supported by conclusive, documenting evidence include:

1. The existence of conditions requiring professional examinations or judgments to establish the existence of incapacity or pregnancy;
2. The amount and source of all income;
3. The equity value of assets whenever available information or the prudent person concept suggests that the equity value may exceed program limitations;
4. The basis for special need requests;
5. The relationship between any dependent child, caretaker relative, and any other member of the household whose presence, assets, or income may affect the composition, eligibility, or benefits of an assistance unit.
6. School attendance of any child sixteen or older;
7. Citizenship or alien status of household members;
8. The identity of each member of the assistance unit;
9. Proof of or application for a social security number;
10. Information sufficient to determine the need to participate in the job opportunity and basic skills program; and
11. Any other factor of eligibility for which available information is lacking, questionable, or inconclusive, and which suggests to a prudent person that further inquiry or documentation is necessary.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, ch. 50-09

75-02-01.1-05. Notification of program requirements. All applicants for aid to families with dependent children must be notified of generally applicable program requirements and of related services through the provision of brochures and through the provision of responses to inquiries made by applicants concerning program requirements. Applicants and recipients are responsible to call attention to their particular circumstances, and to inquire as to the effect of those circumstances on eligibility.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-06. Decision and notice.

1. A decision as to eligibility must be made promptly on applications, within forty-five days, except in unusual circumstances.

2. A decision as to eligibility on redeterminations must be made within thirty days.

3. Immediately upon an eligibility determination, whether eligibility can be found, ineligibility can be found, or eligibility cannot be determined, aid to families with dependent children applicants or recipients shall be notified by the county agency. Adequate notice of any decision terminating or reducing aid to families with dependent children benefits must be sent at the time required by 45 CFR 205.10.

4. The effective date a case is closed or suspended is the last calendar day of the month identified in the notice. The effective date of a transfer to medicaid-only status is the first day of the next month.

5. Errors made by public officials and delays caused by the actions of public officials do not create eligibility or additional benefits for an applicant or recipient who is adversely affected.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-07. Monthly report - Must be complete and timely.

1. When the county agency receives a completed monthly report, it shall process the payment only if all eligibility conditions are met. The county agency shall notify the assistance unit of any changes from a payment made in the month immediately

past. If payment is being reduced or assistance terminated as a result of information provided in the monthly report, the county agency shall send an adequate notice, mailed to arrive no later than the resulting payment or in lieu of the payment. The assistance unit may be reinstated to the payment amount made in the month immediately past if an appeal of the decision described in the notice is made within ten days of the date of the notice.

2. A county agency may terminate assistance if it has received no timely monthly report or has received only an incomplete report. The county agency shall send an adequate notice, mailed to arrive no later than the date it would have made payment if the agency had received a timely and complete monthly report. If the assistance unit notifies the county agency and files a complete report within ten days of the date of the notice, the county agency may accept the replacement report and provide for payment based on the report only if the information indicates that the assistance unit is still eligible but, unless the county agency determines that good cause exists for failing to file a timely report, without consideration of otherwise available earned income disregards. If, based on the replacement report, the assistance unit is found ineligible or eligible for an amount less than the payment amount made in the month immediately past, the county agency shall promptly notify the assistance unit of the right to a fair hearing and, if a hearing is requested within ten days of the date of the notice, the right to have payment reinstated to the payment amount made in the month immediately past.

3. A monthly report is timely, for purposes of avoiding loss of earned income disregards, if it is received by the county agency by the fifteenth day of the month or on the first working day after the fifteenth day of the month if that day falls on a Saturday, Sunday, or holiday and, for all other purposes, if it is received by the county agency by the fifth day of the month.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-08. Good cause for failure to submit complete and timely monthly report. "Good cause" for failure to submit a complete and timely monthly report exists only if:

1. The monthly report form was unavailable to the assistance unit because none was sent or it was lost in the mail;

2. The monthly report form was returned to the sender due to lack of sufficient postage;

3. The caretaker relative and all other responsible members of the assistance unit were absent from their usual place of residence, due to a death or serious illness in the family or the relocation of the assistance unit, during all the days between the day the report form was provided and the day is was to be returned;

4. Weather conditions prevented mailing by the assistance unit, delivery by the postal service, or receipt by the county agency;

5. The assistance unit was unable, despite reasonable efforts, to obtain necessary verification documents;

6. The county agency determines that the report form was incomplete due to the recipient's misinterpretation or misunderstanding of the form; or

7. The county agency determines, for some other reason, that the assistance unit could not reasonably have submitted a timely and complete report.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-09. Determining claims of good cause. Determinations concerning claims of good cause require the use of decisionmaking principles. These principles must be applied to the individual's statements and information to determine if the requirements of good cause are met. The decisionmaking principles are:

1. The individual claiming good cause is responsible to show that good cause exists.

2. Uncorroborated statements of fact are less believable than corroborated statements.

3. Statements by persons with a reputation for being untruthful are less believable than similar statements by persons without that reputation.

4. A reputation for being untruthful exists if the files maintained by the department, the county agency, or the job opportunities and basic skills program coordinator's agency contain evidence of untruthful statements made by the individual, or if the individual has made untruthful statements that are a matter of public record.

5. Statements by individuals with a reputation for failures or delays in furnishing information necessary for official action

are less believable than similar statements by individuals without that reputation.

6. A reputation for failures or delays in furnishing information necessary for official action exists if the files maintained by the department, the county agency, or the job opportunities and basic skills program coordinator's agency contain evidence of any failure or delay (without good cause) to furnish reports (including monthly reports) or necessary verifications, or a failure or delay in attending meetings or interviews intended to secure information necessary for official action.

7. A statement of fact, made by an individual with something to gain if that statement is regarded as true, is less believable than a similar statement made by an individual with little or nothing to gain.

8. An individual's explanations or reasons for claiming good cause must be judged by a reasonable person standard. A reasonable person is one who exercises those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for protection of their own interests and the interests of others.

9. Statements of fact made by the individual claiming good cause, or by other individuals who support or oppose the claim of good cause, are not presumed to be either truthful or untruthful. Rather, statements of fact must be evaluated to determine if they are more likely than not or less likely than not to be true.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-10. Residence.

1. There is no durational state residence required for eligibility for an aid to families with dependent children grant.

2. No individual who is otherwise eligible may be denied assistance under the aid to families with dependent children program if the individual resides in the state.

3. A resident of the state is one who:

   a. Is living in the state voluntarily with the intention of making his or her home there and not for a temporary purpose; or

b. At the time of application, is living in the state, is not receiving assistance from another state, and entered the state with a job commitment or seeking employment in the state, whether or not currently employed.

4. A child is a resident of the state in which he or she is living other than for a temporary basis.

5. Residence may not depend upon the reason for which the individual entered the state, except insofar as it may bear upon whether he or she is there voluntarily or for a temporary purpose.

6. Residence is retained until abandoned. Temporary absence from the state, with subsequent returns or intent to return when the purposes of the absence have been accomplished, must not interrupt continuity of residence.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-11. Deprivation of parental support or care. A dependent child must be shown to be both "deprived of parental support or care" and "needy", although a causal relationship between the two need not exist. The phrase encompasses the situation of any child who is in need and otherwise eligible, and whose parent has died, is continually absent from the home, is physically or mentally incapacitated, or is designated as principal wage earner and is unemployed. The requirement applies whether the parent was the chief breadwinner or devoted himself or herself primarily to the care of the child and whether or not the parents were married to each other. The determination that a child has been deprived of parental support or care is made in relation to the child's natural or adoptive parents.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-12. Continued absence of a parent.

1. For purposes of this chapter:

   a. "Deprived of parental support or care by reason of the continued absence of a parent" means a situation that occurs when all of the following factors are present:

      (1) The parent is physically absent from the home;

      (2) The nature of the parent's absence is such as to interrupt or terminate the parent's functioning as a

provider of maintenance, physical care, or guidance for the child; and

(3) The known or indefinite duration of the absence precludes relying on the parent to perform the parent's functions in planning for the present support or care of the child.

b. A "parent's absence is such as to interrupt or terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child" only if one of these three functions is totally interrupted or finally terminated.

2. A determination that a parent's absence has or has not interrupted or terminated the parent's functioning must be supported by information provided by the applicant or otherwise available to the county agency.

3. Except as provided in subsection 4, if all three of the conditions for showing deprivation by reason of the continued absence of a parent are met, the reason for the parent's absence and the length of the parent's absence is immaterial.

4. A parent who is performing active duty in uniformed service is "absent from the home" only if there is evidence that continued absence would have existed irrespective of the parent's serving in uniformed service. Acceptable evidence that such an absence exists includes proof of legal separation, desertion, or divorce, either final or in process. If there has been no legal action taken, some indication of how the parent came to be absent must be provided.

5. A parent temporarily living apart from the child or children while attending school or vocational training or working or seeking work in another community does not meet the requirements for "continued absence" as long as he or she continues to function as a parent, even if the level of support or care is deficient or diminished.

6. Types of parental absences frequently giving rise to dependency in children include:

a. Divorce. The continued absence of a parent may be established as the result of divorce.

b. Separation. Legal separation is an arrangement by which a husband and wife live apart, subject to a court order that may divide the parties' property, provide for spousal or child support, and provide for custody and visitation of children, but remain married. Such court orders may be temporary or permanent. Separation by mutual consent or agreement involves the discontinuance of the marital

relationship without legal action. Continued absence of a parent as a result of this arrangement can be established if there is no collusion between the parents to render the family eligible for aid to families with dependent children.

c. Imprisonment. Imprisonment of a parent is a type of parental absence that creates dependency among children. A parent who is a convicted offender, but is permitted to live at home while serving a court-imposed sentence by performing unpaid public work or unpaid community service during the workday, is deemed absent from the home. Continued absence exists only if the parent is sentenced to and serves a thirty-day or longer term of incarceration or community service unless:

(1) The term actually served is less than the sentence imposed;

(2) The term served is shortened by order of the court; and

(3) Assistance has been issued before information about the shortened term is received by the county agency.

d. Unmarried parenthood. A child born out of wedlock is deprived of parental support by reason of continued absence of a parent if the child's parents do not reside together.

e. Desertion. Desertion is the voluntary and willful abandonment, by a parent, of the parent's child or children without making adequate provision for the care and support of the child or children.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-13. Unemployment of the principal wage earner - Pay after performance.

1. For purposes of this section, "unemployed parent" means a principal wage earner who meets the requirements of subdivisions a through g.

a. A principal wage earner must verify that he or she was employed less than one hundred hours, including hours when holiday pay or sick pay was received, in any month necessary to determine benefits under this section.

b. A principal wage earner who is not self-employed must provide an employer's statement of any hours worked by the principal wage earner.

c. A principal wage earner who is self-employed must:

(1) Provide, as verification, a reliable written statement made by a disinterested third party who is not an employee of the principal wage earner or a member of the principal wage earner's family;

(2) Verify that one-twelfth of the annual net profit, as reported on the most recent federal income tax return filed by the principal wage earner, when divided by the federal hourly minimum wage, produces a result of less than one hundred; or

(3) Verify that 1.08 times the principal wage earner's net income from self-employment, as calculated under section 75-02-01.1-41, when divided by the federal hourly minimum wage, produces a result of less than one hundred.

d. A principal wage earner who is a seasonal worker must verify that employment of less than one hundred hours in a relevant month was not due to weather conditions when the principal wage earner would otherwise have had work available.

e. A principal wage earner must verify that the principal wage earner is not unemployed by reason of conduct or circumstances that result or would result in disqualification for unemployment compensation.

f. Upon application, a principal wage earner must report the actual number of hours worked in the calendar month immediately preceding the month of application and must estimate the number of hours the principal wage earner expects to work in the month of application.

g. Once determined eligible under this section, a principal wage earner must, on or before the fifth working day of each month, report the actual number of hours worked in the calendar month immediately preceding the month the report is made, must verify the hours worked, and must estimate the number of hours the principal wage earner expects to work in the month immediately following the month the report is made.

2. Benefits under this section are furnished on a calendar month basis.

3. Unemployed parent benefits under the aid to families with dependent children program are available only if all aspects of eligibility required under this chapter are established. Deprivation may be established for unemployed parent benefits by a showing, in the manner required by this section, that the principal wage earner is unemployed. Eligibility for unemployed parent benefits depends upon continued unemployment. Unemployed parent benefits are provided with a goal of encouraging families to become self-supporting as rapidly as possible.

4. Unemployed parent benefits are available only if both parents are living in the household. The parents are not required to be married to each other, but at least one child in the household must be the child of both parents. The parentage of that child must be adjudicated, established by marriage, or acknowledged by the father.

5. The principal wage earner must have had a prior connection with the labor force verified under either subdivision a or b.

   a. Within a one-year period prior to the date of eligibility, the principal wage earner must have received or been qualified for job insurance benefits under the laws of the state or of the United States. For purposes of this subdivision, railroad unemployment benefits are job insurance benefits. A principal wage earner is treated as qualified for job insurance benefits if the principal wage earner would have been eligible to receive benefits upon application or if the principal wage earner performed work which, had it been covered, would, together with any covered work, have made the principal wage earner eligible for job insurance benefits. To determine if a principal wage earner was qualified for job insurance benefits, for purposes of this subdivision, the total amount of earnings during the base period must be established. The base period is the first four quarters in the last five completed quarters prior to the quarter of application. The principal wage earner must have had earnings in at least two quarters in the base period; total base period earnings must be at least one and one-half times the highest quarter earnings in the base period; and base period earnings must be at least two thousand seven hundred ninety-five dollars.

   b. The principal wage earner must have had six or more quarters of work within any thirteen calendar quarter period ending within one year prior to the quarter of application for benefits. A "quarter of work" means a period of three consecutive calendar months ending March thirty-first, June thirtieth, September thirtieth, or December thirty-first in which the principal wage earner:

(1) Received earned income of not less than fifty dollars, including work study income;

(2) Participated in a community work experience program, work incentive program, or job opportunities and basic skills program, but not a tribal work experience program; or

(3) Attended, full time, an elementary school, a secondary school, or a vocational or training course designed to prepare the individual for gainful employment, or participated in an educational or training program under the Job Training Partnership Act of 1982, provided that no more than four quarters of activity under this paragraph may be treated as a quarter of work.

6. The principal wage earner, once designated, remains the principal wage earner for each month the household receives benefits under the program for unemployed parents, or has such benefits suspended. If the case is closed and the household is without such benefits for at least one full calendar month, a new application must be made and a new designation of the principal wage earner is required.

7. In determining which parent is the principal wage earner, the county agency shall:

   a. Consider the verified earnings of each parent;

   b. Use the best information available to designate the principal wage earner if reliable verification of earnings cannot be secured; and

   c. Designate the principal wage earner if both parents earned identical amounts of income or earned no income.

8. If the principal wage earner was employed one hundred hours or more in the calendar month immediately preceding the month of application, there is no eligibility in the month of application.

9. If the principal wage earner was employed less than one hundred hours in the calendar month immediately preceding the month of application, estimates that the principal wage earner expects to work less than one hundred hours in the month of application, and all other conditions of eligibility are met, eligibility may begin as early as the date of application. Payment of benefits, except as provided under subsection 18, may be made no earlier than after verification that the applicable requirements of subsection 16 or 17 are met.

10. If the principal wage earner was employed one hundred hours or more in the month immediately preceding the month of application, is employed less than one hundred hours in the month of application, estimates that the principal wage earner expects to work less than one hundred hours in the month immediately following the month of application, and all other conditions of eligibility are met, eligibility may begin as early as the first day of the month immediately following the month of application. Payment of benefits, except as provided under subsection 18, may be made no earlier than after verification that the applicable requirements of subsection 16 or 17 are met.

11. Once determined eligible under this section, if a principal wage earner reports working one hundred hours or more in the month immediately preceding the month the report is make, and estimates the principal wage earner expects to work one hundred hours or more in the month immediately following the month the report is made, eligibility under this section ends at the end of the month the report is made.

12. Eligibility for unemployed parent benefits may be established for no more than six months in any twelve-month period. For purposes of applying this limitation, a month is a benefit month if:

    a. Eligibility is established at any time during that month;

    b. The household actually receives benefits even though the family is totally ineligible;

    c. The household is eligible for benefits of less than ten dollars; or

    d. The household is eligible but receives benefits in excess of those for which it was eligible.

13. a. The principal wage earner may not, without good cause, refuse a bona fide offer of employment or training for employment in the calendar month immediately preceding authorization of benefits under this chapter.

    b. If an offer of employment or training was made through job service North Dakota, job service North Dakota shall determine if a bona fide offer was made and if there was good cause for refusing it.

    c. If an offer of employment or training was made other than through job service North Dakota, the county agency shall determine if a bona fide offer was made and if there was good cause for refusing it, considering the following factors:

(1) Whether there was a definite offer of employment at wages meeting any applicable minimum wage requirements and that are customary for such work in the community;

(2) Whether there were any questions as to the physical or mental ability of the principal wage earner to engage in the offered employment;

(3) Whether there were any questions of the working conditions such as risks to health, safety, or lack of workers' compensation protection;

(4) Whether the principal wage earner had a way to get to or from the particular job;

(5) Whether, as a condition of being employed, the principal wage earner would be required to join a company union, or to resign or refrain from any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization;

(6) Whether the position offered is vacant directly due to a strike, lockout, or other labor dispute;

(7) Whether the work is at an unreasonable distance from the principal wage earner's residence, considering the type of work the principal wage earner has been accustomed to doing, and travel to the place involves expenses substantially greater than that required for the principal wage earner's former work, unless a travel expense allowance is provided; and

(8) Whether the rate of pay, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

d. If it is determined that a bona fide offer of employment or training was refused by a principal wage earner without good cause, the entire assistance unit is ineligible for the calendar month beginning after the month in which the offer was refused.

14. The principal wage earner must accept any unemployment compensation benefits to which the principal wage earner is entitled. Any principal wage earner must provide verification, from job service North Dakota, as to whether the principal wage earner is qualified for unemployment compensation benefits; and, if qualified, must make application for unemployment compensation benefits. If a principal wage earner who qualifies for unemployment

compensation benefits fails to apply for those benefits, the needs of that principal wage earner must be deleted from the amount of benefits otherwise provided to the assistance unit under this chapter.

15. Pay after performance requires the principal wage earner to complete assigned activities prior to payment of benefits under this chapter. The assigned activities may vary in each of the potential six months of eligibility in a twelve-month period. The six months of potential eligibility need not be consecutive. Within the twelve-month period, the activities of the potential six eligible months must be completed in order. The first month of a twelve-month period is the first month that is a benefit month.

16. If a principal wage earner is a member of an assistance unit that has not previously received benefits under this section, except as provided in subsection 18:

    a. If application is made on or before the twenty-fourth day of a month, before benefits are issued in the first month the principal wage earner shall register with job service North Dakota.

    b. If application is made on or after the twenty-fifth of the first month, the pro rata benefit for the days remaining in that month after the date of application, may be issued in that month. Before benefits are issued in the second month the principal wage earner shall register with job service North Dakota and comply with the provisions otherwise applicable to the second month.

    c. Before benefits are issued in the second month the principal wage earner shall participate in a job search assistance workshop or comply with requirements applicable in the third month.

    d. Before benefits are issued in the third month the principal wage earner shall participate in a designated work program during that month. If the principal wage earner participates in a designated work program for less than sixty-four hours, benefits must be reduced to that proportion of benefits the assistance unit would otherwise receive that is the same proportion actual hours of participation is of sixty-four hours.

    e. Before benefits are issued in the fourth, fifth, and sixth months, the principal wage earner shall participate in a designated work program during each such month. If the principal wage earner participates in a designated work program for less than one hundred twenty-eight hours in each such month, benefits for that month must be reduced to that proportion of benefits the assistance unit would

otherwise receive that is the same proportion actual hours of participation is of one hundred twenty-eight hours.

17. If the principal wage earner is a member of an assistance unit that has previously received benefits under this section, except as provided in subsection 18:

    a. If application is made on or before the twenty-fourth day of the month, before benefits are issued in the first month the principal wage earner shall register with job service North Dakota and shall participate in a designated work program during that month. If the principal wage earner participates in a designated work program for less than sixty-four hours, benefits must be reduced to that proportion of the benefits the assistance unit would otherwise receive that is the same proportion actual hours of participation is of sixty-four hours or the pro rata benefit for the days remaining in the month, upon the date of application, whichever is less.

    b. If application is made on or after the twenty-fifth day of the first month, the pro rate benefit for the days remaining in that month, after the date of application, may be issued in that month. Before benefits may be issued in the second month, the principal wage earner shall register with job service North Dakota and comply with the provisions otherwise applicable to the second month.

    c. Before benefits are issued in the second through sixth months, the principal wage earner shall participate in a designated work program during each such month. If the principal wage earner participates in a designated work program for less than one hundred twenty-eight hours in each such month, benefits for that month must be reduced to that proportion of benefits the assistance unit would otherwise receive that is the same proportion actual hours of participation is of one hundred twenty-eight hours.

18. Once the principal wage earner commences performance in any month, benefits in the amount of ten dollars may be issued immediately, and any additional benefits due in that benefit month may be issued only as provided under subsections 16 and 17.

19. For purposes of subsections 16 and 17, "benefits the assistance unit would otherwise receive" includes only those amounts provided for basic requirements items.

20. A principal wage earner shall verify either the performance of the required activity or good cause for failure to perform.

21. Good cause for failure to perform the required activity exists only if good cause would exist for failure or refusal to participate in the job opportunities and basic skills program, except:

    a. If the principal wage earner is to ill to participate or refuses major medical care, the other parent in the household shall also show good cause for failure to perform; and

    b. Good cause may not be based on a claim that the designated work program assignment does not meet appropriate work or training criteria.

22. If the principal wage earner fails to perform activities required under this section, the second parent is thereafter treated as the principal wage earner subject to all provisions of this section.

23. A household is entitled to adequate notice of a determination that a principal wage earner failed without good cause to perform activities required under this section. The notice must inform the household that it may be reinstated to the payment amount made in the month immediately past if an appeal of the decision described in the notice is made within ten days of the date of the notice.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-14. Death of a parent. A child, if otherwise eligible for aid to families with dependent children, may be deprived of parental care by reason of the death of a parent. The applicant shall verify that the deceased individual is the parent of the child.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-15. Incapacity of a parent.

1. A child, if otherwise eligible for aid to families with dependent children, is "deprived of parental support or care" when the child's parent has a physical or mental defect of such a debilitating nature as to reduce substantially or eliminate the parent's capacity either to earn a livelihood or to discharge the parent's responsibilities as a homemaker and provider of child care for a period of thirty days or more.

2. The incapacity must be such that it reduces substantially or eliminates employment in the parent's usual occupation. It does not matter whether a parent was employed or fulfilled the role of homemaker prior to the onset of the asserted incapacity. Incapacity is established either when the person is unable to earn a livelihood or to act as a homemaker. A parent may also establish incapacity by demonstrating that the parent has reached age sixty-five.

3. A determination that a parent is disabled or blind, made by the social security administration, constitutes adequate substantiation of incapacity for purposes of this section.

4. A parent continues to be incapacitated, for purposes of this section, if the incapacity is not reasonably subject to remediation, or if the parent makes reasonable progress towards remediation of the incapacity. For purposes of this section, "reasonable progress towards remediation of the incapacity" means cooperation with medical practitioners who prescribe a course of treatment intended to remediate or limit the effect of the incapacity, including physical therapy, counseling, use of prosthesis, drug therapy and weight loss, cooperation with vocational practitioners, cooperation with vocational and functional capacity evaluations, and reasonable progress in a course of training or education intended to qualify the parent to perform an occupation which, with that training or education, the parent would have the capacity to perform.

5. A parent who engages in activities inconsistent with the claimed incapacity may be determined to not be incapacitated.

6. The department may require a parent to demonstrate reasonable progress towards remediation of the incapacity, and may set reasonable deadlines for the demonstrations.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-16. Legal custody. Courts may enter orders in child custody matters that place legal custody of a child with either parent or with both parents (joint custody), and may provide for visitation between a parent and child, which results in the visiting parent and child occupying the same place of residence. While intended to help children maintain relationships with both parents, these arrangements sometimes complicate the aid to families with dependent children eligibility determination process. For example, courts may order custody to shift from one parent to the other in alternating weeks, months, or other prescribed periods or that the child live with a given parent only on weekends or during the summer months. On occasion, the child's home may remain fixed and the parents take turns in occupying

that home with the child. Such orders have little or no bearing on whether or not a child is "deprived" as the result of a parent's absence from the home. It is the child's physical presence, rather than legal custody, that is relevant. The facts of each situation must be carefully evaluated. If deprivation is found to exist, one residence must be established for purposes of determining eligibility. The child's caretaker relative is the relative in whose home the child ordinarily spends the greater time. Both parents may not be certified as caretaker relatives for the same child for the same period of time. The state's policy and practice are not intended to interfere with the absent parent's wish to maintain a continuing relationship with the absent parent's children. On the contrary, reasonable visits are to be

encouraged. Visitations between absent parent and child can occasionally be so frequent as to raise doubts about whether there has been a disruption of parental functioning.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-17. Eligibility throughout month.

1. In the first month in which eligibility is established, based on any one application, the benefit amount is that pro rata portion of the monthly benefit amount equal to the percentage of the month remaining after the later of the first day of eligibility or the date of application, except:

   a. In the case of a family that has entered North Dakota from a state which issues grants twice a month, the benefit amount is that pro rata portion of the monthly benefit amount equal to the percentage of the month remaining after the later of the date coverage in the other state ends or the date of application;

   b. The benefit amount may be adjusted to correct an underpayment or overpayment arising out of previous periods of eligibility; and

   c. In the case of an assistance unit which includes members who were eligible for and receiving medicaid benefits at the time the unit requests aid to families with dependent children, if the assistance unit provides all necessary verification and a completed application within forty-five days or by the end of the month following the month of request, whichever is less, the benefit amount in the month of request is that pro rata portion of month remaining after the date of request.

2. In the second and subsequent months in which eligibility is established, based on any one application, if the monthly

reporting requirements are met, and, where applicable, the requirements of section 75-02-01.1-13, concerning unemployed parent cases are met, the household continues to be eligible throughout the month if eligible for any portion of the month.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-18. Asset considerations.

1. a. All assets that are actually available must be considered. Assets are actually available when at the disposal of a member of the assistance unit; when a member of the assistance unit has a legal interest in a liquidated sum and has the legal ability to make the sum available for support or maintenance; or when a member of the assistance unit has the lawful power to make the asset available or to cause the asset to be made available. A determination that an asset is deemed available is a determination that the asset is actually available.

   b. Assets must be reasonably evaluated.

   c. All assets owned individually or jointly by members of an assistance unit are deemed available to the unit.

   d. Assets owned jointly by a member of the assistance unit and an individual who is a member of a separate household, but has a legal obligation to support a member of the assistance unit, are presumed available to the assistance unit unless the applicant can show that the assets are in fact not available.

   e. If the assistance unit can demonstrate that only a portion of an asset is available, only that portion may be considered.

   f. An asset is not available if it cannot be practically subdivided or sold.

   g. A stepparent's assets, whether owned exclusively by the stepparent or jointly with the parent, are deemed available in their entirety to the parent. Because the assistance unit must include the parent, if technically eligible, the equity value of all assets, including the stepparent's assets, must fall within program asset limitations or the unit is ineligible.

   h. Assets owned jointly by a supplemental security income recipient and a member of the assistance unit must be apportioned equally between the supplemental security

income household and the assistance unit, unless the assistance unit establishes that some other distribution is required by law.

i. An asset may be temporarily unavailable while the family is taking reasonable measures to overcome a legal impediment.

j. Assets ordinarily available to the assistance unit may be rendered temporarily unavailable to members of such a unit who are being served by shelters for abused persons and families while the legal ramifications of the circumstances that led to the need for such services are explored.

k. As in all instances in which there is a question of ownership, the family must be given the opportunity to present evidence in rebuttal of the presumption that a joint account is an available asset. A successful rebuttal may result in a finding that the funds in the joint account are in fact not owned by the family. For example, when the funds are clearly available to the family only in the event of the coowner's death, access is restricted and the funds are therefore not an asset. The funds are likewise not an asset to the family if withdrawals from the account are possible only with the surrendering of the passbook, which is not accessible to the applicant or recipient, or with dual signatures and the coowner may not sign.

l. An asset may be sold or exchanged for another asset. An asset acquired in an exchange or with the proceeds from a sale continues to be treated as an asset subject to the asset limits, exemptions, and exclusions applicable to the type of asset acquired. This subdivision does not supersede other provisions of this chapter which describe or require specific treatment of assets, or which describe specific circumstances that require a particular treatment of assets.

2. The financial responsibility of any individual for any applicant or recipient of aid to families with dependent children is limited to members of the assistance unit. Such responsibility is imposed upon applicants or recipients as a condition of eligibility. Except as otherwise provided in this section, the assets of the members of the assistance unit are deemed available to an applicant or recipient, even if those assets are not actually contributed. For purposes of this subsection, biological and adoptive parents, but not stepparents, are treated as parents.

3. Aid to families with dependent children benefits, and any income, earned or unearned, which is taken into account in

determining the amount of a grant for a particular month, may not be treated as an asset in that month.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-19. Asset limits. No person may be found eligible for aid to families with dependent children benefits unless the value of the assistance unit's assets, not specifically excluded under this chapter, does not exceed one thousand dollars. In all instances, including determination of equity, property must be realistically evaluated in accord with current market value. Any reasonable costs associated with liquidation of excess assets must be taken into account.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-20. Excluded assets. The following assets are excluded from consideration in determining eligibility for aid to families with dependent children:

1. The home occupied by the assistance unit, including trailer homes being used as living quarters, and the land upon which the home stands, up to twenty contiguous acres, if rural, and up to two acres, if located within the established boundaries of a city;

2. Personal effects, wearing apparel, household goods, and furniture;

3. One motor vehicle with an equity value not in excess of one thousand five hundred dollars, not including the value of any special equipment intended to allow a handicapped person to operate the vehicle;

4. Indian trust or restricted lands, the proceeds from the sale thereof so long as those proceeds are impressed with the original trust, and the proceeds from the lease thereof so long as those proceeds are not commingled with other funds;

5. For the month of receipt and the following month, any refund of federal income taxes made to a member of the assistance unit by reason of 25 U.S.C. 32, relating to earned income tax credit, and any payment made to a member of the assistance unit by an employer under 26 U.S.C. 3507, relating to advance payment of earned income tax credit;

6. Real property for a period of nine consecutive months in which the family is making a good faith effort to sell; and

7. Indian per capita funds and judgment funds awarded by either the Indian claims commission or the court of claims after October 19, 1973, interest and investment income accrued on such Indian per capita or judgment funds while held in trust, and purchases made using interest or investment income accrued on such funds while held in trust. The funds must be identifiable and distinguishable from other funds. Commingling of per capita funds, judgment funds, and interest and investment income earned on those funds, with other funds, results in loss of the exclusion.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-21. Good faith effort to sell real property.

1. A good faith effort to sell is demonstrated only if the property owner:

   a. Arranges for regular advertising, including classified advertisements in newspapers, post "for sale" signs, and marketing efforts made by real estate agencies;

   b. Makes sales efforts including contacts with persons who respond to advertising efforts, persons known to be potential purchasers of property of the type offered, and entry into a listing agreement with a real estate agency; and

   c. Sets and publishes an asking price likely to result in a sale.

2. In order to secure an exclusion of real property that the owner is making a good faith effort to sell, the owner shall:

   a. Agree, if the property is sold within a nine-month period beginning with the month in which the property is first excluded, to use the net proceeds of the sale to repay aid to families with dependent children benefits received prior to the date of sale; and

   b. Agree, if the property is not sold within a nine-month period beginning with the month in which the real property is first excluded, to repay all aid to families with dependent children benefits received within that nine-month period.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-22. Disqualifying transfers.

1. The transfer of an asset, without adequate consideration, for the purpose of establishing or continuing eligibility for aid to families with dependent children, disqualifies the assistance unit from receipt of benefits for a period beginning with the month in which the transfer took place and continuing for a number of months equal to the result of dividing the assistance unit's total equity value in the transferred asset by the standard of need applicable to the assistance unit.

2. Notwithstanding subsection 1, a transfer is not disqualifying if:

   a. It is made by a person, who is not a responsible relative, by removing the name of a member of the assistance unit from a jointly owned account to which no member of the assistance unit contributed, provided that the name of the assistance unit member is removed:

      (1) If the existence of the account is discovered by the county agency while the unit is in the process of applying for assistance, before the initial payment is certified; or

      (2) If the existence of the account is discovered by the county agency while the unit is receiving aid to families with dependent children, within thirty days after that discover; or

   b. When transferred the asset was excluded for any reason other than a good faith effort to sell real property.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-23. Social security numbers. Before the needs of an individual may be included in the aid to families with dependent children grant, the individual shall furnish a social security number or proof that one has been applied for. No individual may be initially included in or added to a grant, including newborn children, until the social security number or proof of application has been received.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-24. Eligibility for aliens.

1. Except as provided in subsection 3, an alien who is lawfully admitted for permanent residence under color of law is eligible for aid to families with dependent children if all other requirements for eligibility are met.

2. An alien may be lawfully admitted for a temporary or specific period of time. Such aliens are not eligible for aid to families with dependent children because they do not meet the requirement that residence be permanent. Examples include aliens with student visas, visitors, tourists, some workers, and diplomats.

3. a. A sponsored alien is ineligible for aid to families with dependent children for a three-year period, beginning with the alien's entry into the United States, unless the sponsor:

   (1) No longer exists; or

   (2) Is unable to meet the alien's financial needs.

   b. A sponsored alien who applies for aid to families with dependent children within three years following entry into the United States shall, as a condition of eligibility, provide the county agency with information and verification sufficient to determine the portion of the sponsor's income and assets that may be deemed available to the alien.

   c. The sponsor and the sponsored alien are both liable for the amount of any overpayment of aid to families with dependent children benefits that results from the failure of either to provide information and verification sufficient to allow the county agency to correctly determine the portion of the sponsor's income and assets that may be deemed available to the alien.

   d. For purposes of this section:

      (1) "Sponsor" means an individual, public organization, or private organization who executed an affidavit of support or similar agreement on behalf of an alien, who is not the child of the sponsor or the sponsor's spouse, as a condition of the alien's entry into the United States.

      (2) "Sponsored alien" means an alien whose entry into the United States was conditioned on the execution of an affidavit of support or similar agreement by a sponsor who is not a parent or the spouse of a parent of the alien.

History: Effective March 1, 1995.

General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-25. Ineligibility due to participation in strikes.

1. If the caretaker relative is a parent, but not a stepparent, of any member of the assistance unit, no member of the assistance unit is eligible for aid to families with dependent children for any month if, on the last day of that month, the caretaker relative is participating in a strike.

2. A member of the assistance unit, who is not a caretaker relative described in subsection 1, is not eligible for aid to families with dependent children for any month if, on the last day of that month, the member was participating in a strike.

3. For purposes of this section:

   a. "Participating in a strike" means actual refusal, in concert with others, to provide services to one's employer.

   b. "Strike" means a work stoppage, including a work stoppage due to the expiration of a collective bargaining agreement or a deliberate slowdown or interruption of operations by a body of workers to enforce compliance with demands made on an employer.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-26. Limitation on benefits to pregnant women. A pregnant woman, not made ineligible by any other provision of this chapter, who is caretaker relative to no child, may receive aid to families with dependent children based upon the standard of need for one adult, without consideration of any additional pregnancy related needs, no earlier than the sixth month of pregnancy. In addition to medical verification of the pregnancy, the applicant shall verify the approximate date on which the pregnant woman is expected to deliver.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-27. Age of parent - Effect on eligibility.

1. For purposes of this section:

   a. "Adult parent" means a parent who is not a minor parent.

b. "Minor parent" means an individual, under the age of eighteen years, who has never been married and who:

(1) Is the parent of a dependent child living in the same household; or

(2) Is eligible as a pregnant woman who is a caretaker relative to no child.

2. A minor parent who lives with the minor parent's own parent (grandparent) or legal guardian is eligible only if eligibility may be established after consideration of the income, but not the assets, of the grandparents, with whom the minor parent lives, applying the following disregards:

a. The first ninety dollars of earned income of each employed grandparent, for work expenses.

b. An amount equal to the standard of need, not including special allowances, applicable to a household consisting of the grandparent or grandparents and any other individuals living in the household, who are or could be claimed as dependents of the grandparent or grandparents for federal income tax purposes, but who are not members of the assistance unit;

c. Amounts paid by the grandparent or grandparents, to support individuals who are not members of the household or the assistance unit, who are or could be claimed as dependents of the grandparent or grandparents for federal income tax purposes;

d. Amounts paid by the grandparent or grandparents, as child support or spousal support, to individuals who are not members of the household or the assistance unit.

3. An adult parent, who lives with the adult parent's own parent (grandparent) or legal guardian, if eligible, is eligible without consideration of the income or assets of the grandparents with whom the adult parent lives, except that regular contributions of money made by the grandparents to any member of the assistance unit must be considered.

4. For purposes of this section, a minor parent who becomes an adult parent while living with the minor parent's own parent or legal guardian is treated as an adult parent, effective the first day of the month in which the minor parent reaches age eighteen.

5. For purposes of this section, a minor parent who ends residency with the minor parent's own parents (grandparents) is treated as having ended residency on the first day of the month in which the minor parent left the grandparent's home.

6. For purposes of this section, a minor parent who resumes residency with the minor parent's own parents (grandparents) is treated as having resumed that residency on the first day of the month after the month in which the minor parent resumed residency with the grandparents.

7. A minor parent who does not live with the minor parent's own parents (grandparents), if eligible, is eligible without consideration of the income or assets of the grandparents except that regular contributions of money made by the grandparents to any member of the assistance unit must be considered. The grandparents remain legally responsible for the minor parent's support. The matter must be referred to the child support agency for the purpose of securing support from the grandparents for the minor parent as well as for the purpose of securing support for the minor parent's child from the child's absent parent.

8. No assistance unit may include the child of a minor parent, living with that minor parent, during any time when the minor parent is living in a foster home or child care institution and receiving a foster care maintenance benefit. Any amount reasonably necessary to the maintenance of such a child of the minor parent is included in the minor parent's foster care maintenance benefit.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-28. Assignment of right to support.

1. The child support agency must be notified, no later than two working days after the mailing of the initial grant to an assistance unit, of aid to families with dependent children, of any child who is a member of the assistance unit and whose eligibility for benefits is based on the continued absence of the child's parent from the home.

2. The applicant and, upon request, any member of the assistance unit for whom aid to families with dependent children is requested, as a condition of eligibility shall:

   a. Execute all necessary documents to protect the right of any member of the assistance unit, and the agency, to child support from the absent parent of such member;

   b. Cooperate in obtaining support and in establishing paternity of any child in the assistance unit with respect to whom paternity has not been established.

3. The requirement for the assignment of rights to support from absent parents continues through the month in which the latest of the following occurs:

   a. The child reaches age eighteen.

   b. The child graduates from high school, provided that graduation does not occur after the month of the child's nineteenth birthday.

   c. Child support obligations, imposed by a court for periods after the child reaches age eighteen, are terminated.

4. For purposes of this section:

   a. "Cooperate in obtaining support and in establishing paternity" includes:

      (1) Appearing at a state or local office designated by the department or county agency to provide information or evidence relevant to the case;

      (2) Appearing as a witness at a court or other proceeding;

      (3) Providing information, or attesting to lack of information, under penalty of perjury;

      (4) Paying to the department any support funds received that are covered by the assignment of rights; and

      (5) Taking any other reasonable steps to assist in establishing paternity and securing child support.

5. An individual shall cooperate in establishing paternity of a child born out of wedlock for whom the individual can legally assign rights, and obtaining child support and payments for the individual and any other individual for whom the individual can legally assign rights, unless cooperation is waived by the county agency for good cause.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-29. Good cause for failure or refusal to cooperate in obtaining support or establishing paternity.

1. The county agency, for good cause, may waive the requirement that an individual cooperate in obtaining support and establishing paternity if it determines that cooperation is against the best interests of the child. A county agency may

determine that required cooperation is against the best interests of the child only if:

a. The individual's cooperation in establishing paternity or securing child support is reasonably anticipated to result in:

(1) Physical harm to the child for whom support is to be sought;

(2) Emotional harm to the child for whom support is to be sought;

(3) Physical harm to the parent or caretaker relative with whom the child is living which reduces that individual's capacity to care for the child adequately; or

(4) Emotional harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it reduces that individual's capacity to care for the child adequately; or

b. At least one of the following circumstances exists, and the county agency believes that because of the existence of that circumstance, in the particular case, proceeding to establish paternity or secure child support would be detrimental to the child for whom support would be sought:

(1) The child for whom support is sought was conceived as a result of incest or forcible rape;

(2) Legal proceedings for the adoption of the child are pending before a court of competent jurisdiction; or

(3) The individual, otherwise required to cooperate, is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep or relinquish the child for adoption, and the discussions have not gone on for more than three months.

2. Physical harm and emotional harm must be of a serious nature in order to justify a waiver.

3. A waiver due to emotional harm may only be based on a demonstration of an emotional impairment that substantially impairs the individual's functioning. In determining a waiver, based in whole or in part upon the anticipation of emotional harm to the child, the parent, or the caretaker relative, the county agency shall consider:

a. The present emotional state of the individual subject to emotional harm;

b. The emotional health history of the individual subject to emotional harm;

c. Intensity and probable duration of the emotional impairment;

d. The degree of cooperation to be required; and

e. The extent of involvement of the child in the paternity establishment or support enforcement activity to be undertaken.

4. In all cases in which the county agency has determined that good cause exists based on a circumstance subject to change, a determination to grant a waiver must be reviewed no less frequently than every six months to determine if the circumstances which led to the waiver continue to exist.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-30. Basic requirements.

1. The basic requirements are those items, in those amounts, determined by the department to be necessary to maintain a minimum standard of living compatible with decency and health.

2. The basic requirements items include shelter at a cost of twenty-five percent of the total, food at a cost of forty percent of the total, clothing at a cost of ten percent of the total, fuel and utilities at a cost of fifteen percent of the total, personal needs at a cost of five percent of the total, and household supplies at a cost of five percent of the total.

3. The basic requirements items total cost, for a family of a particular size or composition, are the amounts set forth in the state plan for aid to families with dependent children as the standard of need, revised by July 1, 1969, pursuant to the requirements of 42 U.S.C. 602(a)(23), and as adjusted thereafter by the department and approved by the secretary of the United States department of health and human services.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-31. Determining membership of the assistance unit.

1. The assistance unit must include at least one eligible child unless:

   a. The only child receives supplemental security income benefits; or

   b. The assistance unit includes a pregnant woman in the last trimester of her pregnancy.

2. Any parent of a dependent child who resides in the home must be included in the assistance unit.

3. If the assistance unit includes a parent and a needy dependent child, any other child who resides in the home, for whom assistance is sought, and to whom the parent is a relative by birth, marriage, or adoption, must be included in the assistance unit.

4. If the family includes a parent and the parent's nonneedy dependent child or children, any other needy dependent child or children to whom the parent is a relative by birth, marriage, or adoption, must be included in an assistance unit which consists only of the needy dependent child or children.

5. If the family includes a parent, the parent's needy dependent child or children, and other dependent children to whom the parent is a relative by birth, marriage, or adoption, an assistance unit must include the parent and the parent's needy dependent child or children, and may include any needy dependent child or children to whom the parent is a relative by birth, marriage, or adoption, but exclude any nonneedy dependent child or children who is not the parent's child but to whom the parent is a relative by birth, marriage, or adoption, and who is not a brother or sister, whether by the whole or half-blood or by adoption, to a needy dependent child.

6. A minor parent who lives in the home of a parent of the minor parent is treated as a dependent child in an assistance unit that includes a parent of the minor parent unless:

   a. The minor parent is married or formerly married and divorced, but not formerly married in an annulled marriage;

   b. The minor parent has resided with the other parent of the minor parent's child; or

   c. The minor parent has lived separately and apart from the minor parent's parent or lawful guardian, with the consent or acquiescence of the minor parent's parent or lawful guardian, while managing his or her own financial affairs, regardless of the source of income, so long as it is not

from any activity declared to be a crime by the laws of North Dakota or the United States.

7. Family members who are receiving supplemental security income benefits may not be included in the assistance unit.

8. Family members who are ineligible for aid to families with dependent children benefits because of a sanction imposed under this chapter must be included in the assistance unit for the purpose of consideration of income and assets of the sanctioned family member.

9. Family members who are ineligible for aid to families with dependent children benefits because they do not meet citizenship or alienage requirements imposed under this chapter must be included in the assistance unit for the purpose of consideration of income and assets of those family members.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-32. Combined supplemental security income and aid to families with dependent children households.

1. With respect to the same month, no individual may receive benefits through both the supplemental security income program and the aid to families with dependent children program.

2. An individual who is receiving supplemental security income benefits may be a member of a household that includes members who are also members of an assistance unit, and may be an ineligible caretaker relative for a child in an assistance unit.

3. Assets or income owned solely by the recipient of supplemental security income benefits, including that portion of income disregarded in determining eligibility for supplemental security income benefits, may not be considered available to the members of the assistance unit.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-33. Recipients living out of state. An individual who receives aid to families with dependent children is free to travel without a loss of eligibility so long as the individual remains a resident of the state. An individual living out of state who remains a

resident of North Dakota is subject to the same standards and procedures for eligibility determinations and budgeting as a similarly situated individual present in the state.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-34. Grant amount in whole dollars. Aid to families with dependent children benefits are granted in whole dollar amounts. In calculating benefit amounts, numbers are rounded down to the nearest whole dollar.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-35. Benefits less than ten dollars.

1. Except as provided in subsection 2, no benefit payment may be issued if the calculated aid to families with dependent children benefit is less than ten dollars, but the assistance unit must be treated for all other purposes of this chapter, including the application of the retrospective budgeting cycle, as an assistance unit to which the department makes a benefit payment.

2. If the calculated benefit is reduced to less than ten dollars because of recovery of a previous overpayment, benefit payments of less than ten dollars must be issued.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-36. Income described.

1. All income that is actually available must be considered. Income is actually available when it is at the disposal of an applicant or recipient; when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make the sum available for support or maintenance; or when the applicant or recipient has the lawful power to make the income available or to cause the income to be made available. In specific circumstances, income available to persons other than the applicant or recipient is deemed available. This subsection does not supersede other provisions of this chapter which describe or require specific treatment of income, or which describe specific circumstances that require a particular treatment of income.

2. Income may be earned, unearned, or deemed. It may be received regularly, irregularly, or in lump sums. Income may be counted or excluded. It may be disregarded for some purposes, but not for others. Other sections of this chapter explain those treatments.

3. Earned income includes:

   a. Wages, salaries, commissions, bonuses, or profits received as a result of holding a job or being self-employed;

   b. Earnings from on-the-job training provided by the Job Training Partnership Act or the job opportunities and basic skills program;

   c. Wages received as the result of participation in the mainstream and green thumb programs;

   d. Earnings of recipients employed by schools under title I of the Elementary and Secondary Schools Act [20 U.S.C. 236, et seq.];

   e. Wages received from sheltered workshop employment;

   f. Sick leave pay or loss-of-time private insurance paid for the loss of employment due to illness or injury;

   g. Compensation for jury duty;

   h. Tips;

   i. Income from boarders;

   j. Income from room rentals;

   k. Income from participation in job corps; and

   l. Income from internship or stipends.

4. Unearned income includes:

   a. Social security, veterans benefits of any kind, private pensions, pensions provided to former employees of public entities, workers' compensation, unemployment benefits, union compensation during strikes, and military allotments;

   b. Rents paid without an appreciable amount of personal involvement and effort provided as a service to the tenant, mineral lease rentals, bonus payments and royalties, dividends, and interest paid;

c. Cash contributions from relatives provided to aid the assistance unit with living expenses;

d. Cash gifts;

e. Poor relief or general assistance payments made to any member of the assistance unit by a county agency or the bureau of Indian affairs; or

f. Any other form of income that is not earned income.

5. Deemed income includes:

a. In the case of income deemed from a stepparent or alien parent, that stepparent's or alien parent's entire gross income less:

(1) The standard employment expense allowance;

(2) An additional amount for the support of the stepparent or alien parent and any other individuals living in the home whose needs are not taken into account in making the eligibility determination and who are or could be claimed by the stepparent or alien parent as dependents for federal income tax purposes, but not including any sanctioned individuals or individuals who are required to be included in the assistance unit, but have failed to cooperate, equal to the standard of need amount for a family group of the same composition and size as the stepparent or alien parent and those other individuals described in this paragraph;

(3) Spousal support and child support payments actually being made to or on behalf of persons not living in the home; and

(4) Amounts actually being paid to individuals not living in the home who are or could be claimed by the stepparent or alien parent as dependents for federal income tax purposes.

b. In the case of income deemed from the sponsor of a sponsored alien, the entire gross income of the sponsor and the sponsor's spouse, less:

(1) Twenty percent of the total monthly earned income of the sponsor and the sponsor's spouse or one hundred seventy-five dollars, whichever is less;

(2) An amount equal to the standard of need amount for a family group of the same composition and size as the sponsor and those other individuals living in the

sponsor's household who are or could be claimed by the sponsor as dependents for federal income tax purposes, but whose needs are not taken into account in making an eligibility determination under this chapter;

(3) Spousal support and child support payments actually being made by the sponsor to or on behalf of individuals not living in the sponsor's household; and

(4) Amounts actually being paid by the sponsor to individuals not living in the sponsor's household who are or could be claimed by the sponsor as a dependent for federal income tax purposes.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-37. Excluded income. The following income must be excluded in determining eligibility for aid to families with dependent children:

1. Payments made to any member of the assistance unit under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended [Pub. L. 91-646; 42 U.S.C. 4601, et seq.];

2. Per capita payments made to members of Indian tribes under the Indian Tribal Judgment Funds Use and Distribution Act [25 U.S.C. 1407, et seq.], including all interest and investment income accrued on such funds while held in trust pursuant to a plan approved under the provisions of that Act pursuant to a plan approved by Congress prior to January 12, 1983, and any purchases made with such payments for so long as the payment is not commingled with other funds;

3. Income derived from submarginal lands held in trust for Indians, to the extent required by Public Law 94-114 [25 U.S.C. 459e], for so long as the income is not commingled with other funds;

4. Up to two thousand dollars per year of income received by an individual Indian derived from that Indian's interests in trust or restricted lands, as required by 25 U.S.C. 1408, for so long as the income is not commingled with other funds;

5. A loan from any source that is subject to a written agreement requiring repayment by the recipient;

6. Agent orange settlement payments;

7. Payments made under the Radiation Exposure Compensation Act [Pub. L. 101-426; 104 Stat. 920; 42 U.S.C. 2210 (note) (1993 Supp.)], for so long as the payment is not commingled with other funds;

8. The value of any supplemental food assistance received under the Child Nutrition Act of 1966, as amended [42 U.S.C. 1771, et seq.], and the special food service program for children provided under the National School Lunch Act, as amended [42 U.S.C. 1751, et seq.];

9. Food produced by individuals living in the home occupied by the assistance unit for consumption by those individuals;

10. Payments received by any member of the assistance unit, from the child nutrition and food distribution unit of the North Dakota department of public instruction, in reimbursement of the cost of furnishing meals and snacks by any member of the assistance unit who provides child care in the home, provided that the child care provider is licensed under North Dakota Century Code chapter 50-11.1, and is sponsored by a public or nonprofit private organization;

11. Income received as a housing allowance through any program sponsored by the United States department of housing and urban development and rent supplements or utility payments provided through the housing assistance program;

12. Food stamps;

13. The value of surplus commodities provided through the United States department of agriculture;

14. Payments for supporting services or reimbursement of out-of-pocket expenses made to individual volunteers serving as foster grandparents, senior health aides or senior companions, or to individuals serving in the service corps of retired executives, active corps of executives, and any other programs under title II of the Domestic Volunteer Services Act of 1973 [Pub. L. 93-113; 42 U.S.C. 5001, et seq.];

15. Payments made to volunteers in service to America under title I of the Domestic Volunteer Services Act of 1973 [Pub L. 93-113; 42 U.S.C. 4951, et seq.];

16. Any payment made as a result of the Alaska Native Claims Settlement Act, which is made tax exempt under Public Law 92-203 [43 U.S.C. 1601, et seq.];

17. The value of benefits received under the supplemental food program for women, infants, and children [Pub. L. 94-105; 42 U.S.C. 1786];

18. The value of general assistance benefits provided in voucher form by any county agency or the bureau of Indian affairs;

19. Assistance payments from other programs, agencies, or organizations that:

    a. Do not serve the same purposes as aid to families with dependent children; or

    b. Provide goods or services that are not included in the standard of need.

20. Low-income home energy assistance program benefits;

21. Scholarships, grants, and awards for educational purposes, which are given because of need or achievement by the bureau of Indian affairs, other federal sources, state sources, civic, fraternal, and alumni organizations, or relatives, to undergraduate students;

22. Work study program income earned by an undergraduate student;

23. Family subsidy program payments made by the department;

24. Returned deposits from rentals and from utility companies;

25. Adoption assistance payments;

26. Foster care payments and payments received as a retainer for services as an emergency shelter foster home; and

27. Small irregular cash gifts, which total, in any month, less than ten dollars times the number of members in the assistance unit.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-38. Gross income test.

1. A family is ineligible for aid to families with dependent children if the family's gross income, less the exclusions specified in subsection 2, exceeds one hundred eighty-five percent of basic requirements for a family of that family's size and composition.

2. For purposes of this section, only the following income is disregarded:

    a. For six months during any calendar year, income of a dependent child derived from a program carried out under

the Job Training Partnership Act, as originally adopted [29 U.S.C. 1501, et seq.];

b. For six months during any calendar year, any earned income of a dependent child who is a full-time student; and

c. Any refund of federal income taxes received as an earned income tax credit pursuant to 26 U.S.C. 32 and any payments made by an employer as an advance payment of earned income tax credit pursuant to 26 U.S.C. 3507.

3. The first stop in determining a family's financial eligibility is the gross income test. The process continues only if the gross income test is passed.

4. A family that passed the gross income test is subject to the test, in successive months, both for prospective budgeting and two-month retrospective budgeting.

a. If it appears that the family may be ineligible for only one month, and that ineligibility is caused by the receipt of extra payment from a regularly recurring source of income, the county agency shall continue to budget the case retrospectively and suspend the care.

b. If it appears that the family may be ineligible for more than one month, the county agency shall close the case.

c. Provided that the action is not inconsistent with requirements for determining eligibility in cases with income intermittently in excess of need, the family case is in a suspended status due to action under subdivision a, and the family becomes ineligible in the subsequent month, the county agency shall close the case.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-39. Budgeting process.

1. Budgeting is the process by which a family's need is determined. Through the process available, income is matched against basic requirements.

2. If nonexcluded income exceeds basic requirements, the family is not needy, for purposes of the aid to families with dependent children program, and the family is ineligible for program benefits.

3. For families that meet the gross income test, if nonexcluded income is less than basic requirements, the family is eligible

for program benefits equal to the difference between basic requirements and income.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-40. Income considerations.

1. All income must be considered in establishing eligibility and in determining the aid to families with dependent children benefit amount.

2. Income must be reasonably evaluated. A determination that income is deemed available is a determination that the income is actually available.

3. Income is considered to be received in the month in which it is actually received, except income actually available to be received is considered to be received in the month it is actually available.

4. A member of an assistance unit who receives regular income, other than on a monthly basis, may occasionally receive an extra check which causes the unit to become ineligible in the month of receipt. If the receipt of additional income is anticipated to result in ineligibility for only one month, the case may be suspended, rather than closed.

   a. If the additional income is received in the month of application (the first month of prospective budgeting), the application must be denied.

   b. If the additional income is received in the month after the month of application (the second month of prospective budgeting), the case must be prospectively suspended, and all income, except income derived from the last check received in that month, from the source of regular income, must be retrospectively budgeted.

   c. If the additional income is received in any month except the month of application or the month after the month of application, all income must be retrospectively budgeted.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-41. Earned income considerations.

1. Earned income must be verified and documented in the case record. Earned income may be received from a variety of sources.

2. Net earned income is determined by adding monthly net income from self-employment to other monthly earned income and subtracting the applicable deductions.

3. Except as provided in subsection 4, "monthly net income from self-employment" means:

   a. In the case of a self-employed individual whose business does not require the purchase of goods for sale or resale, seventy-five percent of gross monthly earnings from self-employment.

   b. In the case of a self-employed individual whose business requires the purchase of goods for sale or resale, seventy-five percent of the result determined by subtracting cost of goods purchased from gross receipts, determined monthly.

   c. In the case of a business that furnishes room and board, monthly gross receipts less one hundred dollars per room and board client.

   d. In the case of a self-employed individual in a service business that requires the purchase of goods or parts for repair or replacement, twenty-five percent of gross monthly earnings from self-employment.

   e. In the case of a self-employed individual who receives income other than monthly, if the most recently available federal income tax return accurately predicts income, twenty-five percent of gross annual income, plus the gain or minus the loss resulting from the sale of capital items, plus ordinary gains or minus ordinary losses, divided by twelve. If the most recent available federal income tax return does not accurately predict income because the business has been recently established, because the business has been terminated or subject to severe reversal, because the applicant or recipient makes a convincing showing that actual net income is substantially less than twenty-five percent of gross profit, or because the county agency determines for any reason that actual net profits are substantially greater than twenty-five percent of gross profit, an amount determined by the county agency to represent the best estimate of monthly net income from self-employment must be used. A self-employed individual shall provide, on a monthly basis, the best information available on income

and cost of goods. Income statements, when available, must be used as a basis for computation. If the business is farming or any other seasonal business, the annual net income, divided by twelve, is the monthly net income.

4. A self-employed individual who shows that gross income from self-employment, less the cost of purchased goods and building or equipment rental, is less than net income from self-employment, as calculated under subsection 3, may rely on the lesser amount. This calculation is not intended to recognize expenses that require no out-of-pocket payment (such as depreciation) which create an asset (such as equipment or property purchases or loan payments) or which are otherwise treated in this chapter (such as the personal employment expenses of payroll taxes, lunches, and transportation).

5. If earnings from more than one month are received in a lump sum payment, the payment must be divided by the number of months in which the income was earned, and the resulting monthly amounts are attributed to each of the months with respect to which the earnings were received.

6. Income received on a contractual basis is allocated equally to each of the months covered by the contract, regardless of when the contract payments are actually received, and is deemed available to be received in the months to which income is allocated.

7. The standard employment expense allowance recognizes all costs associated with employment, including transportation, uniforms, social security contributions, and income tax withholding.

8. The standard employment expense allowance is ninety dollars per month.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-42. Disregarded income.

1. If permitted under subsection 2, the following amounts of income must be disregarded, in the following order, in determining the amount of aid to families with dependent children:

   a. All of the earned income of each dependent child receiving benefits under this chapter who is a full-time student or a part-time student who is not a full-time employee, and if any income remains;

b. The standard employment expense allowance, and if any income remains;

c. (1) Thirty dollars plus one-third of remaining income in the first four consecutive months after eligibility is established if the first of those four months begins at least one year after the end of the last month in which the individual previously received aid to families with dependent children; or

(2) Thirty dollars per month in the eight consecutive months which begin in the fifth month after eligibility is established if the first month in which eligibility was established begins at least one year after the end of the last month in which the individual previously received aid to families with dependent children, and if any income remains;

d. The earned income of any dependent child derived from a program carried out under the Job Training Partnership Act (as originally enacted) [29 U.S.C. 1501, et seq.], for no more than six months in each calendar year, and if any income remains;

e. The first fifty dollars of any child support payments for that month received in that month, and the first fifty dollars of any child support payments for each prior month received in that month if the payments were made by the absent parent in the month when due, with respect to a dependent child for whom benefits under this chapter are received or sought, and if any income remains;

f. For six months during any calendar year, any earned income of a dependent child who is a full-time student and who is applying for benefits under this chapter, and if any income remains;

g. Any refund of federal income taxes received as an earned income tax credit pursuant to 26 U.S.C. 32, and any payments made by an employer as an advance payment of earned income tax credit pursuant to 26 U.S.C. 3507, and if any income remains;

h. An appropriate deduction for work-related dependent care allowance.

2. An income disregard is available only if:

a. The assistance unit is first determined to be eligible without benefit of the earned income disregard;

b. The assistance unit received aid to families with dependent children in at least one of the four months immediately preceding the month of reapplication; or

c. The eligible employed individual previously received aid to families with dependent children, but has not completed the twelve-month earned income disregard cycle, including months in which the earned income disregard was unavailable because:

(1) No payment was made because the calculated aid to families with dependent children benefit was less than ten dollars;

(2) The assistance unit voluntarily requested termination of assistance for the primary purpose of avoiding completion of the earned income disregard cycle or any part of that cycle;

(3) The assistance unit failed, without good cause, to file a signed and completed monthly report form by the fifteenth day of the month in which the report was due;

(4) A member of the assistance unit terminated or reduced employment, without good cause, in the thirty days preceding the month in which the earned income disregard was unavailable; or

(5) A member of the assistance unit refused a bona fide job offer, without good cause, in the thirty days preceding the month in which the earned income disregard was unavailable.

3. If, in any month, additional income received from a recurring source causes the assistance unit to be suspended as ineligible for one month, the month of suspension does not count as a month for purposes of this section.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-43. Lump sums received by a member of assistance unit.

1. When the assistance unit's income, after applying applicable disregards, exceeds the standard of need applicable to the unit because of receipt of nonrecurring earned or unearned lump sum income, to the extent that the income is not earmarked and used for the purpose for which it is paid, the assistance unit is ineligible for the full number of months derived by dividing the lump sum income and other income by

the monthly need standard for an assistance unit of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility begins with the payment month corresponding to the month of receipt of the lump sum income.

2. For purposes of this section, "lump sum income" includes retroactive monthly benefits provided under title II and other retroactive monthly benefits, payments in the nature of windfall, such as lottery or gambling winnings or inheritances, judgments or settlements for injuries to person or property to the extent that the payment is not earmarked and used for the purpose for which it was paid such as payments on back medical bills resulting from injuries, funeral and burial costs, and repair or replacement of lost or damaged assets, and workers' compensation awards.

3. The period of ineligibility may be shortened when:

   a. The applicable standard of need changes and the amount of benefits the assistance unit would have received also changes;

   b. The lump sum income or a portion of the lump sum income becomes unavailable to the assistance unit for a reason beyond the control of any member of the family, such as loss or theft of the income, collection of income in settlement of a court-imposed judgment, or life threatening circumstances; or

   c. Members of the assistance unit incur and pay for medical expenses of a type which is a covered service under medicaid.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-44. Deductions for voluntary or required payments of current support.

1. When determining the amount of aid to families with dependent children, the county agency shall deduct the lesser of fifty dollars or the amount actually paid, of any payment made, prior to approval of the application for benefits, by an absent parent to any member of the assistance unit as current child or spousal support.

2. Except as provided in subsection 1, when determining the amount of aid to families with dependent children, the county agency shall deduct the lesser of fifty dollars or the amount actually paid, of any payment made by an absent parent

pursuant to any judicial or administrative order for the payment of child support or spousal support, to any member of the assistance unit.

3. If two or more absent parents pay child support or spousal support to members of the assistance unit, no more than a total of fifty dollars may be deducted under this section.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-45. Deduction for work-related dependent care.

1. A deduction for an employed caretaker relative who is a member of the assistance unit may be made for the cost of necessary care of a child or incapacitated adult who is a member of the assistance unit, living in the home, and receiving benefits.

2. The deduction may not be made for the cost of dependent care provided by the caretaker relative's child or stepchild who is under twenty-one years of age, unless:

   a. The provider of dependent care does not live in the home occupied by the assistance unit;

   b. The provider of dependent care is eighteen years of age;

   c. The provider of dependent care was not claimed as a dependent on the most recent federal income tax return filed by the caretaker relative;

   d. A bona fide relationship of employer and employee exists between the caretaker relative and the provider of dependent care; and

   e. The provider of dependent care is not a member of the caretaker relative's assistance unit.

3. The deduction may not be made for the cost of dependent care provided to a child by that child's stepparent or parent who lives in the home occupied by the assistance unit.

4. The deduction is for the actual cost of care limited to:

   a. In the case of a child under age two, two hundred dollars per month;

   b. In the case of an incapacitated adult, two hundred dollars per month; or

c. In the case of a child two years of age or older, one hundred seventy-five dollars per month.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-46. Good cause for refusing or terminating employment. Good cause for terminating employment, reducing earned income, or refusing to accept employment exists if:

1. The individual claiming good cause provides medical verification that the individual's health renders the employment not feasible; or

2. The individual's substantially continuous presence in the household is necessary to care for another individual in the household to whom the individual owes a legal duty to provide care, who has a condition, verified by reliable medical evidence, which does not permit self-care or care by another household member.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-47. Unearned income considerations.

1. Unearned income must be verified and documented in the case record.

2. All unearned income must be treated as available in the month in which the income is received unless the income is disregarded. Unearned income must be applied to determine eligibility for, and the monthly benefit of, aid to families with dependent children.

3. Unearned income received annually or received in regular annual totals, but in irregular intervals, must be considered available, in each month, in an amount equal to one-twelfth of the annual total. The twelve-month period may be a calendar year or other twelve-month fiscal period appropriate to the nature of the payment. Sources of income appropriate for this treatment include:

   a. Nonexcluded lease payment income deposited in and disbursed through individual Indian moneys accounts maintained by individual Indians by the bureau of Indian affairs as proceeds from the lease of lands held by the federal government in trust for the Indian;

b. Lease payments made to persons for the use of lands occupied or owned by those persons unless the lease specifically provides for monthly payments or unless the lease is for a total term of less than one year;

c. Mineral lease payments, however denominated, except initial leasing bonus payments.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-48. Reinstatement following suspension or case closing.

1. If aid to families with dependent children is reinstated after a suspension of one month, all factors of eligibility are considered prospectively to determine eligibility. If prospective eligibility exists, the amount of payment is determined based on two-month retrospective budgeting.

2. Except as provided in subsection 1, if a change of circumstances results in either prospective ineligibility or retrospective ineligibility, the case must be closed.

3. If the assistance unit is for any reason ineligible in the month following the month of a suspension, the case must be closed.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-49. Computing payment for first and second months of eligibility. The county agency shall compute payment for the initial month of eligibility and the month following the initial month of eligibility through prospective budgeting.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-50. Computing payment for months following the second month of eligibility. The county agency shall compute payment for months following the second month of eligibility through two-month retrospective budgeting.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-51. Computing payment where individuals are added to the assistance unit.

1. If the individual being added to an assistance unit did not receive aid to families with dependent children in the previous month, benefits for the added individual are based on the pro rata portion of the additional monthly benefit amount increase equal to the percentage of the month remaining after:

   a. The date of birth of a newborn, provided that the request for the newborn is made within ten days of the date of birth and the newborn's social security number or application for social security number is furnished within thirty days of the request; and

   b. In all other cases, the later of the date of the request or the date the individual becomes eligible.

2. If the individual being added to an assistance unit received aid to families with dependent children in the previous month, payment amounts are determined through two-month retrospective budgeting.

3. The county agency shall determine eligibility prospectively by adding the income and assets of the added individual to the income and assets of the previously existing assistance unit.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-52. Computing payments where individuals leave the assistance unit.

1. If an individual who was an assistance unit member leaves the household during a benefit month, the individual is included in the assistance unit during that month.

2. The county agency shall determine eligibility for the remaining members of the assistance unit, in the month following the month in which the former assistance unit member left, through prospective budgeting.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-53. Computing payment where stepparent or alien parent income is deemed. The amount of an aid to families with dependent children benefit must be reduced by the deemed income of a stepparent or

an alien parent who lives in the home occupied by the assistance unit, but who is not a member of the assistance unit.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-54. Computing benefits when an individual's needs are deleted from the grant. If an individual is subject to the sanction of deletion of that individual's needs from the grant, that individual's income and assets are considered in determining the eligibility and needs of the remaining members of the assistance unit, but that individual's income may not be reduced by the standard employment expense allowance, any portion of the disregard otherwise available concerning thirty dollars or one-third of remaining earned income, or any portion of the disregard otherwise available concerning work-related care for children or dependents.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-55. Computing payment for a child in boarding school.

1. If a child leaves the residence occupied by the assistance unit to attend boarding school, the child is treated as having left on the first day of the month following the month in which the child actually left.

2. If a child returns from boarding school to the residence occupied by the assistance unit and the caretaker relative notifies the county agency of the return or anticipated return by the fifth day of the month of actual return, the child is treated as having returned on the first day of the month of actual return, but is otherwise treated as having returned on the first day of the month following the month of actual return.

3. Payment for any month in which a child who is a member of the assistance unit is in boarding school, or is treated as in boarding school, is, with respect to that child, limited to an allowance for clothing and personal needs.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-56. Budgeting in unusual circumstances.

1. Except as provided in subsection 3, if an eligible child lives in the home of a relative who is not the child's parent, the relative is ineligible if the relative's spouse also lives in the home.

2. If an eligible child lives in the home of a relative who is not the child's parent, and the spouse of that relative does not also live in the home, the relative:

   a. Must be excluded from the assistance unit if the relative's income and assets would cause the assistance unit to be ineligible; and

   b. May be included in the assistance unit if the relative requests inclusion in the assistance unit and the relative's income and assets do not cause the assistance unit to be ineligible.

3. Except as provided in subsection 5, if an eligible child lives in the home of a relative who is not the child's parent, but who is, and could in the absence of that child be, a member of an assistance unit which includes the spouse of the relative, the eligible child must be added as a member of the assistance unit of the relative.

4. Except as provided in subsection 5, if two or more eligible children are living in the home of an ineligible relative who is not a parent of either child, all eligible children must be included in a single assistance unit.

5. An individual who is a caretaker relative in an assistance unit may act as a temporary payee for a child who is a member of another assistance unit and with respect to whom the individual is a relative, while that child lives temporarily with the individual, to preserve the child's usual living arrangement with that child's caretaker relative who is:

   a. Hospitalized; or

   b. Incarcerated for ninety days or less.

6. If two or more relatives, who are each eligible caretakers for one or more children, but who are not married to each other and who have no children in common living in the household, live together, each caretaker and the child or children with respect to whom that caretaker is a relative must be budgeted as an assistance unit.

7. If a child lives with a relative who receives supplemental security income benefits, budgeting is based on the number of eligible individuals in the assistance unit.

8. If a child lives with a parent whose needs are deleted from the assistance unit due to the parent's failure to cooperate in obtaining support and in establishing paternity or in the job opportunities and basic skills program, the parent's income and assets must be considered in determining eligibility for the remaining members of the assistance unit. The income of the parent is subject to any applicable income disregards.

9. If an eligible caretaker leaves a child in the care of another individual while the caretaker pursues an educational program in another community, budgeting for the assistance unit must be done as if the unit resided together.

10. If a member of the assistance unit is hospitalized for an extended period of time, the medical plan must be consulted to determine if the individual is likely to return to the unit.

    a. If the individual is unlikely to return to the unit, the individual is deemed to have left the unit when the individual:

        (1) Is hospitalized; and

        (2) The medical plan is established.

    b. If the individual is likely to return to the unit:

        (1) The individual is deemed to remain in the home of the assistance unit for the first three complete calendar months of hospitalization; and

        (2) The individual is deemed to have need for only clothing and personal needs for months thereafter until the hospitalization ends or the medical plan changes to provide that the individual is unlikely to return to the unit.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-57. Essential services.

1. The county agency may determine that a service, which the family cannot perform independently because of infirmity or illness, is essential to the well-being of the assistance unit.

2. "Essential service" includes housekeeping services and child care during a caregiver's illness or hospitalization, attendant services, and extraordinary costs of accompanying a

member of the family to a distant medical or rehabilitation facility, arising out of a special need or condition of a member of the assistance unit or an ineligible caretaker who is not a parent of a child in the assistance unit and who is not receiving supplemental security income benefits.

3. The cost of essential services:

   a. May be provided for in the grant only if the cost has been established through negotiations with the provider of the services; and

   b. Must be budgeted and paid prospectively.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-58. Catastrophic events. The county agency may authorize vendor payments for the replacement of food, clothing, furniture, household equipment, and supplies, at a level comparable to that maintained by the assistance unit prior to a flood, fire, storm, or other disaster, if:

1. The availability of replacements, at no or nominal cost to the assistance unit, from sources such as the American red cross, has been determined and assistance with replacements coordinated; and

2. The loss of items for which replacement is sought has been determined.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-59. Medical insurance premiums.

1. The county agency may authorize payment for the cost of premiums for health insurance carried by the assistance unit or family. Payment may be made for only one policy of health insurance. If the policy covers individuals who are not members of the assistance unit, payment is limited to:

   a. If the assistance unit or insurer provides information that describes the manner in which the insurance company allocates premium charges between the insureds, the allocation attributable to the members of the assistance unit; or, if that allocation is unavailable;

b. The total premium amount, divided by the number of individuals covered, and then multiplied by the number of covered members of the assistance unit.

2. For purposes of this section, "premiums for health insurance" includes payments made for insurance, health care plans, or nonprofit health service plan contracts that provide benefits for hospital, surgical, and medical care, but do not include payments made for coverage that is:

   a. Limited to disability or income protection coverage;

   b. Automobile medical payment coverage;

   c. Supplemental to liability insurance;

   d. Designed solely to provide payments on a per diem basis, daily indemnity, or nonexpense-incurred basis; or

   e. Credit accident and health insurance.

3. Payment for the cost of premiums for health insurance:

   a. May be provided in the grant only if the cost or pro rata cost has been established; and

   b. Must be budgeted and paid prospectively.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-60. Child restraint systems. The county agency may authorize payment for the verified cost of an approved child restraint system designed to secure a child while riding in a passenger vehicle.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-61. Unrestricted payment of benefits - Exceptions.

1. The usual method of providing benefits under this chapter is through payments in cash, check, or warrant, immediately redeemable at par, made to the caretaker relative or legal guardian at regular intervals, with no restrictions on the use of the funds. This practice is followed because recipients of benefits do not, by virtue of their need for benefits, lose the capacity to select how or when the needs of the assistance unit must be met. If the caretaker relative or other members of the household manage funds in a manner that is clearly

detrimental to members of the assistance unit, or if the caretaker relative is subject to sanction for nonconformance to program requirements, protective payments may be used to assist the assistance unit in financial management.

2. a. A determination that there is a detrimental mismanagement of funds may be based on:

(1) Continued failure to plan for and make necessary expenditures during periods for which benefits are provided;

(2) Continued failure to provide children in the assistance unit with proper food, clothing, or housing so as to threaten the chances of those children for healthy growth and development;

(3) Persistent failure to pay the cost of rent, food, utilities, school supplies, or other essentials;

(4) Repeated loss of housing due to nonpayment of housing costs; or

(5) Repeated failure to pay debts that result in attachments of or levies against current income.

b. The fact that debts are not paid on a timely basis may not be the sole basis for a determination that there is detrimental mismanagement of funds unless relevant factors, including the following, have been considered:

(1) Whether the family has experienced an emergency or extraordinary event that reasonably required the expenditure of funds ordinarily used to meet the needs of the assistance unit;

(2) Whether reasonable payments on necessarily incurred debt exceeds the family's income; or

(3) Whether the family has withheld payment on a debt as a part of a legitimate dispute concerning the amount of the debt or the terms or performance of a contract out of which the debt arises.

3. a. The county agency may select, appoint, and remove a protective payee to receive and manage an assistance unit's benefits. In making a selection, the county agency shall consider any individual nominated by the caretaker relative.

b. The protective payee is a fiduciary responsible for assuring that the benefits are expended to achieve the

maximum reasonable benefit for the assistance and for working cooperatively with the county agency.

c. The protective payee may be furnished information about the assistance unit, from the county agency's records, sufficient to allow the protective payee's role to be carried out. The information furnished to the protective payee under this section remains confidential information subject to the provisions of North Dakota Century Code section 50-06-15.

d. The status of an assistance unit for which a protective payee has been appointed must be reviewed by the county agency as often as necessary, but no less often than every six months, to determine if:

(1) The protective payee is performing satisfactorily;

(2) The assistance unit should be restored to unrestricted money payment status; and

(3) Some other arrangement should be sought for the care of children who are members of the assistance unit.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-62. Payee. Each assistance unit shall have a designated payee who may be:

1. The caretaker relative with whom the child lives;

2. A legally appointed guardian of the caretaker relative with whom the child lives;

3. An individual acting temporarily as a caretaker relative during periods when the child's usual caretaker relative is:

a. Hospitalized; or

b. Incarcerated for ninety days or less; or

4. A protective payee.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-63. Making payment - Correcting overpayments and underpayments.

1. A payment of aid to families with dependent children is deemed to be complete as of 12:01 a.m. on the first day of the month for which it is issued.

2. Except as provided in subsection 3, a payment check must be endorsed by the payee, or an attorney-in-fact for the payee, with a signature, written in ink, in the same form as the indicated payee.

   a. If the payee is a guardian, the endorsement must so indicate and must name the ward.

   b. If the endorsement is by an attorney-in-fact of the payee, the endorsement must so indicate and must name the attorney-in-fact.

3. If the payee dies or becomes absent before a properly issued check has been endorsed, an endorsement may be made:

   a. By the payee's spouse or surviving spouse, if that spouse has been living with the payee, and, if there is no such spouse;

   b. By a temporary payee, and, if there is no such spouse or temporary payee;

   c. By the director of the county agency.

4. A payment check endorsed under subsection 3 must include, immediately below the endorsement, a statement of approval dated and signed by the director of the county agency.

5. A payment check may be issued to replace a lost or destroyed payment check only if:

   a. An indemnity bond is executed by the payee and delivered to the department's finance office; and

   b. A stop-payment order is placed against the payment check alleged to be lost or destroyed.

6. Any overpayment, whether resulting from recipient or administrative error, or from assistance granted pending a decision on an appeal adverse to the appellant, and whenever made, is subject to recovery. Except as provided in subsection 7, an overpayment must be collected from any assistance unit that includes a member who benefited from, or who was responsible for, the overpayment, by reducing the aid to families with dependent children benefits, to that assistance unit, by an amount equal to ten percent of the

standard of need set forth in the state plan for aid to families with dependent children.

7. If a court order, entered in a matter that considered the circumstances leading to the overpayment, requires restitution of an amount less than the amount of the overpayment, or requires periodic payments of restitution greater or less than the monthly amount determined under subsection 6, the amount of restitution and periodic payments so ordered must be used to calculate reduction, in the aid to families with dependent children benefit amount, used to recover an overpayment.

8. Unless the overpayment was the result of fraud, including fraud involving the crimes of theft and making false statements in a governmental matter, the county agency may suspend efforts to collect overpayments when no individual who benefited from, or was responsible for, the overpayment is a member of an assistance unit:

   a. If the amount of the overpayment is less than thirty-five dollars; or

   b. When recovery is determined not to be cost effective after an effort to recover has failed, including, at a minimum, a written communication describing the amount and basis for the overpayment, and requesting repayment.

9. The county agency shall promptly correct any underpayment for a current member of an assistance unit, or to an individual who would be a current member of an assistance unit but for the error that led to the underpayment.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-64. Intentional program violation - Disqualification penalties.

1. An individual who, on any basis, is found to have committed an intentional program violation by a state administrative disqualification proceeding or by a federal or state court must be subject to the penalties provided in this section.

2. An individual who waives the individual's right to appear at an intentional program violation hearing must be subject to the penalties provided in this section.

3. During any period of disqualification:

a. The individual's needs may not be taken into account when determining the assistance unit's need and amount of assistance; and

b. All assets and income of the disqualified individual, including gross earned income, must be considered available to the assistance unit.

4. The duration of the penalty described in this must be:

a. Six months for the first offense;

b. Twelve months for the second offense; and

c. Permanent for the third and any subsequent offense.

5. Any period of disqualification must remain in effect, without possibility of an administrative stay, unless and until the finding upon which the penalty was based is subsequently reversed by a court of appropriate jurisdiction, but in no event may the duration of the period for which the penalty was imposed be subject to review.

6. In cases where a disqualification penalty and other sanctions or penalties apply:

a. The disqualification penalties in this section must be in addition to, and may not be substituted for, any other sanctions or penalties that may be imposed for the same offense; and

b. The disqualification penalties imposed under this section affect only the individual concerned and cannot substitute for other sanctions imposed under this chapter.

7. A disqualification penalty imposed on an individual by another state may be continued in this state and may be used to determine the appropriate duration of a disqualification penalty imposed under this section.

8. Except as provided in subsection 9, a disqualification penalty period must begin no later than the first day of the second month that follows the date of notice of imposition of the penalty.

9. If the individual's disqualification resulted from a prior period of assistance, the disqualification period begins after a reapplication for assistance under this chapter is approved.

10. The department shall issue a written notice informing the individual of the period of disqualification and the amount of assistance the assistance unit may receive during the disqualification period.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-65. Job opportunities and basic skills program - Definitions. For purposes of the job opportunities and basic skills program:

1. "Conciliation" means a meeting between a participant and agents of the department for the purpose of resolving disagreements over the employability plan and related services or when the participant's attendance at a program activity has been insufficient.

2. "Coordinator" means the job opportunities and basic skills program staff person responsible for directing and monitoring a participant's planning and activities that relate to the job opportunities and basic skills program. The coordinator functions as a case manager in the development and execution of an employability plan.

3. "Participant" means a recipient of aid to families with dependent children who is not exempt from participating in the job opportunities and basic skills program or who, if exempt, has volunteered to participate in that program.

4. "Satisfactory progress" in any postsecondary education or training program means the participant is maintaining the greater of a "C" average or progress minimally sufficient to allow continuation of the course of study or training under the standards of the education or training facility.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-66. Job opportunities and basic skills program - Basic requirement. To the extent resources permit, all nonexempt adult members of a family receiving aid to families with dependent children shall participate in the job opportunities and basic skills program.

The program combines education, training, and employment components. Its purpose is to place participants in nonsubsidized employment as soon as possible.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-67. Job opportunities and basic skills program - Participation requirements in households receiving unemployed parent benefits.

1. Each nonexempt parent in a family receiving unemployed parent benefits shall participate or be available for participation in an approved work program component for a total of at least thirty-two hours per week.

2. An individual participating in a work experience program for at least thirty-two hours per week must be treated as a participant in the job opportunities and basic skills program.

3. If a participant receiving unemployed parent benefits is under age twenty-five and has not received a high school diploma or a general equivalency diploma, the employability plan must include high school attendance or general equivalency diploma program attendance in lieu of other participation requirements, if the participant is involved in education or training no less than twelve hours per week, and makes satisfactory progress.

4. If the principal wage earner is exempt, the second parent must meet the participation requirements for the family. If a nonexempt principal wage earner is sanctioned for failure to participate in the program, the second parent shall meet the participation requirements for the family. If the second parent fails to meet the participation requirements, the family is not eligible for aid to families with dependent children. The second parent is subject to all participation requirements of a principal wage earner, and may not show good cause for failure or refusal to participate.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-68. Job opportunities and basic skills program - Components. The components of the job opportunities and basic skills program include:

1. Educational activities related to secondary education, basic and remedial education, or education in English proficiency;

2. Job skills training;

3. Job readiness activities;

4. Job search;

5. Job development and job placement activity;

6. Postsecondary education activities;

7. Self-initiated education activities;

8. Community work experience;

9. Alternate work experience;

10. On-the-job training; and

11. Work supplementation program.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-69. Job opportunities and basic skills program - Tribal program. Tribal job opportunities and basic skills programs are available to native Americans who are recipients of aid to families with dependent children and who reside in a county within which there is a tribal job opportunities and basic skills program. The county agency shall:

1. Refer eligible individuals to the tribal program;

2. Provide child care payments to authorized tribal program participants based on information furnished by the tribal program; and

3. Upon notification from the tribal program, consider sanctioning individuals for failure or refusal to participate in the program without good cause.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-70. Job opportunities and basic skills program - Exemptions from participation.

1. An individual is exempt from participation in the job opportunities and basic skills program if the individual is:

a. A native American who resides in the service area of a tribal job opportunities and basic skills program and meets the requirements of that program;

b. Suffering from a temporary illness or injury, verified by reliable medical evidence, which temporarily prevents entry into employment or training;

c. Age sixty or older;

d. Incapacitated with a physical or mental impairment, verified by reliable medical evidence, which, by itself or in conjunction with age, prevents entry into employment or training;

e. An individual whose substantially continuous presence in the household is necessary to care for another individual in the household, to whom the individual seeking exemption owes a legal duty to provide care, who has a condition, verified by reliable medical evidence, which does not permit self-care, care by another household member, or care provided as supportive services;

f. A dependent child, age fifteen or younger, who is not also a custodial parent;

g. A dependent child, age sixteen or older, who is not also a custodial parent, who is enrolled or accepted for enrollment as a full-time student for the next or current school term in an elementary school, secondary school, vocational school, or technical school;

h. Employed in unsubsidized employment for not less than an average of thirty hours per week, at a salary or wage equaling or exceeding the federal hourly minimum wage, at employment expected to last at least thirty days; and who, if self-employed, is earning a weekly gross income from self-employment equaling or exceeding thirty times the federal hourly minimum wage and a monthly net income from self-employment, as calculated under section 75-02-01.1-41, equaling or exceeding ninety-seven and one-half times the federal hourly minimum wage.

i. Pregnant, in the fourth or later month of a pregnancy, verified by a licensed physician, physician's assistant, nurse practitioner, or midwife, whose verification includes the estimated delivery date;

j. A parent who, if age nineteen or younger, has completed a high school education or its equivalent, or other eligible caretaker relative of a child under age three, or, effective January 1, 1996, under age two, who is personally caring for that child on a full-time basis; or

k. A full-time volunteer serving in the volunteers in service to America program.

2. Exemptions described in subsection 1 apply to the recipients of aid to families with dependent children - unemployed parent benefits except neither parent may claim an exemption for personally caring for a child, under age three, on a full-time basis.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-71. Job opportunities and basic skills program - Referral.

1. Any individual not exempt from the job opportunities and basic skills program and anyone who volunteers must be referred to the program. Referrals of applicants for unemployed parents who seek benefits under section 75-02-01.1-13 may be made at the time of application. Referrals of other individuals may be made only after the individual is determined eligible for aid to families with dependent children.

2. The referred individual shall contact the coordinator within seven days of the referral date to set up an appointment for program orientation, assessment, and employability planning.

3. Upon referral, the county agency may authorize supportive services, limited to child care and transportation allowance, solely for the first thirty days after the referral date and solely when necessary to allow the individual to complete the planning process.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-72. Job opportunities and basic skills program - Orientation, assessment, and employability planning. The coordinator shall complete a general program orientation. The coordinator shall, together with the participant, make an initial assessment of employability and, on the basis of that assessment, develop an employability plan in connection with the participant. The cooperation, assistance, and consultation of the participant is important to the accuracy of the assessment and the appropriateness of the plan, but is not required if the participant seeks to use participation as a means of blocking or delaying entry into the work force. No employability plan is effective unless approved by the department.

1. General program orientation includes a preliminary identification of the participant's needs and of the barriers to the participant's entry into the work force and an explanation of:

   a. Program activities;

   b. Available supportive services;

   c. The relationship between the department, the county agency, and the coordinator's employer;

   d. How other cooperating programs coordinate activities with participants;

   e. The participant's rights and responsibilities; and

   f. Procedures for handling disputes.

2. The initial assessment of employability is based on:

   a. The participant's educational, training, child care, and other supportive service needs;

   b. The participant's proficiencies, skills deficiencies, and prior work experience;

   c. A review of the family circumstances that may include the needs of any child of the participant;

   d. The participant's interests, personal traits, and leisure time activities;

   e. The participant's mental and physical limitations; and

   f. Other factors that may affect the participant's potential for employment.

3. The employability plan must:

   a. Contain an employment goal for the participant;

   b. Describe the supportive services to be provided;

   c. Describe the program components to be undertaken by the participant to achieve the employment goal;

   d. Describe any other needs, identified in the review of family circumstances, that might be met through the program; and

   e. Take into account:

(1) Resources available to the participant;

(2) The participant's supportive service needs;

(3) The participant's skills levels and aptitudes;

(4) Local employment opportunities; and

(5) To the maximum extent reasonably possible, the preferences of the participant.

4. The employability plan is not a contract and may not be so interpreted, considered, or applied.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-73. Job opportunities and basic skills program - Supportive services.

1. Within the limits described in this section, supportive services may be made available to a participant who, but for supportive service, would be unable to enter into or remain in an approved job opportunities and basic skills program activity. No supportive service may be provided with respect to an activity that is not an approved program activity or on behalf of anyone who is not participating satisfactorily in the program.

2. No supportive services may be provided prior to the start of an approved program activity except:

   a. For up to two weeks on behalf of a participant waiting to enter an approved program activity; or

   b. For up to one month if necessary to avoid the loss of the supportive service, and if the approved program activity begins within that period.

3. Supportive services, excluding child care, may be provided for up to three months after termination of aid to families with dependent children benefits provided for in the employability plan.

4. Supportive services include only:

   a. Relocation assistance provided to a participant with moving expenses in order to achieve permanent employment with earnings sufficient to preclude aid to families with dependent children eligibility, provided that:

(1) Payment is made to the vendor of the moving service provider or, if to the participant, is limited under subsection 5; and

(2) The participant demonstrates that the most economical reasonably available means of relocation was used.

b. A monthly transportation allowance provided to participants currently enrolled in an approved program activity, if necessary to continued participation.

c. Child care expense reimbursement of up to the limit established under subsection 5, provided that no child care expense reimbursement may be provided where:

(1) The participant's approved program activities fall within the child's school hours;

(2) There are individuals in the household whose needs are met on the basis of their responsibility for caring for a child in the home; or

(3) There is another legally responsible adult in the home who is not incapacitated and who is not suspected of child abuse or neglect.

d. Assistance in the purchase of care for an incapacitated or disabled adult member of the participant's household, to whom the participant owes a legal duty to provide care, provided:

(1) There is no other person in the household who can provide the care; and

(2) The incapacitated or disabled adult cannot provide self-care.

e. Assistance in the purchase of employment-related clothing determined by the coordinator to be reasonable and necessary for the participant to enter employment.

f. Assistance in the purchase of tools or equipment determined by the coordinator to be required for the participant to accept employment.

g. Assistance in the cost of repairs determined by the coordinator to be reasonable and necessary to return a participant's vehicle to operable condition, provided:

(1) No feasible public transportation is available;

(2) The vehicle is registered to a member of the assistance unit; and

(3) The general condition and value of the vehicle justifies repairs.

h. Assistance for defraying the cost of books, tuition, and fees associated with training the participant, provided:

(1) Available funds are further limited to the total cost of books, tuition, and fees, reduced by the total amount of educational grants and scholarships available to the participant;

(2) The participant is eligible for aid to families with dependent children at the time funds are paid or obligated; and

(3) No payment may be made for tuition, books, or fees secured for self-initiated education or training.

i. Assistance with payment for professional license fees and professional examination fees, where there is no other available source of funding, including fee waivers, and the professional license or examination is necessary to achieve an employment-related goal.

j. Assistance with expenses determined by the coordinator to be reasonable and necessary for employment interviews, including transportation, lodging, grooming, and clothing.

5. The maximum expenditures permitted for supportive services, or for any type of supportive services, under any employability plan, are limited to amounts identified in the approved state plan established under title IV-F of the Social Security Act [42 U.S.C. 681, et seq.].

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-74. Job opportunities and basic skills program - Educational activities related to secondary education, basic and remedial education, or education in English proficiency.

1. If a custodial parent, age twenty or older, has not earned a high school diploma or its equivalent, the employability plan must include activities under this section unless:

a. The individual demonstrates a basic literacy level above the 8.9 grade level;

b. The long-term employment goal of the individual does not require a high school diploma or its equivalent;

c. After assessment by the educational institution, the individual is determined to not have the potential to secure a general equivalency diploma or high school diploma, or to make a significant improvement in reading skills, in a reasonable length of time; or

d. The individual fails to make satisfactory progress.

2. If a custodial parent, under twenty years of age, has not earned a high school diploma or its equivalent, the employability plan must include high school attendance unless:

a. After assessment by the educational institution, the individual is determined to not have the potential to secure a general equivalency diploma or high school diploma, or to make a significant improvement in reading skills, in a reasonable length of time; or

b. The individual fails to make satisfactory progress.

3. For purposes of this section:

a. A "reasonable length of time" means a time determined by the coordinator, based on recommendations of an individual's instructors, for completion of education activities while consistently participating in those activities on a regular basis as a full-time student in a high school program or as a part-time student in a high school program if the coordinator determines that circumstances beyond the individual's control limits attendance to less than full time; and

b. "Activities under this section" include high school, alternative high school, adult learning center programs, general equivalency diploma programs, and basic or remedial education programs.

4. If the employability plan of a custodial parent, under age twenty who does not have a high school diploma or general equivalency diploma, does not include high school attendance, it must include alternative educational activities or training activities no less than twelve hours per week.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-75. Job opportunities and basic skills program - Job skills training. Job skills training is formal training, provided by an organized school or training facility, designed and intended to lead to the participant's unsubsidized employment, in the shortest reasonable time.

1. The training program must be recognized by the state board of vocational education.

2. The participant shall be a full-time trainee pursuing the course of training at a rate intended to achieve the training goal by the end of the first school term that begins before, and ends after, a day twenty-four months after approval of the participant's initial employability plan.

3. The trainee shall verify that the trainee is making satisfactory progress, and taking classes or training required by the employability plan, through class schedules and grade reports for each school term or training period.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-76. Job opportunities and basic skills program - Job readiness activities. Job readiness activities help prepare participants for work by assuring that participants are familiar with general workplace expectations and are able to exhibit work behavior and attitudes necessary to compete successfully in the labor market. Those activities include self-assessment, goal setting, developing a personal marketing strategy, developing self-image, learning interview techniques and basic sales techniques, and developing appropriate work behavior and attitudes necessary to compete successfully in the labor market.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-77. Job opportunities and basic skills program - Job search. Participants may be required by the coordinator to make an individual work search for up to eight weeks in each twelve months of continuous eligibility for aid to families with dependent children benefits by any family member. Upon reapplication for such benefits after any termination, the participant may again be required to make an individual work search for up to eight weeks, even if twelve months has not elapsed since the beginning of an individual work search previously required.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-78. Job opportunities and basic skills program - Job development and job placement activities. The coordinator may create or discover job openings on behalf of participants. The coordinator may market participants for job openings, and may secure job interviews.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-79. Job opportunities and basic skills program - Postsecondary education.

1. A participant in the job opportunities and basic skills program may undertake postsecondary education if:

   a. The employability plan identifies a clearly identified goal of employment in a specific occupation;

   b. The curriculum is recognized by the board of higher education as leading to qualification for employment in the specific occupation identified in the employability plan;

   c. The postsecondary education is not for the purpose of achieving any degree more advanced than a bachelor's degree;

   d. The participant does not already possess a bachelor's degree unless:

      (1) The participant, by reason if incapacity or substantiated lack of employment, in North Dakota, in the field for which the participant was prepared, cannot be employed in North Dakota; and

      (2) The department, exercising its reasonable discretion, approves the employability plan;

   e. The participant is a full-time student;

   f. The selection of a course of study is guided by demand in specific occupations or, upon approval by the coordinator, a course of study in another occupation for which the participant provides substantial justification of demand;

   g. The participant applies for a Pell grant and all other reasonably available sources of grants and scholarships, which become the first source of payment for books, tuition, and fees;

   h. The participant verifies that the participant is maintaining satisfactory progress, and taking classes

required by the employability plan, through class schedules and grade reports; and

i. The employability plan is reviewed and revised at least annually except for child care needs, which must be reviewed at the beginning of each school term.

2. Except as provided in subsection 3, a participant enrolled in postsecondary education may receive any supportive service for which a need can be demonstrated.

3. Recipients of aid to families with dependent children enrolled in any course of postsecondary education study at the time they become participants may seek approval of an employability plan which continues that course of study. Approval may not be granted if the participant is presently qualified for available full-time employment. Any approved employability plan is subject to review. Other program activities in which the participant participates may not interfere with the self-initiated education or training activity so long as the employability plan continues to be approved. Upon review, approval of the employability plan may be terminated, and the participant may be required to seek employment. A participant enrolled in an approved self-initiated course of postsecondary education may receive any supportive service for which a need can be demonstrated, except payment for defraying the cost of books, tuition, or fees.

4. Postsecondary education may not be included in an approved employability plan unless, with satisfactory progress, the course of study will be completed by the end of the first school term that begins before, and ends after, a day twenty-four months after approval of the participant's initial employability plan.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-80. Job opportunities and basic skills program - Self-initiated education activities. Self-initiated education activities are subject to all requirements of education activities otherwise planned for under the job opportunities and basic skills program.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-81. Job opportunities and basic skills program - Community work experience program.

1. The community work experience program offers the performance of public service work in exchange for aid to families with dependent children. Its goal is to improve a participant's employability through supervised work in order to enable the participant to obtain permanent, unsubsidized employment.

2. A participant's work obligation is the number of hours determined by subtracting any child support received in excess of fifty dollars from the aid to families with dependent children grant amount received by the participant's family and dividing the result by the current federal hourly minimum wage.

3. Community work experience worksites must be limited to those provided by public or private, nonprofit public service organizations, tribal governments, nursing homes, and hospitals, or at projects that serve a useful public purpose and provide appropriate working conditions.

4. A worksite placement must be designed to provide a participant with a basic understanding of work and productive work habits, establish positive work references, provide training, and otherwise encourage the participant to become economically self-sufficient.

5. Workers' compensation coverage must be provided for community work experience program participants.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-82. Job opportunities and basic skills program - Alternate work experience.

1. Alternate work experience offers work, based on a forty-hour workweek, that includes work expectations found in unsubsidized employment, provided at private nonprofit or public worksites. Alternate work experience is provided for up to thirty-two hours per week in conjunction with structured job search activities the remaining eight hours per week.

2. A parent under age twenty-five who has neither completed high school nor earned a general equivalency diploma, and who is maintaining satisfactory progress in either of those educational activities, may substitute that educational activity for alternate experience.

3. If a family is eligible for aid to families with dependent children due to the unemployment of the parent who is the principal wage earner, each parent in that family must participate in alternate work experience for at least thirty-two hours per week.

4. Workers' compensation coverage must be provided to alternate work experience participants.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-83. Job opportunities and basic skills program - On-the-job training. On-the-job training provides, through a negotiated agreement, payment to an employer for the costs of training and lower productivity normally associated with a new employee. The agreement is intended to place a participant in an occupational position that requires training. The training is intended to lead to permanent employment with that employer or one that is similar in its training requirements.

1. The agreement must be for a fixed price that does not exceed fifty percent of the average wage paid by the employer to the participant during the training period.

2. The starting wage of an on-the-job training participant must be at least equal to the federal minimum wage rate.

3. On-the-job training participants shall be compensated at the same rates, and receive the same benefits, as other individuals similarly employed by the employer.

4. Wages paid to an on-the-job training participant must be treated as earned income for purposes of this chapter.

5. If an on-the-job training participant becomes ineligible for aid to families with dependent children benefits because of earned income or, in the case of benefits provided under section 75-02-01.1-13, because of employment for one hundred or more hours per month:

   a. That person shall remain a participant for the duration of the on-the-job training and may be eligible for those supportive services available to other similarly situated participants; and

   b. If that participant would have been eligible for transitional child care, under a program furnishing such care pursuant to 45 CFR part 256, at the time the ineligibility for aid to families with dependent children benefits occurred, the participant may:

(1) Remain eligible for transitional child care, after the on-the-job training ends, for the number of months that remain in the twelve-month period following the month in which the participant became ineligible for aid to families with dependent children benefit; or

(2) Receive child care as a supportive service to a participant if the person otherwise meets the requirements to be a participant.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-84. Job opportunities and basic skills program - Work supplementation program.

1. Public and private employers may receive payment for extraordinary costs of training intended to assist a recipient to obtain unsubsidized employment. The payment is diverted from, and limited to, a negotiated amount that cannot exceed the recipient's aid to families with dependent children grant. A work supplementation program participant must be considered a regular employee, and receive benefits and enjoy working conditions at the same level and to the same extent as other employees working a similar length of time and doing the same type of work.

2. Work supplementation program payments may be made only pursuant to a contract signed by the employer, the work supplementation program participant, and the coordinator.

3. The length of the contract is limited to the training time required for the recipient to learn the necessary job skills.

4. The initial work supplementation program contract may be up to six months in length. The contract may be extended, where necessary, provided that the total length of all work supplementation program contracts or extensions, entered into with respect to a particular recipient, may not exceed nine months.

5. If a work supplementation participant becomes ineligible for aid to families with dependent children benefits because of earned income or, in the case of benefits provided under section 75-02-01.1-13, because of employment for one hundred or more hours per month:

   a. That person shall remain a participant for the duration of the work supplementation contract and may be eligible for

those supportive services available to other similarly situated participants; and

b. If that participant would have been eligible for transitional child care, under a program furnishing such care pursuant to 45 CFR part 256, at the time the ineligibility for aid to families with dependent children benefits occurred, the participant may:

(1) Remain eligible for transitional child care, after the work supplementation ends, for the number of months that remain in the twelve-month period following the month in which the participant became ineligible for aid to families with dependent children benefits; or

(2) Receive child care as a supportive service to a participant if the person otherwise meets the requirements to be a participant.

6. Workers' compensation coverage must be provided for work supplementation program participants.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-85. Job opportunities and basic skills program - Failure or refusal to participate. A failure or refusal to participate in the job opportunities and basic skills program occurs any time the participant:

1. Misses a scheduled appointment for any program activity;

2. Is absent from a worksite when scheduled to be there;

3. States an unwillingness to participate in any program activity or worksite activity;

4. Fails to contact the coordinator, within seven days of referral, to set up an appointment for program orientation;

5. Refuses, despite apparent ability, to maintain satisfactory progress in any program activity; or

6. Fails to conform to the requirements of the participant's employability plan.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-86. Job opportunities and basic skills program - Good cause for failure or refusal to participate.

1. Good cause for failure or refusal to participate in the job opportunities and basic skills program exists when:

   a. The participant is too ill to participate or is incapacitated;

   b. The participant is incarcerated or is required by court order or subpoena to be in a location that precludes participation;

   c. A family crisis or change in circumstances precludes participation;

   d. A breakdown in transportation with no readily accessible alternative means of transportation precludes participation;

   e. Weather conditions preclude participation;

   f. A breakdown in a child care arrangement with no readily available alternative child care precludes participation;

   g. Child care or care for an incapacitated individual living in the same home as a dependent child, which is necessary for the participant to participate or continue participation in the program or accept employment, is not available and the department fails to provide that care;

   h. The planned employment would result in the family of the participant experiencing a net loss of cash income;

   i. Services necessary to permit participation are unavailable;

   j. The assignment does not meet appropriate work and training criteria;

   k. The individual is the parent or other relative personally providing care for a child under age three and the employment would require that individual to work more than twenty hours per week; or

   l. The individual refuses major medical care, even if that refusal precludes participation.

2. A net loss of cash income results if the family's gross income, including all earned and unearned income and cash assistance, less necessary work-related expenses, is less than the cash assistance the individual was receiving at the time an offer of employment was made. Necessary work-related

expenses include only transportation, day care, taxes, license, fees, and other costs when it can be established that the costs are necessary for employment and the same costs would not be incurred if the individual were not employed.

3. Claims of good cause must be evaluated using the decisionmaking principles described in section 75-02-01.1-09.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-87. Job opportunities and basic skills program - Conciliation.

1. Conciliation must precede the imposition of a sanction. The participant, the department, or an agent of the department may request conciliation.

2. An initial conciliation notice must state:

   a. The time and place for conciliation;

   b. The responsibility of the participant to participate in conciliation;

   c. The consequences, including sanctions, which may be imposed if the participant fails or refuses to participate in the job opportunities and basic skills program; and

   d. The requirements the participant must meet to show good cause for a failure or refusal to participate in that program.

3. A second and any subsequent conciliation notice may be made in any manner that effectively communicates with the participant, including verbal notice given in person or telephonically, and must state:

   a. The time and place for conciliation;

   b. The responsibility of the participant to participate in conciliation;

   c. The consequences, including sanctions, which may be imposed if the participant fails or refuses to participate in the job opportunities and basic skills program; and

   d. The requirements the participant must meet to show good cause for a failure or refusal to participate in that program.

4. If the conciliation results in the participant's participation in that program, no sanction may be imposed.

5. If the conciliation results in the participant's showing good cause for a failure or refusal to participate in that program, no sanction may be imposed.

6. If the conciliation results in neither the participant's participation in that program nor the participant's showing good cause for a failure or refusal to participate in that program, a sanction must be imposed.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-88. Job opportunities and basic skills program - Sanctions.

1. An adequate notice of sanction must be provided to any participant who fails or refuses, without good cause, to participate in the job opportunities and basic skills program.

2. For purposes of this section, an "adequate notice of sanction" means a written notice that describes the sanction the department intends to impose, states the reasons for imposing that sanction, identifies the specific federal or state law or policy supporting the action, and includes an explanation of the participant's right to request a state evidentiary hearing, the circumstances under which assistance may be continued, if requested, and that such assistance must be repaid if the sanction is upheld.

3. The sanction is imposed:

   a. For the first failure or refusal, until the failure or refusal ceases;

   b. For the second failure or refusal, until the failure or refusal ceases or three months, whichever is longer; and

   c. For any subsequent failure or refusal, until the failure or refusal ceases or six months, whichever is longer.

4. The sanction begins with the date the sanction notice is issued. The grant amount may not be reduced until the first of the month following the issuance of the sanction notice. If the sanction ends during a month, the needs of the sanctioned individual are included in the grant effective the first of that month.

5. During the sanction period, the needs of any sanctioned individual may not be taken into account when determining the household's needs for assistance or the amount of the assistance payment.

6. If the sanctioned individual is a parent or other caretaker relative, assistance payments to the remaining members of the household must be made in the form of protective or vendor payments, unless after a reasonable effort, no individual appropriate to receive a protective payment can be located.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

75-02-01.1-89. County administration and share of assistance cost.

1. Except as provided in subsection 2, the county agency of the county where the aid to families with dependent children unit is physically present must be responsible for the administration of the program with respect to that unit.

2. Where a family unit receiving assistance moves from one county to another, the outgoing county continues to be responsible for the administration of the program with respect to that unit until the last day of the month after the month in which the unit assumes physical residence in an incoming county.

3. For purposes of apportioning each county's share of assistance costs in the aid to families with dependent children program, a fraction must be formed for each county. Each county's assistance expenses, in the year ending June 30, 1983, is the numerator, and the total of all county's assistance expenses, in that year, is the denominator. For periods beginning July 1, 1984, each county's share of the amount expended, statewide, for aid to dependent children, must be determined by multiplying that county's fraction times the total of all county's assistance expenses.

4. For purposes of this section, "county's assistance expense" means the total amount, in dollars, expended from each county's funds, for aid to dependent children, but excluding child support collection expenses and expenses for dependent children defined in subdivision b of subsection 4 of North Dakota Century Code section 50-09-01.

History: Effective March 1, 1995.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 50-06-05.1, 50-09

CHAPTER 75-02-02

AGENCY SYNOPSIS: Amendments to North Dakota Administrative Code chapter 75-02-02, Medical Services specifically section 75-02-02-13, Limitations on Out-of-State Care.

A public hearing was conducted on April 10, 1995, in Bismarck, concerning proposed amendments to North Dakota Administrative Code chapter 75-02-02, Medical Services, specifically section 75-02-02-13, Limitations on Out-of-State Care.

The amendments are intended to focus decisions on the necessity of out-of-state care on recommendations of the primary physician or a specialist, and to clarify the process for approval of out-of-state care.

75-02-02-13. Limitations on out-of-state care.

1. For ~~the~~ purposes of this section:

   a. ~~"North---Dakota---board---certified--specialist"--means--a physician-board-certified-in-the--medical--field--required who--regularly--practices-within-North-Dakota-or-at-a-site within-fifty--statute--miles--[80.45--kilometers]--of--the nearest-North-Dakota-border.~~

   ~~b.~~ "Out-of-state care" means care or services furnished by any individual, entity, or facility, pursuant to a provider agreement with the ~~division-of-medical-services~~ department, at a site located more than fifty statute miles [80.45 kilometers] from the nearest North Dakota border.

   ~~c.~~ b. "Primary physician" means the individual physician who has assumed responsibility for the advice and care of the recipient.

   c. "Specialist" means a physician board certified in the required medical specialty who regularly practices within North Dakota or at a site within fifty statute miles [80.45 kilometers] from the nearest North Dakota border.

2. Except as provided in subsection 3, no payment for out-of-state care, including related travel expenses, will be made unless:

   a. The medical assistance recipient was first seen by that recipient's primary physician;

b. The primary physician determines that it is advisable to refer the recipient for care or services which the primary physician is unable to render;

c. A request for active treatment is first made to a ~~North Dakota-board-certified~~ specialist ~~in--the--medical--field~~ required;

d. The ~~North--Dakota--board-certified~~ specialist ~~advises-the primary-physician~~ concludes that the patient should be referred to an appropriate out-of-state provider because necessary care or services are unavailable in the state; ~~and~~

e. The primary physician or specialist submits, to the department, a written request that includes medical and other pertinent information, including the report of the specialist that documents the specialist's conclusion that the out-of-state referral is medically necessary;

f. The department determines that necessary care and services are unavailable in the state and approves referral on that basis; and

g. The claim for payment ~~sufficiently-identifies-the-North Dakota--board--certified--specialist--who--authorized~~ is otherwise allowable and verifies that the department approved the referral for out-of-state care.

3. a. A referral for emergency care, including related travel expenses, to an out-of-state provider can be made by the primary physician. A determination that the emergency requires out-of-state care may be made at the primary physician's discretion, but is subject to review by the ~~medical-services-division~~ department. Claims for payment for such emergency services must ~~contain--the-name-of~~ identify the referring physician and document the emergency.

b. Claims for payment for care for a medical emergency or surgical emergency, as those terms are defined in section 75-02-02-12, which occurs when the affected medical assistance recipient is traveling outside of North Dakota, will be paid unless payment is denied pursuant to limitations contained in section 75-02-02-12.

c. Claims for payment for any covered service rendered to an eligible medical assistance recipient who is a resident of North Dakota for medical assistance purposes, but whose ~~regular~~ current place of abode is outside of North Dakota, will not be governed by this section.

d. ~~Claims--for-payment-for-any-covered-service-rendered-to-an eligible-North-Dakota--medical--assistance--recipient--who makes--a--showing,--satisfactory--to--the-department,-that particular--circumstances--and--conditions---warrant---the receipt--of--out-of-state--care,--and--that--the--proposed out-of-state--care--is--of--a--quality--superior--to--that available--in-state-or-that-the-proposed-out-of-state-care is-likely-to-enhance-the-recipient's-health-to--a--greater extent-than-similar-in-state-care.~~ Claims for payment for any covered service rendered to an eligible medical assistance recipient during a verified retroactive eligibility period will not be governed by this section.

e. If a recipient is referred for out-of-state care without first securing approval under subsection 2, and the care is not otherwise allowable under this subsection, the department may approve payment upon receipt of a written request, from the primary physician or specialist, that:

(1) Demonstrates good cause for not first securing approval under subsection 2;

(2) Clearly establishes that the care and services were unavailable in the state; and

(3) Documents that the care and services were medically necessary.

History: Effective November 1, 1983; amended effective Octover 1, 1995.
General Authority: NDCC 50-24.1-04
Law Implemented: NDCC 50-24.1-02

AGENCY SYNOPSIS: Proposed new North Dakota Administrative Code chapter 75-08, Vocational Rehabilitation.

A public hearing was conducted on May 25, 1995, in Bismarck concerning proposed new North Dakota Administrative Code chapter 75-08, Vocational Rehabilitation.

Section 75-08-01-01 lists definitions necessary for the article.

Section 75-08-01-02 provides the general requirements of the vocational rehabilitation program. Federal requirements and presumptions are included, in addition to state requirements.

Section 75-08-01-03 allows for a departmental variance upon written application and good cause shown to the satisfaction of the department. Section 75-08-01-04 defines the guidelines for the establishment and maintenance of records. Section 75-08-04-05 provides expenditure authorization procedures.

Section 75-08-01-06 requires vocational rehabilitation counselors to refer clients to other services and agencies, when appropriate. Section 75-08-01-07 requires the division to inform each individual applying for or receiving services of the appeals procedures. Section 75-08-01-08 relates to the department's policy on confidentiality. Section 75-08-01-09 provides the requirements for informed written consent. Section 75-08-01-10 allows for intradepartmental exchange of information within the department without informed written consent. Section 75-08-01-11 provides for the release of information to the client and to others. Section 75-08-01-12 allows for the release of information for program audit, evaluation, and research. Section 75-08-01-13 provides the duty of departmental personnel concerning subpoenas. Section 75-08-04-14 develops administrative review and appeal procedures.

Section 75-08-01-15 defines the application process. Section 75-08-01-16 sets time limits for the department to determine eligibility. Section 75-08-01-17 defines eligibility criteria for vocational rehabilitation, while section 75-08-01-18 presents the eligibility criteria for supported employment. Section 75-08-01-19 provides guidelines for counselors in making eligibility determinations. Section 75-08-01-20 allows for an extended evaluation period for certain applicants. Section 75-08-01-21 presents guidelines for ineligibility determinations.

Section 75-08-01-22 creates the requirement for the comprehensive assessment of rehabilitation needs. Section 75-08-01-23 enumerates the order of selection of clients for the provision of services. Section 75-08-01-24 defines the individualized written rehabilitation program. Sections 75-08-01-25 and 75-08-01-26 present the individual client's financial responsibility for the provision of services. Section 75-08-01-27 provides guidelines for the determination of the client's financial need.

Section 75-08-01-28 delineates and defines vocational rehabilitation services that the department may provide to an individual to achieve an employment outcome. Section 75-08-01-29 provides individual record closure procedures.

STAFF COMMENT: Article 75-08 contains all new material but is not underscored so as to improve readability.

ARTICLE 75-08

VOCATIONAL REHABILITATION

CHAPTER 75-08-01
VOCATIONAL REHABILITATION

75-08-01-01. Definitions. In this chapter:

1. "Assistive technology device", also referred to as "rehabilitation technology device", means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, used to increase, maintain, or improve the functional capabilities of an individual with disabilities.

2. "Assistive technology service", also referred to as "rehabilitation technology service", means a service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device.

3. "Client assistance program" means the federally mandated program that informs and advises an individual of all available benefits under federal vocational rehabilitation law, and, if requested, assists and advocates for the individual in matters related to vocational rehabilitation decisions and services. Client assistance program services include assistance and advocacy in pursuing legal, administrative, or other appropriate remedies for the protection of the rights of an individual.

4. "Department" means department of human services.

5. "Employment objective", also known as "employment outcome" and "vocational goal", means entering or retaining full-time employment, or, if appropriate, part-time competitive employment in the integrated labor market, supported employment, or other type of employment consistent with an eligible individual's abilities, capabilities, and interests as supported by an assessment for determining vocational rehabilitation needs.

6. "Employment outcome" means an employment objective or a vocational goal.

7. "Existing data" means information from any source that currently exists and may be available to the department for a determination. Example: vocational rehabilitation needs a neurological exam of an individual to make a determination, and the individual just had one the week before visiting vocational rehabilitation. Vocational rehabilitation will use

the results of that neurological visit, if possible, rather than ordering a new visit.

8. "Extended evaluation" means the process whereby vocational rehabilitation services are provided to an individual for no more than eighteen months for the limited and specific purpose of determining eligibility for services and the nature and scope of vocational rehabilitation services needed.

9. "Extreme medical risk" means a risk of increasing functional impairment or risk of death if medical services are not provided expeditiously.

10. "Individual with a most severe disability" means an individual:

    a. Who meets the criteria for a severe disability, and is seriously limited in two or more functional capacities, including mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills in terms of an employment outcome; and

    b. Who requires multiple core services over an extended period of time of six months or more.

11. "Individual with a severe disability" means:

    a. An individual who is receiving social security disability insurance or supplemental security income; or

    b. An individual:

        (1) Who has severe physical or mental impairments that seriously limit the individual's functional capacity, including mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills in terms of an employment outcome;

        (2) Whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time of six months or more; and

        (3) Who has one or more physical or mental disabilities resulting from: amputation, arthritis, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculoskeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia and other spinal cord conditions, sickle cell anemia, specific

learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitations.

12. "Postsecondary training" means training offered by institutions that qualify for federal financial student aid and is provided only when necessary to achieve a vocational goal consistent with an individual's capabilities and abilities.

13. "Rehabilitation technology device", also referred to as "assistive technology device", means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, used to increase, maintain, or improve the functional capabilities of an individual with disabilities.

14. "Rehabilitation technology service", also referred to as "assistive technology service", means a service that directly assists an individual with disabilities in the selection, acquisition, or use of an assistive technology device.

15. "Suitable" means consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of the individual.

16. "Supported employment" means competitive work in an integrated work setting with ongoing support services for an individual with a most severe disability for whom competitive employment has not traditionally occurred; or, for whom competitive employment has been interrupted or intermittent because of severe disability; and, who, because of the nature and severity of the disability, needs intensive supported employment services and extended services to be gainfully employed. Supported employment also includes transitional employment for an individual with chronic mental illness. The following terms are defined concerning supported employment:

    a. "Competitive work" means work that, at the time of transition to extended services, is performed weekly on a full-time or part-time basis, as determined in the individualized written rehabilitation program, and for which an individual is compensated consistent with wage standards provided for in the Fair Labor Standards Act [29 U.S.C. § 201, et seq.].

    b. "Extended services" means ongoing support services provided by a state agency, private nonprofit organization, or any other appropriate resource, from funds other than titles I, III-D, or VI-C of the

Rehabilitation Act [29 U.S.C. 701, et seq.]. Extended services include natural supports, are provided once the time-limited services are completed, and consist of the provision of specific services needed to maintain the supported employment placement.

c. "Integrated work setting" means jobsites where there is regular contact with other employees or the general public who do not have a disability. Supported employment requires that no more than eight individuals with disabilities be part of a work group.

d. "Ongoing support services" means services needed to support and maintain an individual with a most severe disability in supported employment. The individual may be provided necessary and appropriate supports, including jobsite training, transportation, followup family contact, or any services necessary to achieve and maintain the supported employment placement, throughout the term of employment. Ongoing support must include two monthly contacts with the supported employee at the worksite to assess job stability, unless it is determined that offsite monitoring is more appropriate for a particular individual. Offsite monitoring consists of at least two face-to-face meetings with the individual and one monthly employer contact.

e. "Time-limited services" means support services provided by vocational rehabilitation for a period not to exceed eighteen months, unless a longer period to achieve job stabilization has been established in the individualized written rehabilitation program, before the individual transition to extended services.

f. "Transitional employment services for an individual with chronic mental illness" means a series of temporary job placements in competitive work in an integrated work setting with ongoing support services for an individual with chronic mental illness.

17. "Vocational goal" means an employment objective or an employment outcome.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16

75-08-01-02. General requirements of the vocational rehabilitation program.

1. The vocational rehabilitation program assists an eligible individual with physical or mental disabilities to prepare for

and achieve an employment outcome. The vocational rehabilitation process is based upon an individualized written rehabilitation program oriented to the achievement of a suitable vocational goal. An individual with disabilities must require the service provided to minimize and accommodate the impediment to employment. Services must be reasonable and provided as cost effectively as possible.

2. Vocational rehabilitation presumes that the individual will benefit in terms of an employment outcome from vocational rehabilitation services, unless the counselor can document, on the basis of clear and convincing evidence and only after an extended evaluation, that the individual is incapable of benefiting from vocational rehabilitation services in terms of an employment outcome.

3. Unless otherwise specified in this chapter, eligibility to participate in the vocational rehabilitation program is governed by federal vocational rehabilitation statutes and the federal procedures embodied in the rehabilitation services administration notices and policy memos. The program must conform to lawfully issued regulations and policies of the rehabilitation services administration. Terms used in this chapter have the same meaning as the terms used in the regulations and policies of the rehabilitation services administration, unless this chapter specifically provides otherwise.

4. The department must provide services without regard to sex, race, creed, age, color, national origin, political affiliation, or type of disability.

5. There is no residency requirement, durational or other, that may exclude an otherwise eligible individual living in the state from eligibility.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16; 29 U.S.C. 720, et seq.

75-08-01-03. Variance. Upon written application and good cause shown to the satisfaction of the department, the department may grant a variance from the provisions of this chapter upon terms prescribed by the department.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16; 29 U.S.C. 720, et seq.

75-08-01-04. Establishment and maintenance of records. Vocational rehabilitation shall establish and maintain a record of

service for each individual applying for or receiving vocational rehabilitation services. The record must include data necessary to comply with state vocational rehabilitation and federal rehabilitation services administration requirements.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16; 29 U.S.C. 720, et seq.

75-08-01-05. Expenditure authorization. Case service expenditures require written authorization prior to the initiation of the purchase of services. Oral authorizations are permitted in emergency situations, but must be confirmed promptly in writing.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16; 29 U.S.C. 720, et seq.

75-08-01-06. Referrals to other services. When appropriate, counselors shall provide the referral necessary to support an individual with disabilities in securing necessary services from other agencies and organizations.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16; 29 U.S.C. 720, et seq.

75-08-01-07. Notification of appeals procedures.

1. Vocational rehabilitation shall inform each individual applying for or receiving vocational rehabilitation services of the appeals procedure in chapter 75-01-03. An individual may request a review of agency determinations concerning the furnishing or denial of services.

2. Vocational rehabilitation shall provide the name and address of the appeals supervisor with whom appeals may be filed and shall inform each individual of the availability of the client assistance program.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-06

75-08-01-08. Confidentiality. All information acquired by vocational rehabilitation about an individual applying for or receiving services must remain the property of the department and must only be used and released for purposes directly connected with the administration of the vocational rehabilitation program. Departmental

use and release of personal information must conform with applicable state and federal regulations.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-05

75-08-01-09. Informed written consent. Informed written consent must:

1. Be in language that the individual or the individual's representative understands;
2. Be signed and dated by the individual or the individual's representative;
3. Include an expiration date;
4. Be specific in designating the department or person authorized to disclose information;
5. Be specific as to the nature of the information that may be released;
6. Be specific in designating the parties to whom the information may be released; and
7. Be specific as to the purpose or purposes for which the released information may be used.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-05

75-08-01-10. Release of information within the department. Intradepartmental exchange of information may occur without informed written consent when the individual is served by other divisions.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-05

75-08-01-11. Release of information to the individual and others.

1. Upon informed written consent by the individual with disabilities or the individual's representative, all information in the record of service must be made available to the individual with disabilities or the individual's representative in a timely manner, except:

a. Medical, psychological, or other information the department believes may be harmful to the individual and that may not be released directly to the individual, and must be provided through the individual's representative, physician, or licensed psychologist; and

b. Information obtained from outside the department that may be released only under the conditions established by the outside agency, organization, or provider.

2. Upon informed written consent of the individual with disabilities or the individual's representative, vocational rehabilitation may release information that may be released under subsection 1 to the individual with disabilities to another agency or organization.

3. Vocation rehabilitation may release personal information, with or without consent of the individual:

a. If required by state or federal law;

b. In response to investigations connected with law enforcement, fraud, or abuse (except where expressly prohibited by federal or state laws or regulations); or

c. In response to judicial order.

4. Vocational rehabilitation may release personal information, without informed written consent of the individual, in order to protect the individual or others when the information poses a threat to the individual's safety or the safety of others, except for human immunodeficiency virus test results that may not be released without informed written consent of the individual.

5. Vocational rehabilitation and social security may exchange information, without informed written consent, when social security also provides services to the individual.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-05

75-08-01-12. Release of information for program audit, evaluation, or research. At the discretion of the vocational rehabilitation director, personal information may be released to an organization, agency, or individual engaged in program audit, program evaluation, or program research only for purposes directly connected with the administration of the vocational rehabilitation program or for purposes that would significantly improve the quality of life for an individual with disabilities, and only if the organization, agency, or individual assures that:

1. The information is used strictly for the purposes for which it is being provided;

2. The information is released only to an individual officially connected with the audit, evaluation, or research;

3. The information is not released to the individual involved;

4. The information is managed in a manner to safeguard confidentiality; and

5. The final product does not reveal any personal identifying information without the informed written consent of the individual involved or the individual's representative.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-05

75-08-01-13. Subpoenas. An employee may testify in court or in an administrative hearing, but may not release information or records, without the consent of the individual with disabilities, unless ordered to do so by a judge or hearing officer.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-05

75-08-01-14. Administrative review procedures - Appeals.

1. An individual applying for or receiving vocational rehabilitation services, who is dissatisfied with any determination made by a rehabilitation counselor concerning the furnishing or denial of services, may request a timely review of the determination. Vocational rehabilitation shall make reasonable accommodation to the individual's disability in the conduct of the appeals process.

2. Pending a final determination of an appeal hearing, vocational rehabilitation may not suspend, reduce, or terminate services that are being provided under an individualized written rehabilitation plan, unless:

   a. The services were obtained through misrepresentation, fraud, collusion, or other criminal conduct;

   b. The individual fails to substantially satisfy the terms of the individualized rehabilitation plan. "Failure to substantially satisfy the terms of the individualized rehabilitation plan" means the individual's failure to

participate in a service that is instrumental to accomplish a vocational objective; or

c. The services are determined to be harmful to the individual.

3. Nothing in this chapter may be construed to forbid any informal, mutally consensual meetings or discussions between the individual and the department or the director. If the department or the director conducts an informal meeting under this section, the individual may still request a formal appeal pursuant to this chapter. An informal meeting will not suspend or extend the time for filing an appeal as set forth in this section. An individual may request a fair hearing through the department immediately without having to go through other appeal procedures.

4. A fair hearing must be conducted, and a recommended decision shall be issued in accord with North Dakota Century Code chapter 28-32 and chapter 75-01-03. Vocational rehabilitation shall consider the decision as final, unless the decision is based on error of law or is contrary to policy.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-15. Application for services. An individual who applies for services shall undergo an assessment for determining eligibility. The results of the assessment must be shared with the individual.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04; 29 U.S.C. 722

75-08-01-16. Period of time to determine eligibility. Vocational rehabilitation shall determine eligibility for services within a reasonable period of time not to exceed sixty days after the receipt of the application for services, unless:

1. The individual is notified that exceptional and unforeseen circumstances beyond the control of the counselor preclude the counselor from completing the determination within the prescribed timeframe, and the individual agrees that an extension of time is warranted; or

2. An extended evaluation is necessary.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-17. Eligibility criteria for vocational rehabilitation. An individual is eligible for vocational rehabilitation if:

1. The individual has a mental or physical impairment, as determined under subdivision a or b;

   a. Social security presumption of disability. An individual who has a disability or is blind, as determined under title II or XVI of the Social Security Act [42 U.S.C. § 301, et seq.], is considered to have a physical or mental impairment which constitutes or results in a substantial impediment to employment and which seriously limits one or more functional capacities in terms of an employment outcome.

   b. Use of other data to determine disability. The eligibility determination of an individual who is not determined to have a disability under subdivision a, must be based on existing data as the primary source of information to the maximum extent possible and appropriate. The information may be provided by the individual, the family of the individual, or other sources.

2. The individual's physical or mental impairment constitutes or results in a substantial impediment to employment; and

3. The individual requires vocational rehabilitation services to prepare for, enter into, engage in, or retain gainful employment.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-18. Eligibility criteria for supported employment. An individual is eligible for supported employment services if:

1. The individual is eligible for vocational rehabilitation services;

2. The individual is determined to be an individual with a most severe disability; and

3. A comprehensive assessment of rehabilitation needs, including an evaluation of rehabilitation, career, and job needs identifies supported employment as the appropriate rehabilitation objective for the individual.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-19. Eligibility determination. The counselor determines eligibility upon completion of the eligibility assessment. In all cases where the counselor determines the individual eligible for vocational rehabilitation services, the record of service must include a determination of the eligibility assessment, dated and signed by the counselor, which demonstrates that the individual:

1. Has a physical or mental impairment that constitutes or results in a substantial impediment to employment; and

2. Requires vocational rehabilitation services to prepare for, enter in, or retain gainful employment.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-20. Extended evaluation. In all cases where the counselor concludes that the individual cannot benefit from services in terms of an employment outcome due to the severity of the individual's disability, the individual shall be provided extended evaluation services and an individualized written rehabilitation program must be developed. An individual may receive extended evaluation services for a period of time not to exceed eighteen months, but sufficient to determine if the individual can benefit from services in terms of an employment outcome. A review of the case must be conducted as often as necessary, but at least every ninety days. In all cases where the counselor has determined that an extended evaluation is required, the record of service must document:

1. That the individual has a physical or mental impairment that constitutes or results in a substantial impediment to employment;

2. That the individual requires vocational rehabilitation services to prepare for, enter into, or retain gainful employment; and

3. That the individual cannot benefit from vocational rehabilitation services in terms of an employment outcome due to the severity of the disability.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-21. Ineligibility determination. In all cases where the counselor determines that an individual applying for or receiving vocational rehabilitation service does not meet the requirements for eligibility, the record of service must include the determination of ineligibility, dated and signed by the counselor, which documents the

reasons for the ineligibility determination. Ineligibility decisions concerning the severity of a disability must be based on clear and convincing evidence and require an extended evaluation, pursuant to section 75-08-01-20, prior to closure.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-22. Comprehensive assessment of rehabilitation needs. For an individual who has been determined eligible for vocational rehabilitation services or for extended evaluation, a comprehensive assessment of rehabilitation needs must be conducted to determine the goals, objectives, nature, and scope of vocational services to be included in the individualized written rehabilitation program. The comprehensive assessment must include an assessment of the individual's unique strengths, resources, priorities, interests and needs, and must document the need for supported employment services.

1. The comprehensive assessment will be limited to information necessary to identify the rehabilitation needs of the individual and to develop an individualized written rehabilitation program. The comprehensive assessment may use existing data collected for the determination of eligibility, and additional data, as necessary, provided by the individual or the individual's family.

2. The comprehensive assessment must include, for the purpose of making a determination of vocational needs and developing an individualized written rehabilitation program, an assessment of:

   a. Personality;

   b. Interests;

   c. Interpersonal skills;

   d. Intelligence and related functional capacities;

   e. Educational achievements;

   f. Work experience, including trial work;

   g. Vocational aptitudes;

   h. Personal and social adjustment;

   i. Employment opportunities available to the individual;

   j. Medical, psychiatric, psychological, and other pertinent vocational, educational, cultural, social, recreational,

and environmental factors that affect the employment and rehabilitation needs of the individual; and

k. An analysis of the patterns of work behavior and services necessary to acquire occupational skills, and to develop work attitudes, work habits, work tolerance, and social and behavioral patterns necessary for successful job performance, including situational assessments to assess and develop the capacities of the individual to perform adequately in the work environment.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-23. Order of selection.

1. An individual applying for services, including those receiving extended evaluation, must receive all services necessary to determine eligibility for vocational rehabilitation services and order of selection priority classification. These services must be provided on a timely basis in accordance with federal law.

2. If services cannot be provided, due to a lack of resources, to all eligible individuals who apply, an order of selection procedure must be implemented.

   a. After completion of a comprehensive assessment to determine rehabilitation needs, vocational rehabilitation shall assign an eligible individual with disabilities a priority.

   b. All services, including postemployment services, must be available to an individual receiving services under a priority.

   c. An individual described in paragraphs 1 through 4 must be assigned a priority in the order in which the paragraphs are listed. Where a category is divided into a subcategory, an individual described in the category must be assigned a priority in the order in which the subcategories are listed.

      (1) Category 1.

         (a) An individual determined eligible for services and who has an individualized written rehabilitation program in effect; or

         (b) An individual who can be provided services without the expenditure of funds.

(2) Category 2.

(a) An individual determined to have a most severe disability and who is a public safety officer injured in the line of duty;

(b) An individual determined to have a most severe disability and whose projected employment outcome could remove or reduce the amount of public support available to the individual;

(c) An individual determined to have a most severe disability and who is being served through a cooperative program, including vision services and transition; or

(d) Other individuals with a most severe disability.

(3) Category 3.

(a) An individual with severe disabilities and who is a public safety officer injured in the line of duty;

(b) An individual with severe disabilities and whose projected employment outcome could remove or reduce the amount of public support available to the individual;

(c) An individual with severe disabilities and who is being served through a cooperative program, including vision services and transition; or

(d) Other individuals with a severe disability.

(4) Category 4.

(a) An individual with nonsevere disabilities and who is a public safety officer injured in the line of duty;

(b) An individual with nonsevere disabilities and whose projected employment outcome could remove or reduce the amount of public support available to the individual;

(c) An individual with nonsevere disabilities and who is being served through a cooperative program, such as vision services and transition; or

(d) Other individuals with nonsevere disabilities.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-04

75-08-01-24. Individualized written rehabilitation program.

1. The individual with a disability and, a parent, family member, guardian, advocate or authorized representative, and the counselor shall jointly develop, amend, and agree on an individualized written rehabilitation program.

2. An individual designing the individualized written rehabilitation program shall plan the program around the individual's achievement of the vocational goal, consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of the individual. The record of service must support the selection of the vocational goal.

3. Counselors shall provide a copy of the individualized written rehabilitation program, and any amendments, to the individual.

4. With the exception of diagnostic and evaluation services, the department may provide vocational rehabilitation goods and services only in accord with the individualized written rehabilitation program.

5. The individualized written rehabilitation program is not a legal contract.

6. The individualized written rehabilitation program must be reviewed at least annually in the same manner as it was originally developed and described in subsection 1.

7. The individualized written rehabilitation program must include:

   a. A vocational goal consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of the individual;

   b. A statement of goals and intermediate rehabilitation objectives that are:

      (1) Based on the assessment determining eligibility and vocational rehabilitation needs, including the assessment of career interests; and

      (2) Inclusive of placement in integrated settings, to the maximum extent appropriate;

c. The specific services to be provided and the projected dates for initiation and anticipated duration of each service, including:

(1) If appropriate, a statement of the specific rehabilitation technology services;

(2) If appropriate, a statement of the specific on-the-job and related personal assistance services, and, the individual's appropriate and desired training in managing, supervising, and directing personal assistance services;

(3) An assessment of the need for postemployment services and, if appropriate, extended services;

(4) Objective criteria, an evaluation procedure, and schedule to determine if the individualized written rehabilitation program objectives are being achieved;

(5) The terms and conditions under which goods and services are to be provided in the most integrated settings;

(6) The terms and conditions for the provision of services, including the individual's:

(a) Responsibilities and vocational rehabilitation's responsibilities;

(b) Participation in the cost of services; and

(c) Access to comparable services and benefits under any other program;

(7) The individual's statement in the individual's own words describing how the individual was informed about and involved in choosing, among alternative goals, objectives, services, entities providing services, and methods used to provide the services;

(8) An assurance that the individual with disabilities was informed of:

(a) The individual's rights, means of expression, and remedies for any dissatisfaction;

(b) The opportunity for a review of the rehabilitation determination, as set forth in section 75-08-01-14 and chapter 75-01-03; and

(c) The availability of the resources available through the client assistance program and that

the individual with disabilities was given a detailed explanation of the resources available;

(9) Information identifying services and benefits from other programs to enhance the capacity of the individual to achieve the individualized written rehabilitation program's objectives;

(10) An amendment specifying the basis for termination of vocational rehabilitation services, if termination is due to ineligibility;

(11) When appropriate, the basis on which the individual has been determined rehabilitated;

(12) A reassessment of the need for postemployment services, or extended services prior to the point of successful closure; and

(13) If appropriate, any plans for the provision of postemployment services and the basis on which the plans are developed.

8. For an individual with a most severe disability for whom a vocational objective of supported employment is appropriate, in addition to the requirements in subsection 7, the following must be addressed:

a. A description of time-limited services that vocational rehabilitation provides, not to exceed eighteen months in duration, unless the individualized written rehabilitation program documents a longer period to achieve job stabilization; and

b. A description of the extended services necessary and identification of the state, federal, or private programs, which may include natural supports, that provide the extended support, or, to the extent that is not possible at the time the individualized written rehabilitation program is written, a statement describing the basis for concluding that there is a reasonable expectation that those sources will become available.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02

75-08-01-25. Comparable services and benefits.

1. In all cases, the department shall encourage an individual with disabilities and the individual's family to financially contribute as much as possible to the cost of vocational

rehabilitation goods and services provided as part of an individualized written rehabilitation program. When available, comparable services and benefits must be used, and the department must apply a financial needs test to specified vocational rehabilitation services. The individual's refusal to provide financial information will constitute the individual's not meeting the financial need criteria. In that event, the individual may be unable to access the services based on financial need.

a. If an individual is single, under the age of eighteen years, and unemancipated, the individual's income, and the income of the individual's parents, must be considered.

b. If an individual is single, under the age of eighteen years, and living with a guardian, the counselor shall determine financial need based on the individual's income.

c. If the individual is single, eighteen years of age or over, but is living with a parent, the counselor shall determine financial need based on the individual's income only.

d. If the individual is married, regardless of age, the counselor shall determine financial need based on the income of the individual and the individual's spouse.

2. The use of comparable services and benefits does not apply:

a. If the determination of the availability would delay the provision of vocational rehabilitation services to an individual with disabilities who is at extreme medical risk; or

b. If the individual would lose an immediate job placement due to a delay in the provision of comparable services and benefits.

3. The following categories of service do not require that comparable services and benefits be used:

a. Evaluation of vocational rehabilitation potential, unless provided under an individualized written rehabilitation program for extended evaluation;

b. Counseling, guidance, referral, and placement;

c. Vocational and other training services not provided in a postsecondary institution;

d. Rehabilitation technology services, excluding assistive technology devices; and

e. Postemployment services that would be included under subdivisions a through d.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02

75-08-01-26. Participation by an individual with disabilities in the cost of vocational rehabilitation services. A financial needs test must be applied as a consideration for the following vocational rehabilitation services:

1. Physical and mental restoration;

2. Maintenance, unless required for diagnostic purposes;

3. Transportation, unless required for diagnostic purposes;

4. Occupational licenses;

5. Tools, equipment, and initial stock, including livestock, supplies, and necessary shelters;

6. Services to family members of an individual with disabilities, which are necessary to the adjustment of rehabilitation of the individual with disabilities;

7. Telecommunications, sensory, and other technological aids and devices for purposes other than evaluation;

8. Postemployment services necessary to assist individuals in maintaining suitable employment, excluding services normally provided without regard to financial needs;

9. Home modifications, including adaptive devices and minor structural changes necessary for the individual to function independently in order to achieve a vocational goal;

10. Other goods and services for which the individual may reasonably expect to receive benefits in terms of the individual's employability;

11. Reader services and notetaker services;

12. Personal assistance services; and

13. Higher education as described in subsection 5 of section 75-08-01-28.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02

75-08-01-27. Determination of financial need.

1. The fee scale established and administered by vocational rehabilitation, as provided for in federal law, must determine client liability. Copies of the fee schedule, which may be updated from time to time, are available from the department upon request.

2. The department must reevaluate financial need annually or whenever financial or other circumstances regarding the individual significantly change, whichever occurs first. Significant change includings marriage or divorce, other changes in dependent status, radical change in income or to the individualized written rehabilitation program.

3. If the individual or the individual's representative disagrees with the outcome of the determination of financial need, the individual has the right to have the determination reviewed in accordance with chapter 75-01-03.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02

75-08-01-28. Vocational rehabilitation services necessary to enable the individual to achieve an employment outcome. Consistent with the individualized written rehabilitation program, vocational rehabilitation may provide, as appropriate to the vocational rehabilitation needs of each eligible individual, any goods or services necessary to enable the individual to achieve an employment outcome. Services include:

1. An assessment for determining eligibility and vocational rehabilitation needs;

2. Counseling, guidance, and work-related placement services for an individual with disabilities, including job search assistance, placement assistance, job retention services, personal assistance services, and followup;

3. Physical and mental restoration services necessary to correct or modify the physical or mental condition of an individual who is stable or slowly progressive. In the purchase of medical goods or services, vocational rehabilitation shall comply with the prevailing medical assistance fee schedule, except for certain diagnostic services that medicaid excludes;

4. Home modifications that may include those adaptive devices and minor structural changes necessary for the individual with disabilities to function independently in order to achieve a vocational goal. Funds for home modifications may not be applied to the purchase or construction of a new residence;

5. Vocational and other training services, including:

   a. Personal and vocational adjustment training;

   b. Services to the individual's family that are necessary to the personal and vocational adjustment or rehabilitation of the individual;

   c. Postsecondary training, with the following limitations:

      (1) Vocational rehabilitation may not provide postsecondary training unless maximum efforts have been made to secure grant assistance in whole, or in part, from other sources. An individual must accept all offered grant assistance. Vocational rehabilitation's participation shall not be calculated until after the institution's financial aid office needs analysis has been received;

      (2) When appropriate, vocational rehabilitation shall request an individual with disabilities to participate in the cost of attendance through the use of college work study and student loans;

      (3) Vocational rehabilitation funding for tuition, room and board, books, supplies, transportation, and incidentals for full-time students may not exceed the financial aid office determined unmet need or the state-supported college and university rate for tuition, room and board, whichever is less;

      (4) If, because of the individual's vocational impediment or vocational goal, the only available postsecondary training is at an out-of-state institution, vocational rehabilitation may waive the expenditure limit defined in paragraph 3 of subdivision c of subsection 5;

      (5) Funding for part-time students is limited to the state-supported college and university rate per credit hour or the financial aid office determined unmet need, whichever is less. For an individual not taking sufficient credit hours to apply for financial aid, the limit is the state university rate per credit hour; and

      (6) An individual shall maintain a grade point average that meets the school's requirement for graduation and shall otherwise demonstrate progress toward meeting the goal of the individualized written rehabilitation program. If the individual is placed on academic probation, continued funding is dependent

on the approval of the regional vocational rehabilitation administrator;

d. Graduate study only when the individual can demonstrate that a suitable vocational goal is otherwise unachievable;

e. Expenditure policies in paragraphs 1 through 6 of subdivision c do not apply to vocational technical training programs not participating in a federal financial aid program. If comparable training is available through a program that participates in a federal financial aid program, vocational rehabilitation shall fund only the costs equal to the costs for attendance in the program that participates in federal financial aid programs; and

f. On-the-job training, with the following limitations:

(1) Conditions of training, certification, and wage payment applicable with state and federal wage and hour laws; and

(2) A written agreement among the individual, counselor, and employer, which states the hourly wage, responsibility for workers' compensation coverage, and any other conditions of employment.

6. Except in institutions of higher education, where comparable benefits, including services for students with disabilities must be used, vocational rehabilitation may provide:

a. Interpreter services and note-taking services for an individual who is deaf, including tactile interpreting for an individual who is deaf-blind;

b. Reader services, rehabilitation teaching services, note-taking services, and orientation and mobility services for an individual who is blind; and

c. Telecommunications, sensory, and other technological aids and devices.

7. Recruitment and training services to provide new employment opportunities in the fields of rehabilitation, health, welfare, public safety, law enforcement, and other appropriate public service employment;

8. Occupational licenses, tools, equipment, initial stocks and supplies necessary in order to enter an occupation, except that vocational rehabilitation shall not purchase land or buildings for an individual with disabilities;

9. Time-limited, ongoing support services for an individual with a vocational objective of supported employment, including:

a. Diagnostic services necessary to determine the individual's rehabilitation needs for supported employment that are supplemental to the assessment for eligibility used to determine vocational rehabilitation eligibility, and are provided only after vocational rehabilitation eligibility has been determined. The purpose of supplemental evaluations is to help develop, finalize, or reassess a supported employment plan of services;

b. Job development and placement services; and

c. Other time-limited services necessary to support the individual in employment. The maximum time period for time-limited services is eighteen months, unless the individualized written rehabilitation program indicates that more than eighteen months of services are necessary in order for the individual to achieve job stability prior to transition to extended services. Time-limited services include:

(1) Intensive on-the-job skills training and other training and support services necessary to achieve and maintain job stability;

(2) Followup services with employers, supported employees, parents and guardians, and others for the purpose of supporting and stabilizing the job placement;

(3) Discrete postemployment services, following transition to extended services, which are not available from the extended service provider and which are needed to maintain job placement; and

(4) Other needed services listed in subsections 1 through 14.

10. Postemployment services for an individual with disabilities who was determined rehabilitated, if the services are necessary to assist the individual to maintain or regain suitable employment. The services must relate to the original vocational impediments and the availability of the individual's record of service. An individual requiring multiple services over an extended period of time and a comprehensive or complex rehabilitation plan is not eligible for postemployment services, but may be encouraged to reapply. Postemployment services may:

a. Include counseling and guidance services to assist an individual to advance in employment; and

b. Require an amendment to the individualized written rehabilitation program.

11. Assistive technology services to meet the needs and address the barriers confronted by an individual with disabilities in the areas of education, rehabilitation, employment, and transportation. Vocational rehabilitation shall provide assistive technology services at any time in the rehabilitation process, including the assessment for determining eligibility and vocational rehabilitation needs, extended evaluation, services provided under an individualized written rehabilitation plan, annual reviews of ineligibility decisions, annual reviews of extended employment in rehabilitation facilities, and postemployment services;

12. Transition services that promote or facilitate the accomplishment of long-term rehabilitation goals and objectives;

13. Other supportive services, including:

    a. Maintenance for additional costs incurred while participating in rehabilitation;

    b. Transportation, including travel and related expenses in connection with transporting an individual and an individual's attendants for the purpose of supporting and deriving the full benefit of other vocational rehabilitation services;

        (1) Reimbursement is at the state rate level;

        (2) Transportation may include relocation, moving expenses, and vehicle modifications only when the individual is otherwise precluded from achieving a vocational objective;

        (3) Reimbursement must be provided at the prevailing rate for the service;

        (4) Vocational rehabilitation will not contribute to the purchase of a vehicle; and

    c. On-the-job or other related personal assistance services provided while an individual with disabilities is receiving vocational rehabilitation services.

14. Other vocational rehabilitation goods and services that an individual with disabilities is reasonably expected to benefit from in terms of employability.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-06

75-08-01-29. Closure. The counselor shall close an individual's record of service at any time in the vocational rehabilitation process when it is determined that the individual is no longer eligible, is unavailable for diagnostic or planned services, chooses not to participate, or is rehabilitated.

1. Closure due to ineligibility.

   a. Vocational rehabilitation shall close the individual's case if the individual has no disability, no substantial impediment to employment, or does not require services to achieve an employment outcome. Closure for ineligibility under these circumstances requires:

      (1) The opportunity for the individual or the individual's representative to participate in the closure decision;

      (2) Written notification of the closure decision;

      (3) Written notification of appeal rights, including the name and address of the appeals supervisor with whom an appeal may be filed, and written notification of the availability of the client assistance program;

      (4) An individualized written rehabilitation program amendment, if appropriate;

      (5) Certification of ineligibility in the record of service that documents the reasons for closure, dated and signed by the counselor; and

      (6) Referral to other agencies and community rehabilitation programs, as appropriate.

   b. Vocational rehabilitation shall close the individual's case, if there is clear and convincing evidence, after an extended evaluation or after a period of service provision under an individualized written rehabilitation program that the individual with disabilities is incapable of benefiting from vocational rehabilitation services in terms of achieving an employment outcome. Closure for ineligibility under these circumstances requires:

      (1) The opportunity for the individual or the individual's representative to participate in the closure decision;

      (2) Written notification of the closure decision;

      (3) Written notification of appeal rights, including the name and address of the appeals supervisor with whom

an appeal may be filed, and written notification of the availability of the client assistance program;

(4) An individualized written rehabilitation program amendment, if appropriate;

(5) Review of the ineligibility determination within twelve months. A review is not required in situations where the individual refuses it, the individual is no longer present in the state, the individual's whereabouts are unknown, or the individual's medical condition is rapidly progressive;

(6) Certification of ineligibility in the record of service that documents the reasons for closure, dated and signed by the counselor; and

(7) Referral to other agencies and community rehabilitation programs, as appropriate.

2. Closure for reasons other than ineligibility. The counselor shall close a case when an individual is unavailable during an extended period of time for an assessment to determine eligibility and vocational rehabilitation needs or when an individual is unavailable to participate in planned vocational rehabilitation services. The counselor shall have made repeated efforts to contact the individual and to encourage the individual's participation. Closure under these circumstances requires:

a. Documentation of the rationale for closure in the record of service;

b. Written notification of the closure decision;

c. Written notification of appeal rights, including the name and address of the appeals supervisor with whom an appeal may be filed, and written notification of the availability of the client assistance program; and

d. An individualized written rehabilitation program amendment, if appropriate.

3. Closure of an individual determined to be rehabilitated.

a. An individual is determined to be rehabilitated if the individual has maintained suitable employment for at least sixty calendar days. The individual's record of service must contain documentation that vocational rehabilitation has:

(1) Determined that the individual is eligible;

(2) Provided an assessment for eligibility and determination of vocational rehabilitation needs;

(3) Provided counseling and guidance;

(4) Provided appropriate and substantial vocational rehabilitation services in accord with the individualized written rehabilitation program;

(5) Determined that the individual has maintained suitable employment for at least sixty calendar days;

(6) Provided an opportunity for individual involvement in the closure decision;

(7) Reassessed the need for and informed the individual of the purpose and availability of postemployment services, when necessary; and

(8) Provided written notification of the closure.

b. An individual in supported employment is determined rehabilitated when:

(1) The individual has substantially met the goals and objectives of the individual's individualized written rehabilitation program;

(2) Extended services immediately available to preclude any interruption in the provision of the ongoing support needed to maintain employment; and

(3) The individual has maintained employment for at least sixty days after the transition to extended services.

c. For an individual's case to be closed while working in a temporary transitional employment placement, the extended support services must include continuous job placements until job permanency is achieved.

4. For an individual's case to be closed in extended employment in rehabilitation facilities, vocational rehabilitation shall conduct an annual review and reevaluation of the status of each individual with disabilities placed in an extended employment setting in a community rehabilitation program, including a workshop or other employment to determine the interest, priorities, and needs of an individual, for employment or training for competitive employment in an integrated setting in the labor market.

History: Effective October 1, 1995.
General Authority: NDCC 50-06-16, 50-06.1
Law Implemented: NDCC 50-06-16, 50-06.1-02, 50-06.1-06