NORTH DAKOTA ADMINISTRATIVE CODE

Supplements 258 through 265

December 2000
January 2001
February 2001
March 2001
April 2001
May 2001
June 2001
July 2001

Prepared by the Legislative Council staff
for the
Administrative Rules Committee

TABLE OF CONTENTS

TITLE 3

Accountancy, Board of

DECEMBER 2000

CHAPTER 3-02-02

3-02-02-04. Certificate and license annual renewal fees. The annual renewal fee for every CPA and LPA shall be forty-five dollars. A CPA or LPA who fails to register or pay the renewal fee by ~~June thirtieth~~ July first of the board's current fiscal year shall pay a late filing fee of twenty dollars in addition to the regular annual fee. Individuals working within the state under the substantial equivalency provisions are required to file an annual renewal form and pay an annual renewal fee of forty-five dollars.

History: Amended effective August 1, 1981; October 1, 1982; July 1, 1987; June 1, 1988; July 1, 1991; March 1, 1995; September 1, 1997; October 1, 1999; December 1, 2000.
General Authority: NDCC 43-02.2-03
Law Implemented: NDCC 43-02.2-03, 43-02.2-04, 43-02.2-05, 43-02.2-07

3-02-02-04.1. Fee for annual firm permit. The annual fee for a firm permit is fifty dollars ~~except that~~ for firms with one or two licensees, one hundred dollars for firms with three to fifteen licensees, two hundred dollars for firms with sixteen to forty-nine licensees, and three hundred dollars for firms with fifty or more licensees. For firms which provide no audit, review, compilation, or examination of prospective financial information services, the fee is ten dollars. A late filing fee of twenty dollars shall also be paid by a firm that fails to register or pay the annual firm permit fee by ~~June thirtieth~~ July first of the board's current fiscal year. A firm shall register and pay a firm permit fee before commencing any activity that requires such a permit. Failure to register and pay the appropriate firm permit fees may result in the board proceeding to revoke, suspend,

or refuse to renew the certificates and licenses of each of the firm's partners, officers, directors, shareholders, or owners.

History: Effective June 1, 1988; amended effective March 1, 1995; September 1, 1997; October 1, 1999; December 1, 2000.
General Authority: NDCC 43-02.2-03
Law Implemented: NDCC 43-02.2-03, 43-02.2-06, 43-02.2-07

3-02-02-05. ~~Inactive or retired~~ Retired accountants.

1. Any CPA or LPA who is no longer employed because of disability or retirement may notify the board of that status. In that event, a certificate to practice as a CPA or license to practice as an LPA shall be designated ~~"inactive"~~ retired and shall remain as such without payment of the annual fees required by this chapter. ~~An inactive~~ A retired certificate holder or licenseholder may not practice in this state but may continue to use the title "certified public accountant" or "licensed public accountant" or the abbreviation "CPA" or "LPA", as applicable. ~~An inactive~~ A retired certificate holder or licenseholder must adhere to the code of ethics set forth in article 3-04~~,~~ but is not required to comply with continuing education regulations set forth in article 3-03.

2. ~~An inactive~~ A retired certificate holder or licenseholder may apply for reinstatement to practice at any time and will be reinstated to ~~"active"~~ practice as a CPA or LPA by paying the annual registration fee required for the year of application~~,~~ and by satisfying the board that all current requirements for continuing education have been met.

History: Effective October 1, 1982; amended effective July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2000.
General Authority: NDCC 43-02.2-03
Law Implemented: NDCC 43-02.2-03

CHAPTER 3-03-01

3-03-01-01. Hours or days required. Continuing education reports are due from all CPAs and LPAs, except those on ~~inactive~~ retired status, by December thirty-first of each year and any hours submitted must be for that previous twelve months, January first through December thirty-first. At the end of each continuing education reporting year, each CPA and LPA ~~practicing public accountancy or providing~~ performing accounting, auditing, management or financial advisory, consulting, bookkeeping, or tax services for a client or an employer's client while holding out to the public as a licensee in this state must have completed one hundred twenty hours of acceptable continuing education in the immediate preceding three reporting periods and a minimum of twenty credit hours each year. All other accountants who in any way hold out as a CPA or LPA in this state, except those on ~~inactive~~ retired status and those who include the term "inactive" whenever using the CPA or LPA title or abbreviation, must have completed sixty hours of acceptable continuing education in the immediately preceding three reporting periods and a minimum of sixteen credit hours each year. At the end of the first full calendar year following receipt of an initial original certificate, an accountant must meet the applicable per year minimum~~,~~ and must meet the applicable three-year minimum at the end of the third full calendar year.

History: Amended effective August 1, 1984; October 1, 1984; July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2000.
General Authority: NDCC 43-02.2-03
Law Implemented: NDCC 43-02.2-03, 43-02.2-05

3-03-01-04. Exceptions. The board will consider exceptions to the continuing education requirements for reasons including military service, foreign residency, retirement, and circumstances beyond the accountant's reasonable control. Nonresident accountants are exempt from the requirements of article 3-03~~,~~ if they verify that they meet the continuing education requirements of their jurisdictions of residence, provided the board considers those continuing education requirements to be substantially equivalent to those of this state~~,--and--provided--that state--provides--similar--exemption--to--accountants-who-reside-in-North Dakota~~. Nonresident accountants practicing public accountancy in North Dakota must meet the public practice continuing education requirements of their jurisdictions of residence.

History: Amended effective March 1, 1995; September 1, 1997; October 1, 1999; December 1, 2000.
General Authority: NDCC 43-02.2-03
Law Implemented: NDCC 43-02.2-03, 43-02.2-05

CHAPTER 3-03-03

3-03-03-01. Coverage of requirement. The continuing education requirements promulgated by the board will apply to all CPAs and LPAs except those on ~~inactive~~ retired status. In order to enter public practice either full time or part time in North Dakota, an accountant must meet the continuing education requirements as specified in section 3-03-01-01, and furnish evidence of familiarity with current procedures and practices in the service areas they intend to practice.

A late filing fee of twenty dollars will be imposed on any CPA or LPA whose continuing education reports are not received by the date indicated on the reporting form.

History: Amended effective July 1, 1991; March 1, 1995; October 1, 1999; December 1, 2000.
General Authority: NDCC 43-02.2-03
Law Implemented: NDCC 43-02.2-03, 43-02.2-05

TITLE 11

Audiology and Speech-Language Pathology, Board of Examiners on

FEBRUARY 2001

CHAPTER 11-02-01

11-02-01-05. Fees. The following fees shall be paid in connection with audiologist and speech-language pathologist applications, examinations, renewals, and penalties:

1. Application fee for an audiologist license: ~~seventy-five~~ one hundred dollars.

2. Application fee for a speech-language pathologist license: ~~seventy-five~~ one hundred dollars.

3. Renewal fee for an audiologist license: ~~thirty~~ seventy-five dollars.

4. Renewal fee for a speech-language pathologist license: ~~thirty~~ seventy-five dollars.

5. A license expires on January first of the calendar year. If a person fails to renew the person's license before January first, a ~~twenty-five~~ fifty dollar penalty fee will be incurred up to March thirty-first of that same year. After March thirty-first, the person will be considered by the board to be practicing without a license.

History: Amended effective May 1, 1984; June 1, 1990; February 1, 2001.
General Authority: NDCC 43-37-06
Law Implemented: NDCC 43-37-06

TITLE 13

Banking and Financial Institutions, Department of

JANUARY 2001

CHAPTER 13-03-16

13-03-16-01. Definitions.

1. "Member business loans" means any loan, line of credit, or letter of credit, the proceeds of which will be used for a commercial, corporate, business, investment property or venture, or agricultural purpose, except that the following may not be considered member business loans for the purposes of this section:

   a. A loan or loans fully secured by a lien on a one to four family dwelling that is the member's primary residence.

   b. A loan that is fully secured by shares in the credit union or deposits in other financial institutions.

   c. A loan meeting the general definition of member business loans under subsection 1 and, made to a borrower or an associated member as defined in subsection 3, which, when added to other such loans to the borrower or associated member, is less than fifty thousand dollars.

   d. A loan, the repayment of which is fully insured or fully guaranteed by, or where there is an advance commitment to purchase in full by, any agency of the federal government or of a state or any of its political subdivisions.

   e. A loan granted by a corporate credit union operating under the provisions of part 704 of the national credit union administration rules and regulations to another credit union.

2. ~~"Reserves"-mean-all-reserves,-including-the-allowance-for-loan losses-and-undivided-earnings-or-surplus.~~

3. "Associated member" means any member with a shared ownership, investment or other pecuniary interest in a business or commercial endeavor with the borrower.

4. 3. "Immediate family member" means a spouse or other family member living in the same household.

5. 4. "Loan-to-value (LTV)" ratio means the quotient of the aggregate amount of all sums borrowed from all sources on an item of collateral divided by the market value of the collateral used to secure the loan.

6. 5. "Construction or development loan" means a financing arrangement for the purpose of acquisition of property or rights to property including land or structures with the intent of conversion into income-producing property including residential housing for rental or sale, commercial, or industrial use, or a similar use.

6. "Net worth" means all the credit union's undivided earnings, regular reserves, and any other reserves.

History: Effective December 1, 1992; amended effective October 1, 1994; January 1, 2001.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

13-03-16-02. Requirements.

1. **Written loan policies.** The board of directors shall adopt specific business loan policies and review them at least annually. The policies must, at a minimum, address the following:

   a. Types of business loans that will be made;

   b. The credit union's trade area for business loans;

   c. Maximum amount of credit union assets, in relation to ~~reserves~~ net worth, that will be invested in business loans;

   d. Maximum amount of credit union assets, in relation to ~~reserves~~ net worth, that will be invested in a given category or type of business loan;

   e. Maximum amount of credit union assets, in relation to ~~reserves~~ net worth, that will be loaned to any one member

or group of associated members, subject to subsection 1 of section 13-03-16-03;

f. Qualifications and experience of personnel involved in making and administering business loans with a minimum of two years direct experience with this type of lending;

g. Analysis of the ability of the borrower to repay the loan;

h. Documentation supporting each request for an extension of credit or an increase in an existing loan or line of credit shall, except where the board of directors finds that such documentation requirements are not generally available for a particular type of business loan and states the reasons for those findings in the credit union's written policies, include ~~the following:~~ balance sheet, cash flow analysis, income statement, tax data; leveraging; comparison with industry averages; receipt and periodic updating of financial statements and other documentation; including tax returns;

i. Collateral requirements, including loan-to-value ratios; ~~appraisal~~ determination of value, title search, and insurance requirements; steps to be taken to secure various types of collateral; and how often the value and marketability of collateral is reevaluated;

j. Appropriate interest rates and maturities of business loans;

k. Loan monitoring, servicing, and followup procedures, including collection procedures;

l. Provision for periodic disclosure to the credit union's members of the number and aggregate dollar amount of member business loans; and

m. Identification, by position, of those senior management employees prohibited by subsection 1 of section 13-03-16-06 from receiving member business loans.

2. **Other policies.** The following minimum limits and policies must also be established in writing and reviewed at least annually for loans granted under this section:

a. Loans, except with respect to credit card line of credit programs offered to nonnatural person members which are limited to routine purposes made available under such programs, must be granted on a fully secured basis by collateral as follows:

(1) ~~Second lien for loan to value ratios of up to seventy percent;~~ Agricultural operating crop and livestock

production loans with loan-to-value ratios up to eighty percent of projected crop production and livestock sales using current crop and livestock prices. This limitation does not apply if the agricultural operating loan is cross-collateralized with chattel or real estate if such loans do not exceed the loan-to-value ratios on chattel or real estate loans.

(2) First ~~lien~~ and second liens, including chattel, real estate, and all commercial loans, for loan-to-value ratios of up to eighty percent~~;~~.

(3) First lien with a loan-to-value ratio in excess of eighty percent shall be granted only where the value in excess of eighty percent is covered through acquisition of private mortgage, or equivalent type, insurance provided by an insurer acceptable to the credit union or insurance or guarantees by or subject to advance commitment to purchase by, an agency of the federal government or of a state or any of its political subdivisions, and in no event may the loan-to-value ratio exceed ninety-five percent~~;~~.

b. Loans may not be granted without the personal liability and guarantees of the principals (natural person members) except where the borrower is a not-for-profit organization as defined by the Internal Revenue Service Code [26 U.S.C. 501]~~;~~.

History: Effective December 1, 1992; amended effective January 1, 2001.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

13-03-16-03. Loan limits.

1. **Loans to one borrower.** Unless a greater amount is approved by the state credit union board, the aggregate amount of outstanding member business loans to any one member or group of associated members may not exceed fifteen percent of the credit union's ~~reserves~~ net worth (less the allowance for loan losses account), or ~~seventy-five~~ one hundred thousand dollars, whichever is higher. A credit union may lend an additional ten percent of the credit union's ~~reserve~~ net worth to any one member or group of associated members if such credit is extended for seasonal advances associated with operating purposes for the production of farm products and repayment of which is required to be made within a normal business cycle not to exceed twelve months. In no event can the credit union lend, or the state credit union board approve an exception for a credit union resulting in a loan to any one member in excess of the limitation specified in subsection 7 of North Dakota

Century Code section 6-06-12. If any portion of a member business loan is secured by shares in the credit union, or deposits in another financial institution, or fully or partially insured or guaranteed by, or subject to an advance commitment to purchase by, any agency of the federal government or of a state or any of its political subdivisions, such portion may not be calculated in determining the fifteen percent limit.

2. **Exceptions.** Credit unions seeking an exception from the limits of subsection 1 or section 13-03-16-05 must present the state credit union board with, at a minimum: the higher limit sought; an explanation of the need by the members to raise the limit and ability of the credit union to manage this activity; and analysis of the credit union's prior experience making member business loans; and a copy of its business lending policy. The analysis of credit union experience in making member business loans shall document the history of loan losses, loan delinquency, volume and cyclical or seasonal patterns, diversification, concentrations of credit to one borrower or group of associated borrowers in excess of fifteen percent of ~~reserves~~ net worth (less the allowance for loan losses account), underwriting standards and practices, types of loans grouped by purpose and collateral and qualifications of personnel responsible for underwriting and administering member business loans. ~~State~~ The state credit union board shall consider, in addition to the information submitted by the credit union, the historical CAMEL ratings. If the credit union does not receive notification of the action taken within ninety calendar days of the date the request was received by the state credit union board, the credit union may assume approval of the request to exceed the limit.

3. **Maturity.** Member business loans must be granted for periods consistent with the purpose, security, creditworthiness of the borrower and sound lending policies.

4. **Monitoring requirement.** Credit unions with member business loans in excess of one hundred percent of ~~reserves~~ net worth (less the allowance for loan losses account) shall submit the following information regarding member business loans to the national credit union administration regional director on a quarterly basis: the aggregate total of loans outstanding; the amount of loans delinquent in excess of thirty days; the balance of the allowance for member business loan losses; the aggregate total of all concentrations of credit to one borrower or group of associated borrowers in excess of fifteen percent of ~~reserves~~ net worth (less the allowance for loan losses account); the total number and amount of all construction, development, or speculative loans; and any other information pertinent to the safe and sound condition of the member business loan portfolio.

History: Effective December 1, 1992; amended effective January 1, 2001.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

13-03-16-05. Construction and development lending. Loans granted under this section to finance the construction or development of commercial or residential property are subject to the following additional provisions:

1. The aggregate of all such loans, excluding any portion of a loan secured by shares in the credit union, or deposits in another financial institution, or fully or partially insured or guaranteed by, or subject to an advance commitment to purchase by, any agency of the federal government or of a state or any of its political subdivisions, may not exceed fifteen percent of reserves net worth less the allowance for loan losses account;

2. The borrower shall have a minimum of thirty-five percent equity interest in the project being financed; and

3. Funds for such projects must be released following onsite inspections by independent, qualified personnel in accordance with a preapproved draw schedule.

History: Effective December 1, 1992; amended effective January 1, 2001.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

13-03-16-08. Aggregate loan limit. A credit union's aggregate limit for all outstanding member business loans, including any unfunded commitments, is the lesser of one hundred seventy-five percent of the credit union's net worth or twelve and one-quarter percent of the credit union's total assets. The aggregate loan limit must include the outstanding balance of any loan portion retained as to any participation sold and must include any outstanding balance for any portion of a loan participation purchased.

History: Effective January 1, 2001.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

13-03-16-09. Exceptions to the aggregate loan limit. The state credit union board may exclude a credit union from the aggregate loan limit under section 13-03-16-08 for any one of the following conditions:

1. Credit unions that have a low-income designation as provided for in 12 CFR 701.34 or participate in the community development financial institutions program as provided for in

the Riegle Community Development and Regulatory Improvement Act of 1994 [12 U.S.C. 4703].

2. Credit unions that were chartered for the purpose of making member business loans under any of the following:

   a. Original bylaws listing the field of membership to include a farm cooperative or agricultural-related association.

   b. Charter application including a narrative identifying lending focus to be business loans of any amount, including loans made for agricultural purposes.

3. Credit unions that have a history of primarily making member business loans, meaning that either member business loans comprise at least twenty-five percent of the credit union's outstanding loans as evidenced in a recent call report from 1996 or later or member business loans comprise the largest portion of the credit union's loan portfolio.

History: Effective January 1, 2001.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

TITLE 17

Chiropractic Examiners, Board of

APRIL 2001

CHAPTER 17-01-01

17-01-01-01. Organization and functions of the board of chiropractic examiners.

1. **History.** The board of chiropractic examiners was first established in 1915 under laws now codified as North Dakota Century Code chapter 43-06. North Dakota was the first state in the United States to issue a license to practice chiropractic.

2. **Functions.** One function of the board is to examine, or designate a testing agency to examine, candidates coming into the state to see if they are qualified to practice chiropractic in North Dakota. It is also the function of the board to prevent those who are unqualified ~~to practice~~ from practicing chiropractic in the state.

3. **Board membership.** The board consists of five members appointed by the governor. Each member is a doctor of chiropractic. Members of the board serve five-year terms, and one term expires each year. Board members annually elect from board membership the president, vice president, and secretary-treasurer of the board.

4. **Secretary-treasurer.** The secretary-treasurer of the board is elected by the board and is responsible for ~~administration of~~ overseeing the board's activities.

5. Executive director. The board may hire an executive director to oversee the clerical needs of the board, and who will answer to the board president.

6. **Inquiries.** Any questions or suggestions concerning these rules should be sent to the ~~secretary-treasurer~~ executive director:

Jerry Blanchard, D.C.
Box 185
Grafton, ND 58237
Telephone 701-352-1690
Fax 701-352-2258

History: Amended effective December 1, 1981; March 1, 1986; April 1, 1988; July 1, 1990; April 1, 2001.
General Authority: NDCC ~~43-06-04~~ 43-06-04.1
Law Implemented: NDCC 28-32-02.1, 43-06-04, 43-06-04.1

17-01-01-02. Fees. The board charges the following fees:

1. For an application for initial licensure, one hundred fifty dollars.

2. For renewal of a license, one hundred fifty dollars for active status or one hundred dollars for inactive status.

3. To change from inactive to active status, fifty dollars.

4. For a duplicate license, twenty-five dollars.

5. The additional administrative fee for late renewals is two hundred dollars.

History: Effective April 1, 2001.
General Authority: NDCC 43-06-04.1
Law Implemented: NDCC 43-06-08, 43-06-13

CHAPTER 17-01-02

17-01-02-01. Regular or special meetings. The board will hold regular sessions meetings at least twice a year at approximate six month intervals for examination of candidates and the transaction of such other business as may properly come before it. Such meetings shall be held at the state capitol in Bismarck, or at any more convenient place designated by the board. Adjournment. Regular or special meetings may be called at any time when the opinion of the board justifies such action. Three members of the board shall constitute a quorum.

History: Amended effective April 1, 1984; April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-05
Law Implemented: NDCC 43-06-05

17-01-02-03. Board expenses. Each member of the board of chiropractic examiners shall be reimbursed for the member's expenses for each day the member is actually engaged in performing the duties of the member's office as provided for in North Dakota Century Code section 44-08-04, and such mileage and travel expenses as are provided for in North Dakota Century Code section 54-06-09 and additional allowance for other necessary expenses incurred. Each member of the board shall receive compensation in the amount of one hundred fifty dollars for each day or portion thereof spent in the discharge of the member's duties. The secretary treasurer of the board shall receive an annual salary not to exceed five thousand dollars.

History: Effective April 1, 1982; amended effective April 1, 1984; February 1, 1990; April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-05
Law Implemented: NDCC 43-06-05, 44-08-04, 54-06-09

17-01-03-02. Duties of secretary-treasurer. ~~The secretary-treasurer is the filing, recording, and corresponding officer of the board. The secretary-treasurer shall keep on file a register showing names and addresses and complete registration of all chiropractors who have been licensed by the board. The secretary-treasurer shall be custodian of the seal and affix the same to documents when necessary. The secretary-treasurer shall collect and receipt for all money received, keep an accurate account of the same and deposit all such money after each regular or special meeting of the board with the bank selected by the board. The secretary-treasurer shall keep an accurate record of all money received and disbursed, and report the condition of the finances to the board after each board meeting or whenever required to do so. The secretary-treasurer shall take the minutes of each board meeting and make a complete record of the minutes, which shall be kept in a book provided for that purpose.~~ The secretary-treasurer will review and sign minutes of all meetings as prepared by the executive director. Authorization by the secretary-treasury is required for any checks that exceed five hundred dollars. The secretary-treasurer will review the bank statements each month. The secretary-treasurer will assume the duties of the executive director if the position is unfilled.

History: Amended effective April 1, 2001.
General Authority: NDCC ~~28-32-02~~ 43-06-04.1
Law Implemented: NDCC 43-06-05, ~~43-06-07~~

17-01-03-02.1. Duties of executive director. The executive director is the filing, recording, and corresponding officer of the board. The executive director shall keep on file a register showing names and addresses and complete registration of all chiropractors who have been licensed by the board. The executive director shall be custodian of the seal and affix the same to documents when necessary. The executive director shall collect and receipt for all money received, keep an accurate account of the same and deposit all such money after each regular or special meeting of the board with the bank selected by the board. The executive director shall keep an accurate record of all money received and disbursed and report the condition of the finances to the board after each board meeting or whenever required to do so. The executive director shall take the minutes of each board meeting and make a complete record of the minutes, to be signed by the secretary-treasurer, which shall be kept in a book provided for that purpose. The executive director will keep the board compliant with the state's open meetings laws.

History: Effective April 1, 2001.
General Authority: NDCC 43-06-04.1
Law Implemented: NDCC 43-06-04.1, 43-06-05, 43-06-07

17-02-01-01.2. Definitions.

1. Unless specifically stated otherwise, all definitions found in North Dakota Century Code section 43-06-01 are applicable to this title.

2. "Actual consultation" as used in North Dakota Century Code section 43-06-02 means seeking or giving professional advice, opinions, or assistance in conjunction with a licensed chiropractor in this state with regard to a specific patient for the purpose of providing chiropractic treatment to the patient.

3. In this title, unless the context or subject matter otherwise requires:

   a. "National board" means the national board of chiropractic examiners.

   b. "Special purposes examination for chiropractic" or "SPEC" means the special purposes examination for chiropractic offered by the national board.

History: Effective May 1, 1993; amended effective April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-04.1
Law Implemented: NDCC 43-06-02, 43-06-10, 43-06-10.1

17-02-01-02. ~~Applications~~ Application **for** ~~examination~~ licensure. Application shall be made on the official form issued by the board. The forms may be secured upon application to the ~~secretary-treasurer.--If the-applicant-graduated-prior-to-1966-(prenational-board)-and--has--been in--active--practice,--the-applicant-must-pass-five-examinations-(x-ray, orthopedics,-jurisprudence,-nutrition,--and--neurology)--and--also--five practicals--(x-ray,-spinal-biomechanics,-extremity-adjusting,-first-aid, and-case-management)~~ executive director.

~~All--applicants--graduating--after--1966-and-before-July-1988-must pass-parts-I-and-II--of--the--national--board,--plus--five--examinations (x-ray,--orthopedics,--jurisprudence,-nutrition,-and-neurology)-and-also five-practicals-(x-ray,-spinal-biomechanics,-extremity-adjusting,--first aid,-and-case-management).~~

~~If--the--applicant--graduated--after-July-1988,-the-applicant-must have--passed--all--parts--of--the--national--board,--plus--the--clinical competency--examination.--The-applicant-must-pass-jurisprudence-and-five practicals-(x-ray,-spinal-biomechanics,-extremity-adjusting,-first--aid, and-case-management).~~

History: Amended effective February 1, 1990; April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-04.1, 43-06-05
Law Implemented: NDCC 43-06-08

17-02-01-02.1. Reciprocity. An applicant for reciprocal licensure will be considered by the board if the following conditions are met:

1. The applicant has a license and is in good standing to practice chiropractic in another state or jurisdiction;

2. The applicant has been licensed to practice chiropractic for at least the preceding two years in the other state or jurisdiction;

3. The applicant has successfully passed the national board on an earlier occasion; and

4. The applicant successfully passes the special purposes examination for chiropractic, or part IV of the national board examination, unless waived by the board for good cause; and

5. The applicant sucessfully passes the jurisprudence examination required by North Dakota law.

History: Effective May 1, 1993; amended effective April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-04.1, 43-06-10.1
Law Implemented: NDCC 43-06-10, 43-06-10.1

17-02-01-05. Examination number. ~~Before the examination each applicant shall be given a confidential number which the applicant shall place at the top of each page of manuscript. No other marks shall be placed on any paper whereby the identity of the candidate may become known to the examiner.~~ Repealed effective April 1, 2001.

General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 43-06-08~~

17-02-01-06. Examination requirements. ~~To be entitled to a license, every candidate must answer correctly at least seventy-five percent of the questions in each subject, in addition to conducting a satisfactory clinical demonstration.~~ Repealed effective April 1, 2001.

History: ~~Amended effective February 1, 1990.~~
General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 43-06-08~~

17-02-01-07. Conduct of examination. ~~All examinations shall be conducted by the board. No person except the candidate or candidates and the board, or such other assistants as may be employed, shall be allowed in the room during examinations. All written examinations must be in ink, on one side of the paper furnished by the board.~~ Repealed effective April 1, 2001.

General Authority: ~~NDCC~~ 28-32-02
Law Implemented: ~~NDCC~~ 43-06-08

17-02-01-08. Examination subjects and requirements. ~~Written examinations shall be conducted in the subjects as set forth in North Dakota Century Code sections 43-06-10 and 43-06-10.1. Each candidate must make a satisfactory clinical demonstration in the practical examinations set forth by the board.~~ Examinations will be provided by the national board, or its successor, except for jurisprudence, which will be administered by the board. An applicant must satisfy the following criteria:

1. The applicant must hold a diploma from a chiropractic college fully accredited by the council on chiropractic education.

2. If the applicant graduated before 1966, the applicant must have been in active practice and have passed five examinations (x-ray, orthopedics, jurisprudence, nutrition, and neurology) and also five practicals (x-ray, spinal biomechanics, extremity adjusting, first aid, and case management).

3. If the applicant graduated between 1966 and 1988, the applicant must have passed parts I and II of the national board examination. In addition, the applicant must have passed part IV or the SPEC.

4. If the applicant graduated between July 1988 and January 1997, the applicant must have passed parts I, II, and III of the national board examination. In addition, the applicant must have passed part IV or the SPEC.

5. If the applicant graduated after January 1997, the applicant must have passed parts I, II, III, and IV of the national board examination.

6. Passing grades for part IV of the national board examination are effective for seven years after which time the applicant may be required to take and pass the SPEC.

7. Applications made after January 1, 2001, must reflect a passing score on the national board's physiotherapy examination.

History: Amended effective February 1, 1990; April 1, 2001.

General Authority: NDCC 28-32-02, 43-06-04.1, 43-06-05
Law Implemented: NDCC 43-06-10, 43-06-10.1

17-02-01-09. Declaration. At the conclusion of the examination, each candidate shall be required to sign the following declaration:

NORTH DAKOTA STATE BOARD OF
CHIROPRACTIC EXAMINERS

Date _____, 19____

I, _____
City of _____, State of _____
certify that I am an applicant for a certificate from the North Dakota State Board of Chiropractic Examiners authorizing me to practice chiropractic in North Dakota and that I was present and took the examination held at _____, North Dakota, on _____ 19____.

I further declare upon my honor that during said examination I neither received aid from nor extended any aid to others, nor resorted to any unfair means whatsoever, to secure the required rating to enable me to pass.

I further certify that I did not see any of the sets of questions used at this examination until I appeared before the board.

Signature of applicant _____

Repealed effective April 1, 2001.

General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-06-08

17-02-01-10.1. License displayed. If a licensed chiropractor moves from his the chiropractor's primary location, the office of the secretary-treasurer executive director must be notified of the change of location of the chiropractor. The A current certificate or duplicate certificate issued by the board must at all times be displayed in the each office of the chiropractor. In case of loss by fire or other destruction, a duplicate certificate may be issued by the board at a regular meeting upon receipt of satisfactory evidence of the destruction and payment of a fee not to exceed twenty-five dollars.

History: Effective February 1, 1990; amended effective April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-04.1, 43-06-05
Law Implemented: NDCC 43-06-04.1

17-02-01-13. License renewal and fees.

1. Every chiropractor who has been licensed by the board shall renew the license by remitting a renewal fee ~~not to exceed two hundred dollars~~ on or before September first of each year. A For applicants who receive an initial license after July first, the license will be deemed to be automatically renewed on September first for an additional year without payment of an additional renewal fee.

2. Subject to subsection 3, a license which has not been renewed as a result of nonpayment of the annual registration fee may be reinstated upon payment to the board of past renewal fees plus an additional administrative fee ~~not to exceed four hundred dollars~~ set by the board. Proof of appropriate continuing education hours must be presented.

3. If a license has not been renewed during a continuous two-year period, no renewal of the license may be issued unless the applicant passes the special purposes examination for chiropractic or part IV of the national board examination, or has passed part IV within the seven years immediately preceding the date of application for renewal, unless waived by the board for good cause. Further, the applicant must pass the jurisprudence examination required under North Dakota law. ~~If a license has not been renewed during a continuous five-year period, no renewal of the license may issue and the applicant must pass the examinations required by North Dakota Century Code sections 43-06-10 and 43-06-10.1.~~

History: Amended effective April 1, 1984; February 1, 1990; May 1, 1993; April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-04.1, 43-06-05
Law Implemented: NDCC 43-06-04.1, 43-06-13

17-02-01-14. License renewal - Special purposes examination for chiropractic. ~~If a license has not been renewed for a period of two years, no renewal of the license may be issued unless the applicant passes the special purposes examination for chiropractic.~~ Repealed effective April 1, 2001.

History: ~~Effective May 1, 1993.~~
General Authority: ~~NDCC 43-06-04.1, 28-32-02~~
Law Implemented: ~~NDCC 43-06-13~~

17-02-01-15. Lapsed licenses. Notwithstanding the provisions in this chapter regarding renewal of lapsed licenses, once a license has lapsed, the person who held the lapsed license may not practice chiropractic or use a title reserved under state law for individuals who are licensed by the board until the individual's license is renewed or until a new license is issued. A person whose license has lapsed but

who continues to practice chiropractic or use a restricted title violates state law and this chapter. Such a violation is grounds for denying an application by the former licensee for renewal of the lapsed license or for a new license.

History: Effective April 1, 2001.
General Authority: NDCC 43-06-04.1
Law Implemented: NDCC 43-06-04.1

CHAPTER 17-02-03

17-02-03-01. Filing addresses. Every chiropractor shall file with the ~~secretary-treasurer~~ executive director of the board of examiners the chiropractor's address in the city and location of the place where the chiropractor conducts practice and shall report the name of any other city and place wherein the chiropractor maintains a branch office for the purpose of practice.

History: Amended effective April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-04.1, 43-06-05
Law Implemented: NDCC 43-06-13

17-02-03-03. Releasing patients from quarantine. ~~Before--a chiropractor-shall-release-from-quarantine-a-patient--suffering--from--a contagious-or-infectious-disease,-the-patient-shall-first-be-examined-by the-attending-chiropractor,-and-if-fully-recovered-and-ready-for-release and--the-patient-has-passed-the-required-number-of-days-in-quarantine-as required-by-statute,-the-patient's-condition-shall-then-be--reported--by the--attending--chiropractor--to-the-health-officer,-who-shall-have-full charge-of-the-disinfection-of-the-patient,-the-patient's--clothing,--and the-place-of-quarantine.~~ Repealed effective April 1, 2001.
History: ~~Amended-effective-February-1,-1990.~~
General Authority: ~~NDCC-28-32-02~~
Law Implemented: ~~NDCC-43-06-16~~

17-02-04-03. Advertising. Chiropractors will be privileged to advertise their practice in any legitimate manner set forth in the American chiropractic association code of ethics adopted by this state, except as limited or prohibited in section 17-03-01-01.

History: Amended effective February 1, 1990; April 1, 2001.
General Authority: NDCC 43-06-04.1, 43-06-15
Law Implemented: NDCC 43-06-15

17-02-04-06. Needle acupuncture.

1. "Needle acupuncture" means a system of diagnosis and treatment for the purpose of restoring the body back to health which includes the utilization of needles which may be manipulated or stimulated by hand as well as by electric, magnetic, light, heat, or ultrasound. "Needle acupuncture" does not include electric point stimulation, the use of pressure adjunctive techniques for muscle, ligamentous, or neurologic stimulation or inhibition, or the drawing of blood for the purpose of clinical diagnostic laboratory evaluation.

2. A chiropractor may only practice needle acupuncture if the chiropractor is certified to practice needle acupuncture by the board.

3. A minimum of one hundred hours of training in needle acupuncture sponsored by a council of chiropractic education accredited college of chiropractic is required before a chiropractor may be certified to practice needle acupuncture.

4. The one hundred hours of training in acupuncture must be certified by the sponsoring college and registered by the sponsoring college with the ~~secretary~~ executive director of the board.

5. When the required hours of training are registered by the sponsoring college, the board will issue the chiropractor a letter certifying that the chiropractor is authorized to practice needle acupuncture.

History: Effective May 1, 1993; amended effective April 1, 2001.
General Authority: NDCC 28-32-02, 43-06-04.1
Law Implemented: NDCC 43-06-04.1

CHAPTER 17-03-01

17-03-01-01. Unprofessional conduct. The board may revoke, suspend, or deny a license to any person otherwise qualified or licensed by the board who is found to have committed unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

1. Exploitation of patients for financial gain, which includes:

   a. Overutilization of chiropractic services or practices. Overutilization is defined as services or practices rendered or goods or appliances sold by a chiropractor to a patient for the financial gain of the chiropractor or a third party which are excessive in quality or quantity to the justified needs of the patient.

   b. Ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient.

   c. Exercising undue influence on a patient or client, including the promotion or the sale of services, goods, or appliances~~;--or--drugs~~ in such a manner as to exploit the patient or client.

   d. The administration of treatment or the use of diagnostic procedures which are clearly excessive as determined by the customary practices and standards of the local community of licensees.

2. Willfully harassing, abusing, or intimidating a patient, either physically or verbally.

3. Failing to maintain a patient record and a billing record for each patient which accurately reflect the evaluation or treatment of the patient and the bills charged to the patient. Unless otherwise provided, all patient records must be retained for at least six years.

4. The willful or grossly negligent failure to comply with the substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of the profession.

5. Any conduct which has endangered or is likely to endanger the health, welfare, or safety of the public including habitual intemperance, illegal use of controlled substances, or conducting unauthorized experiments or tests upon patients.

6. Conviction of a crime which is substantially related to the qualifications, functions, or duties of a chiropractor.

7. Conviction of a felony or any offense involving moral turpitude, dishonesty, or corruption.

8. Violation of any of the provisions of law regulating the dispensing or administration of narcotics, dangerous drugs, or controlled substances.

9. The commission of any act involving moral turpitude or dishonesty, whether the act is committed in the course of the individual's activities as a licenseholder or otherwise.

10. Knowingly making or signing any false certificate or other document relating to the practice of chiropractic care which falsely represents the existence or nonexistence of a state of facts.

11. Violating or attempting to violate, directly or indirectly, or assisting in or abetting in the violations of, or conspiring to violate any provision of the law or the rules adopted by the board.

12. Making or giving any false statement or information in connection with the application for issuance of a license.

13. Participation in any act of fraud or misrepresentation.

14. Except as required by law, the unauthorized disclosure of any information about a patient revealed or discovered during the course of examination or treatment.

15. The employment or use of persons known as cappers or steerers to obtain business.

16. The offering, delivering, receiving, or accepting of any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration as compensation or inducement for referring patients to any person.

17. Practicing or offering to practice beyond the scope permitted by law, or accepting and performing professional responsibilities which a licensee knows or has reason to know that the licensee is not competent to perform, or performing without adequate supervision professional services which a licensee is authorized to perform only under the supervision of a licensed professional, except in an emergency situation where a person's life or health is in danger.

18. Delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, by experience, or by licensure, to perform them.

19. Advertising or soliciting for patronage that is not in the public interest, which includes:

    a. Advertising or soliciting which is false, fraudulent, deceptive, or misleading.

    b. Advertising or soliciting which guarantees any service or result.

    c. Advertising or soliciting which makes any claim relating to professional services or products or the cost or price thereof which cannot be substantiated by the licensee.

    d. Advertising or soliciting which make claims of professional superiority which cannot be substantiated by the licensee.

    e. Advertising or soliciting which is based upon a claim that the chiropractor uses a secret or special method of treatment and the chiropractor refuses to divulge the secret or special method of treatment to the board.

    f. Advertising no out-of-pocket expenses or practicing same.

    g. Advertising free examination or service.

20. Violation of any term of suspension or probation imposed by the board.

History: Effective February 1, 1990; amended effective April 1, 2001.
General Authority: NDCC 43-06-04.1, 43-06-15
Law Implemented: NDCC 43-06-15

17-03-01-04. Code of ethics. The board adopts the 1999 edition of the American chiropractic association code of ethics as the code of ethical conduct governing the practice of chiropractic in the state of North Dakota.

History: Effective April 1, 2001.
General Authority: NDCC 43-06-04.1
Law Implemented: NDCC 43-06-04.1

CHAPTER 17-03-02

17-03-02-01. Professional education.

1. All licensees shall complete a minimum of ~~twelve~~ twenty hours of approved continuing chiropractic education per year. Only hours earned at board-approved continuing chiropractic education programs will be acceptable. In order to receive board approval, a continuing chiropractic education program:

   a. Must be a program sponsored by the board;

   b. Must be a program approved by the council on chiropractic education;

   c. Must be a program sponsored by a college of chiropractic accredited by the council on chiropractic education or its successor;

   d. Must be a health-related seminar sponsored by an equally accredited college or university;

   e. Must be a medical seminar qualifying for continuing education credits; or

   f. Must be an educational program arranged by the North Dakota chiropractic association and approved by the board.

2. In order to have a program approved, the sponsor shall submit to the board the following information in addition to any other information requested by the board:

   a. A detailed course outline or syllabus including such items as the method of instruction and the testing materials.

   b. The qualifications and subjects taught by each instructor appearing in the program.

   c. The procedure to be used for recording attendance of those attendees seeking to apply for continuing chiropractic education credit.

   d. The instructor is approved by the board of chiropractic examiners.

3. The board must be the sole determinant of whether the courses are approved for continuing chiropractic education credit. The board shall make that determination based on the information submitted to it. In making its decision, the board shall determine whether or not the course submitted for credit meets the basic objectives and goals of continuing

chiropractic education. Those basic goals include the growth of knowledge, the cultivation of skills and greater understanding, the continual striving for excellence in chiropractic care, and the improvement of health and welfare of the public.

4. On or before September first of each year, licensees may elect to renew their licenses as inactive. The inactive status is at a reduced fee for those licensees who do not practice, consult, or provide any service relative to the chiropractic profession in the state. The inactive licensee does not have to provide proof of continuing educational hours. Any inactive licensee may activate the license at any time by paying an additional fee and showing proof of twenty hours of continuing education in the last twelve months.

5. All licensees must have four hours of professional boundary study every three years prior to renewal of their licenses. These four hours will be included in the annual twenty-hour requirement in the year taken.

6. During the first calendar year a new license is issued to practice chiropractic in North Dakota, the licensee will be required to attend a seminar put on by the board. The seminar will be provided twice a year without charge.

History: Effective February 1, 1990; amended effective April 1, 2001.
General Authority: NDCC 43-06-13, 43-06-04.1, 43-06-05
Law Implemented: NDCC 43-06-13

17-03-02-03. Report of disciplinary actions. The board will report all final disciplinary actions to CIN-BAD, the internet data base of the federation of chiropractic licensing boards. In addition, by law, the board will report all final disciplinary actions to the federal healthcare integrity and protection data base.

History: Effective April 1, 2001.
General Authority: NDCC 43-06-04.1, 43-06-05
Law Implemented: NDCC 43-06-15

TITLE 33

State Department of Health

MAY 2001

CHAPTER 33-07-01.1

33-07-01.1-01. General provisions - Definitions.

1. Institutions covered by medical hospital licensure laws. The following types of institutions are covered by North Dakota Century Code chapter 23-16 for the purpose of rules and are deemed to come within the provisions of North Dakota Century Code section 23-16-01 which provides for licensure of any institution that maintains and operates organized facilities for the diagnosis, treatment, or care of two or more nonrelated persons suffering from illness, injury, or deformity or where obstetrical or other care is rendered over a period exceeding twenty-four hours:

   a. General acute, primary care, and specialized hospitals, including rehabilitation and psychiatric hospitals.

   b. Skilled nursing facilities and nursing facilities.

   c. Outpatient facilities, including surgical centers and trauma centers, excluding physicians' clinics.

   d. Maternity homes that receive more than one patient in six months.

2. Institutions not covered by medical hospital licensure laws. The following types of institutions that provide some medical or nursing service are deemed not to come within the provisions of North Dakota Century Code chapter 23-16:

a. Any institutions that are regularly licensed by the social service board of North Dakota, such as homes for unmarried mothers.

b. Federal and state institutions. For state institutions, the primary purpose of which is the provision of medical care, the department has the responsibility for inspection on the same basis as those institutions that are covered by North Dakota Century Code chapter 23-16. Upon the findings of such inspections, recommendations will be formulated by the department.

c. Chiropractic hospitals licensed under North Dakota Century Code chapter 23-17.

d. Homes in which the only persons receiving nursing care are those related to the householder by blood or marriage.

e. Homes in which only one person receives care at any one time.

3. An institution shall hold licensure in the same category for which it seeks federal certification.

4. The following terms are defined for purposes of this chapter and North Dakota Century Code chapter 23-16:

a. "Abuse" includes mental, physical, sexual, and verbal abuse which would result in temporary or permanent mental or physical injury, harm, or ultimately death. Mental abuse includes humiliation, harassment, threats of punishment, or deprivation. Physical abuse includes hitting, slapping, pinching, and kicking. It also includes controlling behavior through corporal punishment. Sexual abuse includes sexual harassment, sexual coercion, sexual contact, or sexual assault. Verbal abuse includes any use of oral, written, or gestured language that includes disparaging and derogatory terms to patients or their families used within their hearing distance to describe the patients, regardless of their age, ability to comprehend, or disability.

b. "Acute care" means care for an episode of illness, injury, deformity, or pregnancy which may have a rapid onset or be severe in nature or have a short duration which requires medical treatment and continuous nursing care in a hospital setting.

c. "Authentication" means identification of the individual who made the medical record entry by that individual in writing, and verification that the contents are what the individual intended.

d. "Bed capacity" is bed space designed for inpatient care~~, including--space--originally--designed--or--remodeled--for inpatient--beds--even-though-temporarily-not-used-for-such purposes.--The-number-of-beds-to-be-counted-in-any-patient room--is--the-maximum-number-for-which-adequate-floor-area is-provided.--In-measuring-the-floor-area-of-patient-rooms for--the-purpose-of-determining-bed-capacity,-only-the-net usable-space-in-the-room--may--be--considered.---Space--in toilet---rooms,---washrooms,---closets,---vestibules,--and corridors-may-not-be-counted~~.

(1) Areas to be included:

(a) Bed space in all nursing units, including:

[1] Intensive care or cardiac care units.

[2] Minimal or self-care units.

(b) Isolation units.

(c) Pediatrics units, including:

[1] Pediatric bassinets.

[2] Incubators located in the pediatrics department.

~~(d)--Observation---units--equipped--and--staffed--for overnight-use.~~

~~(e)--All--space--designed-for-inpatient-bed-care-even if--currently--closed--or--assigned--to---easily convertible,-nonpatient-uses-such-as-storage.~~

~~(f)--Space--in--areas-originally-designed-as-solaria, waiting--rooms,---offices,---conference---rooms, classrooms,--and-such-which-have-necessary-fixed equipment-(nurse's-call,-lighting,-etc.)-and-are accessible--to--a--nurse's--station--exclusively staffed-for-inpatient-bed-care.~~

~~(g)--Bed--space--under--construction--if--planned-for immediate-completion-(not-an-unfinished--"shell" floor).~~

(2) Areas to be excluded:

(a) Newborn nurseries in the obstetrical department.

(b) Labor and delivery rooms.

(c) Recovery rooms.

(d) Emergency units.

(e) Preparation or anesthesia induction rooms.

(f) Rooms designed for diagnostic or treatment procedures.

(g) Hospital staff sleeping quarters, including accommodations for oncall staff.

~~(h)--Corridors.~~

~~(i)--Solaria,---waiting--rooms,--offices,--conference rooms,--classrooms,--and--such--which--are---not readily--equipped--and-staffed-for-inpatient-bed care.~~

~~(j)--Unfinished---shell--space.---An--area--which--is finished-except-for-movable-equipment-shall--not be-considered-unfinished-space.~~

e. "Department" means the North Dakota state department of health.

f. "Governing body" means the individual or group in whom the ultimate authority and legal responsibility is vested for the conduct of the institution.

g. "Hospital" means a facility that provides continuous nursing services, the principal activity or business of which is the reception of a person for diagnosis, medical care, and treatment of human illness to meet the needs of the patient served.

(1) "General acute hospital" means a facility with physician services available, permanent facilities that include inpatient beds, and continuous registered nurse staffing on a twenty-four-hour basis for treatment or care for illness, injury, deformity, abnormality, or pregnancy.

(a) In addition to medical staff and nursing services, the hospital shall regularly maintain either directly or through agreement the following services to meet the needs of the patients served:

[1] Dietary services.

[2] Medical records services.

[3] Pharmaceutical services.

[4] Laboratory services.

[5] Radiology services.

[6] Emergency services.

[7] Social services.

[8] Basic rehabilitation services.

[9] Housekeeping and related services including laundry.

[10] Central services.

(b) Complementary services are optional services which the hospital may provide and include:

[1] Nuclear medicine services.

[2] Surgical services.

[3] Recovery services.

[4] Anesthesia services.

[5] Respiratory care services.

[6] Obstetrical services.

[7] Specialized rehabilitation services.

[8] Psychiatric services.

(2) "Primary care hospital" means a facility that has available twenty-four-hour licensed health care practitioner and nursing services, provides inpatient care to ill or injured persons prior to their transportation to a general acute hospital, or provides inpatient care to persons needing acute-type care for a period of no longer than an average of ninety-six hours, excluding persons participating in a federal swing-bed program.

(a) In addition to medical staff and nursing services, the hospital shall regularly maintain either directly or through agreement the following services to meet the needs of the patients served:

[1] Dietary services.

[2] Medical records services.

[3] Pharmaceutical services.

[4] Laboratory services.

[5] Radiology services.

[6] Emergency services.

[7] Social services.

[8] Basic rehabilitation services.

[9] Housekeeping and related services including laundry.

[10] Central services.

(b) Complementary services are optional.

(3) "Specialized hospital" means a facility with hospital characteristics which provides medical care for persons with a categorical illness or condition.

(a) In addition to medical staff and nursing services, the hospital shall regularly provide directly or through agreement the following services to meet the needs of the patients served:

[1] Dietary services.

[2] Medical records services.

[3] Pharmaceutical services.

[4] Laboratory services.

[5] Radiology services.

[6] Emergency services.

[7] Social services.

[8] Basic rehabilitation services.

[9] Housekeeping and related services including laundry.

[10] Central services.

(b) Complementary services are optional services which the hospital may provide and include:

[1] Nuclear medicine services.

[2] Surgical services.

[3] Recovery services.

[4] Anesthesia services.

[5] Respiratory care services.

[6] Obstetrical services.

(c) Hospitals meeting the definition of a specialized hospital shall be licensed as such and may include the following:

[1] "Rehabilitation hospital" means a facility or unit providing specialized rehabilitation services to patients for the alleviation or amelioration of the disabling effects of illness or injury. Specialized rehabilitation services are characterized by the coordinated delivery of interdisciplinary care intended to achieve the goals of maximizing the self-sufficiency of the patient. A rehabilitation hospital is a facility licensed to provide only specialized rehabilitation services or is a distinct unit providing only specialized rehabilitation services located in a general acute hospital. A rehabilitation hospital must arrange to provide the services identified in section 33-07-01-35.

[2] "Psychiatric hospital" means a facility or unit providing psychiatric services to patients with a diagnosis of mental illness. A psychiatric hospital is a hospital licensed to provide only psychiatric services or is a distinct unit providing only psychiatric services located in a general acute hospital. Psychiatric hospitals must provide services consistent with section 33-07-01-36.

h. "Licensee" means an individual, officer, or member of the governing body of a hospital or related institution.

i. "Licensed health care practitioner" means an individual who is licensed or certified to provide medical, medically related, or advanced registered nursing care to individuals in North Dakota.

j. "Medical staff" in general acute and specialized hospitals means a formal organization of physicians (and dentists) and may include other licensed health care practitioners with the delegated authority and responsibility to maintain proper standards of patient care and to plan for continued improvement of that care. Medical staff in primary care hospitals means one or more licensed health care practitioners with the delegated authority and responsibility to maintain proper standards of medical care and to plan for continued improvement of that care.

k. "Misappropriation of patient property" means the deliberate misplacement, exploitation, or wrongful temporary or permanent taking or use of a patient's belongings or money, or both.

l. "Neglect" includes one severe incident or a pattern of incidents of willful failure to carry out patient services as directed or ordered by the licensed health care practitioner, willful failure to give proper attention to patients, or failure to carry out patient services through careless oversight.

m. "Nursing facilities" are the following:

(1) "Basic care facility" means a facility consistent with North Dakota Century Code chapter 23-09.3 and North Dakota Administrative Code chapter 33-03-24.

(2) "Nursing facility" means a facility consistent with North Dakota Century Code chapter 23-16 and North Dakota Administrative Code chapters 33-07-03.1 and 33-07-04.1.

n. "Outpatient facility" (including ambulatory surgical centers and trauma centers - excluding physicians' clinic) means a facility, located in or apart from a hospital; providing community service for the diagnosis or diagnosis and treatment of ambulatory patients (including ambulatory inpatients) in need of physical or mental care (see chapter 33-03-01):

(1) Which is operated in connection with a hospital; or

(2) Which offers to patients not requiring hospitalization the services of licensed health care practitioners in various medical specialties, and which makes provision for its patients to receive a reasonably full range of diagnostic and treatment services; and

(3) Which is subject to the requirements of chapter 33-03-01.

o. "Qualified activities coordinator" means a qualified therapeutic recreation specialist who is eligible for registration as a therapeutic recreation specialist by the national therapeutic recreation society (branch of national recreation and park association) under its requirements; is a qualified occupational therapist as defined in North Dakota Century Code chapter 43-40; is certified as an occupational therapist assistant; or has two years of experience in a social or recreational program within the last five years, one year of which was as a full-time employee in a patient activities program in a health care setting; or has completed a training course approved by the department.

p. "Separate license for building on separate premises" means, in the case of a hospital or related institution where two or more buildings are used in the housing of patients, a separate license is required for each building. Separate licenses are required even though the buildings may be operated under the same management.

q. "Signature" means the name of the individual written by the individual or an otherwise approved identification mechanism used by the individual which may include the approved use of a rubber stamp or an electronic signature.

r. "Writing" means the use of any tangible medium for entries into the medical record, including ink or electronic or computer coding, unless otherwise specifically required.

History: Effective April 1, 1994; amended effective August 1, 1999; May 1, 2001.
General Authority: NDCC 23-01-03(3), 28-32-02
Law Implemented: NDCC 23-16-06, 31-08-01.2, 31-08-01.3

CHAPTER 33-07-03.2

33-07-03.2-01. Definitions. The following terms are defined for this chapter, chapter 33-07-04.2, and North Dakota Century Code chapter 23-16:

1. "Abuse" for the purposes of this chapter is defined in section 33-07-06-01.

2. "Adult daycare" means the provision of facility services to meet the needs of individuals who do not remain in the facility overnight.

3. "Authentication" means identification of the individual who made the resident record entry by that individual in writing, and verification that the contents are what the individual intended.

4. "Bed capacity" means bed space designed for resident care~~, including space originally designed or remodeled for resident beds even though temporarily not used for such purposes. The number of beds to be counted in any resident room is the maximum number for which adequate floor area is provided. In measuring the floor area of resident rooms for the purposes of determining bed capacity, only the net usable space in the room may be considered. Space in toilet rooms, washrooms, closets, vestibules, and corridors may not be counted. Areas included are:~~

   ~~a. All space designed for resident bedrooms even if currently closed or assigned to easily convertible, nonresident uses; and~~

   ~~b. Space in areas originally designed as solaria, waiting rooms, offices, conference rooms, classrooms, and such that has necessary fixed equipment (nurses' call, lighting, etc.) and is accessible to a nurses' station exclusively staffed for resident care.~~

5. "Department" means the state department of health.

6. "Discharge" means movement from a facility to a noninstitutional setting when the discharging facility ceases to be legally responsible for the care of the resident.

7. "Emanating services" means services which are provided from a facility to nonresidents.

8. "Facility" means a nursing facility.

9. "Governing body" means the individual or group in whom legal responsibility is vested for conducting the affairs of a private or governmental facility. Governing body includes, where appropriate, a proprietor, the partners of any partnership including limited partnerships, the board of directors and the shareholders or members of any corporation including limited liability companies and nonprofit corporations, a city council or commission, a county commission or social service board, a governmental commission or administrative entity, and any other person or persons vested with management of the affairs of the facility irrespective of the name or names by which the person or group is designated.

10. "Licensed health care practitioner" means an individual who is licensed or certified to provide medical, medically related, or advanced registered nursing care to individuals in North Dakota.

11. "Licensee" means the legal entity responsible for the operation of a facility.

12. "Medical staff" means a formal organization of licensed health care practitioners with the delegated authority and responsibility to maintain proper standards of medical care.

13. "Misappropriation of resident property" means the willful misplacement, exploitation, or wrongful temporary or permanent use of a resident's belongings or money without the resident's consent. Willful for the purpose of this definition means to do so intentionally, knowingly, or recklessly.

    a. "Intentionally" means to do deliberately or purposely.

    b. "Knowingly" means to be aware or cognizant of what one is doing, whether or not it is one's purpose to do so.

    c. "Recklessly" means to consciously engage in an act without regard or thought to the consequences.

14. "Neglect" for the purposes of this chapter is defined in section 33-07-06-01.

15. "Nursing facility" means an institution or a distinct part of an institution established to provide health care under the supervision of a licensed health care practitioner and continuous nursing care for twenty-four or more consecutive hours to two or more residents who are not related to the licensee by marriage, blood, or adoption; and who do not require care in a hospital setting.

16. "Rural area" means an area defined by the United States bureau of the census as a rural area.

17. "Secured unit" means a specific area of the facility that has a restricting device separating the residents in the unit from the residents in the remainder of the facility.

18. "Signature" means the name of the individual written by the individual or an otherwise approved identification mechanism used by the individual that may include the approved use of a rubber stamp or an electronic signature.

19. "Transfer" means movement from a facility to another institutional setting when the legal responsibility for the care of the resident changes from the transferring facility to the receiving institutional setting.

20. "Writing" means the use of any tangible medium for entries into the medical record, including ink or electronic or computer coding, unless otherwise specifically required.

History: Effective July 1, 1996; amended effective May 1, 2001.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-16-01, 28-32-02

JUNE 2001

CHAPTER 33-15-14

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 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.

c. Any owner or operator of a source who requests an increase in the allowable sulfur dioxide emission rate for the source pursuant to section 33-15-02-07 shall demonstrate through a dispersion modeling analysis that the revised allowable emissions will not cause or contribute to a violation of the national ambient air quality standards for sulfur oxides (sulfur dioxide) or the prevention of significant deterioration increments for sulfur dioxide. The owner or operator shall also demonstrate that the revised allowable emission rate will not violate any other requirement of this article or the Federal Clean Air Act. Requests for emission limit changes shall be subject to review by the public and the environmental protection agency in accordance with subsection 6.

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, division of environmental engineering). These documents are incorporated by reference.

b. ~~Where~~ <u>When</u> 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.**

a. The following source categories are subject to the public participation procedures under this subsection:

(1) Those affected facilities designated under chapter 33-15-13.

(2) New sources that will be required to obtain a permit to operate under section 33-15-14-06.

(3) Modifications to an existing facility which will increase the potential to emit from the facility by the following amounts:

(a) One hundred tons [90.72 metric tons] per year or more of particulate matter, sulfur dioxide, nitrogen oxides, hydrogen sulfide, carbon monoxide, or volatile organic compounds;

(b) Ten tons [9.07 metric tons] per year or more of any contaminant listed under section 112(b) of the Federal Clean Air Act; or

(c) Twenty-five tons [22.68 metric tons] per year or more of any combination of contaminants listed under section 112(b) of the Federal Clean Air Act.

(4) Sources which the department has determined to have a major impact on air quality.

(5) Those for which a request for a public comment period has been received from the public.

(6) Sources for which a significant degree of public interest exists regarding air quality issues.

(7) Those sources which request a federally enforceable permit which limits their potential to emit.

b. With respect to the permit to construct application, the department shall:

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

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) Allow thirty days for public comment.

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

(8) 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.

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

(10) 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.

c. 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. **[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 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; September 1, 1997; September 1, 1998; June 1, 2001.
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; or 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 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. **[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; June 1, 2001.
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

33-15-14-07. Source exclusions from title V permit to operate requirements.

1. Purpose. The purpose of this section is to clarify which sources are minor sources with respect to section 33-15-14-06. The owner or operator of any source that would be classified as a major source under section 33-15-14-06 and which is not specifically excluded by this section shall comply with the requirements of section 33-15-14-06.

2. Definitions. For purposes of this section:

a. "Bulk gasoline plant" means any bulk gasoline distribution facility that has a gasoline throughput less than or equal to twenty thousand gallons [75700 liters] per day and that receives gasoline by truck rather than by rail.

b. "Coatings" means coatings plus diluents plus cleanup solvents.

c. "Fountain solution additives" includes isopropyl alcohol, n-propyl alcohol, n-butanol, and alcohol substitutes.

d. "Hazardous air contaminant" means any air contaminant listed pursuant to subsection 112(b) of the Federal Clean Air Act.

e. "Refueling positions" means the number of vehicles that could be dispensing simultaneously at a gasoline service station.

3. Applicability.

a. The owner or operator of the following stationary sources is not required to obtain a title V permit to operate under section 33-15-14-06 if the conditions of this section are met:

(1) Gasoline service stations.

(2) Gasoline bulk plants.

(3) Coating sources.

(4) Printing, publishing, and packaging operations.

(5) Degreasers using volatile organic solvents.

(6) Hot mix asphalt plants.

b. Any facility obtaining coverage under this section must submit a notification in writing to the department within ninety days of publication of this section unless specifically exempted from this requirement in the applicable subdivision of this section. The notification must contain the following information:

(1) Facility name, location, and nature of business.

(2) A list of all the sources of air contaminants at the facility.

(3) The condition of this section which is applicable to the facility.

(4) Total material usage, source capacity, or throughput for the previous month or twelve months at the facility, in accordance with the subdivision that is applicable to the facility.

(5) A signed statement accepting the throughput or usage limitation.

c. Complying with the conditions of this section does not exempt the owner or operator of a facility from the obligation to apply for and obtain a permit to construct or a minor source permit to operate unless specifically exempted in section 33-15-14-02 or 33-15-14-03.

d. The owner or operator of any facility listed in subdivision a which has potential emissions that would classify it as a major source even after the conditions of this section are met, or are not able to comply with the applicable conditions, shall obtain a title V permit to operate or a minor source permit to operate which limits the potential to emit of the source to a level below the major source threshold.

e. Complying with the conditions of this section does not relieve the owner or operator of a source of the responsibility to comply with any other applicable requirements of this article.

f. If the facility deviates from any condition, limit, or requirement of this section, a report must be submitted to the department within thirty days of the deviation containing the following information:

(1) The facility's name and location.

(2) Applicable condition, limit, or requirement for the facility for which a deviation occurred.

(3) A summary of the records showing the deviation, accompanied by an explanation of the deviation.

(4) A plan of action to prevent future occurrences of any deviation at the facility.

g. All records required by this section must be maintained for a period of five years from the last date of entry. The records must be available for inspection or submittal to the department upon request. If a facility is limited by a material usage, capacity, or throughput based on a twelve-month rolling period, a log must be updated monthly to include the previous twelve months' total material usage, capacity, or throughput.

4. Exclusion standards.

a. Gasoline service stations. The owner or operator of sources where gasoline dispensing operations account for more than ninety percent of all emissions from the facility is not required to obtain a title V permit to operate if the following conditions are met:

(1) No vapor recovery is used:

(a) The source's total sales of gasoline must not exceed three hundred eighty thousand gallons [1438300 liters] per month in any calendar month. To demonstrate compliance with this

limit, monthly records of throughput must be maintained at the source.

(b) If the number of refueling positions is no more than seventeen at the source, then the source is exempt from formal application to the department under subdivision b of subsection 3.

(2) Stage I vapor recovery is used:

(a) The source's total sales of gasoline must not exceed six hundred thirty thousand gallons [2384800 liters] per month in any calendar year. To demonstrate compliance with this limit, monthly records of throughput must be maintained at the source.

(b) If the number of refueling positions is no more than twenty-nine at the source, then the source is exempt from formal application to the department under subdivision b of subsection 3.

b. Gasoline bulk plants. The owner or operator of gasoline bulk plants where gasoline loading and unloading operations account for more than ninety percent of all emissions from the source are covered by this subdivision. To demonstrate compliance with the twenty thousand gallons [75700 liters] per day of gasoline definition of a bulk plant, monthly records of throughput must be maintained at the source.

c. Coating sources.

(1) The owner or operator of sources where surface coating operations account for more than ninety percent of all hazardous air contaminant emissions from the facility is not required to obtain a title V permit to operate if the conditions in subparagraph a or b are met.

(a) The source's total usage of surface coatings must not exceed two hundred fifty gallons [946.25 liters] of coatings per month in any calendar month nor exceed three thousand gallons [11355 liters] of coatings per twelve-month period. The coatings are limited to six pounds per gallon [719 grams per liter] of any individual hazardous air contaminant. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(b) The source's total hazardous air contaminant emissions shall not exceed ten tons per twelve-month period. Hazardous air contaminant emissions must be calculated by multiplying the surface coating material usage in gallons by the individual hazardous air contaminant content in pounds per gallon. To demonstrate compliance with the emissions limitation, the emissions must be calculated on a monthly basis and recorded in a log. All records of material usage, hazardous air contaminant content, and emissions must be maintained at the facility.

(2) The owner or operator of an automobile refinishing shop where operations account for more than ninety percent of volatile organic compound emissions and hazardous air contaminant emissions is not required to obtain a title V permit to operate if the usage of coatings is less than two hundred fifty gallons [946.25 liters] per month or three thousand gallons [11355 liters] of coatings per twelve-month period. This item does not apply to facilities capable of refinishing vehicles other than automobiles or trucks. Sources are exempt from the notification requirements under subdivision b of subsection 3 if:

(a) The auto refinishing shop business is entirely, or almost entirely, for collision repairs and the business has two or fewer bays;

(b) Substantial portions of the auto refinishing shop business are devoted to repainting entire vehicles and the business only has one bay devoted to painting; or

(c) The auto refinishing shop business does not have the physical or operational capability to do more than fifty jobs per week.

d. Printing, publishing, and packaging operations.

(1) The owner or operator of facilities where sheetfed (nonheatset) offset lithography or nonheatset web offset lithography printing operations are conducted is not required to obtain a title V permit to operate if the conditions in subparagraphs a, b, and c are met.

(a) The facility must use less than fourteen thousand two hundred seventy-five gallons [54030 liters] of cleaning solvent and fountain solution additives in any twelve-month rolling period. To demonstrate compliance with the

usage limit, monthly records of material usage must be maintained at the facility.

(b) The facility must use less than three thousand three hundred thirty-three gallons [12615 liters] of materials containing multiple hazardous air contaminants in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(c) The facility must use less than one thousand three hundred thirty-three gallons [5045 liters] of material containing any individual hazardous air contaminant in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(2) The owner or operator of facilities where heatset web offset lithography printing operations are conducted is not required to obtain a title V permit to operate if the conditions in subparagraphs a, b, and c are met.

(a) The facility must use less than one hundred thousand pounds [45.36 megagrams] of ink, cleaning solvent, and fountain solution additives in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(b) The facility must use less than three thousand three hundred thirty-three gallons [12615 liters] of materials containing multiple hazardous air contaminants in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(c) The facility must use less than one thousand three hundred thirty-three gallons [5045 liters] of material containing any individual hazardous air contaminant in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(3) The owner or operator of facilities where screen printing operations are conducted is not required to obtain a title V permit to operate if the conditions in subparagraphs a, b, and c are met.

(a) The facility must use less than fourteen thousand two hundred seventy-five gallons [54030 liters] of the sum of solvent based inks, cleaning solvents, adhesives, and coatings in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(b) The facility must use less than three thousand three hundred thirty-three gallons [12615 liters] of materials containing multiple hazardous air contaminants in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(c) The facility must use less than one thousand three hundred thirty-three gallons [5045 liters] of material containing any individual hazardous air contaminant in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(4) The owner or operator of facilities, where flexography or rotogravure printing operations with water-based or ultraviolet-cured inks, coatings, and adhesives are conducted, is not required to obtain a title V permit to operate if the conditions in subparagraphs a, b, and c are met.

(a) The facility must use less than four hundred thousand pounds [181 megagrams] of the sum of solvent-based inks, cleaning solvents, and adhesives in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(b) The facility must use less than three thousand three hundred thirty-three gallons [12615 liters] of materials containing multiple hazardous air contaminants in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(c) The facility must use less than one thousand three hundred thirty-three gallons [5045 liters] of material containing any individual hazardous air contaminant in any twelve-month rolling period. To demonstrate compliance with the

usage limit, monthly records of material usage must be maintained at the facility.

(5) The owner or operator of facilities where flexography or rotogravure printing operations with solvent inks are conducted is not required to obtain a title V permit to operate if the conditions in subparagraphs a, b, and c are met.

(a) The facility must use less than one hundred thousand pounds [45.36 megagrams] of the sum of ink, coatings, adhesives, dilution solvents, and cleaning solvents in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(b) The facility must use less than three thousand three hundred thirty-three gallons [12615 liters] of materials containing multiple hazardous air contaminants in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

(c) The facility must use less than one thousand three hundred thirty-three gallons [5045 liters] of material containing any individual hazardous air contaminant in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of material usage must be maintained at the facility.

e. Degreasers using volatile organic solvents. The owner or operator of facilities where degreasing operations account for more than ninety percent of all volatile organic compound emissions and hazardous air contaminant emissions from the facility is not required to obtain a title V permit to operate if the conditions in paragraph 1 or 2 are met.

(1) If non-halogenated solvents are used, the usage is limited to two thousand two hundred gallons [8327 liters] of any one solvent-containing material and five thousand four hundred gallons [20439 liters] of any combination of solvent-containing materials in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of solvent usage must be maintained at the facility.

(2) If halogenated solvents are used, including methyl chloroform, trichloroethane, and methylene chloride, the usage is limited to one thousand two hundred

gallons [4542 liters] of any one solvent-containing material and two thousand nine hundred gallons [10976 liters] of any combination of solvent-containing materials in any twelve-month rolling period. To demonstrate compliance with the usage limit, monthly records of solvent usage must be maintained at the facility.

f. Hot mix asphalt plants. The owner or operator of facilities where hot mix asphalt production operations account for more than ninety percent of all emissions from the facility is not required to obtain a title V permit to operate if the amount of hot mix asphalt produced does not exceed two hundred fifty thousand tons [226757 metric tons] in any twelve-month rolling period. To demonstrate compliance with this limit, monthly records of hot mix asphalt produced must be maintained at the facility. Sources that are excluded under this subdivision must obtain a minor source permit to operate under section 33-15-14-03.

History: Effective June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03, 23-25-04, 23-25-04.1

CHAPTER 33-15-21

33-15-21-01. General provisions.

1.--Definitions.--The-terms-used-in-this-chapter-have-the-meanings set-forth-in-title-IV-of-the-Clean-Air-Act,-42-U.S.C-7401,--et seq.--as--amended--by-the-Clean-Air-Act-Amendments-of-1990,-42 U.S.C.-7651,-et--seq.--(November-15,--1990).---All--terms--not defined---herein--have--the--meaning--given--them--in--section 33-15-01-04--or-in-North-Dakota-Century-Code-chapter-23-25.

a.--"Acid--rain-compliance-option"-means-one-of-the-methods-of compliance-used-by-an-affected-unit-under--the--acid--rain program--as--described--in-a-compliance-plan-submitted-and approved--in--accordance--with--section---33-15-21-04---or regulations--or-rules-implementing-section-407-of-the-Act.

b.--"Acid-rain-emissions-limitation"-means:

(1)--For-the-purposes-of-sulfur-dioxide-emissions:

(a)--The--tonnage--equivalent--of--the-basic-phase-II allowance-allocations-authorized-to-be-allocated to-an-affected-unit-for-use-in-a-calendar-year;

(b)--As-adjusted:

[1]--By-----allowances----allocated----by----the administrator--pursuant--to--section---403, section-405-(a)(2),-(a)(3),-(b)(2),-(c)(4), (d)(3),-and-(h)(2),-and-section-406-of--the Act;

[2]--By-----allowances----allocated----by----the administrator--pursuant--to--subpart-D---of title-40,---Code--of--Federal--Regulations, part-72,-and-thereafter;-and

[3]--By--allowance--transfers--to--or--from--the compliance-subaccount-for--that--unit--that were--recorded--or--properly--submitted-for recordation--by--the---allowance---transfer deadline--as--provided-in-title-40,-Code-of Federal----Regulations,----73.35,-----after deductions--and--other-adjustments-are-made pursuant--to--title-40,--Code--of---Federal Regulations,-73.34(c).

(2)--For---purposes--of--nitrogen--oxides--emissions,--the applicable--limitation--established--by---regulations promulgated--by-the-administrator-pursuant-to-section

407 of the Act, as modified by an acid rain permit application submitted to the department, and an acid rain permit issued by the department, in accordance with rules implementing section 407 of the Act.

e. "Acid rain emissions reduction requirement" means a requirement under the acid rain program to reduce the emissions of sulfur dioxide or nitrogen oxides from a unit to a specified level or by a specified percentage.

d. "Acid rain permit or permit" means the legally binding written document, or portion of such document, issued by the department following an opportunity for appeal pursuant to North Dakota Century Code chapter 28-32 or article 33-22, or both, including any permit revisions, specifying the acid rain program requirements applicable to an affected source, to each affected unit at an affected source, and to the owners and operators and the designated representative of the affected source or the affected unit.

e. "Acid rain program" means the national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program established in accordance with title IV of the Act, title 40, Code of Federal Regulations, parts 72, 73, 75, 77, and 78, and regulations or rules implementing sections 407 and 410 of the Act, and this chapter.

f. "Act" means the Federal Clean Air Act, 42 U.S.C. 7401, et seq. as amended by Public Law No. 101-549 (November 15, 1990).

g. "Actual sulfur dioxide emissions rate" means the annual average sulfur dioxide emissions rate for the unit (expressed in lb/mmBtu), for the specified calendar year; provided that, if the unit is listed in the national allowance data base, the "1985 actual sulfur dioxide emissions rate" for the unit is the rate specified by the administrator in the national allowance data base under the data field "SO_2 RTE".

h. "Administrator" means the administrator of the United States environmental protection agency or the administrator's duly authorized representative.

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

j. "Affected unit" means a unit that is subject to any acid rain emissions reduction requirement or acid rain emissions limitation.

k.--"Affiliate"--has-the-meaning-set-forth-in-section-2(a)(11) of-the-Public-Utility-Holding--Company--Act--of--1935,--15 U.S.C.-79b(a)(11),-as-of-November-15,-1990.

l.--"Allocate-or-allocation"-means-the-initial-crediting-of-an allowance-by-the-administrator-to--an--allowance--tracking system-unit-account-or-general-account.

m.--"Allowance"--means--an--authorization-by-the-administrator under-the-acid-rain-program-to--emit--up--to--one--ton--of sulfur--dioxide-during-or-after-a-specified-calendar-year.

n.--"Allowance---deduction,---or---deduct--when--referring--to allowances"-means-the-permanent-withdrawal--of--allowances by--the--administrator--from--an-allowance-tracking-system compliance-subaccount-to-account-for--the--number--of--the tons-of-sulfur-dioxide-emissions-from-an-affected-unit-for the--calendar--year,--for--tonnage---emissions---estimates calculated--for--periods--of--missing--data-as-provided-in title-40,-Code-of-Federal-Regulations,-part-75,-or-for-any other--allowance--surrender--obligations--of-the-acid-rain program.

o.--"Allowances--held-or-hold-allowances"-means-the-allowances recorded--by--the--administrator,--or--submitted--to---the administrator-for-recordation-in-accordance-with-title-40, Code--of--Federal--Regulations,--73.50,--in--an--allowance tracking-system-account.

p.--"Allowance--tracking--system"--means-the-acid-rain-program system-by--which--the--administrator--allocates,--records, deducts,-and-tracks-allowances.

q.--"Allowance--tracking--system--account"-means-an-account-in the--allowance--tracking---system---established---by---the administrator---for---purposes---of--allocating,--holding, transferring,-and-using-allowances.

r.--"Allowance--transfer--deadline"--means-midnight-of-January thirtieth-or,-if-January-thirtieth-is-not-a-business--day, midnight--of--the-first-business-day-thereafter-and-is-the deadline--by--which--allowances--may--be---submitted---for recordation--in--an--affected-unit's-compliance-subaccount for-the-purposes-of-meeting-the-unit's-acid-rain-emissions limitation---requirements---for--sulfur--dioxide--for--the previous-calendar-year.

s.--"Authorized--account--representative"--means-a-responsible natural-person--who--is--authorized,--in--accordance--with title-40,---Code---of--Federal--Regulations,--part-73,--to transfer-and-otherwise-dispose-of-allowances--held--in--an allowance-tracking-system-general-account;-or,-in-the-case

of a unit account, the designated representative of the owners and operators of the affected unit.

t. "Basic phase II allowance allocations" means:

(1) For calendar years 2000 through 2009 inclusive, allocations of allowances made by the administrator pursuant to section 403 and section 405 (b)(1), (3), and (4); (c)(1), (2), (3), and (5); (d)(1), (2), (4), and (5); (e); (f); (g)(1), (2), (3), (4), and (5); (h)(1); (i); and (j) of the Act.

(2) For each calendar year beginning in 2010, allocations of allowances made by the administrator pursuant to section 403 and section 405 (b)(1), (3), and (4); (c)(1), (2), (3), and (5); (d)(1), (2), (4), and (5); (e); (f); (g)(1), (2), (3), (4), and (5); (h)(1) and (3); (i); and (j) of the Act.

u. "Boiler" means an enclosed fossil or other fuel fired combustion device used to produce heat and to transfer heat to recirculating water, steam, or any other medium.

v. "Certificate of representation" means the completed and signed submission required by title 40, Code of Federal Regulations, 72.20, for certifying the appointment of a designated representative for an affected source or a group of identified affected sources authorized to represent the owners and operators of such sources and of the affected units at such sources with regard to matters under the acid rain program.

w. "Certifying official" means:

(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;

(2) For partnership or sole proprietorship, a general partner or the proprietor, respectively; and

(3) For a local government entity or state, federal, or other public agency, either a principal executive officer or ranking elected official.

x. "Coal" means all solid fuels classified as anthracite, bituminous, subbituminous, or lignite by the American society for testing and materials designation ASTM D388-92 "Standard Classification of Coals by Rank".

y.--"Coal-derived--fuel"--means--any-fuel,-whether-in-a-solid,-liquid,-or-gaseous--state,--produced--by--the--mechanical,-thermal,--or-chemical-processing-of-coal-(e.g.,-pulverized-coal,-coal-refuse,--liquefied--or--gasified--coal,--washed-coal,--chemically--cleaned--coal,--coal-oil--mixtures,-and-coke).

z.--"Coal-fired"--means--the--combustion-of-fuel-consisting-of-coal-or--any--coal-derived--fuel,--except--a--coal-derived-gaseous-fuel-with-a-sulfur-content-no-greater-than-natural-gas,-alone-or-in-combination-with-any-other-fuel,-where--a-unit--is-"coal-fired"-if-it-uses-coal-or-coal-derived-fuel-as-its-primary-fuel-(expressed-in-mmBtu);--provided--that,-if-the-unit-is-listed-in-the-national-allowance-data-base,-the-primary-fuel--is--the--fuel--listed--in--the--national-allowance-data-base-under-the-data-field-"PRIMEFUEL".

aa.--"Cogeneration--unit"--means-a-unit-that-has-equipment-used-to-produce-electric-energy-and--forms--of--useful--thermal-energy,-such-as-heat-or-steam,-for-industrial,-commercial,-heating-or-cooling-purposes,-through-the-sequential-use-of-energy.

bb.--"Commence--commercial--operation"--means--to-have-begun-to-generate-electricity-for-sale,-including-the-sale-of--test-generation.

cc.--"Commence--construction"--means--that-an-owner-or-operator-has-either-undertaken-a-continuous-program-of-construction-or--has-entered-into-a-contractual-obligation-to-undertake-and-complete,--within--a--reasonable--time,--a--continuous-program-of-construction.

dd.--"Commence--operation"--means-to-have-begun-any-mechanical,-chemical,-or-electronic-process,-including-startup--of--an-emissions--control-technology-or-emissions-monitor-or-of-a-unit's-combustion-chamber.

ee.--"Common--stack"-means-the-exhaust-of-emissions-from-two-or-more-units-through-a-single-flue.

ff.--"Compliance--certification"--means--a--submission--to--the-administrator-or-the-department-that-is-required--by--this-chapter,--by--title-40,--Code-of-Federal-Regulations,-part-72,-73,--75,--77,--or--78,--or--by--regulations--or--rules-implementing--sections--407-or-410-of-the-Act-to-report-an-affected--source--or--an--affected--unit's--compliance--or-noncompliance--with--a--provision-of-the-acid-rain-program-and--that--is--signed--and--verified--by--the---designated-representative--in--accordance-with-subpart-B-of-title-40,-Code-of-Federal-Regulations,-part-72,-section-33-15-21-08,-and--the-acid-rain-program-regulations-or-rules-generally.

~~gg.--"Compliance--plan",-for-purposes-of-the-acid-rain-program,~~
~~means-the-document-submitted-for--an--affected--source--in~~
~~accordance-with-subsections-1-and-2-of-section-33-15-21-03~~
~~and-specifying-the-methods,-including--one--or--more--acid~~
~~rain--compliance--options--under--section--33-15-21-04--or~~
~~regulations-or-rules-implementing-section-407-of-the--Act,~~
~~by--which--each--affected-unit-at-the-source-will-meet-the~~
~~applicable-acid-rain-emissions-limitation--and--acid--rain~~
~~emissions-reduction-requirements.~~

~~hh.--"Compliance---subaccount"---means--the--subaccount--in--an~~
~~affected--unit's--allowance---tracking---system---account,~~
~~established---pursuant---to---title-40,--Code--of--Federal~~
~~Regulations,-73.31-(a)-or-(b),-in-which-are-held,-from-the~~
~~date--that--allowances--for--the-current-calendar-year-are~~
~~recorded-under--title-40,--Code--of--Federal--Regulations,~~
~~73.34(a)-until-December-thirty-first,-allowances-available~~
~~for-use-by-the-unit-in--the--current--calendar--year--and,~~
~~after-December-thirty-first-until-the-date-that-deductions~~
~~are-made-under--title-40,--Code--of--Federal--Regulations,~~
~~73.35(b),--allowances-available-for-use-by-the-unit-in-the~~
~~preceding-calendar-year,-for-the-purpose--of--meeting--the~~
~~unit's--acid-rain-emissions-limitation-for-sulfur-dioxide.~~

~~ii.--"Compliance--use--date"--means-the-first-calendar-year-for~~
~~which-an-allowance-may-be-used-for-purposes-of--meeting--a~~
~~unit's--acid-rain-emissions-limitation-for-sulfur-dioxide.~~

~~jj.--"Construction"----means----fabrication,----erection,----or~~
~~installation-of-a-unit-or-any-portion-of-a-unit.~~

~~kk.--"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-title-40,-Code-of-Federal~~
~~Regulations,-part-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-section-33-15-14-06,-it~~
~~shall---be---deemed---to---refer---to---the----"designated~~
~~representative"--with-regard-to-all-matters-under-the-acid~~
~~rain-program.~~

~~ll.--"Diesel-fuel"-means-a-low-sulfur-fuel-oil-of-grades-1-D-or~~
~~2-D,-as-defined-by-the-American-society--for--testing--and~~
~~materials-ASTM-D975-91,-"Standard-Specification-for-Diesel~~
~~Fuel-Oils".~~

~~mm.--"Direct--public--utility-ownership"-means-direct-ownership~~
~~of-equipment-and-facilities-by-one-or--more--corporations,~~
~~the--principal-business-of-which-is-sale-of-electricity-to~~
~~the--public--at--retail.---Percentage--ownership--of--such~~

equipment-and-facilities-shall-be-measured-on-the-basis-of book-value.

nn.--"Draft-acid-rain-permit-or-draft-permit"-means-the-version of-the-acid-rain-permit,-or-the-acid-rain--portion--of--an operating--permit,--that--the-department-offers-for-public comment.

oo.--"Emissions"--means-air-pollutants-exhausted-from-a-unit-or source-into-the-atmosphere,--as--measured,--recorded,--and reported---to---the---administrator---by---the--designated representative-and-as-determined-by-the-administrator,--in accordance--with--the-emissions-monitoring-requirements-of title-40,-Code-of-Federal-Regulations,-part-75.

pp.--"EPA"--means--the--United--States-environmental-protection agency.

qq.--"Excess-emissions"-means:

(1)--Any--tonnage-of-sulfur-dioxide-emitted-by-an-affected unit-during-a-calendar-year--that--exceeds--the--acid rain--emissions-limitation-for-sulfur-dioxide-for-the unit;-and

(2)--Any--tonnage-of-nitrogen-oxide-emitted-by-an-affected unit-during-a-calendar-year-that-exceeds--the--annual tonnage---equivalent---of--the--acid--rain--emissions limitation-for--nitrogen--oxides--applicable--to--the affected--unit--taking--into--account-the-unit's-heat input-for-the-year.

rr.--"Existing--unit"-means-a-unit,-including-a-unit-subject-to section--111--of--the--Act,--that---commenced---commercial operation--before--November-15,-1990,-and-that-on-or-after November-15,-1990,--served-a-generator--with--a--nameplate capacity-of-greater-than-twenty-five-megawatts-electrical. "Existing--unit"--does--not--include---simple---combustion turbines--or--any-unit-that-on-or-after-November-15,-1990, served--only--generators--with--a--nameplate--capacity--of twenty-five--megawatts--electrical-or-less.--Any-"existing unit"-that-is-modified,-reconstructed,-or-repowered--after November-15,--1990,--shall--continue--to--be--an-"existing unit".

ss.--"Facility"---means---any---institutional,--commercial,--or industrial--structure,--installation,--plant,--source,--or building.

tt.--"Fossil--fuel"--means-natural-gas,-petroleum,-coal,-or-any form-of-solid,-liquid,-or-gaseous-fuel-derived--from--such material.

uu.--"Fossil-fuel-fired"-means-the-combustion-of-fossil-fuel-or any-derivative-of-fossil-fuel,--alone--or--in--combination with--any--other--fuel,--independent--of-the-percentage-of fossil-fuel-consumed-in-any-calendar-year.

vv.--"Fuel--oil"--means--any--petroleum-based--fuel,--including diesel-fuel-or-petroleum-derivatives-such-as-oil--tar,--as defined--by-the-American-society-for-testing-and-materials in-ASTM-D396-90a,-"Standard-Specification-for-Fuel--Oils", and---any---recycled--or--blended--petroleum--products--or petroleum-byproducts-used-as-a-fuel-whether-in--a--liquid, solid,-or-gaseous-state.

ww.--"Gas-fired"--means--the--combustion--of--natural-gas,-or-a coal-derived-gaseous-fuel-with-a-sulfur-content-no-greater than--natural--gas,--for--at--least--ninety-percent-of-the average--annual--heat--input--during--the--previous--three calendar-years-and-for-at-least-eighty-five-percent-of-the annual-heat-input-in-each-of-those-calendar-years;-and-any fuel--other--than--coal-or-any-other-coal-derived-fuel-for the-remaining-heat-input,-if-any.

xx.--"General--account"--means--an--allowance--tracking--system account-that-is-not-a-unit-account.

yy.--"Generator"--means--a-device-that-produces-electricity-and was-or-would-have--been--required--to--be--reported--as--a generating--unit--pursuant-to-the-United-States-department of-energy-form-eight-hundred-sixty-(1990-edition).

zz.--"Generator-output-capacity"-means-the-full-load-continuous rating--of--a--generator--under--specific--conditions---as designed-by-the-manufacturer.

aaa.---"Heat--input"--means-the-product-(expressed-in-mmBtu/time) of-the-gross-calorific-value-of--the--fuel--(expressed--in Btu/lb)--and-the-fuel-feed-rate-into-the-combustion-device (expressed-in-mass-of-fuel/time)-and-does-not-include--the heat--derived--from-preheated-combustion-air,-recirculated flue-gases,-or-exhaust-from-other-sources.

bbb.---"Independent--power--production--facility"--means-a-source that:

(1)--Is--nonrecourse--project--financed,-as-defined-by-the secretary-of-energy--at--title-10,--Code--of--Federal Regulations,-part-715;

(2)--Is--used--for--the--generation-of-electricity,-eighty percent-or-more-of-which-is-sold-at-wholesale;

(3)--Is--a--new--unit--required--to--hold-allowances-under title-IV-of-the-Act;-and

(4)--Provided--that-direct-public-utility-ownership-of-the equipment-comprising-the--facility--does--not--exceed fifty-percent.

eee.---"Life-of-the-unit,--firm--power--contractual--arrangement" means-a-unit-participation--power--sales--agreement--under which--a--utility--or--industrial-customer-reserves,-or-is entitled-to-receive,-a-specified-amount-or--percentage--of nameplate--capacity-and-associated-energy-generated-by-any specified-generating-unit-and-pays-its-proportional-amount of-such-unit's-total-costs,-pursuant-to-a-contract:

(1)--For-the-life-of-the-unit;

(2)--For--a--cumulative-term-of-no-less-than-thirty-years, including-contracts-that-permit-an-election-for-early termination;-or

(3)--For--a--period--equal--to-or-greater-than-twenty-five years-or-seventy-percent-of-the-economic-useful--life of--the--unit--determined-as-of-the-time-the-unit-was built,-with-option-rights-to-purchase-or-release-some portion--of--the--nameplate--capacity--and-associated energy-generated-by--the--unit--at--the--end--of--the period.

ddd.---"Nameplate---capacity"---means---the---maximum--electrical generating-output-(expressed-in-MWe)-that-a-generator--can sustain---over---a--specified--period--of--time--when--not restricted-by-seasonal-or-other-deratings,--as--listed--in the--national--allowance--data--base--under-the-data-field "NAMECAP"-if-the--generator--is--listed--in--the--national allowance--data-base-or-as-measured-in-accordance-with-the United--States--department--of--energy--standards--if--the generator--is--not--listed--in-the-national-allowance-data base.

eee.---"National---allowance--data--base"--means--the--data--base established-by-the-administrator-under--section--402(4)(C) of-the-Act.

fff.---"Natural-gas"-means-a-naturally-occurring-fluid-mixture-of hydrocarbons--containing--little--or--no---sulfur---(e.g., methane,--ethane,--or--propane),--produced--in--geological formations-beneath-the-earth's-surface,-and-maintaining--a gaseous--state--at--standard--atmospheric--temperature-and pressure-conditions-under-ordinary-conditions.

ggg.---"New---unit"---means--a--unit--that--commences--commercial operation-on-or-after--November-15,--1990,--including--any such--unit--that--serves--a--generator--with--a--nameplate capacity-of-twenty-five-megawatts-electrical--or--less--or that-is-a-simple-combustion-turbine.

hhh. "Offset plan" means a plan pursuant to title 40, Code of Federal Regulations, part 77 for offsetting excess emissions of sulfur dioxide that have occurred at an affected unit in any calendar year.

iii. "Oil-fired" means the combustion of fuel oil for more than ten percent of the average annual heat input during the previous three calendar years or for more than fifteen percent of the annual heat input in any one of those calendar years; and any solid, liquid, or gaseous fuel, other than coal or any other coal-derived fuel, except a coal-derived gaseous fuel with a sulfur content no greater than natural gas, for the remaining heat input, if any.

jjj. "Operating permit" means a permit issued under section 33-15-14-06.

kkk. "Owner" means any of the following persons:

(1) Any holder of any portion of the legal or equitable title in an affected unit;

(2) Any holder of a leasehold interest in an affected unit;

(3) Any purchaser of power from an affected unit under a life of the unit, firm power contractual arrangement. However, unless expressly provided for in a leasehold agreement, owner shall not include a passive lessor, or a person who has an equitable interest through such lessor, whose rental payments are not based, either directly or indirectly, upon the revenues or income from the affected unit; or

(4) With respect to any allowance tracking system general account, any person identified in the submission required by title 40, Code of Federal Regulations, 73.31(c) that is subject to the binding agreement for the authorized account representative to represent that person's ownership interest with respect to allowances.

lll. "Owner or operator" means any person who is an owner or who operates, controls, or supervises an affected unit or affected source and includes any holding company, utility system, or plant manager of an affected unit or affected source.

mmm. "Permit revision" means a permit modification, fast-tract modification, administrative permit amendment, or automatic permit amendment, as provided in section 33-15-21-07.

nnn.---"Phase--II"--means--the-acid-rain-program-period-beginning January-1,--2000,---and---continuing---into---the---future thereafter.

ooo.---"Potential-electrical-output-capacity"-means-the-megawatts electrical-capacity-rating-for-the-units--which--shall--be equal--to--thirty-three-percent-of-the-maximum-design-heat input-capacity-of-the-steam-generating-unit,-as-calculated according--to--appendix-D--of--title-40,--Code--of-Federal Regulations,-part-72.

ppp.---"Power--distribution--system"--means--the--portion--of--an electricity-grid-owned-or-operated-by-a--utility--that--is dedicated-to-delivering-electric-energy-to-customers.

qqq.---"Power---purchase---commitment"---means--a--commitment--or obligation-of-a-utility-to-purchase-electric-power-from--a facility-pursuant-to:

(1)--A-power-sales-agreement;

(2)--A---state--regulatory--authority--order--requiring--a utility-to:

(a)--Enter--into--a--power--sales--agreement-with-the facility;

(b)--Purchase-from-the-facility;-or

(c)--Enter--into--arbitration-concerning-the-facility for--the--purpose--of--establishing--terms---and conditions-of-the-utility's-purchase-of-power;

(3)--A--letter--of-intent-or-similar-instrument-committing to--purchase--power--(actual--electrical--output---or generator--output--capacity)--from--the--source--at-a previously-offered-or-lower-price-and-a--power--sales agreement-applicable-to-the-source-is-executed-within the-timeframe-established-by-the-terms-of-the--letter of--intent--but--no-later-than-November-15,-1992,-or, where--the--letter--of--intent--does--not--specify--a timeframe,--a-power-sales-agreement-applicable-to-the source-is-executed-on-or-before-November-15,-1992;-or

(4)--A--utility--competitive--bid--solicitation--that--has resulted-in-the-selection-of-the-qualifying--facility of--independent--power--production--facility--as--the winning-bidder.

rrr.---"Power--sales--agreement"--is--a-legally-binding-agreement between-a-qualifying-facility,-independent-power-producer, or--firm--associated--with--such--facility-and-a-regulated

electric utility that establishes the terms and conditions for the sale of power from the facility to the utility.

sss. "Primary fuel or primary fuel supply" means the main fuel type (expressed in mmBtu) consumed by an affected unit for the applicable calendar year.

ttt. "Proposed acid rain permit or proposed permit" means the version of an acid rain permit that the department submits to the administrator after the public comment period, but prior to completion of the United States environmental protection agency permit review period under subdivision e of subsection 7 of section 33-15-14-06 and title 40, Code of Federal Regulations, 70.8(e).

uuu. "Qualifying facility" means a "qualifying small power production facility" within the meaning of section 3(17)(C) of the Federal Power Act or a "qualifying cogeneration facility" within the meaning of section 3(18)(B) of the Federal Power Act.

vvv. "Qualifying power purchase commitment" means a power purchase commitment in effect as of November 15, 1990 without regard to changes to that commitment so long as:

(1) The identity of the electric output purchaser, the identity of the steam purchaser, and the location of the facility remain unchanged as of the date the facility commences commercial operation; and

(2) The terms and conditions of the power purchase commitment are not changed in such a way as to allow the costs of compliance with the acid rain program to be shifted to the purchaser.

www. "Qualifying repowering technology" means:

(1) Replacement of an existing coal fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal fired turbines, integrated gasification fuel cells, or as determined by the administrator, in consultation with the secretary of energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990; or

(2)--Any-oil-fired-or-gas-fired-unit-that-has-been-awarded clean-coal-technology--demonstration--funding--as--of January-1,--1991,--by-the-United-States-department-of energy.

xxx.---"Receive--or--receipt-of"-means-the-date-the-administrator or-the-department-comes-into-possession-of-information--or correspondence,--whether--sent-in-writing-or-by-authorized electronic--transmission,--as--indicated--in--an--official correspondence---log,---or--by--a--notation--made--on--the information-or-correspondence,-by-the-administrator-or-the department-in-the-regular-course-of-business.

yyy.---"Recordation,--record,--or-recorded"-means,-with-regard-to allowances,---the---transfer---of---allowances---by----the administrator--from--one-allowance-tracking-system-account or-subaccount-to-another.

zzz.---"Schedule--of-compliance"-means-an-enforceable-sequence-of actions,-measures,-or-operations-designed--to--achieve--or maintain--compliance,--or--correct--noncompliance,-with-an applicable-requirement-of-the-acid-rain-program,-including any-applicable-acid-rain-permit-requirement.

aaaa.--"Secretary--of--energy"--means-the-secretary-of-the-United States--department--of--energy--or--the--secretary's--duly authorized-representative.

bbbb.--"Simple--combustion-turbine"-means-a-unit-that-is-a-rotary engine-driven-by-a-gas-under-pressure-that-is--created--by the--combustion--of-any-fuel.--This-term-includes-combined cycle-units-without-auxiliary-firing.--This-term--excludes combined--cycle--units--with--auxiliary-firing,-unless-the unit-did-not-use-the-auxiliary-firing--from--1985--through 1987--and--does-not-use-auxiliary-firing-at-any-time-after November-15,-1990.

cccc.--"Solid--waste--incinerator"--means--a-source-as-defined-in section-129(g)(1)-of-the-Act.

dddd.--"Source"----means----any----governmental,---institutional, commercial,-or-industrial-structure,-installation,--plant, building,--or--facility-that-emits-or-has-the-potential-to emit-any-regulated--air--pollutant--under--the--Act.---For purposes--of--section--502(c)--of--the--Act,--a--"source", including--a--"source"--with--multiple--units,--shall---be considered-a-single-"facility".

eeee.--"Stack"--means-a-structure-that-includes-one-or-more-flues and-the-housing-for-the-flues.

ffff.--"State"-means-one-of-the-forty-eight-contiguous-states-and the-District--of--Columbia--and--includes--any--nonfederal

authorities,----including---local---agencies,---interstate associations,--and--statewide---agencies---with---approved state-operating--permit--programs.--The-term-"state"-shall have-its-conventional-meaning-where-such-meaning-is--clear from-the-context.

gggg.--"State-operating-permit-program"-means-an-operating-permit program-that-the-administrator-has-approved-as-meeting-the requirements--of--titles-IV-and-V-of-the-Act-and-title-40, Code-of-Federal-Regulations,-parts-70-and-72.

hhhh.--"Submit--or--serve"--means-to-send-or-transmit-a-document, information,-or-correspondence-to-the-person-specified--in accordance-with-the-applicable-regulation:

(1)--In-person;

(2)--By--United--States-postal-service-certified-mail-with the-official--postmark--or,--if--service--is--by--the administrator--or--the--department,-by-any-other-mail service-by-the-United-States-postal-service;-or

(3)--By--other-means-with-an-equivalent-time-and-date-mark used-in-the-regular-course-of--business--to--indicate the--date-of-dispatch-or-transmission-and-a-record-of prompt-delivery.--Compliance-with--any--"submission", "service",--or-"mailing"-deadline-shall-be-determined by-the-date-of-dispatch,-transmission,-or-mailing-and not-the-date-of-receipt.

iiii.--"Ton-or-tonnage"-means-any-"short-ton"-(i.e.,-two-thousand pounds).--For-the-purpose-of-determining--compliance--with the---acid---rain---emissions--limitations--and--reduction requirements,-total-tons-for-a-year-shall-be-calculated-as the--sum--of-all-recorded-hourly-emissions-(or-the-tonnage equivalent-of-the--recorded--hourly--emissions--rates)--in accordance--with--title-40,--Code--of-Federal-Regulations, part-75,-with-any-remaining-fraction-of-a-ton-equal-to--or greater--than-fifty-hundredths-ton-deemed-to-equal-one-ton and-any-fraction-of-a-ton-less-than-fifty--hundredths--ton deemed-not-to-equal-any-ton.

jjjj.--"Total--planned--net--output--capacity"--means-the-planned generator-output-capacity,-excluding-that-portion--of--the electrical-power-which-is-designed-to-be-used-at-the-power production--facility,--as--specified--under--one--or--more qualifying--power--purchase-commitments-or-contemporaneous documents-as-of-November-15,-1990.--"Total--installed--net output--capacity"--shall-be-the-generator-output-capacity, excluding-that-portion-of-the--electrical--power--actually used-at-the-power-production-facility,-as-installed.

kkkk.--"Unit"-means-a-fossil-fuel-fired-combustion-device.

llll.--"Unit account"-means-an-allowance-tracking-system-account, established-by-the--administrator--for--an--affected--unit pursuant---to---title-40,--Code--of--Federal--Regulations, 73.31(a)-or-(b).

mmmm.--"Utility"-means-any-person-that-sells-electricity.

nnnn.--"Utility-competitive-bid-solicitation"-is-a-public-request from-a-regulated-utility-for-offers--to--the--utility--for meeting--future--generating-needs.--A-qualifying-facility, independent-power-production-facility-may-be--regarded--as having-been-"selected"-in-such-solicitation-if-the-utility has-named-the-facility-as-a-project-with-which-the-utility intends-to-negotiate-a-power-sales-agreement.

oooo.--"Utility--regulatory-authority"-means-an-authority,-board, commission,-or-other-entity,-limited-to-the-local,--state, or--federal--level,-whenever-so-specified,-responsible-for overseeing-the-business-operations--of--utilities--located within--its--jurisdiction,--including--utility--rates--and charges-to-customers.

pppp.--"Utility--unit"--means--a--unit--owned--or--operated--by-a utility:

(1)--That-serves-a-generator-that-produces-electricity-for sale;-or

(2)--That--during--1985--served--a-generator-that-produced electricity-for-sale.

(3)--Notwithstanding--paragraphs--1-and-2,-a-unit-that-was in--operation--during--1985,--but--did--not--serve--a generator--that--produced-electricity-for-sale-during 1985,-and-did-not-commence-commercial-operation-on-or after--November-15,--1990,--is-not-a-utility-unit-for purposes-of-the-acid-rain-program.

(4)--Notwithstanding--paragraphs--1--and--2,--a--unit-that cogenerates-steam-and-electricity-is--not--a--utility unit--for--purposes--of-the-acid-rain-program,-unless the-unit-is-constructed-for-the-purpose-of-supplying, or--commences--construction--after-November-15,-1990, and-supplies,-more-than-one-third--of--its--potential electrical--output-capacity-and-more-than-twenty-five megawatts-electrical-output-to-any-power-distribution system-for-sale.

2.--Measurements,---abbreviations,--and--acronyms.---Measurements, abbreviations,-and-acronyms-used-in-this-chapter--are--defined as-follows:

a.--ASTM---American-society-for-testing-and-materials.

b.--Btu---British-thermal-unit.

c.--CFR---Code-of-Federal-Regulations.

d.--DOE---department-of-energy.

e.--mmBtu---million-Btu.

f.--MWe---megawatt-electrical.

g.--SO_2 - sulfur dioxide.

3.--Applicability.

a.--Each-of-the-following-units-shall-be-an-affected-unit,-and any-source-that-includes-such-a-unit-shall-be-an--affected source,--subject--to--the--requirements--of--the-acid-rain program:

(1)--A-unit-listed-in-table-1-of-title-40,-Code-of-Federal Regulations,-73.10(a).

(2)--An--existing--unit-that-is-identified-in-table-2-or-3 of-title-40,-Code-of-Federal-Regulations,--73.10--and any--other-existing-utility-unit,-except-a-unit-under subdivision-b-of-this-subsection.

(3)--A--utility-unit,-except-a-unit-under-subdivision-b-of this-subsection,-which:

(a)--Is-a-new-unit;

(b)--Did--not--serve--a--generator--with--a-nameplate capacity--greater--than--twenty-five---megawatts electrical-on-November-15,-1990,-but-serves-such a-generator-after-November-15,-1990;

(c)--Was--a-simple-combustion-turbine-on-November-15, 1990,-but-adds-or-uses--auxiliary--firing--after November-15,-1990;

(d)--Was---an---exempt--cogeneration--facility--under paragraph-4-of--subdivision--b--but--during--any three--calendar--year--period-after-November-15, 1990,-sold,--to--a--utility--power--distribution system,-an-annual-average-of-more-than-one-third of-its-potential-electrical-output-capacity--and more---than---two---hundred---nineteen--thousand megawatts-electrical-hours-electric-output,-on-a gross-basis;

(e)--Was---an---exempt---qualifying---facility--under paragraph-5-of-subdivision-b-but,--at--any--time

after the later of November 15, 1990, or the date the facility commences commercial operation, fails to meet the definition of qualifying facility;

(f) Was an exempt independent power production facility under paragraph 6 of subdivision b but, at any time after the later of November 15, 1990, or the date the facility commences commercial operation, fails to meet the definition of an independent power production facility; or

(g) Was an exempt solid waste incinerator under paragraph 7 of subdivision b but during any three calendar year period after November 15, 1990, consumes twenty percent or more (on a Btu basis) fossil fuel.

b. The following types of units are not affected units subject to the requirements of the acid rain program:

(1) A simple combustion turbine that commenced operation before November 15, 1990.

(2) Any unit that commenced commercial operation before November 15, 1990, and that did not, as of November 15, 1990, and does not currently, serve a generator with a nameplate capacity of greater than twenty five megawatts electrical.

(3) Any unit that, during 1985, did not serve a generator that produced electricity for sale and that did not, as of November 15, 1990, and does not currently, serve a generator that produces electricity for sale.

(4) A cogeneration facility that:

(a) For a unit that commenced construction on or prior to November 15, 1990, was constructed for the purpose of supplying equal to or less than one third its potential electrical output capacity or equal to or less than two hundred nineteen thousand megawatts electrical hours actual electric output on an annual basis to any utility power distribution system for sale on a gross basis. If the purpose of construction is not known, it will be presumed to be consistent with the actual operation from 1985 through 1987. However, if in any three calendar year period after November 15, 1990, such unit sells to a utility power distribution system an annual average of more than one third of its potential

electrical output capacity and more than two hundred nineteen thousand megawatts electrical hours actual electric output on a gross basis, that unit shall be an affected unit, subject to the requirements of the acid rain program; or

(b) For units that commenced construction after November 15, 1990, supplies equal to or less than one-third its potential electrical output capacity or equal to or less than two hundred nineteen thousand megawatts electrical hours actual electric output on an annual basis to any utility power distribution system for sale on a gross basis. However, if in any three calendar year period after November 15, 1990, such unit sells to a utility power distribution system an annual average of more than one-third of its potential electrical output capacity and more than two hundred nineteen thousand megawatts electrical hours actual electric output on a gross basis, that unit shall be an affected unit, subject to the requirements of the acid rain program.

(5) A qualifying facility that:

(a) Has, as of November 15, 1990, one or more qualifying power purchase commitments to sell at least fifteen percent of its total planned net output capacity; and

(b) Consists of one or more units designated by the owner or operator with total installed net output capacity not exceeding one hundred thirty percent of the total planned net output capacity. If the emissions rates of the units are not the same, the administrator may exercise discretion to designate which units are exempt.

(6) An independent power production facility that:

(a) Has, as of November 15, 1990, one or more qualifying power purchase commitments to sell at least fifteen percent of its total planned net output capacity; and

(b) Consists of one or more units designated by the owner or operator with total installed net output capacity not exceeding one hundred thirty percent of its total planned net output capacity. If the emissions rates of the units

are not the same, the administrator may exercise discretion to designate which units are exempt.

(7) A solid waste incinerator, if more than eighty percent on a Btu basis of the annual fuel consumed at such incinerator is other than fossil fuels. For a solid waste incinerator that began operation before January 1, 1985, the average annual fuel consumption of nonfossil fuels for calendar years 1985 through 1987 must be greater than eighty percent for such an incinerator to be exempt. For a solid waste incinerator that began operation after January 1, 1985, the average annual fuel consumption of nonfossil fuels for the first three years of operation must be greater than eighty percent for such an incinerator to be exempt. If, during any three calendar year period after November 15, 1990, such incinerator consumes twenty percent or more fossil fuel on a Btu basis, such incinerator will be an affected source under the acid rain program.

(8) A nonutility unit.

e. A certifying official of any unit may petition the administrator for a determination of applicability under title 40, Code of Federal Regulations, 72.6(e). The administrator's determination of applicability shall be binding upon the department, unless the petition is found to have contained significant errors or omissions.

4. New units exemption.

a. Applicability. This subsection applies to any new utility unit that serves one or more generators with total nameplate capacity of twenty five megawatts electrical or less and burns only fuels with a sulfur content of five hundredths percent or less by weight, as determined in accordance with paragraph 1 of subdivision d.

b. Petition for written exemption. The designated representative, authorized in accordance with subpart B of title 40, Code of Federal Regulations, part 72, of a source that includes a unit under subdivision a may petition the department for a written exemption, or to renew a written exemption, for the unit from certain requirements of the acid rain program. The petition shall be submitted on a form approved by the department which includes the following elements:

(1) Identification of the unit.

(2) The nameplate capacity of each generator served by the unit.

(3)--A--list-of-all-fuels-currently-burned-by-the-unit-and their-percentage-sulfur-content-by-weight,-determined in-accordance-with-subdivision-a.

(4)--A-list-of-all-fuels-that-are-expected-to-be-burned-by the-unit-and-their-sulfur-content-by-weight.

(5)--The-special-provisions-in-subdivision-d.

e.--North-Dakota-state-department-of-health's-action.

(1)--(a)--The--department-will-issue,-for-any-unit-meeting the-requirements--of--subdivisions-a--and--b,--a written--exemption--from-the-requirements-of-the acid-rain-program-except--for--the--requirements specified--in-this-subsection,-title-40,-Code-of Federal--Regulations,--72.2--through--72.7,--and title-40,--Code--of--Federal--Regulations,-72.10 through-72.13,-provided-that-no--unit--shall--be exempted-unless-the-designated-representative-of the--unit--surrenders,--and--the---administrator deducts--from--the--unit's--allowances--tracking system-account,-allowances-pursuant-to-title-40, Code--of--Federal-Regulations,-72.7(e)(1)(i)-and (d)(1).

(b)--The-exemption-shall-take-effect-on-January-first of-the-year-immediately-following--the--date--on which-the-written-exemption-is-issued-as-a-final agency-action-subject--to--judicial--review,--in accordance--with--paragraph-2--of-subdivision-e, provided-that-the-owners-and-operators,-and,--to the----extent----applicable,----the---designated representative,---shall----comply----with----the requirements-of-the-acid-rain-program-concerning all-years-for-which-the-unit-was--not--exempted, even--if--such--requirements--arise,--or-must-be complied-with,-after-the-exemption-takes-effect. The-exemption-shall-not-be-a-defense-against-any violation-of-such-requirements-of-the-acid--rain program--whether--the-violation-occurs-before-or after-the-exemption-takes-effect.

(2)--In--considering--and--issuing--or--denying--a-written exemption-under--paragraph-1--of--subdivision-e,--the department--will--apply--the-permitting-procedures-in section-33-15-21-06-by:

(a)--Treating--the--petition--as--an-acid-rain-permit application-under-such-provisions;

(b) Issuing or denying a draft written exemption that is treated as the issuance or denial of a draft permit under such provisions; and

(c) Issuing or denying a proposed written exemption that is treated as the issuance or denial of a proposed permit under such provisions; provided that no provision under section 33-15-21-06 concerning the content, effective date, or term of an acid rain permit shall apply to the written exemption or proposed written exemption under this subsection.

(3) A written exemption issued under this subsection shall have a term of five years from its effective date, except as provided in paragraph 3 of subdivision d.

d. Special provisions.

(1) The owners and operators of each unit exempted under this subsection shall determine the sulfur content by weight of its fuel as follows:

(a) For petroleum or petroleum products that the unit burns starting on the first day on which the exemption takes effect until the exemption terminates, a sample of each delivery of such fuel shall be tested using American society for testing and materials methods ASTM D4057-88 and ASTM D129-91, ASTM D2622-92, or ASTM D4294-90.

(b) For natural gas that the unit burns starting on the first day on which the exemption takes effect until the exemption terminates, the sulfur content shall be assumed to be five hundredths percent or less by weight.

(c) For gaseous fuel other than natural gas which the unit burns starting on the first day on which the exemption takes effect until the exemption terminates, a sample of each delivery of such fuel shall be tested using American society for testing and materials methods ASTM D1072-90 and ASTM D1265-92; provided that if the gaseous fuel is delivered by pipeline to the unit, a sample of the fuel shall be tested, at least once every quarter in which the unit operates during any year for which the exemption is in effect, using American society for testing and materials method ASTM D1072-90.

(2) The owners and operators of each unit exempted under this subsection shall retain at the source that includes the unit, the records of the results of the tests performed under subparagraphs a and e of paragraph 1 and a copy of the purchase agreements for the fuel under paragraph 1, stating the sulfur content of such fuel. Such records and documents shall be retained for five years from the date they are created.

(3) On the earlier of the date the written exemption expires, the date a unit exempted under this subsection burns any fuel with a sulfur content in excess of five hundredths percent by weight, as determined in accordance with paragraph 1, or twenty-four months prior to the date the unit first serves one or more generators with total nameplate capacity in excess of twenty-five megawatts electrical, the unit shall no longer be exempted under this subsection and shall be subject to all requirements of the acid rain program, except that:

(a) Notwithstanding subdivisions b and e of subsection 1 of section 33-15-21-03, the designated representative of the source that includes the unit shall submit a complete acid rain permit application on the later of January 1, 1998, or the date the unit is no longer exempted under this subsection.

(b) For purposes of applying monitoring requirements under title 40, Code of Federal Regulations, part 75, the unit shall be treated as a new unit that commenced commercial operation on the date the unit no longer meets the requirements of subdivision a of this subsection.

5. Retired units exemption.

a. Applicability. This subsection applies to any affected unit that is retired prior to the issuance, including renewal, of an acid rain permit for the unit as a final agency action.

b. Petition for written exemption.

(1) The designated representative, authorized in accordance with subpart B of title 40, Code of Federal Regulations, part 72, of a source that includes a unit under subdivision a may petition the department for a written exemption, or to renew a written exemption, for the unit from certain requirements of the acid rain program.

(2) A petition under this subsection shall be submitted on or before:

(a) The deadline for submitting an acid rain permit application for phase II; or

(b) If the unit has a phase II acid rain permit, the deadline for reapplying for such permit.

(3) The petition under this subsection shall be submitted on a form approved by the department which includes the following elements:

(a) Identification of the unit;

(b) The applicable deadline under paragraph 2;

(c) The actual or expected date of retirement of the unit;

(d) The following statement: "I certify that this unit [is or will be, as applicable] permanently retired on the date specified in this petition and will not emit any sulfur dioxide or nitrogen oxides after such date";

(e) A description of any actions that have been or will be taken and provide the basis for the certification in subparagraph d; and

(f) The special provisions in subdivision d.

c. North Dakota state department of health's action.

(1) (a) The department will issue, for any unit meeting the requirements of subdivisions a and b, a written exemption from the requirements of sections 33-15-21-01 through 33-15-21-08 and title 40, Code of Federal Regulations, part 72, except for the requirements specified in this subsection and title 40, Code of Federal Regulations, 72.1 through 72.6, title 40, Code of Federal Regulations, 72.8, and title 40, Code of Federal Regulations, 72.10 through 72.13.

(b) The exemption shall take effect on January first of the year following the date on which the written exemption is issued as a final agency action subject to judicial review, in accordance with paragraph 2, provided that the owners and operators, and, to the extent applicable, the designated representative, shall comply with the requirements of sections 33-15-21-01 through

33-15-21-08---and---title-40,--Code--of--Federal Regulations,-part-72,-concerning-all--years--for which--the--unit--was-not-exempted,-even-if-such requirements-arise--or--must--be--complied--with after-the-exemption-takes-effect.--The-exemption shall-not-be-a-defense-against-any-violation--of such--requirements--of--the--acid--rain--program whether-the-violation-occurs-before-or-after-the exemption-takes-effect.

(2)--In--considerating--and--issuing--or-denying-a-written exemption--under--paragraph-1,--the--department--will apply-the-procedures-in-section-33-15-21-06-by:

(a)--Treating--the--petition--as--an-acid-rain-permit application-under-such-provisions;

(b)--Issuing--or--denying--a--draft-written-exemption that-is-treated-as-the-issuance-or-denial--of--a draft-permit-under-such-provisions;-and

(c)--Issuing--or-denying-a-proposed-written-exemption that-is-treated-as-a-proposed-permit-under--such provisions;--provided--that--no--provision-under section--33-15-21-06--concerning,--the--content, effective--date,--or-term-of-an-acid-rain-permit shall-apply-to-the-written-exemption-or-proposed written-exemption-under-this-section.

(3)--A--written--exemption--issued--under--this-subsection shall-have-a-term-of-five-years,-except--as--provided in-paragraph-3-of-subdivision-d.

d.--Special-provisions.

(1)--A--unit-exempted-under-this-subsection-shall-not-emit any-sulfur-dioxide-and-nitrogen-dioxide--starting--on the-date-it-is-exempted.

(2)--The--owners--and--operators--of-a-unit-exempted-under this--subsection---shall---comply---with---monitoring requirements--in--accordance--with--title-40,-Code-of Federal-Regulations,-part-75,-and-will--be--allocated allowances--in--accordance--with--title-40,--Code--of Federal-Regulations,-part-73.

(3)--A--unit--exempted--under--this--subsection--shall-not resume-operation-unless-the-designated-representative of--the-source-that-includes-the-unit-submits-an-acid rain-permit-application-for-the-unit--not--less--than twenty-four--months--prior-to-the-later-of-January-1, 2000,-or-the-date-the-unit-is--to--resume--operation. On--the--earlier--of--the--date-the-written-exemption

expires or the date an acid rain permit application is submitted or is required to be submitted under this subdivision, the unit shall no longer be exempted under this subsection and shall no longer be exempted under this subsection and shall be subject to all requirements of sections 33-15-21-01 through 33-15-21-08 and title 40, Code of Federal Regulations, part 72.

6. Standard requirements.

a. Permit requirements.

(1) The designated representative of each affected source and each affected unit at the source shall:

(a) Submit a complete acid rain permit application under this chapter in accordance with the deadlines specified in subsection 1 of section 33-15-21-03; and

(b) Submit in a timely manner any supplemental information that the department determines is necessary in order to review an acid rain permit application and issue or deny an acid rain permit.

(2) The owners and operators of each affected source and each affected unit at the source shall:

(a) Operate the unit in compliance with a complete acid rain permit application or a superseding acid rain permit issued by the department; and

(b) Have an acid rain permit.

b. Monitoring requirements.

(1) The owners and operators and, to the extent applicable, designated representative of each affected source and each affected unit at the source shall comply with the monitoring requirements as provided in title 40, Code of Federal Regulations, part 75, and section 407 of the Act and regulations or rules implementing section 407 of the Act.

(2) The emissions measurements recorded and reported in accordance with title 40, Code of Federal Regulations, part 75, and section 407 of the Act and regulations or rules implementing section 407 of the Act shall be used to determine compliance by the unit with the acid rain emissions limitations and

emissions--reduction--requirements-for-sulfur-dioxide and-nitrogen-oxides-under-the-acid-rain-program.

(3)--The---requirements---of--title-40,--Code--of--Federal Regulations,--part-75,--and--regulations---or---rules implementing--section-407-of-the-Act-shall-not-affect the-responsibility-of-the--owners--and--operators--to monitor---emissions--of--other--pollutants--or--other emissions-characteristics-at--the--unit--under--other applicable---requirements---of---the--Act--and--other provisions-of-the-operating-permit-for-the-source.

e.--Sulfur-dioxide-requirements.

(1)--The--owners--and--operators--of--each-source-and-each affected-unit-at-the-source-shall:

(a)--Hold--allowances,--as--of-the-allowance-transfer deadline,-in-the-unit's--compliance--subaccount, after-deductions-under-title-40,-Code-of-Federal Regulations,-73.34(c),-not-less-than--the--total annual--emissions--of--sulfur--dioxide--for--the previous-calendar-year-from-the-unit;-and

(b)--Comply--with--the-applicable-acid-rain-emissions limitation-for-sulfur-dioxide.

(2)--Each--ton--of-sulfur-dioxide-emitted-in-excess-of-the acid-rain-emissions-limitations--for--sulfur--dioxide shall-constitute-a-separate-violation-of-the-Act.

(3)--An-affected-unit-shall-be-subject-to-the-requirements under-paragraph-1-as-follows:

(a)--Starting-January-1,-2000,-an-affected-unit-under paragraph-2-of-subdivision-a-of-subsection-3;-or

(b)--Starting-on-the-later-of-January-1,-2000,-or-the deadline---for---monitor---certification---under title-40,--Code-of-Federal-Regulations,-part-75, an---affected---unit---under---paragraph-3----of subdivision-a-of-subsection-3.

(4)--Allowances--shall--be--held--in,--deducted--from,--or transferred-among-allowance-tracking-system--accounts in-accordance-with-the-acid-rain-program.

(5)--An--allowance--shall--not--be--deducted,--in-order-to comply-with-the-requirements-under-subparagraph-a--of paragraph-1--of--subdivision-e,-prior-to-the-calendar year-for-which-the-allowance-was-allocated.

(6)--An-allowance-allocated-by-the-administrator-under-the acid-rain-program-is-a-limited-authorization-to--emit sulfur--dioxide--in--accordance--with--the--acid-rain program.--No-provision-of-the-acid-rain-program,--the acid--rain--permit-application,-the-acid-rain-permit, or-the-written-exemption-under--subsections-4--and--5 and--no--provision-of-law-shall-be-construed-to-limit the-authority--of--the--United--States--environmental protection---agency---to---terminate--or--limit--such authorization.

(7)--An-allowance-allocated-by-the-administrator-under-the acid-rain-program--does--not--constitute--a--property right.

d.--Nitrogen-oxides-requirements.--The-owners-and-operators-of the-source-and-each-affected--unit--at--the--source--shall comply--with-the-applicable-acid-rain-emissions-limitation for-nitrogen-oxides.

e.--Excess-emissions-requirements.

(1)--The--designated--representative--of--an-affected-unit that-has-excess-emissions-in-any-calendar-year--shall submit--a--proposed-offset-plan-to-the-administrator, as--required--under---title-40,---Code---of---Federal Regulations,--part-77,--and--submit--a--copy--to--the department.

(2)--The-owners-and-operators-of-an-affected-unit-that-has excess-emissions-in-any-calendar-year-shall:

(a)--Pay--to--the--administrator--without--demand-the penalty-required,-and-pay-to--the--administrator upon--demand--the--interest--on-that-penalty,-as required---by---title-40,---Code---of----Federal Regulations,-part-77;-and

(b)--Comply--with--the--terms--of--an-approved-offset plan,-as-required-by-title-40,-Code--of--Federal Regulations,--part-77.

f.--Recordkeeping-and-reporting-requirements.

(1)--Unless--otherwise--provided,-the-owners-and-operators of-the-source-and-each-affected-unit--at--the--source shall-keep-onsite-at-the-source-each-of-the-following documents-for-a-period-of-five-years--from--the--date the-document-is-created.--This-period-may-be-extended for-cause,-at-any-time--prior--to--the--end--of--five years,---in--writing--by--the--administrator--or--the department.

(a) The certificate of representation for the designated representative for the source and each affected unit at the source and all documents that demonstrate the truth of the statements in the certificate of representation, in accordance with title 40, Code of Federal Regulations, 72.24; provided that the certificate and documents shall be retained onsite at the source beyond such five-year period until such documents are superseded because of the submission of a new certificate of representation changing the designated representative.

(b) All emissions monitoring information, in accordance with title 40, Code of Federal Regulations, part 75.

(c) Copies of all reports, compliance certifications, and other submissions and all records made or required under the acid rain program.

(d) Copies of all documents used to complete an acid rain permit application and any other submission under the acid rain program or to demonstrate compliance with the requirements of the acid rain program.

(2) The designated representative of an affected source and each affected unit at the source shall submit the reports and compliance certifications required under the acid rain program, including those under section 33-15-21-08 and title 40, Code of Federal Regulations, part 75.

g. Liability.

(1) Any person who knowingly violates any requirement or prohibition of the acid rain program, a complete acid rain permit application, an acid rain permit, or a written exemption under subsections 4 or 5, including any requirement for the payment of any penalty owed to the United States, shall be subject to enforcement by the administrator pursuant to section 113(c) of the Act and by the department.

(2) Any person who knowingly makes a false, material statement in any record, submission, or report under the acid rain program shall be subject to criminal enforcement by the administrator pursuant to section 113(c) of the Act and 18 U.S.C. 1001 and by the department.

~~(3)--No--permit-revision-shall-excuse-any-violation-of-the requirements-of-the-acid--rain--program--that--occurs prior-to-the-date-that-the-revision-takes-effect.~~

~~(4)--Each--affected--source--and--each-affected-unit-shall meet-the-requirements-of-the-acid-rain-program.~~

~~(5)--Any--provision--of-the-acid-rain-program-that-applies to--an--affected--source,---including---a---provision applicable--to--the--designated--representative-of-an affected-source,-shall-also-apply-to-the--owners--and operators-of-such-source-and-of-the-affected-units-at the-source.~~

~~(6)--Any--provision--of-the-acid-rain-program-that-applies to-an-affected-unit,-including-a-provision-applicable to-the-designated-representative-of-an-affected-unit, shall-also-apply-to-the-owners-and-operators-of--such unit.---Except--as--provided--under--subsection-2--of section-33-15-21-04,--phase-II--repowering--extension plans,--section--407--of--the--Act-and-regulations-or rules-implementing-section-407-of-the-Act,-and-except with--regard--to-the-requirements-applicable-to-units with-a-common-stack-under-title-40,-Code--of--Federal Regulations,--part-75,--including--title-40,--Code-of Federal-Regulations,-75.16,--75.17,--and--75.18,--the owners----and----operators----and----the---designated representative-of-one--affected--unit--shall--not--be liable--for--any-violation-by-any-other-affected-unit of-which-they-are-not--owners--or--operators--or--the designated--representative--and--that-is-located-at-a source-of-which-they-are-not-owners-or--operators--or the-designated-representative.~~

~~(7)--Each-violation-of-a-provision-of-sections-33-15-21-01 through-33-15-21-10-and--title-40,--Code--of--Federal Regulations,--parts--72,--73,--75,--77,--and--78,-and regulations-or-rules-implementing--sections--407--and 410--of--the--Act--by--an-affected-source-or-affected unit,-or--by--an--owner--or--operator--or--designated representative--of--such--source--or-unit,-shall-be-a separate-violation-of-the-Act.~~

~~h.--Effect--on--other--authorities.---No-provision-of-the-acid rain-program,-an-acid-rain--permit--application,--an--acid rain-permit,-or-a-written-exemption-under-subsections-4-or 5-shall-be-construed-as:~~

~~(1)--Except--as-expressly-provided-in-title-IV-of-the-Act, exempting-or-excluding-the-owners-and-operators--and, to----the----extent----applicable,---the---designated representative-of-an-affected-source-or-affected-unit from--compliance-with-any-other-provision-of-the-Act,~~

including the provisions of title I of the Act relating to applicable national ambient air quality standards or state implementation plans;

(2) Limiting the number of allowances a unit can hold; provided, that the number of allowances held by the unit shall not affect the source's obligation to comply with any other provisions of the Act or this article;

(3) Requiring a change of any kind in any state law regulating electric utility rates and charges, affecting any state law regarding such state regulation, or limiting such state regulation, including any prudence review requirements under such state law;

(4) Modifying the Federal Power Act or affecting the authority of the federal energy regulatory commission under the Federal Power Act; or

(5) Interfering with or impairing any program for competitive bidding for power supply in a state in which such program is established.

Repealed effective June 1, 2001.

History: Effective December 1, 1994; amended effective April 1, 1998.
General Authority: NDCC 23-25-03, 23-25-04, 23-25-04.1
Law Implemented: NDCC 23-25-03, 23-25-04, 23-25-04.1, 23-25-10

33-15-21-02. Designated representative.

1. Submissions.

a. The designated representative shall submit a certificate of representation, and any superseding certificate of representation, to the administrator in accordance with subpart B of title 40, Code of Federal Regulations, part 72, and, concurrently, shall submit a copy to the department. Whenever the term "designated representative" is used in this section, the term shall be construed to include the alternate designated representative.

b. Each submission under the acid rain program shall be submitted, signed, and certified by the designated representative for all sources on behalf of which the submission is made.

c. In each submission under the acid rain program, the designated representative shall certify, by the designated representative's signature:

(1)--The--following--statement,--which--shall--be-included verbatim-in-such-submission:---"I--am--authorized--to make--this--submission--on--behalf--of-the-owners-and operators-of-the-affected-source--or--affected--units for-which-the-submission-is-made".

(2)--The--following--statement,--which--shall--be-included verbatim--in--such--submission:---"I--certify---under penalty--of--law-that-I-have-personally-examined,-and am-familiar--with,--the--statements--and--information submitted--in--this-document-and-all-its-attachments. Based-on-my-inquiry-of-those-individuals-with-primary responsibility---for--obtaining--the--information,--I certify-that-the-statements-and--information--are--to the--best--of-my-knowledge-and-belief-true,-accurate, and-complete.--I-am-aware-that-there-are--significant penalties---for---submitting---false--statements--and information--or--omitting--required--statements---and information,--including--the--possibility--of-fine-or imprisonment".

d.--The--department-will-accept-or-act-on-a-submission-made-on behalf-of-owners-or-operators-of-an-affected-source-and-an affected--unit--only--if--the--submission--has--been-made, signed,-and-certified-in--accordance--with--subdivisions-b and-c.

e.--(1)--The-designated-representative-of-a-source-shall-serve notice-on-each-owner-and-operator-of-the--source--and of-an-affected-unit-at-the-source:

(a)--By--the--date--of--submission,--of-any-acid-rain program---submissions----by----the----designated representative;

(b)--Within---ten--business--days--of--receipt--of--a determination,-of-any-written--determination--by the-administrator-or-the-department;-and

(c)--Provided--that--the--submission-or-determination covers-the-source-or-the-unit.

(2)--The--designated--representative--of--a--source--shall provide-each-owner-and-operator-of-an--affected--unit at---the---source---a---copy--of--any--submission--or determination-under-paragraph-1,-unless-the-owner--or operator-expressly-waives-the-right-to-receive-such-a copy.

2.--Objections.

a.--Except---as---provided---in---title-40,--Code--of--Federal Regulations,-72.23,-no-objection--or--other--communication

submitted---to---the---administrator---or--the--department concerning-the-authorization,-or-any-submission,-action-or inaction,--of--the--designated-representative-shall-affect any-submission,-action,--or--inaction--of--the--designated representative,--or--the--finality--of-any-decision-by-the department,-under-the-acid-rain-program.--In-the-event--of such-communication,-the-department-is-not-required-to-stay any-submission-or-the-effect-of--any--action--or--inaction under-the-acid-rain-program.

b.--The--department--will--not--adjudicate--any--private-legal dispute-concerning-the-authorization--or--any--submission, action,--or--inaction--of--any--designated-representative, including-private-legal-disputes-concerning--the--proceeds of--allowance-transfers. Repealed effective June 1, 2001.

History: Effective-December-1,-1994.
General Authority: NDCC-23-25-03,-23-25-04
Law Implemented: NDCC-23-25-03,-23-25-04

33-15-21-03. Acid rain permit applications.

1.--Requirement-to-apply.

a.--Duty--to--apply.---The--designated--representative--of-any source-with-an-affected-unit-shall-submit-a-complete--acid rain--permit--application--by--the--applicable-deadline-in subdivisions-b-and-c-of-this-subsection,--and--the--owners and--operators-of-such-source-and-any-affected-unit-at-the source-shall-not-operate-the--source--or--unit--without--a permit-that-states-its-acid-rain-program-requirements.

b.--Deadlines.

(1)--For--any-source-with-an-existing-unit-described-under paragraph-2--of--subdivision-a--of--subsection-3---of section--33-15-21-01,--the--designated-representative shall-submit-a-complete-acid-rain-permit--application governing--such--unit--to-the-department-on-or-before January-1,-1996.

(2)--For--any--source--with--a--new--unit--described-under subparagraph-a-of--paragraph-3--of--subdivision-a--of subsection-3--of--section-33-15-21-01,-the-designated representative-shall--submit--a--complete--acid--rain permit---application---governing--such--unit--to--the department-at-least--twenty-four--months--before--the later--of--January-1,--2000,-or-the-date-on-which-the unit-commences-operation.

(3)--For---any---source---with---a--unit--described--under subparagraph-b-of--paragraph-3--of--subdivision-a--of

~~subsection 3 of section 33-15-21-01, the designated representative shall submit a complete acid rain permit application governing such unit to the department at least twenty-four months before the later of January 1, 2000, or the date on which the unit begins to serve a generator with a nameplate capacity greater than twenty-five megawatts electrical.~~

~~(4) For any source with a unit described under subparagraph c of paragraph 3 of subdivision a of subsection 3 of section 33-15-21-01, the designated representative shall submit a complete acid rain permit application governing such unit to the department at least twenty-four months before the later of January 1, 2000, or the date on which the auxiliary firing commences operation.~~

~~(5) For any source with a unit described under subparagraph d of paragraph 3 of subdivision a of subsection 3 of section 33-15-21-01, the designated representative shall submit a complete acid rain permit application governing such unit to the department before the later of January 1, 1998, or March first of the year following the three calendar year period in which the unit sold to a utility power distribution system an annual average of more than one-third of its potential electrical output capacity and more than two hundred nineteen thousand megawatts electrical hours actual electric output on a gross basis.~~

~~(6) For any source with a unit described under subparagraph e of paragraph 3 of subdivision a of subsection 3 of section 33-15-21-01, the designated representative shall submit a complete acid rain permit application governing such unit to the department before the later of January 1, 1998, or March first of the year following the calendar year in which the facility fails to meet the definition of qualifying facility.~~

~~(7) For any source with a unit described under subparagraph f of paragraph 3 of subdivision a of subsection 3 of section 33-15-21-01, the designated representative shall submit a complete acid rain permit application governing such unit to the department before the later of January 1, 1998, or March first of the year following the calendar year in which the facility fails to meet the definition of an independent power production facility.~~

(8) For any source with a unit described under subparagraph g of paragraph 3 of subdivision a of subsection 3 of section 33-15-21-01, the designated representative shall submit a complete acid rain permit application governing such unit to the department before the later of January 1, 1998, or March first of the year following the three calendar year period in which the incinerator consumed twenty percent or more fossil fuel on a British thermal unit basis.

e. Duty to reapply. The designated representative shall submit a complete acid rain permit application for each source with an affected unit at least six months but no more than eighteen months prior to the expiration of an existing acid rain permit governing the unit.

d. The original and two copies of all permit applications shall be submitted to the department and one copy shall be submitted to the administrator, United States environmental protection agency, region eight.

2. Information requirements for acid rain permit applications. A complete acid rain permit application shall be submitted on a form approved by the department, which includes the following elements:

a. Identification of the affected source for which the permit application is submitted;

b. Identification of each affected unit at the source for which the permit application is submitted;

c. A complete compliance plan for each unit, in accordance with section 33-15-21-04;

d. The standard requirements under subsection 6 of section 33-15-21-01; and

e. If the unit is a new unit, the date that the unit has commenced or will commence operation and the deadline for monitor certification.

3. Permit application shield and binding effect of permit application.

a. Once a designated representative submits a timely and complete acid rain permit application, the owners and operators of the affected source and the affected units covered by the permit application shall be deemed in compliance with the requirement to have an acid rain permit under paragraph 2 of subdivision a of subsection 6 of section 33-15-21-01 and subdivision a of subsection 1

of section 33-15-21-03, provided that any delay in issuing an acid rain permit is not caused by the failure of the designated representative to submit in a complete and timely fashion supplemental information, as required by the department, necessary to issue a permit.

b. Prior to the date on which an acid rain permit is issued as a final agency action subject to judicial review, an affected unit governed by and operated in accordance with the terms and requirements of a timely and complete acid rain permit application shall be deemed to be operating in compliance with the acid rain program.

c. A complete acid rain permit application shall be binding on the owners and operators and the designated representative or the affected source and the affected units covered by the permit application and shall be enforceable as an acid rain permit from the date of submission of the permit application until the issuance or denial of such permit as a final agency action subject to judicial review. Repealed effective June 1, 2001.

History: Effective December 1, 1994.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-04.1

33-15-21-04. Acid rain compliance plan and compliance options.

1. General.

a. For each affected unit included in an acid rain permit application, a complete compliance plan shall include:

(1) For sulfur dioxide emissions, a certification that, as of the allowance transfer deadline, the designated representative will hold allowances in the unit's compliance subaccount, after deductions under title 40, Code of Federal Regulations, 73.34(c), not less than the total annual emissions of sulfur dioxide from the unit. The compliance plan may also specify, in accordance with section 33-15-21-04, one or more of the acid rain compliance options.

(2) For nitrogen oxides emissions, a certification that the unit will comply with the applicable limitation established by regulations or rules implementing section 407 of the Act or shall specify one or more acid rain compliance options, in accordance with section 407 of the Act and regulations or rules implementing section 407.

b.--The--compliance--plan--may--include-a-multiunit-compliance option--under--subsection-2--of--section--33-15-21-04---or section---407---of---the---Act--or--regulations--or--rules implementing-section-407.

(1)--A-plan-for-a-compliance-option-that-includes-units-at more-than-one-affected-source-shall-be-complete--only if:

(a)--Such---plan--is--signed--and--certified--by--the designated-representative-for-each--source--with an-affected-unit-governed-by-such-plan;-and

(b)--A---complete--permit--application--is--submitted covering-each-unit-governed-by-such-plan.

(2)--The-department's-approval-of-a-plan-under-paragraph-1 that-includes-units-in-more-than-one-state--shall--be final--only--after--every--permitting--authority-with jurisdiction-over-any-such-unit-has-approved-the-plan with-the-same-modifications-or-conditions,-if-any.

c.--Conditional---approval.----In--the--compliance--plan,--the designated-representative-of-an-affected-unit-may-propose, in--accordance--with--section--33-15-21-04,--any-acid-rain compliance-option-for-conditional-approval;-provided--that an--acid--rain--compliance-option-under-section-407-of-the Act-may-be--conditionally--proposed--only--to--the--extent provided--in-regulations-or-rules-implementing-section-407 of-the-Act.

(1)--To---activate--a--conditionally--approved--acid--rain compliance--option,--the--designated---representative shall--notify--the--department--in--writing--that-the conditionally---approved---compliance---option---will actually--be--pursued--beginning--January--first-of-a specified-year.--Such-notification-shall--be--subject to--the--limitations-on-activation-under-subsection-2 of--section--33-15-21-04--and--regulations--or--rules implementing---section---407--of--the--Act.---If--the conditionally-approved-compliance-option--includes--a plan--described--in-paragraph-1-of-subdivision-b,-the designated-representative-of-each-source-governed--by the-plan-shall-sign-and-certify-the-notification.

(2)--The--notification--under-paragraph-1-of-subdivision-c shall-specify-the-first-calendar-year--and--the--last calendar--year--for--which-the-conditionally-approved acid-rain-compliance-option-is-to--be--activated.---A conditionally--approved--compliance--option--shall-be activated,--if--at--all,--before--the--date--of---any enforceable--milestone--applicable--to-the-compliance option.--The-date-of--activation--of--the--compliance

option shall not be a defense against failure to meet the requirements applicable to that compliance option during each calendar year for which the compliance option is activated.

(3) Upon submission of a notification meeting the requirements of paragraphs 1 and 2, the conditionally approved acid rain compliance option becomes binding on the owners and operators and the designated representative of any unit governed by the conditionally approved compliance option.

(4) A notification meeting the requirements of paragraphs 1 and 2 will revise the unit's permit in accordance with subsection 4 of section 33-15-21-07 (administrative permit amendment).

d. Termination of compliance option.

(1) The designated representative for a unit may terminate an acid rain compliance option by notifying the department in writing that an approved compliance option will be terminated beginning January first of a specified year. Such notification shall be subject to the limitations on termination under subsection 2 of section 33-15-21-04 and regulations or rules implementing section 407 of the Act. If the compliance option includes a plan described in paragraph 1 of subdivision b, the designated representative for each source governed by the plan shall sign and certify the notification.

(2) The notification under paragraph 1 shall specify the calendar year for which the termination will take effect.

(3) Upon submission of a notification meeting the requirements of paragraphs 1 and 2, the termination becomes binding on the owners and operators and the designated representative of any unit governed by the acid rain compliance option to be terminated.

(4) A notification meeting the requirements of paragraphs 1 and 2 will revise the unit's permit in accordance with subsection 4 of section 33-15-21-07 (administrative permit amendment).

2. Repowering extensions.

a. Applicability.

(1) This subsection shall apply to the designated representative of:

(a)--Any--existing-affected-unit-that-is-a-coal-fired unit--and--has--a--1985--actual--sulfur--dioxide emissions--rate-equal-to-or-greater-than-one-and two-tenths-lbs/mmBtu;-or

(b)--Any-new-unit-that-will-be-a-replacement-unit,-as provided-in-paragraph-2-of-subdivision-b,-for--a unit-meeting-the-requirements-of-subparagraph-a; or

(c)--Any-oil-fired-or-gas-fired-unit-or-oil-fired-and gas-fired-unit-that-has-been-awarded-clean--coal technology----demonstration----funding---as---of January-1,-1991,-by-the-secretary-of-energy.

(2)--A--repowering--extension-does-not-exempt-the-owner-or operator-for-any-unit-governed-by-the-repowering-plan from--the-requirement-to-comply-with-such-unit's-acid rain-emissions-limitations-for-sulfur-dioxide.

b.--The--designated--representative--of--any--unit-meeting-the requirements---of---subparagraph-a---of---paragraph-1---of subdivision-a--may--include-in-the-unit's-acid-rain-permit application-a-repowering-extension-plan--that--includes--a demonstration-that:

(1)--The---unit---will--be--repowered--with--a--qualifying repowering-technology-in-order--to--comply--with--the emissions-limitations-for-sulfur-dioxide;-or

(2)--The--unit-will-be-replaced-by-a-new-utility-unit-that has-the-same-designated-representative--and--that--is located---at--a--different--site--using--a--qualified repowering-technology-and-the-existing-unit--will--be permanently--retired--from--service--on-or-before-the date--on--which--the--new--utility---unit---commences commercial-operation.

c.--In---order--to--apply--for--a--repowering--extension,--the designated-representative-of-a--unit--under--subdivision-a shall:

(1)--Submit--to--the--department,--by--January-1,--1996,-a complete-repowering-extension-plan;

(2)--Submit--to--the--administrator-before-June-1,-1997,-a complete--petition---for---approval---of---repowering technology--in--accordance--with--title-40,--Code--of Federal-Regulations,-72.44(d)-and-submit--a--copy--to the-department;-and

(3)--If--the--repowering--extension--plan-is-submitted-for conditional-approval,-submit--to--the--department--by

December 31, 1997, a notification to activate the plan in accordance with subdivision e of subsection 1.

d. Contents of repowering extension plan. A complete repowering extension plan shall include the following elements:

(1) Identification of the existing unit governed by the plan.

(2) The unit's federally approved state implementation plan sulfur dioxide emissions limitation.

(3) The unit's 1995 actual sulfur dioxide emissions rate, or best estimate of the actual emissions rate; provided that the actual emissions rate is submitted to the department by January 30, 1996.

(4) A schedule for construction, installation, and commencement of operation of the repowering technology approved or submitted for approval under title 40, Code of Federal Regulations, 72.44(d) with dates for the following milestones:

(a) Completion of design engineering;

(b) For a plan under paragraph 1 of subdivision b, removal of the existing unit from operation to install the qualified repowering technology;

(c) Commencement of construction;

(d) Completion of construction;

(e) Startup testing;

(f) For a plan under paragraph 2 of subdivision b, shutdown of the existing unit; and

(g) Commencement of commercial operation of the repowering technology.

(5) For a plan under paragraph 2 of subdivision b:

(a) Identification of the new unit. A new unit shall not be included in more than one repowering extension plan.

(b) Certification that the new unit will replace the existing unit.

(c)--Certification--that--the--new--unit-has-the-same designated-representative-as-the-existing--unit.

(d)--Certification--that--the--existing--unit-will-be permanently-retired-from-service--on--or--before the--date--the--new--unit--commences--commercial operation.

(6)--The-special-provisions-of-subdivision-g.

e.--North--Dakota--state--department--of--health's--action--on repowering-extension-plan.

(1)--The---department---will---not--approve--a--repowering extension--plan--until--the--administrator--makes---a conditional--determination--that--the-technology-is-a qualified---repowering---technology;----unless----the department---approves---such---plan--subject--to--the conditional-determination-of-the-administrator.

(2)--Permit-issuance.

(a)--Upon---a---conditional---determination---by--the administrator-that-the-technology-to-be-used--in the--repowering--extension--plan--is-a-qualified repowering-technology-and-a-determination-by-the department-that-such-plan-meets-the-requirements of-this-subsection,-the--department--will--issue the--acid--rain--portion-of-the-operating-permit including:

(1)--The-approved-repowering-extension-plan;-and

(2)--A--schedule--of-compliance-with-enforceable milestones-for-construction,--installation, and---commencement---of--operation--of--the repowering-----technology-----and-----other requirements---necessary---to--ensure--that emission-reduction-requirements-under--this subsection-will-be-met.

(b)--Except--as--otherwise-provided-in-subdivision-f, the-repowering--extension--shall--be--in--effect starting--January-1,-2000,-and-ending-on-the-day before-the--date--specified--in--the--acid--rain permit--on--which--the--existing--unit--will--be removed-form-operation-to-install-the-qualifying repowering--technology--or--will--be-permanently removed-from-service-for-replacement--by--a--new unit--with--such--technology;--provided-that-the repowering-extension-shall--end--no--later--than December-31,-2003.

(e)--The--portion--of-the-operating-permit-specifying the-repowering-extension-and-other--requirements under--subparagraph-a--shall--be--subject-to-the administrator's---final---determination,---under title-40,----Code----of---Federal---Regulations, 72.44(d)(4),-that-the-technology-to-be--used--in the--repowering--extension--plan-is-a-qualifying repowering-technology.

(3)--Allowance--allocation.---Allowances-will-be-allocated in--accordance--with--title-40,---Code---of---Federal Regulations,-72.44(f)(3)-and-(g).

f.--Failed-repowering-projects.

(1)--(a)--If,-at-any-time-before-the-end-of-the-repowering extension-under-subparagraph-b-of-paragraph-2-of subdivision-e,--the-designated-representative-of a--unit--governed--by--an--approved---repowering extension--plan--submits--the-notification-under subdivision-d---of---subsection-2---of---section 33-15-21-08--that--the-owners-and-operators-have decided-to-terminate-efforts-to-properly-design, construct,--and--test--the-repowering-technology specified--in--the--plan--before--completion--of construction--or-startup-testing,-the-designated representative-may-submit-to--the--department--a proposed--permit-modification-demonstrating-that such--efforts--were--in--good--faith.---If--such demonstration--is--to--the--satisfaction--of-the administrator,-the-unit-shall-not-be--deemed--in violation---of---the---Act--because--of--such--a termination-and-the-department-will--revise--the operating-----permit----in----accordance----with subparagraph-b-of-this-subsection.

(b)--Regardless---of---whether---notification---under subparagraph-a---is---given,---the----repowering extension--will--end-beginning-on-the-earlier-of the-date-of-such-notification--or--the--date--by which-the-designated-representative-was-required to-give-such-notification-under-subdivision-d-of subsection-2-of-section-33-15-21-08.

(2)--The--designated--representative-of-a-unit-governed-by an-approved-repowering-extension-plan-may--submit--to the---department---a---proposed--permit--modification demonstrating---that---the---repowering----technology specified--in--the--plan-was-properly-constructed-and tested-on-such-unit-but-was--unable--to--achieve--the emissions-reduction-limitations-specified-in-the-plan and--that--it--is--economically--or---technologically infeasible--to--modify-the-technology-to-achieve-such

limits,-the-unit-shall-not-be-deemed-in-violation--of the--Act--because--of--such--failure--to--achieve-the emissions-reduction--limitations.---In--order--to--be properly---constructed--and--tested,--the--repowering technology-shall--be--constructed--at--least--to--the extent--necessary--for-direct-testing-of-the-multiple combustion-emissions,-including--sulfur--dioxide--and nitrogen--oxides,--from-such-unit-while-operating-the technology---at---nameplate---capacity.----If----such demonstration---is---to---the---satisfaction--of--the administrator:

(a)--The-unit-shall-not-be-deemed-in-violation-of-the Act-because--of--such--failure--to--achieve--the emissions-reduction-limitations;

(b)--The-department-will-revise-the-acid-rain-portion of--the--operating--permit--in--accordance--with subparagraphs-c--and--d-and-with-subsection-2-of section-33-15-21-07;

(c)--The---existing---unit---may--be--retrofitted--or repowered--with--another--clean--coal--or--other available-control-technology;-and

(d)--The-repowering-extension-will-continue-in-effect until-the-earlier-of-the-date-the-existing--unit commences-commercial-operation-with-such-control technology-or-December-31,-2003.

g.--Special-provisions.

(1)--Emissions-limitations.

(a)--Sulfur-dioxide.--Allowances-allocated-during-the repowering--extension---under---paragraph-2---of subdivision-e---and---subdivision-f--to--a--unit governed-by--an--approved--repowering--extension plan--shall--not-be-transferred-to-any-allowance tracking-system--account--other--than--the--unit accounts--of--other--units-at-the-same-source-as that-unit.

(b)--Nitrogen--oxides.--Any-existing-unit-governed-by an-approved-repowering-extension-plan--shall--be subject--to--the-acid-rain-emissions-limitations for-nitrogen-oxides-in-accordance--with--section 407---of---the--Act--and--regulations--or--rules implementing-section-407-of-the-Act-beginning-on the-date-that-the-unit-is-removed-from-operation to--install--the--repowering--technology--or--is permanently-removed-from-service.

(c) No existing unit governed by an approved repowering extension plan shall be eligible for a waiver under section 111(j) of the Act.

(d) No new unit governed by an approved repowering extension plan shall receive an exemption from the requirements imposed under section 111 of the Act.

(2) Reporting requirements. Each unit governed by an approved repowering extension plan shall comply with the special reporting requirements of subsection 2 of section 33-15-21-08.

(3) Liability.

(a) The owners and operators of a unit governed by an approved repowering plan shall be liable for any violation of the plan or this subsection at that or any other unit governed by the plan.

(b) The units governed by the plan under paragraph 2 of subdivision b shall continue to have a common designated representative until the existing unit is permanently retired under the plan.

(4) Terminations. Except as provided in subdivision f, a repowering extension plan shall not be terminated after December 31, 1999. Repealed effective June 1, 2001.

History: Effective December 1, 1994; amended effective April 1, 1998.
General Authority: NDCC 23-25-03, 23-25-04
Law Implemented: NDCC 23-25-04, 23-25-04.1

33-15-21-05. Acid rain permit contents.

1. General.

a. Each acid rain permit including any draft or proposed acid rain permit must contain the following elements:

(1) All elements required for a complete acid rain permit application under subsection 2 of section 33-15-21-03 as approved or adjusted by the department;

(2) The applicable acid rain emissions limitation for sulfur dioxide; and

(3) The applicable acid rain emissions limitation for nitrogen oxides.

b.--Each--acid--rain--permit--is--deemed--to--incorporate--the definitions--of--terms--under--subsection-1---of---section 33-15-21-01.

2.--Permit-shield.--Each-affected-unit-operated-in-accordance-with the-acid-rain-permit-that-governs-the-unit-and-that-was-issued in--compliance--with--title-IV--of--the--Act,--as--provided-in sections-33-15-21-01-through-33-15-21-08,--title-40,--Code--of Federal--Regulations,--parts--72,--73,-75,-77,-and-78,-and-the regulations-or-rules-implementing--section--407--of--the--Act, shall--be--deemed--to-be-operating-in-compliance-with-the-acid rain--program,--except---as---provided---in---paragraph-6---of subdivision-g---of---subsection-6---of---section--33-15-21-01. Repealed effective June 1, 2001.

History: Effective-December-1,-1994.
General Authority: NDCC-23-25-03
Law Implemented: NDCC-23-25-04,-23-25-04.1

33-15-21-06. Acid rain permit issuance procedures.

1.--General.---The--department--will--issue--or-deny-all-acid-rain permits-in-accordance-with-section-33-15-14-06,-including--the completeness---determination,---draft--permit,--administrative record,-statement-of-basis,-public-notice-and-comment--period, public--hearing,--proposed--permit,--permit--issuance,--permit revision,--and--appeal--procedures--as--amended--by---sections 33-15-21-06-and-33-15-21-07.

2.--Completeness.---The-department-will-submit-a-written-notice-of application--completeness--to--the--administrator--within--ten working--days-following-a-determination-by-the-department-that the-acid-rain-permit-application-is-complete.

3.--Statement-of-basis.

a.--The--statement-of-basis-will-briefly-set-forth-significant factual,-legal,-and-policy--considerations--on--which--the department--relied-in-issuing-or-denying-the-draft-permit.

b.--The--statement--of--basis--will--include--the--reasons-and supporting-authority-for-approval-or--disapproval--of--any compliance--options--requested--in-the-permit-application, including-references-to-applicable-statutory-or-regulatory provisions-and-to-the-administrative-record.

c.--The--department-will-submit-to-the-administrator-a-copy-of the-draft-acid-rain-permit-and-the-statement-of-basis--and all--other--relevant-portions-of-the-operating-permit-that may-affect-the-draft-acid-rain-permit.

4.--Issuance-of-acid-rain-permits.

a.--Proposed--permit.---After--the-close-of-the-public-comment period,-the--department--will--incorporate--all--necessary changes-and-issue-or-deny-a-proposed-acid-rain-permit.

b.--The--department--will-submit-the-proposed-acid-rain-permit or--denial--of--a--proposed--acid--rain--permit---to---the administrator---in---accordance---with---subdivision-a--of subsection-7-of-section--33-15-14-06,--the--provisions--of which--shall--be--treated--as--applying-to-the-issuance-or denial-of-a-proposed-acid-rain-permit.

c.--(1)--Following--the-administrator's-review-of-the-proposed acid-rain-permit-or-denial-of-a--proposed--acid--rain permit,---the---department---under--subdivision-c--of subsection-7-of-section-33-15-14-06-will--incorporate any--required-changes-and-issue-or-deny-the-acid-rain permit-in-accordance-with-section-33-15-21-05.

(2)--No--acid--rain--permit,-including-a-draft-or-proposed permit,-shall-be-issued-unless-the-administrator--and the---department---have--received--a--certificate--of representation-for-the-designated--representative--of the--source-in-accordance-with-subpart-B-of-title-40, Code-of-Federal-Regulations,-part-72.

d.--Permit-issuance-deadline-and-effective-date.

(1)--On--or--before-December-31,-1997,-the-department-will issue-an-acid-rain-permit--to--each--affected--source whose--designated--representative--submitted-a-timely and--complete--acid--rain---permit---application---by January-1,--1996,--in-accordance-with-subsection-1-of section-33-15-21-02-and--meets--the--requirements--of sections-33-15-14-06-and-33-15-21-06.

(2)--Nitrogen-oxides.--Not-later-than-January-1,-1999,-the department-will-reopen-the-acid-rain--permit--to--add the--acid--rain-program-nitrogen-oxides-requirements; provided-that-the-designated--representative--of--the affected--source-submitted-a-timely-and-complete-acid rain--permit--application--for--nitrogen--oxides---in accordance--with-subsection-1-of-section-33-15-21-02. Such-reopening-shall-not-affect-the-term-of-the--acid rain-portion-of-an-operating-permit.

(3)--Each--acid--rain--permit--issued--in--accordance-with paragraph-1--shall--take--effect--by--the--later---of January-1,--2000,--or,--if--the-permit-governs-a-unit under-paragraph-3-of-subdivision-a-of-subsection-3-of section---33-15-21-01,---the---deadline--for--monitor certification--under--title-40,---Code---of---Federal Regulations,-part-75.

(4)--Each-acid-rain-permit-shall-have-a-term-of-five-years commencing-on-its-effective-date.

(5)--An-acid-rain-permit-shall-be-binding-on-any-new-owner or--operator--or--designated--representative--of--any source-or-unit-governed-by-the-permit.

e.--(1)--Each--acid--rain--permit-shall-contain-all-applicable acid-rain-requirements,-shall-be--a--portion--of--the operating-permit-that-is-complete-and-segregable-from all-other-air-quality--requirements,--and--shall--not incorporate---information---contained--in--any--other documents,-other--than--documents--that--are--readily available.

(2)--Invalidation-of-the-acid-rain-portion-of-an-operating permit-shall-not-affect-the--continuing--validity--of the---rest---of---the--operating--permit,--nor--shall invalidation-of-any-other-portion--of--the--operating permit--affect--the--continuing--validity-of-the-acid rain-portion-of-the-permit.

5.--Acid-rain-permit-appeal-procedures.

a.--Appeals--of--the--acid-rain-portion-of-an-operating-permit issued-by-the-department-that-do-not-challenge-or--involve decisions--or-actions-of-the-administrator-under-title-40, Code-of-Federal-Regulations,-parts-72,-73,-75,-77,-and--78 and--sections--407--and--410-of-the-Act-and-regulations-or rules-implementing-sections-407-and-410-shall-be-conducted according--to--North-Dakota-Century-Code-chapter-28-32-and article-33-22.--Appeals-of-the-acid-rain-portion-of-such-a permit-that-challenge-or-involve-such-decisions-or-actions of-the-administrator-shall--follow--the--procedures--under title-40,-Code-of-Federal-Regulations,-part-78-and-section 307--of--the--Act.---Such--decisions--or--actions--include allowance-----allocations,----determinations----concerning alternative--monitoring--systems,--and--determinations--of whether---a---technology---is---a---qualifying--repowering technology.

b.--No--administrative--appeal--of-the-acid-rain-portion-of-an operating-permit-shall-be-allowed-more-than--fifteen--days following-notice-of-issuance-of-the-acid-rain-portion-that is-subject-to-administrative-appeal.--No--judicial--appeal of--the--acid-rain-portion-of-an-operating-permit-shall-be allowed-more-than-thirty--days--following--notice--of--the final-agency-action-that-is-subject-to-judicial-appeal.

c.--The--administrator--may--intervene-as-a-matter-of-right-in any-state-administrative-appeal-of-an-acid-rain-permit--or denial-of-an-acid-rain-permit.

d.--No---administrative---appeal---concerning---an--acid--rain requirement-shall--result--in--a--stay--of--the--following requirements:

(1)--The--allowance--allocations-for-any-year-during-which the--appeal--proceeding--is--pending--or---is---being conducted;

(2)--Any---standard---requirement--under--subsection-6--of section-33-15-21-01;

(3)--The--emissions--monitoring-and-reporting-requirements applicable-to--the--affected--units--at--an--affected source--under--title-40,-Code-of-Federal-Regulations, part-75;

(4)--Uncontested-provisions-of-the-decision-on-appeal;-and

(5)--The---terms---of---a--certificate--of--representation submitted--by--a--designated---representative---under subpart-B--of--title-40,-Code-of-Federal-Regulations, part-72.

e.--The---department---will---serve---written--notice--on--the administrator-of--any--state--administrative--or--judicial appeal--concerning-an-acid-rain-provision-of-any-operating permit-or-denial-of-an-acid-rain-portion-of-any--operating permit-within-thirty-days-of-the-filing-of-the-appeal.

f.--The---department---will---serve---written--notice--on--the administrator-of-any-determination-or--order--in--a--state administrative--or--judicial--proceeding--that-interprets, modifies,-voids,-or-otherwise-relates-to-any-portion-of-an acid--rain--permit.---Following--any-such-determination-or order,-the--administrator--will--have--an--opportunity--to review--and-veto-the-acid-rain-permit-or-revoke-the-permit for-cause--in--accordance--with--subsection-7--of--section 33-15-14-06. Repealed effective June 1, 2001.

History: Effective-December-1,-1994.
General Authority: NDCC-23-25-02,-23-25-03
Law Implemented: NDCC-23-25-03,-23-25-04.1,-23-25-08

33-15-21-07. Permit revisions.

1.--General.

a.--This--section--governs--revisions--to-any-acid-rain-permit issued-by-the-department.

b.--A--permit--revision--may--be-submitted-for-approval-at-any time.--No-permit-revision-shall-affect--the--term--of--the

acid--rain-permit-to-be-revised.--No-permit-revision-shall excuse-any-violation-of-an-acid-rain--program--requirement that-occurred-prior-to-the-effective-date-of-the-revision.

e.--The--terms--of--the-acid-rain-permit-shall-apply-while-the permit-revision-is-pending.

d.--Any---determination---or---interpretation--by--the--state, including-the-department-or-a-state--court,--modifying--or voiding-any-acid-rain-permit-provision-shall-be-subject-to review---by---the---administrator---in---accordance---with subdivision-c--of--subsection-7--of-section-33-15-14-06-as applied-to-permit-modifications,-unless-the--determination or--interpretation-is-an-administrative-amendment-approved in-accordance-with-subsection-4.

e.--The--standard--requirements--of--subsection-6--of--section 33-15-21-01-shall-not-be-modified-or-voided--by--a--permit revision.

f.--Any---permit---revision---involving---incorporation--of--a compliance-option-that-was-not-submitted-for-approval--and comment-during-the-permit-issuance-process,-or-involving-a change--in--a--compliance--option--that---was---previously submitted,--shall--meet--the-requirements-for-applying-for such--compliance--option--under--subsection-2--of--section 33-15-21-04--and-section-407-of-the-Act-and-regulations-or rules-implementing-section-407-of-the-Act.

g.--For-permit-revisions-not-described-in-subsections-2-and-3, the-department-may-determine-which-of-these-subsections-is applicable.

2.--Permit-modifications.

a.--(1)--Permit-modifications-shall-follow-the-permit-issuance requirements----of----section-----33-15-21-06-----and subparagraph-b--of--paragraph-3--of--subdivision-e-of subsection-6-of-section-33-15-14-06.

(2)--For---purposes--of--applying--paragraph-1,--a--permit modification-shall-be-treated-as-an-acid-rain--permit application,--to--the--extent-consistent-with-section 33-15-21-07.

b.--The-following-permit-revisions-are-permit-modifications:

(1)--Relaxation--of--an-excess-emission-offset-requirement after--approval---of---the---offset---plan---by---the administrator;

(2)--Incorporation--of-a-final-nitrogen-oxides-alternative emission-limitation-following-a-demonstration-period;

(3) Determinations concerning failed repowering projects under subparagraph a of paragraph 1 of subdivision f of subsection 2 of section 33-15-21-04 and paragraph 2 of subdivision f of subsection 2 of section 33-15-21-04; and

(4) At the option of the designated representative submitting the permit revision, the permit revisions listed in subdivision b of subsection 3 of section 33-15-21-07.

3. Fast-tract modifications.

a. Fast-tract modifications shall follow the following procedures:

(1) The designated representative shall serve a copy of the fast-tract modification on the administrator, the department, and any person entitled to a written notice under subdivision h of subsection 6 and subdivision b of subsection 7 of section 33-15-14-06. Within five business days of serving such copies, the designated representative shall also give public notice 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.

(2) The public shall have a period of thirty days, commencing on the date of publication of the notice, to comment on the fast-tract modification. Comments shall be submitted in writing to the department and to the designated representative.

(3) The designated representative shall submit the fast-tract modification to the department on or before commencement of the public comment period.

(4) Within thirty days of the close of the public comment period, the department will consider the fast-tract modification and the comments received and approve, in whole or in part or with changes or conditions as appropriate, or disapprove the modification. In addressing the fast-tract modification, the permitting authority may defer ruling on any compliance option for any year. A fast-tract modification shall be effective immediately upon issuance, in accordance with subparagraph e of paragraph 1 of subdivision a of subsection 6 of section 33-15-14-06 as applied to significant modifications.

b.--The--following--permit-revisions-are,-at-the-option-of-the designated-representative-submitting-the-permit--revision, either--fast-tract--modifications-under-this-subsection-or permit--modifications--under---subsection-2---of---section 33-15-21-07.

(1)--Incorporation---of---a--compliance--option--that--the designated-representative-did-not-submit-for-approval and-comment-during-the-permit-issuance-process;

(2)--Addition--of--a--nitrogen--oxides-averaging-plan-to-a permit;-and

(3)--Changes---in---a--repowering--plan,--nitrogen--oxides averaging--plan,--or---nitrogen---oxides---compliance deadline-extension.

4.--Administrative-permit-amendment.

a.--Administrative--amendments-shall-follow-the-procedures-set forth-at-paragraph-3-of-subdivision-d-of--subsection-6--of section--33-15-14-06.---The--department--will--submit--the revised-portion-of-the-permit-to-the-administrator--within ten--working--days--after--the-date-of-final-action-on-the request-for-an-administrative-amendment.

b.--The---following---permit---revisions---are--administrative amendments:

(1)--Activation---of--a--compliance--option--conditionally approved--by--the--department;--provided---that---all requirements--for--activation--under-subdivision-e-of subsection-1-and-subsection-2-of-section--33-15-21-04 are-met;

(2)--Changes---in---the---designated---representative---or alternative-designated-representative;-provided--that a--new--certificate-of-representation-is-submitted-to the-administrator-in--accordance--with--subpart-B--of title-40,--Code-of-Federal-Regulations,-part-72,-with a-copy to the department;

(3)--Correction-of-typographical-errors;

(4)--Changes---in---names,---addresses,--or--telephone--or facsimile-numbers;

(5)--Changes--in--the-owners-or-operators;-provided-that-a new-certificate-of-representation-is-submitted-within thirty--days--to-the-administrator-in-accordance-with subpart-B-of-title-40,-Code-of--Federal--Regulations, part-72,-with-a-copy-to-the-department;

~~(6)--Termination--of--a--compliance--option-in-the-permit; provided-that-all-requirements-for-termination--under subdivision-d--of-subsection-1-of-section-33-15-21-04 shall-be-met-and-this-procedure-shall-not-be-used--to terminate-a-repowering-plan-after-December-31,-1999;~~

~~(7)--Changes--in--the-date,-specified-in-a-new-unit's-acid rain-permit,-of--commencement--of--operation--or--the deadline--for--monitor--certification,--provided-that they-are-in-accordance-with-subsection-6--of--section 33-15-21-01;~~

~~(8)--The--addition--of--or--change--in--a--nitrogen-oxides alternative---emissions---limitation----demonstration period,-provided-that-the-requirements-of-regulations or-rules-implementing-section-407-of-the-Act-are-met; and~~

~~(9)--Incorporation--of--changes-that-the-administrator-has determined-to-be-similar--to--those--in--paragraphs-1 through-8.~~

~~5.--Automatic--permit--amendment.---The-following-permit-revisions shall-be-deemed-to-amend-automatically,-and-become-a--part--of the--affected--unit's--acid--rain--permit--by-operation-of-law without-any-further-review:~~

~~a.--Upon-recordation-by-the-administrator-under-title-40,-Code of-Federal-Regulations,-part-73,-all-allowance-allocations to,--transfers--to,-and-deductions-from-an-affected-unit's allowance-tracking-system-account;-and~~

~~b.--Incorporation--of-an-offset-plan-that-has-been-approved-by the--administrator--under--title-40,---Code---of---Federal Regulations,-part-77.~~

~~6.--Permit-reopenings.~~

~~a.--As--provided--in--subdivision-f-of-subsection-6-of-section 33-15-14-06-the-department-will-reopen-an-acid-rain-permit for--cause,--including--whenever--additional--requirements become-applicable-to-any-affected--unit--governed--by--the permit.~~

~~b.--In-reopening-an-acid-rain-permit-for-cause,-the-department will-issue-a-draft--permit--changing--the--provisions,--or adding--the--requirements,--for--which--the--reopening-was necessary.--The-draft--permit--shall--be--subject--to--the requirements-of-sections-33-15-21-05-and-33-15-21-06.~~

~~c.--Any--reopening-of-an-acid-rain-permit-shall-not-affect-the term-of-the-permit.~~ Repealed effective June 1, 2001.

History: Effective December 1, 1994.
General Authority: NDCC 23-25-03, 23-25-04.1
Law Implemented: NDCC 23-25-03, 23-25-04.1

33-15-21-08. Compliance certification.

1. Annual compliance certification report.

   a. Applicability and deadline. For each calendar year in which a unit is subject to the acid rain emissions limitations, the designated representative of the source at which the unit is located shall submit to the administrator and to the department, within sixty days after the end of the calendar year, an annual compliance certification report for the unit in compliance with title 40, Code of Federal Regulations, 72.90.

   b. The submission of complete compliance certifications in accordance with subdivision a of this subsection and title 40, Code of Federal Regulations, part 75, shall be deemed to satisfy the requirement to submit compliance certifications under subparagraph c of paragraph 5 of subdivision e of subsection 5 of section 33-15-14-06 with regard to the acid rain portion of the source's operating permit.

2. Units with repowering extension plans.

   a. Design and engineering and contract requirements. No later than January 1, 2000, the designated representative of a unit governed by an approved repowering plan shall submit to the administrator and the department:

      (1) Satisfactory documentation of a preliminary design and engineering effort.

      (2) A binding letter agreement for the executed and binding contract, or for each in a series of executed and binding contracts, for the majority of the equipment to repower the unit using the technology conditionally approved by the administrator under title 40, Code of Federal Regulations, 72.44(d)(3).

      (3) The letter agreement under paragraph 2 shall be signed and dated by each party and specify:

         (a) The parties to the contract;

         (b) The date each party executed the contract;

         (c) The unit to which the contract applies;

~~(d)--A--brief--list-identifying-each-provision-of-the contract;~~

~~(e)--Any--dates-to-which-the-parties-agree,-including construction-completion-date;~~

~~(f)--The-total-dollar-amount-of-the-contract;-and~~

~~(g)--A--statement--that--a--copy--of--the-contract-is onsite-at-the-source-and-will-be-submitted--upon written--request--of--the--administrator--or-the department.~~

~~b.--Removal---from---operation--to--repower.---The--designated representative--of--a--unit--governed---by---an---approved repowering--plan--shall--notify--the-administrator-and-the department-in-writing-at-least-sixty-days--in--advance--of the--date-on-which-the-existing-unit-is-to-be-removed-from operation-so-that-the-qualified-repowering-technology--can be--installed,--or--is-to-be-replaced-by-another-unit-with the-qualified-repowering-technology,--in--accordance--with the-plan.~~

~~c.--Commencement--of--operation.---Not--later--than-sixty-days after-the-units-repowered--under--an--approved--repowering plan--commences--operation--at--full--load,-the-designated representative-of-the-unit-shall-submit-a--report--to--the administrator--and--the--department--comparing--the-actual hourly-emissions-and-percent--removal--of--each--pollutant controlled--at-the-unit-to-the-actual-hourly-emissions-and percent-removal-at-the-existing-unit-under-the-plan--prior to--repowering,--determined--in--accordance-with-title-40, Code-of-Federal-Regulations,-part-75.~~

~~d.--Decision--to--terminate.--If-at-any-time-before-the-end-of the--repowering--extension--and---before---completion---of construction-and-startup-testing,-the-owners-and-operators decide--to--terminate--good--faith--efforts---to---design, construct,-and-test-the-qualified-repowering-technology-on the-unit-to-be--repowered--under--an--approved--repowering plan,--then--the--designated-representative-shall-submit-a notice-to-the-administrator--and--the--department--by--the earlier--of--the-end-of-the-repowering-extension-or-a-date within-thirty-days-of-such-decision,-stating-the--date--on which--the--decision-was-made.~~ Repealed effective June 1, 2001.

History: ~~Effective-December-1,-1994.~~
General Authority: NDCC-23-25-03,-23-25-04
Law Implemented: NDCC-23-25-04

33-15-21-08.1. Permits. The provisions of title 40, Code of Federal Regulations, part 72, as they exist on August 1, 2000, for purposes of implementing an acid rain program that meets the requirements of title IV of the Federal Clean Air Act, are incorporated into this chapter by reference. The term "administrator" means the department except for those duties that cannot be delegated to the department. For those duties that cannot be delegated, "administrator" means the administrator of the United States environmental protection agency. If the provisions or requirements of title 40, Code of Federal Regulations, part 72, conflict with or are not included in section 33-15-14-06, the provisions of part 72 shall apply and take precedence.

History: Effective June 1, 2001.
General Authority: NDCC 23-25-03, 23-01-04.1
Law Implemented: NDCC 23-25-03, 23-25-04, 23-25-04.1

33-15-21-09. Continuous emissions monitoring.

1. **General.** The monitoring, recordkeeping, and reporting of sulfur dioxide, nitrogen oxides, and carbon dioxide emissions, volumetric flow, and opacity data from affected units under the acid rain program shall be ~~conduced~~ conducted in accordance with title 40, Code of Federal Regulations, part 75, as it exists on August 1, 2000.

2. **Exceptions.** Those portions of title 40, Code of Federal Regulations, part 75, that are controlled and administered completely by the United States environmental protection agency will not be enforced by the state. This should not be construed as precluding the United States environmental protection agency from exercising its statutory authority under the Clean Air Act, as amended, or an affected source from complying with the authority or the requirements of the federal acid rain program.

History: Effective December 1, 1994; amended effective June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03, 23-25-04, 23-25-04.1

33-15-21-10. Acid rain nitrogen oxides emission reduction program. Title 40, Code of Federal Regulations, part 76 and its appendices, as they exist on ~~July 1, 1997~~ August 1, 2000, are incorporated into this chapter by reference.

History: Effective April 1, 1998; amended effective June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-01-04.1, 23-25-03

CHAPTER 33-16-02

STANDARDS OF WATER QUALITY FOR STATE OF NORTH DAKOTA

[Repealed effective June 1, 2001]

STAFF COMMENT: Chapter 33-16-02.1 contains all new material and is not underscored so as to improve readability.

CHAPTER 33-16-02.1
STANDARDS OF QUALITY FOR WATERS OF THE STATE

33-16-02.1-01. Authority. These rules are promulgated pursuant to North Dakota Century Code chapters 61-28 and 23-33; specifically, sections 61-28-04 and 23-33-05, respectively.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

33-16-02.1-02. Purpose.

1. The purposes of this chapter are to establish a system for classifying waters of the state; provide standards of water quality for waters of the state; and protect existing and potential beneficial uses of waters of the state.

2. The state and public policy is to maintain or improve, or both, the quality of the waters of the state and to maintain and protect existing uses. Classifications and standards are established for the protection of public health and environmental resources and for the enjoyment of these waters, to ensure the propagation and well-being of resident fish, wildlife, and all biota associated or dependent upon these waters, and to safeguard social, economical, and industrial development. Waters not being put to use shall be protected for all reasonable uses for which these waters are suitable. All known and reasonable methods to control and prevent pollution of the waters of this state are required, including improvement in quality of these waters, when feasible.

a. The "quality of the waters" shall be the quality of record existing at the time the first standards were established in 1967, or later records if these indicate an improved quality. Waters with existing quality that is higher than established standards will be maintained at the higher quality unless affirmatively demonstrated, after full satisfaction of the intergovernmental coordination and public participation provisions of the continuing planning process, that a change in quality is necessary to accommodate important social or economic development in the area in which the waters are located. In allowing the lowering of existing quality, the department shall assure that existing uses are fully protected and that the highest statutory and regulatory requirements for all point sources and cost-effective and reasonable best management practices for nonpoint sources are achieved.

b. Waters of the state having unique or high quality characteristics that may constitute an outstanding state resource shall be maintained and protected.

c. Any public or private project or development which constitutes a source of pollution shall provide the best degree of treatment as designated by the department in the North Dakota pollutant discharge elimination system. If review of data and public input indicates any detrimental water quality changes, appropriate actions will be taken by the department following procedures approved by the environmental protection agency. (North Dakota Antidegradation Implementation Procedure, Appendix IV.)

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04, 61-28-05
Law Implemented: NDCC 23-33, 61-28-04

33-16-02.1-03. Applicability. Nothing in this chapter may be construed to limit or interfere with the jurisdiction, duties, or authorities of other North Dakota state agencies.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

33-16-02.1-04. Definitions. The terms used in this chapter have the same meaning as in North Dakota Century Code chapter 61-28, except:

1. "Acute standard" means the one-hour average concentration does not exceed the listed concentration more than once every three years on the average.

2. "Best management practices" are methods, measures, or procedures selected by the department to control nonpoint source pollution. Best management practices include, but are not limited to, structural and nonstructural measures and operation and maintenance procedures.

3. "Chronic standard" means the four-day average concentration does not exceed the listed concentration more than once every three years on the average.

4. "Consecutive thirty-day average" is the average of samples taken during any consecutive thirty-day period. It is not a requirement for thirty consecutive daily samples.

5. "Department" means the North Dakota state department of health.

6. A standard defined as "dissolved" means the total quantity of a given material present in a filtered water sample, regardless of the form or nature of its occurrence.

7. "Pollution" means such contamination, or other alteration of the physical, chemical, or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor. Pollution includes discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state that will or is likely to create a nuisance or render such waters harmful, detrimental, or injurious to public health, safety, or welfare; domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses; or livestock, wild animals, birds, fish, or other aquatic biota.

8. "Site-specific standards" mean water quality criteria developed to reflect local environmental conditions to protect the uses of a specific water body.

9. A standard defined as "total" means the entire quantity of a given material present in an unfiltered water sample regardless of the form or nature of its occurrence. This includes both dissolved and suspended forms of a substance, including the entire amount of the substance present as a constituent of the particulate material. Total recoverable is the quantity of a given material in an unfiltered aqueous sample following digestion by refluxing with hot dilute mineral acid.

10. "Water usage". The best usage for the waters shall be those uses determined to be the most consistent with present and potential uses in accordance with the economic and social development of the area. Present principal best uses are those defined in subdivisions a, b, c, and d. These are not to be construed to be the only possible usages.

a. Municipal and domestic water. Waters suitable for use as a source of water supply for drinking and culinary purposes after treatment to a level approved by the department.

b. Recreation, fishing, and wildlife. Waters suitable for the propagation or support of fish and other aquatic biota, waters that will not adversely affect wildlife in the area, and waters suitable for boating and swimming. Natural high turbidities in some waters and physical characteristics of banks and streambeds of many streams are factors that limit their value for bathing. Low flows or natural physical and chemical conditions in some waters may limit their value for fish propagation or aquatic biota.

c. Agricultural uses. Waters suitable for irrigation, stock watering, and other agricultural uses, but not suitable for use as a source of domestic supply for the farm unless satisfactory treatment is provided.

d. Industrial water. Waters suitable for industrial purposes, including food processing, after treatment. Treatment may include that necessary for prevention of boiler scale and corrosion.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04, 61-28-05
Law Implemented: NDCC 23-33, 61-28

33-16-02.1-05. Variances. Upon written application by the responsible discharger, the department finds that by reason of substantial and widespread economic and social impacts the strict enforcement of state water quality criteria is not feasible, the department can permit a variance to the water quality standard for the affected segment. The department can set conditions and time limitations with the intent that progress toward improvements in water quality will be made. This can include interim criteria which must be reviewed at least once every three years. A variance will be granted only after fulfillment of public participation requirements and environmental protection agency approval. A variance will not preclude an existing use.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04, 61-28-05
Law Implemented: NDCC 23-33, 61-28

33-16-02.1-06. Severability. The rules contained in this chapter are severable. If any rules, or part thereof, or the application of such rules to any person or circumstance are declared invalid, that

invalidity does not affect the validity of any remaining portion of this chapter.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

33-16-02.1-07. Classification of waters of the state. General. Classification of waters of the state shall be used to maintain and protect the present and future beneficial uses of these waters. Classification of waters of the state shall be made or changed whenever new or additional data warrant the classification or a change of an existing classification.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

33-16-02.1-08. General water quality standards.

1. Narrative standards.

   a. The following minimum conditions are applicable to all waters of the state except for class II ground waters. All waters of the state shall be:

      (1) Free from substances attributable to municipal, industrial, or other discharges or agricultural practices that will cause the formation of putrescent or otherwise objectionable sludge deposits.

      (2) Free from floating debris, oil, scum, and other floating materials attributable to municipal, industrial, or other discharges or agricultural practices in sufficient amounts to be unsightly or deleterious.

      (3) Free from materials attributable to municipal, industrial, or other discharges or agricultural practices producing color, odor, or other conditions to such a degree as to create a nuisance or render any undesirable taste to fish flesh or, in any way, make fish inedible.

      (4) Free from substances attributable to municipal, industrial, or other discharges or agricultural practices in concentrations or combinations which are toxic or harmful to humans, animals, plants, or resident aquatic biota. For surface water, this standard will be enforced in part through appropriate

whole effluent toxicity requirements in North Dakota pollutant discharge elimination system permits.

(5) Free from oil or grease residue attributable to wastewater, which causes a visible film or sheen upon the waters or any discoloration of the surface of adjoining shoreline or causes a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines or prevents classified uses of such waters.

b. There shall be no materials such as garbage, rubbish, offal, trash, cans, bottles, drums, or any unwanted or discarded material disposed of into the waters of the state.

c. There shall be no disposal of livestock or domestic animals in waters of the state.

d. The department shall propose and submit to the state engineer the minimum streamflows of major rivers in the state necessary to protect the public health and welfare. The department's determination shall address the present and prospective future use of the rivers for public water supplies, propagation of fish and aquatic life and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses.

e. No discharge of pollutants, which alone or in combination with other substances, shall:

(1) Cause a public health hazard or injury to environmental resources;

(2) Impair existing or reasonable beneficial uses of the receiving waters; or

(3) Directly or indirectly cause concentrations of pollutants to exceed applicable standards of the receiving waters.

f. If the department determines that site-specific criteria are necessary and appropriate for the protection of designated uses, procedures described in the environmental protection agency's Water Quality Standards Handbook 1994 or other defensible methods may be utilized to determine maximum limits. Where natural chemical, physical, and biological characteristics result in exceedences of the limits set forth in this section, the department may derive site-specific criteria based on the natural background level or condition. All available information shall be examined, and all possible sources of a contaminant will be identified in determining the

naturally occurring concentration. All site-specific criteria shall be noticed for public comment and subjected to other applicable public participation requirements prior to being adopted.

2. Narrative biological goal.

a. Goal. The biological condition of surface waters shall be similar to that of sites or water bodies determined by the department to be regional reference sites.

b. Definitions.

(1) "Assemblage" means an association of aquatic organisms of similar taxonomic classification living in the same area. Examples of assemblages include fish, macroinvertebrates, algae, and vascular plants.

(2) "Aquatic organism" means any plant or animal which lives at least part of its life cycle in water.

(3) "Biological condition" means the taxonomic composition, richness, and functional organization of an assemblage of aquatic organisms at a site or within a water body.

(4) "Functional organization" means the number of species or abundance of organisms within an assemblage which perform the same or similar ecological functions.

(5) "Metric" means an expression of biological community composition, richness, or function which displays a predictable, measurable change in value along a gradient of pollution or other anthropogenic disturbance.

(6) "Regional reference sites" are sites or water bodies which are determined by the department to be representative of sites or water bodies of similar type (e.g., hydrology and ecoregion) and are least impaired with respect to habitat, water quality, watershed land use, and riparian and biological condition.

(7) "Richness" means the absolute number of taxa in an assemblage at a site or within a water body.

(8) "Taxonomic composition" means the identity and abundance of species or taxonomic groupings within an assemblage at a site or within a water body.

c. Implementation. The intent of the state in adopting a narrative biological goal is solely to provide an

additional assessment method that can be used to identify impaired surface waters. Regulatory or enforcement actions based solely on a narrative biological goal, such as the development and enforcement of North Dakota pollutant discharge elimination system permit limits, are not authorized. However, adequate and representative biological assessment information may be used in combination with other information to assist in determining whether designated uses are attained and to assist in determining whether new or revised chemical-specific permit limitations may be needed. Implementation will be based on the comparison of current biological conditions at a particular site to the biological conditions deemed attainable based on regional reference sites. In implementing a narrative biological goal, biological condition may be expressed through an index composed of multiple metrics or through appropriate statistical procedures.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

33-16-02.1-09. Surface water classifications, mixing zones, and numeric standards.

1. **Classifications.** Procedures for the classifications of streams and lakes of the state shall follow this subsection. Classifications of streams and lakes are listed in appendix I and appendix II, respectively.

   a. Class I streams. The quality of the waters in this class shall be suitable for the propagation or protection, or both, of resident fish species and other aquatic biota and for swimming, boating, and other water recreation. The quality of the waters shall be suitable for irrigation, stock watering, and wildlife without injurious effects. After treatment consisting of coagulation, settling, filtration, and chlorination, or equivalent treatment processes, the water quality shall meet the bacteriological, physical, and chemical requirements of the department for municipal or domestic use.

   b. Class IA streams. The quality of the waters in this class shall be the same as the quality of class I streams, except that treatment for municipal use may also require softening to meet the drinking water requirements of the department.

   c. Class II streams. The quality of the waters in this class shall be the same as the quality of class I streams, except that additional treatment may be required to meet

the drinking water requirements of the department. Streams in this classification may be intermittent in nature which would make these waters of limited value for beneficial uses such as municipal water, fish life, or irrigation.

d. Class III streams. The quality of the waters in this class shall be suitable for agricultural and industrial uses such as stock watering, irrigation, washing, and cooling. These streams have low average flows and, generally, prolonged periods of no flow. They are of limited seasonal value for immersion recreation, fish life, and aquatic biota. The quality of these waters must be maintained to protect recreation, fish, and aquatic biota.

e. Wetlands. These water bodies are to be considered waters of the state and will be protected under section 33-16-02-08.

f. Lakes. The type of fishery a lake may be capable of supporting is based on the lake's geophysical characteristics. However, the capability of the lake to support a fishery may be affected by seasonal variations or other natural occurrences which may alter the lake characteristics.

Class	Characteristics
1	Cold water fishery. Waters capable of supporting growth of salmonid fishes and associated aquatic biota.
2	Cool water fishery. Waters capable of supporting growth and propagation of nonsalmonid fishes and marginal growth of salmonid fishes and associated aquatic biota.
3	Warm water fishery. Waters capable of supporting growth and propagation of nonsalmonid fishes and associated aquatic biota.
4	Marginal fishery. Waters capable of supporting a fishery on a seasonal basis.
5	Not capable of supporting a fishery due to high salinity.

2. **Mixing zones.** North Dakota mixing zone and dilution policy is contained in appendix III.

3. **Numeric standards.**

a. Class I streams. Unless stated otherwise, maximum limits for class I streams are listed in table 1 and table 2.

b. Class IA streams. The physical and chemical criteria shall be those for class I, with the following exceptions:

Substance or Characteristic	Maximum Limit
Chlorides (Total)	175 mg/l
Sodium	60% of total cations as mEq/l
Sulfate (Total)	450 mg/l

c. Class II streams. The physical and chemical criteria shall be those for class IA, with the following exceptions:

Substance or Characteristic	Maximum Limit
Chlorides (Total)	250 mg/l
pH	6.0-9.0

d. Class III streams. The physical and chemical criteria shall be those for class II, with the following exceptions:

Substance or Characteristic	Maximum Limit
Sulfate (Total)	750 mg/l

e. Lakes.

(1) The beneficial uses and parameter limitations designated for class I streams shall apply to all classified lakes. However, specific background studies and information may require that the department revise a standard for any specific parameter.

(2) In addition, these nutrient parameters are guidelines for use as goals in any lake improvement or maintenance program:

Parameter	Limit
NO_3 as N	.25 mg/l
PO_4 as P	.02 mg/l

(3) The temperature standard for class I streams does not apply to Nelson Lake in Oliver County. The temperature of any discharge to Nelson Lake shall not have an adverse effect on fish, aquatic life, and wildlife, or Nelson Lake itself.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

TABLE 1

MAXIMUM LIMITS FOR SUBSTANCES IN
OR CHARACTERISTICS OF CLASS I STREAMS

CAS No.	Substance or Characteristic	Maximum Limit
		Acute Standard
7446-41-7	Ammonia (Total as N)	The one-hour average concentration of total ammonia (expressed as N in mg/L) does not exceed, more often than once every three years on the average, the numerical value given by the following formula: $\frac{0.411}{1 + 10^{7.204-pH}} + \frac{58.4}{1 + 10^{pH-7.204}}$, where salmonids are absent; or $\frac{0.275}{1 + 10^{7.204-pH}} + \frac{39.0}{1 + 10^{pH-7.204}}$, where salmonids are present.
		Chronic Standard
		The 30-day average concentration of total ammonia (expressed as N in mg/l) does not exceed, more often than once every three years on the average, the numerical value given by the following formula; and the highest 4-day average concentration of total ammonia within the 30-day averaging period does not exceed 2.5 times the numerical value given by the following formula: $= \left(\frac{0.0577}{1+ 10^{7.688-pH}} + \frac{2.487}{1 + 10^{pH-7.688}} \right) \cdot CV$; where CV = 2.85, when T ≤ 14° C; or $CV = 1.45 \cdot 10^{0.028(25-T)}$, when T > 14 ° C.

CAS No.	Substance or Characteristic	Maximum Limit
		Site-Specific Chronic Standard The following site-specific standard applies to the Red River of the North beginning at the 12th Avenue North bridge in Fargo, North Dakota and extending approximately 32 miles downstream to its confluence with the Buffalo River, Minnesota. This site-specific standard applies only during the months of October, November, December, January, and February. During the months of March through September, the statewide chronic ammonia standard applies. The 30-day average concentration of total ammonia (expressed as N in mg/L) does not exceed, more often than once every three years on the average, the numerical value given by the following formula; and the highest 4-day average concentration of total ammonia within the 30-day averaging period does not exceed 2.5 times the numerical value given by the following formula: $= \left(\frac{0.0577}{1 + 10^{7.688-pH}} + \frac{2.487}{1 + 10^{pH-7.688}} \right) \cdot CV$; where CV = 4.63, when $T \leq 7°C$; or $CV = 1.45 \cdot 10^{0.028 \cdot (25-T)}$, when $T > 7°$ C.
7440-39-3	Barium (Total)	1.0 mg/l
	Boron (Total)	.75 mg/l
16887-00-6	Chlorides (Total)	100 mg/l
7.782-50-5	Chlorine Residual (Total)	Acute .019 mg/l Chronic .011 mg/l
7782-44-7	Dissolved Oxygen	not less than 5 mg/l
	Fecal Coliform	200 fecal coliforms per 100 ml. This standard shall apply only during the recreation season May 1 to September 30.
14797-55-8	Nitrates (N) (Diss.)[1]	1.0 mg/l
	pH	7.0-9.0

CAS No.	Substance or Characteristic	Maximum Limit
32730	Phenols (Total)	0.3 mg/l (organoleptic criterion)
7723-14-0	Phosphorus (P) (Total)[1]	0.1 mg/l
	Sodium	50 percent of total cations as mEq/l
	Sulfates (Total as SO_4)	250 mg/l
	Temperature	Eighty-five degrees Fahrenheit [29.44 degrees Celsius]. The maximum increase shall not be greater than five degrees Fahrenheit [2.78 degrees Celsius] above natural background conditions.
	Combined radium 226 and radium 228 (Total)	5 pCi/L
	Gross alpha particle activity, including radium 226, but excluding radon and uranium	15 pCi/L

[1] The standards for nitrates (N) and phosphorus (P) are intended as interim guideline limits. Since each stream or lake has unique characteristics which determine the levels of these constituents that will cause excessive plant growth (eutrophication), the department reserves the right to review these standards after additional study and to set specific limitations on any waters of the state. However, in no case shall the standard for nitrates (N) exceed 10 mg/l for any waters used as a municipal or domestic drinking water supply.

TABLE 2

WATER QUALITY CRITERIA[1]
PRIORITY POLLUTANTS (MICROGRAMS PER LITER)

CAS No.	Pollutant	Aquatic Life Value Classes I,IA,II,III Acute	Chronic	Human Health Value Classes I,IA,II[2]	Class III[3]
83-32-9	Acenaphthene			1200	2700
107-02-8	Acrolein			320	780
107-13-1	Acrylonitrile[4]			0.059	0.66
71-43-2	Benzene[4]			1.2	71
92-87-5	Benzidine[4]			0.00012	0.00054
56-23-5	Carbon tetrachloride[4] (Tetrachloromethane)			0.25	4.4
108-90-7	Chlorobenzene (Monochlorobenzene)			100	21000
120-82-1	1,2,4-Trichlorobenzene			70[7]	940
118-74-1	Hexachlorobenzene[4]			0.00075	0.00077
107-06-2	1,2-Dichloroethane[4]			0.38	99
71-55-6	1,1,1-Trichloroethane			200	
67-72-1	Hexachloroethane[4]			1.9	8.9
79-00-5	1,1,2-Trichloroethane[4]			0.61	42.0
79-34-5	1,1,2,2-Tetrachloroethane[4]			0.17	11.0
111-44-4	Bis(2-chloroethyl) ether[4]			0.031	1.40
91-58-7	2-Chloronaphthalene			1700	4300
88-06-2	2,4,6-Trichlorophenol[4]			2.1	6.5
59-50-7	p-Chloro-m-cresol (4-Chloro-3-methylphenol)			3000	
67-66-3	Chloroform (HM)[4] (Trichloromethane)			5.7	470
95-57-8	2-Chlorophenol			120	400
95-50-1	1,2-Dichlorobenzene[7]			600	17000
541-73-1	1,3-Dichlorobenzene			400	2600
106-46-7	1,4-Dichlorobenzene[7]			75	2600
91-94-1	3,3'-Dichlorobenzidine[4]			0.039	0.077
75-35-4	1,1-Dichloroethylene[4]			0.057	3.2
156-60-5	1,2-trans-Dichloroethylene[7]			100	140000
120-83-2	2,4-Dichlorophenol			93	790
542-75-6	1,3-Dichloropropylene (1,3-Dichloropropene) (cis and trans isomers)			10	1700
78-87-5	1,2-Dichloropropane			.52	39
105-67-9	2,4-Dimethylphenol			540	2300
121-14-2	2,4-Dinitrotoluene[4]			0.11	9.1
122-66-7	1,2-Diphenylhydrazine[4]			0.040	0.54
160-41-4	Ethylbenzene[7]			700	29000
206-44-0	Fluoranthene			300	370
39638-32-9	Bis(2-chloroisopropyl) ether			1400	170000
75-09-2	Methylene chloride (HM)[4] (Dichloromethane)			4.7	1600
74-83-9	Methyl bromide (HM) (Bromomethane)			48	4000

CAS No.	Pollutant	Aquatic Life Value Classes I,IA,II,III Acute	Chronic	Human Health Value Classes I,IA,II[2]	Class III[3]
75-25-2	Bromoform (HM)[5] (Tribromomethane)			4.3	360
75-27-4	Dichlorobromomethane (HM)[5]			0.56	46
124-48-1	Chlorodibromomethane (HM)[5]			0.41	34
87-68-3	Hexachlorobutadiene[4]			0.44	50
77-47-4	Hexachlorocyclopentadiene			50[7]	17000
78-59-1	Isophorone[4]			36	2600
98-95-3	Nitrobenzene			17	1900
51-28-5	2,4-Dinitrophenol			70	14000
534-52-1	4,6-Dinitro-o-cresol (4,6-Dinitro-2-methylphenol)			13	765
62-75-9	N-Nitrosodimethylamine[4]			0.00069	8.1
86-30-6	N-Nitrosodiphenylamine[4]			5.0	16
621-64-7	N-Nitrosodi-n-propylamine[4]			0.005	1.4
87-86-5	Pentachlorophenol	19	15	0.28	8.2
108-95-2	Phenol			21000	4600000
117-81-7	Bis(2-ethylhexyl)phthalate[4]			1.8	5.9
85-68-7	Butyl benzyl phthalate			3000	5200
84-74-2	Di-n-butyl phthlate			2700	12000
84-66-2	Diethyl phthalate			23000	120000
131-11-3	Dimethyl phthlate			313000	2900000
56-55-3	Benzo(a)anthracene (PAH)[4] (1,2-Benzanthracene)			0.0044	0.049
50-32-8	Benzo(a)pyrene (PAH)[4] (3,4-Benzopyrene)			0.0044	0.049
205-99-2	Benzo(b)fluoranthene (PAH)[4] (3,4-Benzofluoranthene)			0.0044	0.049
207-08-9	Benzo(k)fluoranthene (PAH)[4] (11,12-Benzofluoranthene)			0.0044	0.049
218-01-9	Chrysene (PAH)[4]			0.0044	0.049
120-12-7	Anthracene (PAH)[5]			9600	110000
86-73-7	Fluorene (PAH)[5]			1300	14000
53-70-1	Dibenzo(a,h)anthracene (PAH)[4] (1,2,5,6-Dibenzanthracene)			0.0044	0.049
193-39-5	Indeno(1,2,3-cd)pyrene (PAH)[4]			0.0044	0.049
129-00-0	Pyrene (PAH)[5]			960	11000
127-18-4	Tetrachloroethylene[4]			0.8	8.9
108-88-3	Toluene			10007	200000
79-01-6	Trichloroethylene[4]			2.7	81
75-01-4	Vinyl chloride[4] (Cloroethylene)			2	530
309-00-2	Aldrin[4]	1.5		0.00013	0.00014
60-57-1	Dieldrin[4]	1.25	0.56	0.00014	0.00014
57-74-9	Chlordane[4]	1.2	0.0043	0.0021	0.0022
80-29-3	4,4'-DDT[4]	0.55	0.001	0.00059	0.00059
75-55-9	4,4'-DDE[4]			0.00059	0.00059
72-54-8	4,4'-DDD[4]			0.00083	0.00084
115-29-7	alpha-Endosulfan	0.11	0.056	110	240
115-29-7	beta-Endosulfan	0.11	0.05	110	240
1031-07-8	Endosulfan sulfate			110	240
72-20-8	Endrin	0.09	0.036	0.76	0.81
7421-93-4	Endrin aldehyde			0.76	0.81
76-44-8	Heptachlor[4]	0.26	0.0038	0.00021	0.00021
1024-57-3	Heptachlor epoxide[4]	0.26	0.0038	0.00010	0.00011

CAS No.	Pollutant	Aquatic Life Value Classes I,IA,II,III Acute	Chronic	Human Health Value Classes I,IA,II[2]	Class III[3]
319-84-6	alpha-BHC[4] (Hexachlorocyclohexane-alpha)			0.0039	0.013
319-85-7	beta-BHC[4] (Hexachlorocyclohexane-beta)			0.014	0.046
58-89-9	gamma-BHC (Lindane)[4] (Hexachlorocyclohexane-gamma)	0.95		0.019	0.063
319-86-8	delta-BHC[4] (Hexachlorocyclohexane-delta)				
1336-36-3	PCB 1242 (Arochlor 1242)[4]		0.014	0.00017	0.00017
1336-36-3	PCB-1254 (Arochlor 1254)[4]		0.014	0.00017	0.00017
1336-36-3	PCB-1221 (Arochlor 1221)[4]		0.014	0.00017	0.00017
1336-36-3	PCB-1232 (Arochlor 1232)[4]		0.014	0.00017	0.00017
1336-36-3	PCB-1248 (Arochlor 1248)[4]		0.014	0.00017	0.00017
1336-36-3	PCB-1260 (Arochlor 1260)[4]		0.014	0.00017	0.00017
1336-36-3	PCB-1016 (Arochlor 1016)[4]		0.014	0.00017	0.00017
8001-35-2	Toxaphene[4]	0.73	0.0002	0.00073	0.00075
7440-36-0	Antimony			6	4300
7440-38-2	Arsenic[4,7]	340	150	50[7]	
1332-21-4	Asbestos[4]				7000000 f/l
7440-41-7	Beryllium[4]			4[7]	
7440-43-9	Cadmium	4.5[6]	2.5[6]	5[7]	
7440-47-3	Chromium (III)	1800[6]	86[6]	100(total)	
	Chromium (VI)	16	11	100(total)[7]	
7440-50-8	Copper	7.9[6]	9.3[6]	1000	
57-12-5	Cyanide (total)	22	5.2	200[7]	220000
7439-92-1	Lead	82[6]	3.2[6]	15[7]	
7439-97-6	Mercury	1.7	0.91	0.050	0.051
7440-02-0	Nickel	470[6]	52[6]	100[7]	4600
7782-49-2	Selenium	20	5	50[7]	
7440-22-4	Silver	4.1[6]			
7440-28-0	Thallium			1.7	6.2
7440-66-6	Zinc	120[6]	120[6]	9100	69000
1746-01-6	Dioxin (2,3,7,8-TCDD)[4]			0.000000013	0.000000014
15972-60-8	Alachlor			2[7]	
1912-24-9	Atrazine			3[7]	
1563-66-2	Carbofuran			40[7]	
94-75-7	2,4-D			70[7]	
75-99-0	Dalapon			200[7]	
103-23-1	Di(2-ethylhexyl)adipate			400[7]	
96-12-8	Dibromochloropropane			0.2[7]	
156-59-2	Dichloroethylene (cis-1.2-)			70[7]	
88-85-7	Dinoseb			7[7]	
85-00-7	Diquat			20[7]	
145-73-3	Endothall			100[7]	
106-93-4	Ethylene dibromide (EDB)			0.05[7]	
107-83-6	Glyphosate			700[7]	
72-43-5	Methoxychlor			40[7]	
23135-22-0	Oxamyl (Vydate)			200[7]	
1918-02-1	Picloram			500[7]	
122-34-9	Simazine			4[7]	
100-42-5	Styrene			100[7]	
1330-20-7	Xylenes			10,000[7]	
7782-41-4	Fluoride			4,000[7]	
14797-65-0	Nitrite			1,000[7]	
12587-47-2	Beta/photon emitters			4 mrem/yr[7]	

CAS No. Chemical Abstracts Service Registry Number

---

[1] Except for the aquatic life values for metals, the values given in this appendix refer to the total (dissolved plus suspended) amount of each substance. For the aquatic life values for metals, the values refer to the total recoverable method for ambient metals analyses.

[2] Based on two routes of exposure - ingestion of contaminated aquatic organisms and drinking water.

[3] Based on one route of exposure - ingestion of contaminated aquatic organisms only.

[4] Substance classified as a carcinogen, with the value based on an incremental risk of one additional instance of cancer in one million persons.

[5] Chemicals which are not individually classified as carcinogens but which are contained within a class of chemicals, with carcinogenicity as the basis for the criteria derivation for that class of chemicals; an individual carcinogenicity assessment for these chemicals is pending.

[6] Hardness dependent criteria. Value given is an example only and is based on a $CaCO_3$ hardness of 100 mg/l. Criteria for each case must be calculated using the following formula:

CMC = exp (ma [ln (hardness)] + ba)

	ma	ba
Cadmium	1.128	-3.6867
Copper	0.9422	-1.700
Chromium (III)	0.8190	3.7256
Lead	1.273	-1.460
Nickel	0.8460	2.255
Silver	1.72	- 6.52
Zinc	0.8473	0.884

CMC = Criterion Maximum Concentration (acute exposure value)
The threshold value at or below which there should be no unacceptable effects to freshwater aquatic organisms and their uses if the one-hour concentration does not exceed that CMC value more than once every three years on the average.

CCC = exp (mc [ln (hardness)] + bc)

	mc	bc
Cadmium	0.7852	-2.715
Copper	0.8545	-1.702
Chromium	0.8190	0.6848
Lead	1.273	- 4.705
Nickel	0.8460	0.0584
Silver	------	------
Zinc	0.8473	0.884

CCC = Criterion Continuous Concentration (chronic exposure value)
The threshold value at or below which there should be no unacceptable effects to freshwater aquatic organisms and their uses if the four-day concentration does not exceed that CCC value more than once every three years on the average.

[7] Safe Drinking Water Act (MCL).

[8] pH dependent criteria. Value given is an example only and is based on a pH of 7.8. Criteria for each case must be calculated using the following formula:

33-16-02.1-10. Ground water classifications and standards.

1. Class I ground waters. Class I ground waters shall have a total dissolved solids concentration of less than 10,000 mg/l. Class I ground waters are not exempt under the North Dakota underground injection control program in section 33-25-01-08.

2. Class II ground waters. Class II ground waters shall have a total dissolved solids concentration of 10,000 mg/l or greater. Class II ground waters are exempt under the North Dakota underground injection control program in section 33-25-01-08.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04, 61-28-05
Law Implemented: NDCC 61-28-04

33-16-02.1-11. Discharge of wastes. On-surface discharges. The following are general requirements for all waste discharges:

1. No untreated domestic sewage shall be discharged into the waters of the state.

2. No untreated industrial wastes or other wastes which contain substances or organisms which may endanger public health or degrade the water quality of water usage shall be discharged into the waters of the state.

3. The degree of treatment for municipal wastes shall be that required by the department and shall be based on the following:

   a. Wastes are to receive a minimum of secondary treatment or equivalent which shall be equal to at least an eighty-five percent removal of five-day biochemical oxygen demand, or shall meet the effluent standards noted in subdivision c. The more restrictive requirements shall apply.

   b. Wastes shall be effectively disinfected before discharge into state waters if such discharges cause violation of the fecal coliform criteria as set forth in these standards.

   c. No waste discharge shall be permitted unless the effluent meets the following criteria:

      (1) Five-day biochemical oxygen demand: 25 mg/l consecutive thirty-day average.

      (2) Suspended solids: 30 mg/l consecutive thirty-day average.

(3) Fecal coliform: Fecal coliform not to exceed 200 colonies/100 ml consecutive thirty-day geometric mean.

In certain instances, external circumstances or specific uses of the receiving waters make either attainment or application of the suspended solids or fecal coliform limitations an ineffective means of controlling water quality. For this reason, the department reserves the right to evaluate the application of these limitations on a case-by-case basis.

(4) pH: 6.0-9.0.

Natural ground waters and surface waters in some parts of the state presently used for water supplies with or without treatment are basic and the stabilization process of wastewater treatment in lagoon systems can result in more alkaline (increased pH) water. Discharges from waste treatment facilities may exceed the upper pH limit due to these uncontrollable properties. Approval to discharge may be granted providing the pH of the receiving water is not violated.

d. The department may require treatment in addition to that listed in this section if such waste discharges, made during low stream flows, cause violations of stream water quality standards or have a detrimental effect on the beneficial uses of the receiving waters.

4. Industrial waste effluents shall meet all parameters of quality as set forth under the North Dakota pollutant discharge elimination system and shall not violate North Dakota water quality standards.

5. The department must be notified at least twenty days prior to the application of any herbicide or pesticide to surface waters of the state for control of aquatic pests. The notification must include the following information:

a. Chemical name and composition.

b. Map which identifies the area of application and number of square feet.

c. A list of target species of aquatic biota the applicant desires to control.

d. The calculated concentration of the active ingredient in surface waters immediately after application.

e. Name, address, and telephone number of the certified applicator.

6. Any spill or discharge of waste which causes or is likely to cause pollution of waters of the state must be reported immediately. The owner, operator, or person responsible for a spill or discharge must notify the department as soon as possible (701-328-5210) or the North Dakota hazardous materials emergency assistance and spill reporting number (1-800-472-2121) and provide all relevant information about the spill. Depending on the severity of the spill or accidental discharge, the department may require the owner or operator to:

   a. Take immediate remedial measures;

   b. Determine the extent of pollution to waters of the state;

   c. Provide alternate water sources to water users impacted by the spill or accidental discharge; or

   d. Any other actions necessary to comply with this chapter.

History: Effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 23-33, 61-28

APPENDIX I

STREAM CLASSIFICATIONS

The following intrastate and interstate streams are classified as the class of water quality which is to be maintained in the specified stream or segments noted. There are a number of minor or intermittently flowing watercourses, unnamed creeks, or draws, etc., which are not listed. All tributaries not specifically mentioned are classified as Class III streams.

RIVER BASINS, SUBBASINS, AND TRIBUTARIES	CLASSIFICATION
Missouri River, including Lake Sakakawea and Oahe Reservoir	I
Yellowstone	I
Little Muddy Creek near Williston	II
White Earth River	II
Little Missouri River	II
Knife River	II
Spring Creek	IA
Square Butte Creek below Nelson Lake	IA
Heart River	IA
Green River	IA
Antelope Creek	II
Muddy Creek	II
Apple Creek	II
Cannonball River	II
Cedar Creek	II
Beaver Creek near Linton	II
Grand River	IA
Spring Creek	II
Souris River	IA
Des Lacs River	II
Willow Creek	II
Deep River	III
Mauvais Coulee	I
James River	IA
Pipestem	IA
Cottonwood Creek	II

RIVER BASINS, SUBBASINS, AND TRIBUTARIES	CLASSIFICATION
Beaver Creek	II
Elm River	II
Maple River	II
Bois de Sioux	I
Red River	I
Wild Rice River	II
Antelope Creek	III
Sheyenne River	IA
Baldhill Creek	II
Maple River	II
Rush River	III
Elm River	II
Goose River	IA
Turtle River	II
Forest River	II
North Branch	III
Park River	II
North Branch	III
South Branch	II
Middle Branch	III
Cart Creek	III
Pembina River	IA
Tongue River	II

APPENDIX II

LAKE CLASSIFICATION

Lakes are classified according to the water characteristics which are to be maintained in the specified lakes. The beneficial water uses and parameter limitations designated for Class I streams shall apply to all classified lakes.

COUNTY	LAKE	CLASSIFICATION
Adams	Mirror	3
Adams	N. Lemmon	1
Barnes	Ashtabula	3
Barnes	Heinze	3
Barnes	Moon	2
Barnes	Clausen Spring	1
Benson	Wood Lake	2
Benson	Graves	3
Benson	Reeves	3
Bottineau	Metigoshe	2
Bottineau	Long Lake	2
Bottineau	Pelican	3
Bottineau	Carbury	2
Bottineau	Cassidy	3
Bottineau	Strawberry	2
Bowman	Bowman-Haley	3
Bowman	Gascoyne	3
Bowman	Kalina	3
Bowman	Spring Lake	3
Burke	Powers Lake	3

COUNTY	LAKE	CLASSIFICATION
Burke	Short Creek	2
Burke	Smishek	2
Burke	Truax Mine	1
Burke	Northgate	2
Burke	Bowbells Mine	1
Burleigh	McDowell Dam	3
Burleigh	New Johns Lake	2
Cass	Casselton Reservoir	3
Cass	Hunter Dam	3
Cass	Brewer Lake	2
Cavalier	Mt. Carmel	2
Dickey	Moores Lake	1
Dickey	Pheasant	3
Dickey	Wilson Dam	3
Divide	Skjermo	2
Dunn	Lake Ilo	3
Eddy	Warsing Dam	2
Emmons	Braddock Dam	3
Emmons	Nieuwsma Dam	2
Emmons	Rice Lake	4
Emmons	Welk Dam	3
Foster	Juanita	3
Golden Valley	Camel Hump	1
Golden Valley	Odland Dam	3
Golden Valley	Williams Creek	4
Grand Forks	Fordville	2
Grand Forks	Larimore	2
Grand Forks	Kolding	2

COUNTY	LAKE	CLASSIFICATION
Grant	Tschida	2
Grant	Raleigh Reservoir	4
Grant	Sheep Creek	2
Griggs	Red Willow	3
Griggs	Carlson-Tande	3
Hettinger	Larson Lake	3
Hettinger	Kilzer	3
Hettinger	Castle Rock	1
Hettinger	Indian Creek	3
Hettinger	Mott Dam	2
Hettinger	Blickensderfer	2
Kidder	Cherry Lake	2
Kidder	Crystal Springs	3
Kidder	Frettum Lake	2
Kidder	Round Lake	2
Kidder	Lake Williams	2
Kidder	Lake Isabel	3
Kidder	George Lake	5
LaMoure	Schlect-Weix.	3
LaMoure	Hein.-Martin	2
LaMoure	Kulm-Edgeley	2
LaMoure	Cottonwood	4
LaMoure	Kalmbach	4
LaMoure	Schlect-Thom	2
LaMoure	Lake LaMoure	2
Logan	Beaver Lake	3
Logan	Mundt Lake	2
Logan	Rudolph Lake	4

COUNTY	LAKE	CLASSIFICATION
McHenry	Cottonwood	3
McHenry	George Lake	2
McHenry	Round Lake	3
McHenry	Buffalo Lodge	3
McIntosh	Blumhardt	1
McIntosh	Coldwater	2
McIntosh	Green Lake	2
McIntosh	Lake Hoskins	2
McIntosh	Clear Lake	2
McKenzie	Arnegard Dam	4
McKenzie	Sather Dam	2
McLean	Brush Lake	3
McLean	W. Park Lake	2
McLean	E. Park Lake	2
McLean	Brekken	2
McLean	Holmes	2
McLean	Lightning	2
McLean	Crooked Lake	2
McLean	Custer Mine	1
McLean	Audubon	2
McLean	Strawberry	3
McLean	Long Lake	4
McLean	Riv. Spillway	1
Morton	Crown Butte	3
Morton	Fish Creek	1
Morton	Sweetbriar	3
Morton	Nygren	3
Morton	Danzig	3

COUNTY	LAKE	CLASSIFICATION
Mountrail	Clearwater	3
Mountrail	White Earth	2
Mountrail	Stanley Reservoir	3
Nelson	McVille Dam	1
Nelson	Whitman Dam	1
Nelson	Tolna Dam	2
Oliver	Nelson Lake	3
Oliver	Van Oosting	3
Oliver	M. Mosbrucker	2
Oliver	A. Mosbrucker	1
Oliver	E. Arroda Lake	1
Oliver	W. Arroda Lake	1
Pembina	Renwick Dam	2
Pierce	Balta Dam	2
Pierce	Buffalo Lake	2
Ramsey	Devils Lake	3
Ramsey	Cavanaugh	3
Ransom	Dead Colt Creek	3
Renville	Lake Darling	2
Richland	Lake Elsie	2
Richland	Mooreton Pond	2
Rolette	Carpenter	2
Rolette	Dion Lake	2
Rolette	Gravel Lake	1
Rolette	Gordon	2
Rolette	Hooker Lake	1
Rolette	Belcourt	2
Rolette	School Section	2

COUNTY	LAKE	CLASSIFICATION
Rolette	Upsilon	3
Rolette	Shutte Lake	2
Sargent	Alkali Lake	3
Sargent	Silver Lake	2
Sargent	Tewaukon	3
Sargent	Buffalo Lake	4
Sargent	Sprague Lake	3
Sheridan	Hecker	2
Sheridan	S. McClusky	2
Sioux	Froelich	2
Slope	Cedar Lake	3
Slope	Davis Dam	1
Slope	Hamann Dam	1
Slope	Stewart Lake	3
Stark	Patterson	3
Stark	Dickinson Dike	2
Stark	Belfield Pond	3
Steele	N. Tobiason	3
Steele	Golden Lake	3
Steele	N. Golden Lake	3
Stutsman	Jamestown Reservoir	2
Stutsman	Clark Lake	3
Stutsman	Jim Lake	3
Stutsman	Spiritwood	2
Stutsman	Arrowwood	4
Stutsman	Krapp Dam	2
Stutsman	Barnes Lake	3
Stutsman	Pipestem Reservoir	3

APPENDIX III

MIXING ZONE AND DILUTION POLICY
AND
IMPLEMENTATION PROCEDURE

PURPOSE

This policy addresses how mixing and dilution of point source discharges with receiving waters will be addressed in developing chemical-specific and whole effluent toxicity discharge limitations for point source discharges. Depending upon site-specific mixing patterns and environmental concerns, some pollutants/criteria may be allowed a mixing zone or dilution while others may not. In all cases, mixing zone and dilution allowances shall be limited, as necessary, to protect the integrity of the receiving water's ecosystem and designated uses.

MIXING ZONES

Where dilution is available and the discharge does not mix at a near instantaneous and complete rate with the receiving water (incomplete mixing), an appropriate mixing zone may be designated. In addition, a mixing zone may only be designated if it is not possible to achieve chemical-specific standards and whole effluent toxicity objectives at the end-of-pipe with no allowance for dilution. The size and shape of a mixing zone will be determined on a case-by-case basis. At a maximum, mixing zones for streams and rivers shall not exceed one-half the cross-sectional area or a length 10 times the stream width at critical low flows, whichever is more limiting. Also, at a maximum, mixing zones in lakes shall not exceed 5 percent of lake surface area or 200 feet in radius, whichever is more limiting. Individual mixing zones may be limited or denied in consideration of designated beneficial uses or presence of the following concerns in the area affected by the discharge:

1) There is the potential for bioaccumulation in fish tissues or wildlife.
2) The area is biologically important, such as fish spawning/nursery areas.
3) The pollutant of concern exhibits a low acute to chronic ratio.
4) There is a potential for human exposure to pollutants resulting from drinking water use or recreational activities.
5) The effluent and resultant mixing zone results in an attraction of aquatic life to the effluent plume.
6) The pollutant of concern is extremely toxic and persistent in the environment.
7) The mixing zone would prohibit a zone of passage for migrating fish or other species (including access to tributaries).
8) There are cumulative effects of multiple discharges and their mixing zones.

Within the mixing zone designated for a particular pollutant, certain numeric water quality criteria for that substance may not apply. However, all mixing zones shall meet the general conditions set forth in Section 33-16-02-08 of the State Water Quality Standards.

While exceedences of acute chemical specific numeric standards are not allowed within the entire mixing zone, a portion of the mixing zone (the zone of initial dilution or ZID) may exceed acute chemical-specific numeric standards established for the protection of aquatic life. The ZID shall be determined on a case-by-case basis where the statement of basis for the discharge permit includes a rationale for concluding that a zone of initial dilution poses no unacceptable risks to aquatic life. Acute whole effluent toxicity (WET) limits shall be achieved at the end-of-pipe with no allowance for a ZID.

DILUTION ALLOWANCES

An appropriate dilution allowance may be provided in calculating chemical-specific acute and chronic and WET discharge limitations where: 1) the discharge is to a river or stream, 2) dilution is available at low-flow conditions, and 3) available information is sufficient to reasonably conclude that there is near instantaneous and complete mixing of the discharge with the receiving water (complete mixing). The basis for concluding that such near instantaneous and complete mixing is occurring shall be documented in the statement of basis for the NDPDES permit. In the case of field studies, the dilution allowance for continuous dischargers shall be based on the critical low flow (or some portion of the critical low flow). The requirements and environmental concerns identified in the paragraphs above may be considered in deciding the portion of the critical low flow to provide as dilution. The following critical low flows shall be used for streams and effluents:

Stream Flows	
Aquatic life, chronic	4-day, 3-year flow (biologically based*)**
Aquatic life, acute	1-day, 3-year flow (biologically based)
Human health (carcinogens)	harmonic mean flow
Human health (non-carcinogens)	4-day, 3-year flow (biologically based) or 1-day, 3-year flow (biologically based)
Effluent Flows	
Aquatic life, chronic	Mean daily flow
Aquatic life, acute	Maximum daily flow
Human health (all)	Mean daily flow

* Biologically based refers to the biologically based design flow method developed by EPA. It differs from the hydrologically based design flow method in that it directly uses the averaging periods and frequencies specified in the aquatic life water quality criteria for individual pollutants and whole effluents for determining design flows.

** A 30-day, 10-year flow (biologically based) can be used for ammonia or other chronic standard with a 30-day averaging period.

For chemical-specific and chronic WET limits, an appropriate dilution allowance may also be provided for certain minor publicly owned treatment works (POTWs) where allowing such dilution will pose insignificant environmental risks. For acute WET limits, an allowance for dilution is authorized only where dilution is available and mixing is complete.

For controlled discharges, such as lagoon facilities that discharge during high ambient flows, the stream flow to be used in the mixing zone analysis should be the lowest statistical flow expected to occur during the period of discharge.

Where a discharger has installed a diffuser in the receiving water, all or a portion of the critical low stream flow may be provided as a dilution allowance. The determination shall depend on the diffuser design and on the requirements and potential environmental concerns identified in the above paragraphs. Where a diffuser is installed across the

entire river/stream width (at critical low flow), it will generally be presumed that near instantaneous and complete mixing is achieved and that providing the entire critical low flow as dilution is appropriate.

OTHER CONSIDERATIONS

Where dilution flow is not available at critical conditions (i.e., the water body is dry), the discharge limits will be based on achieving applicable water quality criteria (i.e., narrative and numeric, chronic and acute) at the end-of-pipe; neither a mixing zone or an allowance for dilution will be provided.

All mixing zone dilution assumptions are subject to review and revision as information on the nature and impacts of the discharge becomes available (e.g., chemical or biological monitoring at the mixing zone boundary). At a minimum, mixing zone and dilution decisions are subject to review and revision, along with all other aspects of the discharge permit upon expiration of the permit.

For certain pollutants (e.g., ammonia, dissolved oxygen, metals) that may exhibit increased toxicity or other effects on water quality after dilution and complete mixing is achieved, the waste load allocation shall address such effects on water quality, as necessary, to fully protect designated and existing uses. In other words, the point of compliance may be something other than the mixing zone boundary or the point where complete mixing is achieved.

The discharge will be consistent with the Antidegradation Procedure.

Step 4 - Site-Specific Risk Considerations

Where allowing a mixing zone or a dilution allowance would pose unacceptable environmental risks, the discharge limitations will be based on achieving applicable narrative and numeric water quality criteria at the end-of-pipe. The existence of environmental risks may also be the basis for a site-specific mixing zone or dilution allowance. Such risk determinations will be made on a case-by-case and parameter-by-parameter basis. These decisions will take into account the designated and existing uses and all relevant site-specific environmental concerns, including the following:

1. Bioaccummulation in fish tissues or wildlife
2. Biologically important areas such as fish spawning areas
3. Low acute to chronic ratio
4. Potential human exposure to pollutants resulting from drinking water or recreational areas
5. Attraction of aquatic life to the effluent plume
6. Toxicity/persistence of the substance discharged
7. Zone of passage for migrating fish or other species (including access to tributaries)
8. Cumulative effects of multiple discharges and mixing zones

Step 5 - Complete Mix Procedures

For point source discharges to rivers/streams where available data are adequate to support a conclusion that there is near instantaneous and complete mixing of the discharge with the receiving water (complete mix) the full critical low flow or a portion thereof may be provided as dilution for chemical-specific and WET limitations. Such determinations of complete mixing will be made on a case-by-case basis using best professional judgement. Presence of an effluent diffuser that covers the entire river/stream width at critical low flow will generally be assumed to provide complete mixing. Also, where the mean daily flow of the discharge exceeds the chronic low stream flow of the receiving water, complete mixing will generally be assumed. In addition, where the mean daily flow of the discharge is less than or equal to the chronic low flow of the receiving water, it will generally be assumed that complete mixing does not occur unless otherwise demonstrated by the permittee. Demonstrations for complete mixing should be consistent with the study plan developed in cooperation with the states/tribes and EPA Region VIII. Near instantaneous and complete mixing is defined as no more than a 10 percent difference in bank-to-bank concentrations within a longitudinal distance not greater than two river/stream widths. For controlled discharges (lagoon facilities), the test of near instantaneous and complete mixing will be made using the expected rate of effluent discharge and the lowest upstream flow expected to occur during the period of discharge.

The following critical low flows shall be applied for streams and effluents:

Stream Flows	
Aquatic life, chronic	4-day, 3-year flow (biologically based*)**
Aquatic life, acute	1-day, 3-year flow (biologically-based)
Human health (carcinogens)	Harmonic mean flow
Human health (non-carcinogens)	4-day, 3-year flow (biologically-based) or 1-day, 3-year flow (biologically-based)
Effluent Flows	
Aquatic life, chronic	Mean daily flow
Aquatic life, acute	Maximum daily flow
Human health (all)	Mean daily flow

* Biologically based refers to the biologically based design flow method developed by EPA. It differs from the hydrologically based design flow method in that it directly uses the averaging periods and frequencies specified in the aquatic life water quality criteria for individual pollutants and whole effluents for determining design flows.

** A 30-day, 10-year flow (biologically based) can be used for ammonia or other chronic standard with a 30-day averaging period.

Where complete mixing can be concluded and the environmental concerns identified in step 4 do not justify denying dilution, but are nevertheless significant, some portion of the critical low flows identified above may be provided as dilution. Such decisions will take site-specific environmental concerns into account as necessary to ensure adequate protection of designated and existing uses.

Step 6 - Incomplete Mix Procedures

This step addresses point source discharges that exhibit incomplete mixing. Because acute WET limits are achieved at the end-of-pipe in incomplete mix situations, this step provides mixing zone procedures for chronic aquatic life, human health, and WET limits, and ZID procedures for acute chemical-specific limits. Where a ZID is allowed for chemical limits, the size of the ZID shall be limited as follows:

Lakes:	The ZID volume shall not exceed 10 percent of the volume of the chronic mixing zone.
Rivers and Streams:	The ZID shall not exceed 10 percent of the chronic mixing zone volume or flow, nor shall the ZID exceed a maximum downstream length of 100 feet, whichever is more restrictive.

The following provides guidelines for determining the amount of dilution available for dischargers that exhibit incomplete mixing.

Default Method

This method addresses situations where information needed for modeling is not available or there are concerns about potential environmental impacts of allowing a mixing zone. The default method provides a conservative dilution allowance.

Stream/River Dischargers: Dilution calculation which uses up to 10 percent of the critical low flow for chronic aquatic life limits or human health limits. However, this allowance may be adjusted downward on a case-by-case basis depending upon relevant site-specific information, designed and existing uses of the segment, and especially the uses of the segment portion affected by the discharge.

Lake/Reservoir Dischargers: Dilution up to 4:1 ratio (20 percent effluent) may be provided for chronic aquatic life analyses or human health analyses. However, this allowance may be adjusted downward on a case-by-case basis depending upon discharge flow, lake size, lake flushing potential, designated and existing uses of the lake, and uses of the lake portion affected by the discharge.

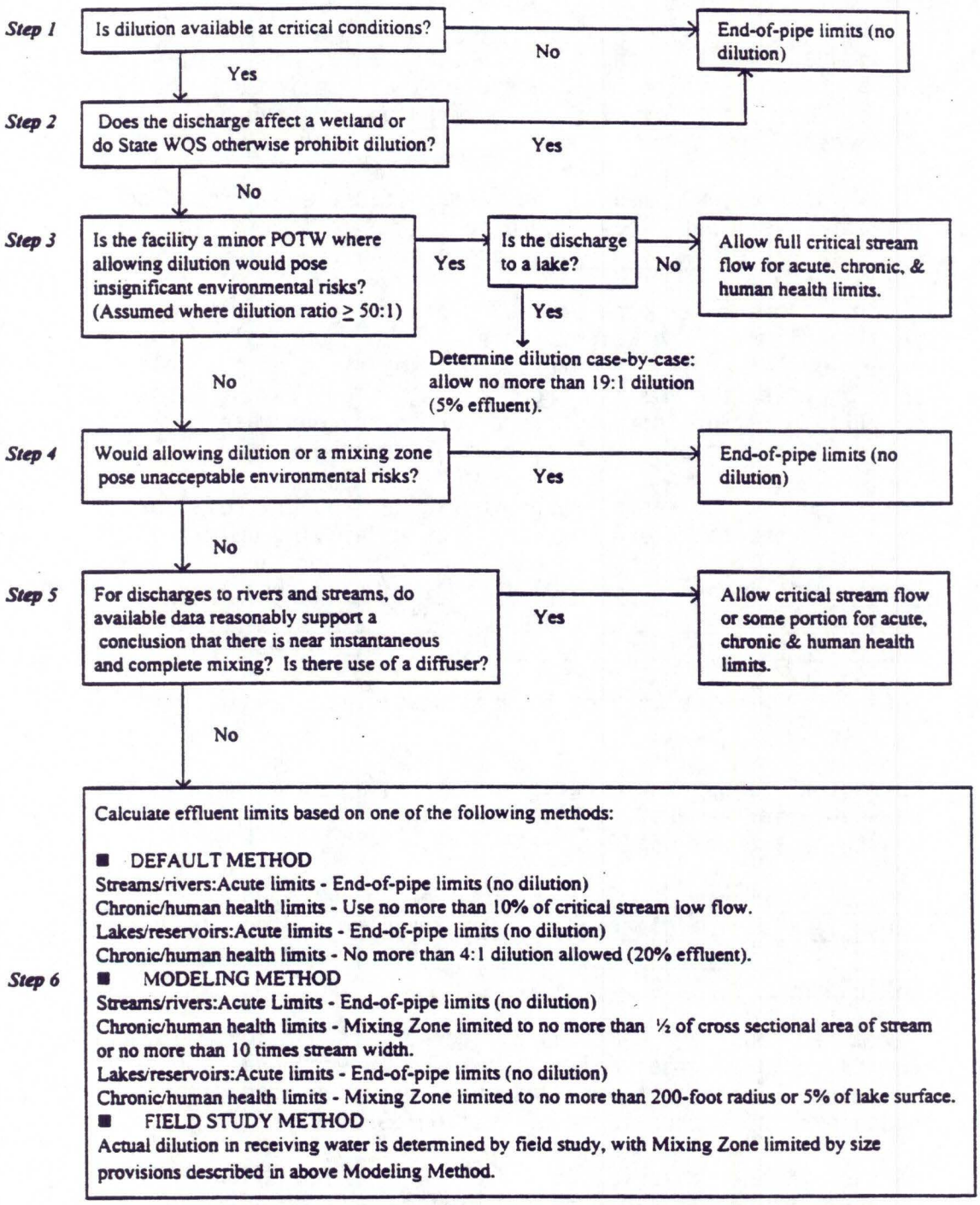
Modeling Method

An appropriate mixing zone model is used to calculate the dilution flow that will allow mixing zone limits to be achieved at the critical low flow. Prior to initiating modeling studies, it should be determined that compliance with criteria at the end-of-pipe is not practicable.

Field Study Method

Field studies which document the actual mixing characteristics in the receiving water are used to determine the dilution flow that will allow mixing zone size limits to be achieved at the critical low flow. For the purposes of field studies, "near instantaneous and complete mixing" is operationally defined as no more than a 10 percent difference in bank-to-bank concentrations within a longitudinal distance not greater than two stream/river widths.

FIGURE 1
NORTH DAKOTA MODEL MIXING ZONE/DILUTION PROCEDURE*



* This procedure is applied to both chemical-specific and WET limits. In the case of complex discharges, the dilution or mixing zone may vary parameter-by-parameter.

CHAPTER 33-25-01

33-25-01-01. Definitions.

1. "Abandoned well" means a well whose use has been permanently discontinued or which is in a state of disrepair such that it cannot be used for its intended purpose or for observation purposes.

2. "Area of review" means the area of review surrounding an injection well described according to the criteria ~~in~~ under title 40 ~~CFR~~ C.F.R. part 146, sections 146.6 and 146.63.

3. "Casing" means a pipe or tubing of appropriate material, of varying diameter and weight, lowered into a borehole during or after drilling in order to support the sides of the hole and thus prevent the walls from caving, to prevent loss of drilling mud into porous ground, or to prevent water, gas, or other fluid from entering or leaving the hole.

4. "Catastrophic collapse" means the sudden and utter failure of overlying strata caused by removal of underlying materials.

5. "Cesspool" means a drywell that receives untreated sanitary waste containing human excreta and which sometimes has an open bottom or perforated sides, or both.

6. "CFR C.F.R." means Code of Federal Regulations as of August ~~27~~ 3, ~~1987~~ 2000.

~~6.~~ 7. "Director" means the director of the division of water ~~supply and pollution control~~ quality of the state department of health ~~and consolidated laboratories~~.

8. "Drywell" means a well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

~~7.~~ 9. "Exempted aquifer" means an aquifer or its portion that meets the criteria in the definition of "underground source of drinking water" but which has been exempted according to the procedures of subsection 2 of section 33-25-01-05.

~~8.~~ 10. "Fluid" means material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

~~9.~~ 11. "Formation" means a body of rock characterized by a degree of lithologic homogeneity which is prevailing, but not

necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

~~10.~~ 12. "Hazardous waste" means a hazardous waste as defined ~~in~~ under title 40 ~~CFR~~ C.F.R. part 261, section 261.3.

13. "Improved sinkhole" means a naturally occurring karst depression or other natural crevice found in volcanic terrain and other geologic settings which have been modified by man for the purpose of directing and emplacing fluids into the subsurface.

~~11.~~ 14. "Injection zone" means a geological formation, group of formations, or part of a formation receiving fluids through a well.

~~12.~~ 15. "Packer" means a device lowered into a well to produce a fluidtight seal.

~~13.~~ 16. "Plugging" means the act or process of stopping the flow of water, oil, or gas into and out of a formation through a borehole or well penetrating that formation.

17. "Point of injection" means the last accessible sampling point prior to waste fluids being released into the subsurface environment through a class V injection well. For example, the point of injection of a class V septic system might be the distribution box--the last accessible sampling point before the waste fluids drain into the underlying soils. For a drywell, it is likely to be the well bore itself.

~~14.~~ 18. "Radioactive waste" means any waste which contains hazardous material in concentrations which exceed those listed ~~in~~ under title 10 ~~CFR~~ C.F.R. part 20, appendix B, table II, column 2.

19. "Sanitary waste" means liquid or solid wastes originating solely from humans and human activities, such as wastes collected from toilets, showers, wash basins, sinks used for cleaning domestic areas, sinks used for food preparation, clothes washing operations, and sinks or washing machines where food and beverage serving dishes, glasses, and utensils are cleaned. Sources of these wastes may include single or multiple residences, hotels and motels, restaurants, bunkhouses, schools, ranger stations, crew quarters, guard stations, campgrounds, picnic grounds, day-use recreation areas, other commercial facilities, and industrial facilities provided the waste is not mixed with industrial waste.

20. "Septic system" means a well that is used to emplace sanitary waste below the surface and is typically comprised of a septic tank and subsurface fluid distribution system or disposal system.

21. "Subsurface fluid distribution system" means an assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground.

~~15.~~ 22. "Well" means a bored, drilled or driver shaft, or a dug hole, whose depth is greater than the largest surface dimension; or an improved sinkhole; or a subsurface fluid distribution system.

23. "Well injection" means the subsurface emplacement of fluids through a well.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 61-28-04

33-25-01-02. Classification of injection wells. Injection wells are classified as follows:

1. **Class I.** Wells used to inject hazardous waste, radioactive waste, and other industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile [402.34 meters] of the well bore, an underground source of drinking water.

2. **Class II.** Wells which inject fluids:

   a. Which are brought to the surface in connection with conventional oil or natural gas production and may be commingled with wastewaters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection;

   b. For enhanced recovery of oil or natural gas; and

   c. For storage of hydrocarbons which are liquid at standard temperature and pressure.

3. **Class III.** Wells which inject for extraction of minerals or energy.

4. **Class IV.** Wells used to dispose of hazardous wastes or radioactive wastes into or above a formation which, within one quarter mile [402.34 meters] of the well, contains an underground source of drinking water and wells used to dispose of hazardous wastes which cannot be classified under class I wells, e.g., wells used to dispose of hazardous wastes into or above a formation which contains an exempted aquifer.

5. **Class V.** Injection wells not included in class I, II, III, or IV.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 23-20.3, 61-28-04, 61-28.1-03
Law Implemented: NDCC 23-20.3, 61-28-04, 61-28.1-03

33-25-01-03. Prohibition of unauthorized injection. Any underground injection (except class II and class III) is prohibited except as authorized by permit or rule issued under this section. Also the construction of any well required to have a permit under this section is prohibited until the permit has been issued. These include the well types specifically identified in title 40 C.F.R. part 144, section 144.1(g) and title 40 C.F.R. part 144, section 144.81.

The following well types are not covered by these rules:

1. Individual or single-family residential waste disposal systems such as domestic cesspools or septic systems.

2. Nonresidential cesspools, septic systems, or similar waste disposal systems if such systems are used solely for the disposal of sanitary waste and have the capacity to serve fewer than twenty persons a day.

3. Injection wells used for injection of hydrocarbons which are of pipeline quality and are gases at standard temperature and pressure for the purpose of storage.

4. Any dug hole, drilled hole, or bored shaft which is not used for emplacement of fluids underground.

History: Effective June 1, 1983; amended effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 61-28-04, 61-28-06

33-25-01-04. Prohibition of movement of fluid into underground sources of drinking water.

1. No owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any other underground injection activity in a manner which causes or allows movement of fluid containing any contaminant into an underground source of drinking water if the presence of that contaminant may cause a violation of any maximum contaminant level under chapter 33-17-01 or which may adversely affect the health of persons. The applicant for a permit shall have the burden of showing that the requirements of this section are met.

2. The director shall prescribe additional requirements in accordance ~~to~~ with title 40 ~~CFR~~ C.F.R. part 144, section 144.12(b) through (e) for all injection wells which may cause a violation of a maximum contaminant level under chapter 33-17-01 or which may adversely affect the health of persons.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 61-28-04, 61-28.1-03
Law Implemented: NDCC 61-28-04, 61-28.1-03

33-25-01-05. Identification of underground sources of drinking water and exempted aquifers.

1. The director may identify and shall protect as an underground source of drinking water all aquifers or parts of aquifers which:

   a. Supply any public water system; or

   b. Contain a sufficient quantity of ground water to supply a public water system and:

      (1) Currently supply drinking water for human consumption; or

      (2) Contain fewer than ten thousand milligrams per liter total dissolved solids; and

      (3) Are not exempted aquifers.

2. After notice and opportunity for a public hearing the director may designate, identify, and describe in geographic or geometric terms, or both, which are clear and definite exempted aquifers or parts thereof using the following criteria:

   a. It does not currently serve as a source of drinking water; and

   b. (1) It cannot now and will not in the future serve as a source of drinking water ~~because~~ for any of the following reasons:

      (a) It ~~is~~ produces mineral, hydrocarbon, or geothermal energy ~~producing~~;

      (b) It is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical;

(c) It is so contaminated that it would be economically or technologically impractical to render that water fit for human consumption; or

(d) It is located over a class III well mining area subject to subsidence or catastrophic collapse; or

(2) The total dissolved solids content of the ground water is more than three thousand and less than ten thousand milligrams per liter and it is not reasonably expected to supply a public water system.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 61-28-04, 61-28.1-03
Law Implemented: NDCC 61-28-04, 61-28.1-03

33-25-01-06. Permitting.

1. **Application for a permit.**

a. Any person who is required to have a permit shall complete, sign, and submit an application to the director.

b. When the owner and operator are different, it is the operator's duty to obtain a permit.

c. The application must be complete before the permit is issued.

d. All applicants of class I wells shall provide information specified ~~in~~ under title 40 ~~CFR~~ C.F.R. parts 144 and 146, sections 144.31(e) and 146.14(a) and (c) (for class I nonhazardous waste injection wells) or title 40 ~~CFR~~ C.F.R. part 146, sections 146.70(a), 146.71(a), and 146.72(a) (for class I hazardous waste injection wells).

e. Applicants shall keep records of all data used to complete permit applications and supplemental information for at least three years from the date the application is signed.

f. Operators of new injection wells, unless covered by an existing area permit, shall submit an application within a reasonable time before construction is expected to begin.

2. **Signatories to permit applications.**

a. All permits shall be signed as follows:

(1) For a corporation: by a principal executive officer of at least the level of vice president.

(2) For a partnership or sole proprietor: by a general partner or proprietor.

(3) For a municipality, state, federal, or other public agency: by either a principal officer or authorized representative.

b. A person is a duly authorized representative if the authorization:

(1) Is made in writing by the legal signatory;

(2) Specifies an individual or position having responsibility for the overall operation; and

(3) Is submitted to the director either prior to or along with documents signed by the authorized representative.

c. Changes in authorization must be in writing and submitted to the director.

3. **Duration of permits.** Underground injection control permits for class I and class V wells shall be effective for a fixed term of not more than ten years.

4. **Transfer of permits.**

a. Any class V permit may be automatically transferred to a new permittee if:

(1) The current permittee notifies the director at least thirty days prior to the proposed transfer date; and

(2) The notice includes a written agreement between the existing and new permittee containing:

(a) A specific date for transfer of permit responsibility, coverage, and liability; and

(b) A demonstration that the new permittee meets the financial responsibility requirements.

b. Permits for class I wells may be transferred only if the permit has been modified or revoked and reissued.

5. **Modification, revocation and reissuance, or termination of permits.**

a. Permits may be modified, revoked and reissued, or terminated at the request of any affected person or at the director's initiative if cause exists as specified ~~in~~ under title 40 ~~CFR~~ C.F.R. part 144, section 144.39. All

requests shall be in writing and shall contain facts or reasons supporting the request.

b. If the director tentatively decides to modify or revoke and reissue a permit, the director shall prepare a draft permit incorporating the proposed changes. The director may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the director shall require the submission of a new application.

c. The following are causes for terminating a permit during its term or for denying a permit renewal application:

(1) Noncompliance by the permittee with any permit condition;

(2) Failure by the permittee to fully disclose all relevant facts or misrepresentation of relevant facts; or

(3) A determination that the permitted activity endangers human health or the environment.

d. If the director tentatively decides to terminate a permit, the director shall issue notice of intent to terminate.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 61-28-04, 61-28-06

33-25-01-08. Draft permits and fact sheets.

1. **Draft permits.**

a. When the application is complete, the director shall tentatively decide to either ~~to~~ prepare a draft permit or deny the application.

b. If the director decides to prepare the draft permit, it shall contain the following information:

(1) All required permit conditions;

(2) All compliance schedule requirements;

(3) All monitoring requirements; and

(4) All specific requirements for construction, corrective action, operation, hazardous waste

management, reporting, plugging and abandonment, financial responsibility, mechanical integrity, and any other conditions the director may impose.

2. **Fact sheets.**

a. A fact sheet shall be prepared for:

(1) Every draft permit for a major facility or activity.

(2) Every draft permit which the director finds is the subject of widespread public interest or raises major issues.

b. If a fact sheet is required, it:

(1) Shall be sent to the applicant and, on request, to any other person.

(2) Shall include:

(a) A brief description of the type of facility or activity.

(b) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being injected.

(c) A brief summary of the basis for the draft permit conditions.

(d) The reasons why any requested variances or alternatives to required standards do or do not appear justified.

(e) A description of the procedures for reaching a final decision, including:

[1] Beginning and ending dates of comment period;

[2] Address where comments will be received;

[3] Procedures for requesting a hearing and the nature of the hearing; and

[4] Any other procedures by which the public may participate.

(f) The name and telephone number of a person to contact for additional information.

History: Effective June 1, 1983; amended effective June 1, 2001.

General Authority: NDCC 61-28-04
Law Implemented: NDCC 61-28-04

33-25-01-09. Public notice and comment - Requests for hearings - Public hearings - Response to comments.

1. **Public notice.**

   a. The director shall give public notice that the following actions have occurred~~.~~:

      (1) A draft permit has been prepared.

      (2) A hearing has been scheduled.

      (3) Intent to deny a permit application.

   b. Public notice shall be given to allow thirty days for public comment on the draft permit.

   c. Public notice of a public hearing shall be given at least thirty days before the hearing.

   d. Public notice shall be given by the methods specified ~~in~~ under title 40 ~~CFR~~ C.F.R. part 124, section 124.10(c).

   e. Public notices and public notices for hearings shall at a minimum contain the information specified ~~in~~ under title 40 ~~CFR~~ C.F.R. part 124, section 124.10(d).

2. **Public comment.**

   a. During the public comment period, any interested person may submit written or oral comments and, if no public hearing is scheduled, request a public hearing in writing, stating the nature of the issues.

   b. All comments shall be considered in making the final decision and shall be answered when the final permit decision is made.

3. **Public hearing.** The director shall hold a public hearing whenever there is a significant degree of public interest in a draft permit. The director also may hold a public hearing at the director's discretion.

4. **Response to comments.**

   a. The director shall issue a response to comments when a final permit decision is made. The response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

b. The response to comments shall be available to the public.

History: Effective June 1, 1983; amended effective June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 61-28-04

33-25-01-10. Conditions applicable to all permits.

1. The general conditions contained ~~in~~ under title 40 CFR C.F.R. part 144, section 144.51 apply to class I and class V underground injection control permits. All conditions shall be incorporated into the permits, either expressly or by reference.

2. A permittee may not commence injection into a new injection well until:

   a. Construction is complete;

   b. The permittee has submitted notice to the director that construction is complete; and

   c. The director has inspected or reviewed the new injection well and finds it in compliance with the permit, or the permittee has not received notice from the director of intent to inspect within thirteen days of the permittee's completion notice.

3. The director shall impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water.

4. The permit shall require the permittee to maintain financial responsibility and resources to close, plug, and abandon the underground injection operation in a manner prescribed by the director. The permittee must show evidence of financial responsibility to the director by the submission of surety bond, or other adequate assurance, such as financial statements or other materials acceptable to the director. Operators of Class I hazardous waste injection wells must maintain the resources to close, plug, or abandon the well and for postclosure care pursuant to title 40 CFR C.F.R. part 144

subpart F and title 40 CFR C.F.R. part 146, sections 146.71 and 146.72.

5. The permittee shall retain all records concerning the nature and composition of injected fluids until three years after completion of plugging and abandonment of the well.

6. The following information shall be reported within twenty-four hours:

   a. Any monitoring or other information which indicates that any contaminant may cause an endangerment to an underground source of drinking water.

   b. Any noncompliance with a permit condition or malfunction of the injection system which may cause fluid migration into or between underground sources of drinking water.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 23-20.3-03, 61-28-04, 61-28.1-03
Law Implemented: NDCC 23-20.3-03, 61-28-04, 61-28.1-03

33-25-01-11. Technical requirements.

1. Construction requirements.

   a. (1) Existing wells shall achieve compliance with construction requirements prior to permitting or according to a compliance schedule established as a permit condition.

   (2) New injection wells shall submit plans for testing, drilling, and construction as part of the permit application.

   (3) New injection wells shall be in compliance with construction requirements prior to commencing injection operations.

   (4) Changes in construction plans require approval of the director.

   b. Class I well construction shall conform to the requirements contained ~~in~~ under title 40 CFR C.F.R. part 146, section 146.12 (nonhazardous waste injection wells) or title 40 CFR C.F.R. part 146, section 146.65 (hazardous waste injection wells).

2. Corrective action.

a. Applicants for class I nonhazardous waste injection well permits shall identify all known wells which penetrate the injection zone within the area of review.

b. Applicants for class I hazardous waste injection well permits are subject to the corrective action requirements of title 40 CFR C.F.R. part 146, section 146.64 and shall as part of the permit application submit a plan to the director outlining the protocol used to:

(1) Identify all wells penetrating the confining zone or injection zone within the area of review; and

(2) Determine whether wells are adequately completed or plugged.

c. All class I injection wells are subject to the following:

(1) For wells in the area of review which are improperly sealed, completed, or abandoned, the applicant shall also submit a corrective action plan consisting of such steps or modifications as are necessary to prevent movement of fluid into an underground source of drinking water.

(2) The director's review of the corrective action plan shall consider all of the following criteria and factors:

(a) Toxicity and volume of the injected fluid.

(b) Toxicity of native fluids or byproducts of injection.

(c) Potentially affected population.

(d) Geology.

(e) Hydrology.

(f) History of the injection operation.

(g) Completion and plugging records.

(h) Abandonment procedures in effect at the time the well was abandoned.

(i) Hydraulic connections with an underground source of drinking water.

(3) Where the corrective action plan is adequate, the director shall incorporate the plan into the permit as a condition.

(4) Where the corrective action plan is inadequate, the director shall:

(a) Require the applicant to revise the plan;

(b) Prescribe a corrective action plan as a permit condition; or

(c) Deny the permit.

(5) Permits for existing injection wells that require corrective action shall include a compliance schedule requiring corrective action as soon as possible.

(6) New injection wells may not be permitted until all required corrective action has been taken.

(7) The director may require as a permit condition that injection pressure be so limited that pressure in the injection zone does not exceed hydrostatic pressure at the site of an improperly completed or abandoned well within the area of review. This pressure limitation shall satisfy the corrective action requirement. Alternatively, such injection pressure limitation can be part of a compliance schedule and last until all other required corrective action has been taken.

3. All class I hazardous waste injection wells must be sited in accordance with title 40 CFR C.F.R. part 146, section 146.62.

4. Operating, monitoring, and reporting requirements for class I wells shall at a minimum include the items contained ~~in~~ under title 40 CFR C.F.R. part 146, section 146.13 (for nonhazardous waste injection wells) or title 40 CFR C.F.R. part 146, sections 146.67, 146.68, and 146.69 (for hazardous waste injection wells).

5. In authorizing a new class I well, the director shall require the submission of all the information specified ~~in~~ under title 40 CFR C.F.R. parts 144 and 146, sections 144.31 and 146.14 (for nonhazardous waste injection wells) or title 40 CFR C.F.R. parts 144 and 146, sections 144.31, 146.70(a), 146.71(a), and 146.72(a) (for hazardous waste injection wells).

6. Prior to granting approval for the operation of a class I well, the operator shall submit for review by the director information listed ~~in~~ under title 40 CFR C.F.R. part 146, section 146.14(b) (for nonhazardous waste injection wells) or title 40 CFR C.F.R. part 146, sections 146.66 and 146.70(b) (for hazardous waste injection wells).

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 23-20.3-03, 61-28-04, 61-28.1-03
Law Implemented: NDCC 23-20.3-03, 61-28-04, 61-28.1-03

33-25-01-12. Plugging and abandonment.

1. Any class I permit shall include, and any class V permit may include, a plan for plugging and abandonment which shall be incorporated into the permit as a condition to ensure that movement of fluids either into an underground source of drinking water or between underground sources of drinking water is not allowed.

2. Temporary intermittent cessation of injection operations is not abandonment.

3. The permittee shall notify the director at such times as the permit requires before conversion or abandonment of the well or in the case of area permits before closure of the project. Owners and operators of class V wells authorized by section 33-25-01-16 must notify the director at least thirty days prior to closure.

4. Prior to granting approval for plugging and abandonment of a class I well, the director shall consider the plan submitted by the operator which contains the information listed ~~in~~ under title 40 CFR C.F.R. part 146, section 146.14(c) (for nonhazardous waste injection wells) or title 40 CFR C.F.R. part 146, sections 146.71(a)(4) and 146.72(a) (for hazardous waste injection wells).

History: Effective June 1, 1983; amended effective June 1, 2001.
General Authority: NDCC 23-20.3-03, 61-28-04, 61-28.1-03
Law Implemented: NDCC 23-20.3-03, 61-28-04, 61-28.1-03

33-25-01-13. Mechanical integrity.

1. A permit for any class I well shall include, and for any class V well may include, a condition prohibiting injection operations until the permittee shows to the satisfaction of the director that the well has mechanical integrity.

2. An injection well has mechanical integrity if:

   a. There is no significant leak in the casing, tubing, or packer; and

   b. There is no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore.

3. The mechanical integrity of a class I nonhazardous waste well must be demonstrated using the methods listed ~~in~~ under title 40 CFR C.F.R. part 146, section 146.8(b), (c), (d), and (e). The director may also allow the use of a radioactive tracer survey (timed run method) for detecting leaks in the tubing, casing, or packer and for demonstrating the absence of fluid movement behind the casing (where the injection zone immediately underlies the lowermost underground source of drinking water on a case-by-case basis).

4. The mechanical integrity of a class I hazardous waste injection as defined by title 40 CFR C.F.R. part 146, section 146.8 must be demonstrated as established by title 40 CFR C.F.R. part 146, section 146.68(d).

5. The mechanical integrity of a class I nonhazardous waste injection well must be demonstrated at least once every five years and whenever there has been a well workover.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 23-20.3-03, 61-28-04, 61-28.1-03
Law Implemented: NDCC 23-20.3-03, 61-28-04, 61-28.1-03

33-25-01-14. Area of review. The area of review for each injection well or each field, project, or area of the state shall be determined according to title 40 CFR C.F.R. part 146, section 146.6 (for nonhazardous waste injection wells) or title 40 CFR C.F.R. part 146, section 146.63 (for hazardous waste injection wells).

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 23-20.3-03, 61-28-04
Law Implemented: NDCC 23-20.3-03, 61-28-04

33-25-01-15. Schedules of compliance.

1. The compliance schedule of a class I nonhazardous waste injection well or a class V injection well must require compliance as soon as possible, and not later than three years after the effective date of the permit.

2. If the schedule of compliance is for more than one year, then interim requirements and completion dates (not to exceed one year) must be incorporated into the compliance schedule and permit.

3. No later than thirty days following each interim and final date, the permittee shall submit progress reports to the director.

4. No owner or operator of a class I hazardous waste injection well may begin injection until all corrective action as required ~~in~~ under title 40 ~~CFR~~ C.F.R. part 146, section 146.64 has been taken.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 23-20.3-03, 61-28-04, 61-28.1-03
Law Implemented: NDCC 23-20.3-03, 61-28-04, 61-28.1-03

33-25-01-16. Authorization of class V underground injection wells.

1. Authorization of injection into a class V well is authorized indefinitely, subject to the requirements of subsections 4, 5, and 6 of section 33-25-01-10 and subsection 3 of section 33-25-01-12, and title 40 C.F.R part 144, sections 144.84(b)(2) through (5).

2. The owner or operator of any existing class V well shall, within one year of the effective date of an underground injection control program, notify the director of the existence of any well meeting the definitions of class V under the owner's or operator's control, and submit the following inventory information:

   a. Name of owner or operator of the well and legal contact;

   b. Number of wells and location by township, range, and section;

   c. Nature and volume of injected fluids;

   d. Construction features of the well, including well depth, screened interval, and casing size and type; and

   e. Any other information which the director requests.

3. All owners or operators of new class V wells shall be in compliance with article 43-35 and submit to the director a log of formations penetrated and the inventory information requested in subsection 2.

4. a. The director may require the operator of a class V well authorized by rule to apply for and obtain an individual or area permit. Cases where permits may be required include:

      (1) The injection well is not in compliance with the applicable rule.

(2) The injection well is not or no longer is within the category of wells and types of well operations authorized by rule.

(3) Protection of an underground source of drinking water requires the injection operation be regulated by requirements not contained in the rules.

b. Any ~~owner/operator~~ owner or operator authorized by rule may request and be granted a permit and hence be excluded from coverage by rule.

c. All injection wells regulated by rule shall submit inventory information to the director.

d. Upon program approval, the director shall notify ~~owner/operators~~ owners or operators of injection wells of their duty to submit inventory information.

e. Failure to submit required inventory information for a class V well within one year of program approval will result in authorization removal for that well.

5. All owners or operators of class V wells shall be in compliance with title 40 C.F.R. part 144, subpart G.

a. New large capacity cesspools that receive waste from multiple dwellings or have the capacity to receive waste from twenty or more persons per day are prohibited after April 5, 2000. Existing large capacity cesspools must be closed by April 5, 2005.

b. New motor vehicle waste disposal wells that receive waste fluids from vehicular repair or maintenance activities, such as auto body repair shops, automotive repair shops, new or used motor vehicle dealerships, specialty repair shops (e.g., transmission or muffler repair shops), or any vehicular repair works are prohibited after April 5, 2000.

c. Existing motor vehicle waste disposal wells in groundwater protection areas designated by the director must be closed or permitted within one year of completion of the groundwater protection area designation or one year after June 1, 2001, whichever is later. Existing motor vehicle waste disposal wells in sensitive groundwater areas designated by the director must be closed or permitted by January 1, 2007.

d. (1) Groundwater protection areas are geographic areas near or surrounding community and nontransient noncommunity water systems that use groundwater as a source of drinking water. They are equivalent to wellhead protection areas delineated by the director

through the wellhead protection program, which is defined in section 1428 of the Safe Drinking Water Act.

(2) Sensitive groundwater areas are vulnerable hydrogeologic settings such as glacial outwash deposits or alluvial or aeolian sand deposits that are critical to protecting current or future underground sources of drinking water. Areas designated as sensitive groundwater areas by the director are alluvial or aeolian sand deposits shown on Geologic Map of North Dakota (Clayton, 1980, North Dakota geological survey) and glacial drift aquifers listed in North Dakota Geographic Targeting System for Groundwater Monitoring (Radig, 1997, North Dakota department of health), or most recent editions of these publications, with DRASTIC scores greater than or equal to 100 based on methodology described in DRASTIC: A Standardized System For Evaluating Groundwater Pollution Potential (Aller et al, 1987, United States environmental protection agency).

e. Location outside of a designated groundwater protection area or sensitive groundwater area does not relieve an owner or operator of a class V well from meeting all other requirements of this article and title 40 C.F.R. part 144, subpart G.

f. In limited cases, the underground injection control director may authorize the conversion (reclassification) of a motor vehicle waste disposal well to another type of class V well. Motor vehicle wells may only be converted if all motor vehicle fluids are segregated by physical barriers and are not allowed to enter the well; and, injection of motor vehicle waste is unlikely based on a facility's compliance history and records showing proper waste disposal. The use of a semipermanent plug as the means to segregate waste is not sufficient to convert a motor vehicle waste disposal well to another type of class V well.

History: Effective June 1, 1983; amended effective June 1, 2001.
General Authority: NDCC 61-28-04, 61-28.1-03
Law Implemented: NDCC 61-28-04, 61-28.1-03

33-25-01-17. Requirements for hazardous waste injection wells. The owner or operator of all wells injecting hazardous waste shall comply with the requirements for hazardous waste management facilities as specified ~~in~~ under title 40 ~~CFR--144.14~~ C.F.R. parts 144, 146, including subpart G, part 148 and ~~148~~ including specifically section 144.14.

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 23-20.3-04, 23-20.3-05, 61-28-04
Law Implemented: NDCC 23-20.3-04, 23-20.3-05, 61-28-04

33-25-01-18. Class IV wells. All class IV wells are prohibited except wells used to inject contaminated ground water that has been treated and is being injected into the same formation from which it was drawn if such injection is approved by the director in accordance with title 40 CFR ~~144.13(c)~~ C.F.R. part 144, section 144.23(c).

History: Effective June 1, 1983; amended effective November 1, 1989; June 1, 2001.
General Authority: NDCC 61-28-04
Law Implemented: NDCC 61-28-04, 61-28-06

CHAPTER 33-38-01

33-38-01-01. Definitions. Words defined in North Dakota Century Code chapter 23-01.2 have the same meaning in this chapter. As used in this chapter:

1. "Advanced prehospital trauma life support" means the most current edition of the course as developed by the national association of emergency medical technicians in cooperation with the American college of surgeons - committee on trauma, or its equivalent, as determined by the department.

2. "Advanced trauma life support" means the most current edition of the course as developed by the American college of surgeons - committee on trauma, or its equivalent, as determined by the department.

3. "Department" means the state department of health.

~~2.~~ 4. "Emergency medical services" means the system of personnel who provide medical care from the time of injury to hospital admission.

~~3.~~ 5. "Local emergency medical services transport plans" means plans developed by emergency medical services, medical directors, and hospital officials which establish the most efficient method to transport trauma patients.

~~4.~~ 6. "Major trauma patient" means any patient that fits the trauma triage algorithm adopted by American college of surgeons, committee on trauma, Resources for Optimal Care of the Injured Patient: ~~1993~~ 1999, page ~~20~~ 14.

7. "Provisional designation" means a state process of designating a facility as a level I, II, or III trauma center based on American college of surgeons standards for a period of up to twenty-four months, until an American college of surgeons verification visit is completed.

~~5.~~ 8. "Trauma" means tissue damage caused by the transfer of thermal, mechanical, electrical, or chemical energy, or by the absence of heat or oxygen.

~~6.~~ 9. "Trauma center" means a facility that has made a commitment to serve the trauma patient, has met the standards of the trauma system, and has obtained designation as a trauma center.

~~7.~~ 10. "Trauma code" includes the activation and assembly of the trauma team to provide care to the major trauma patient.

11. "Trauma nursing core course" means the most current edition of the course as developed by the emergency nurses association, or its equivalent, as determined by the department.

~~8.~~ 12. "Trauma quality improvement program" means a system of evaluating the prehospital, trauma center, and rehabilitative care of trauma patients.

~~9.~~ 13. "Trauma registry" includes the collection and analysis of trauma data from the trauma system.

~~10.~~ 14. "Trauma team" includes a group of health care professionals organized to provide care to the trauma patient.

History: Effective July 1, 1997; amended effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

33-38-01-05. Local emergency medical services transport plans. Emergency medical services shall develop local emergency medical services transport plans for the transport of major trauma patients by appropriate means to the nearest designated trauma center. Emergency medical services may bypass the nearest designated trauma center for a higher level trauma center provided that it does not result in an additional thirty minutes or more of transport time. If there are multiple trauma centers in the community, the major trauma patient meeting the criteria in steps one or two of the field triage decision scheme, provided by the American college of surgeons Resources for Optimal Care of the Injured Patient: 1999, page 14, should be taken to the trauma center with the highest level of designation. The plans are subject to approval by all the participating health care entities named in the plan, then submitted for review and approval to the regional trauma committee. Following approval, the local emergency medical services transport plans must be filed with the department and distributed to participating dispatch centers.

After activation of a trauma code, a dispatch center shall notify the necessary facilities and the emergency medical service unit shall transport the patient according to its local emergency medical services transport plan.

History: Effective July 1, 1997; amended effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

33-38-01-06. Trauma center designation.

1. ~~Four~~ Five levels of hospital designation must be established ~~based on the standards developed for trauma center verification by the American college of surgeons. The standards must be those indicated in the American college of~~

~~surgeons;--committee--on-trauma;-Resources-for-Optimal-Care-of the-Injured-Patient:--1993;-pages-29--through--33.---Beginning January-1;-1999;-a-physician-with-advanced-trauma-life-support training-shall-respond-to-each-trauma-code.~~

2. Hospitals applying for level I, level II, or level III designation shall present evidence of having current trauma center verification from the American college of surgeons. The department shall issue designation with an expiration date consistent with the American college of surgeons verification expiration date.

3. Hospitals applying for level IV and V trauma center designation must submit an application to the department. Once the application is approved by the department, an onsite verification visit shall be conducted by the department or its designee. The verification team shall compile a report. The application and report will be reviewed by the state trauma committee. If approved, the department shall issue the designation to the facility.

4. Hospitals without trauma center designation applying for a provisional designation must submit an application to the department. Once the application is approved by the department an onsite visit shall be conducted by a team designated by the state trauma committee. The team shall compile a report. The application and report will be reviewed by the state trauma committee. If approved, the department shall issue a provisional designation for a maximum of twenty-four months. During these twenty-four months the facility must complete an American college of surgeons verification visit.

5. The health council, in establishing a comprehensive trauma system, may designate an out-of-state hospital within fifty miles of any border of this state.

History: Effective July 1, 1997; amended effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

33-38-01-08. State trauma registry. The department shall establish a trauma registry including the minimum data elements. All hospitals must report the minimum data elements to the department for patients who have an international classification of diseases, ninth revision (ICD-9) code of 800-959.9 and one of the following criteria:

1. Trauma deaths.

2. Hospital admission greater than forty-eight hours.

3. Patients admitted that go to the intensive care unit or operating room.

4. Patients transferred into or out of the hospital.

Reporting may occur electronically by downloading computer files or through completion of the North Dakota transfer form or other form approved by the department. Information may not be released from the state trauma registry except as permitted by North Dakota Century Code sections 23-01-15 and 23-01-02.1.

History: Effective July 1, 1997; amended effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

33-38-01-10. State trauma committee membership. The state trauma committee membership must include the following:

1. One member from the North Dakota committee on trauma - American college of surgeons, appointed by the committee.

2. One member from the American college of emergency physicians - North Dakota chapter, appointed by the chapter.

3. One member from the North Dakota health care association, appointed by the association.

4. One member from the North Dakota medical association, appointed by the association.

5. One member from the North Dakota EMS association - basic life support, appointed by the association.

6. One member from the North Dakota EMS association - advanced life support, appointed by the association.

7. One member from the North Dakota nurses association, appointed by the association.

8. One member on the faculty of the university of North Dakota school of medicine and health sciences, appointed by the dean of the medical school.

9. One member from the North Dakota emergency nurses association, appointed by the association.

10. One member from Indian health service, appointed by the Aberdeen area director of the service.

11. One member from accredited trauma rehabilitation facilities, appointed by the state health council.

12. One member who is a hospital trauma coordinator, appointed by the trauma coordinators committee.

13. The medical director of the division of emergency health services of the department.

14. The regional trauma committee chair from each region, if not representing an association.

15. Four additional members, appointed by the state health council.

History: Effective July 1, 1997; amended effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

33-38-01-11. Trauma regions - Regional trauma committee. The state trauma committee shall establish four trauma regions. The regions must be designated northwest, northeast, southeast, and southwest. An emergency medical service or trauma center that is located within fifteen miles [24.14 kilometers] of a regional boundary may request to function within another region. This request shall be reviewed and is subject to approval by the state trauma committee.

The state trauma committee shall appoint a regional trauma committee to serve each trauma region. The regional committees may consist of members representing the following:

1. North Dakota committee on trauma - American college of surgeons.

2. North Dakota chapter of American college of emergency physicians.

3. Physician of a level IV trauma center.

4. Level IV or V hospital representative.

5. Hospital trauma coordinator.

6. Accredited rehabilitation facility representative.

7. Indian health service or tribal government representative.

8. North Dakota EMS association.

9. Other members, chosen by the state trauma committee.

History: Effective July 1, 1997; amended effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

33-38-01-13. Level IV trauma center designation standards. The following standards must be met to achieve level IV designation:

1. Trauma team activation plan.

2. Trauma team leader must be a current advanced trauma life support certified physician, who is on call and available within twenty minutes and has experience in resuscitation and care of trauma patients.

3. Transfer agreements as the transferring facility to a level II trauma center for major trauma care, burn care, rehabilitation service for long-term care, acute spinal cord and head injury management, and pediatric trauma management.

4. Equipment for resuscitation and life support of all ages must include:

   a. Airway control and ventilation equipment, including laryngoscopes and endotracheal tubes of all sizes, including pediatrics, bag mask resuscitator, pocket masks, and oxygen.

   b. Pulse oximetry.

   c. End tidal CO_2 determination.

   d. Suction devices.

   e. Electrocardiograph, oscilloscope, and defibrillator.

   f. Standard intravenous fluids and administration devices, including large bore intravenous catheters.

   g. Sterile surgical sets for airway control, cricothyrotomy, vascular access, and chest decompression.

   h. Gastric decompression.

   i. Drugs necessary for emergency care.

   j. Communication with emergency medical services vehicles.

   k. Spinal stabilization equipment.

   l. Thermal control equipment for patients.

   m. Broselow tape.

5. Quality improvement programs, to include:

   a. Focused audit of selected filters.

b. Trauma registry in accordance with section 33-38-01-08.

c. Focused audit for all trauma deaths.

d. Morbidity and mortality review.

e. Medical nursing audit, utilization review, and tissue review.

6. Trauma transfer protocol to include:

a. Triage decision scheme.

b. Trauma transport plan.

History: Effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

33-38-01-14. Level V trauma designation standards. The following standards must be met to achieve level V designation:

1. Trauma team activation plan.

2. Trauma team leader must be on call and available within twenty minutes, who has experience in resuscitation and care of trauma patients. The trauma team leader must be one of the following:

a. A physician who is current in advanced trauma life support.

b. A physician assistant, whose supervising physician has delegated to the physician assistant the authority to provide care to trauma patients and who has taken the trauma nursing core course, and is current in advanced prehospital trauma life support and advanced trauma life support.

c. A nurse practitioner whose scope of practice entails the care of trauma patients, has taken the trauma nursing core course, is current in advanced prehospital trauma life support and advanced trauma life support, and whose scope of practice is approved by the North Dakota board of nursing.

3. Transfer agreements as the transferring facility to a level II trauma center for major trauma care, burn care, rehabilitation service for long-term care, acute spinal cord and head injury management, and pediatric trauma management.

4. Equipment for resuscitation and life support of all ages must include:

   a. Airway control and ventilation equipment, including laryngoscopes and endotracheal tubes of all sizes, including pediatrics, bag mask resuscitator, pocket masks, and oxygen.

   b. Pulse oximetry.

   c. End tidal CO_2 determination.

   d. Suction devices.

   e. Electrocardiograph, oscilloscope, and defibrillator.

   f. Standard intravenous fluids and administration devices, including large bore intravenous catheters.

   g. Sterile surgical sets for airway control, cricothyrotomy, vascular access, and chest decompression.

   h. Gastric decompression.

   i. Drugs necessary for emergency care.

   j. Communication with emergency medical services vehicles.

   k. Spinal stabilization equipment.

   l. Thermal control equipment for patients.

   m. Broselow tape.

5. Quality improvement programs to include:

   a. Focused audit of selected filters.

   b. Trauma registry in accordance with section 33-38-01-08.

   c. Focused audit for all trauma deaths.

   d. Morbidity and mortality review.

   e. Medical nursing audit, utilization review, and tissue review.

   f. Current advanced trauma life support certified physician review of all trauma codes managed by a physician assistant or advanced nurse practitioner within forty-eight hours. This may be either the consulting or transfer receiving physician.

6. Trauma transfer protocol to include:

a. Triage decision scheme.

b. Trauma transport plan.

c. Call schedule for physician, if available.

d. Immediate telephone contact with a level II trauma center.

History: Effective June 1, 2001.
General Authority: NDCC 23-01.2-01
Law Implemented: NDCC 23-01.2-01

JULY 2001

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. "Coal conversion facility" means any of the following:

   a. An electrical generating plant, and all additions thereto, which processes or converts coal from its natural form into electrical power and which has at least one single electrical energy generation unit with a generator nameplate capacity of twenty-five megawatts or more.

   b. A plant, and all additions thereto, which processes or converts coal from its natural form into a form

substantially different in chemical or physical properties, including coal gasification, coal liquefaction, and the manufacture of fertilizer and other products and which uses or is designed to use over five hundred thousand tons of coal per year.

c. A coal beneficiation plant, and all additions thereto, which improve the physical, environmental, or combustion qualities of coal and are built in conjunction with a facility defined in subdivision a or b.

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

8. "Department" means the North Dakota state department of health.

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

10. "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 alteration, rebuilding, or repair results in the emission of an additional or greater amount of air contaminants.

11. "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.

12. "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.

13. "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.

14. "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.

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

16. "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.

17. "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.

18. "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.

19. ~~"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.~~

~~20.~~ "Inhalable particulate matter" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers. ~~Also-known-as-PM_{10}.~~

~~21.~~ 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.

~~22.~~ 21. "Multiple chamber incinerator" means any article, machine, equipment, contrivance, structure, or part of a structure used to burn combustible refuse, consisting of 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.

~~23.~~ 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.

~~24.~~ 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.

~~25.~~ 24. "Opacity" means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

~~26.~~ 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.

~~27.~~ 26. "Particulate matter" means any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than one hundred micrometers.

~~28.~~ 27. "Particulate matter emissions" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air.

~~29.~~ 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.

~~30.~~ 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.

~~31.~~ 30. "Petroleum refinery" means an installation that is engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation

of petroleum, or through the redistillation, cracking, or reforming of unfinished petroleum derivatives.

~~32.~~ 31. "PM_{10}" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers.

~~33.~~ 32. "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.

~~34.~~ 33. "Premises" means any property, piece of land or real estate, or building.

~~35.~~ 34. "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.

~~36.~~ 35. "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.

~~37.--"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.~~

~~38.~~ 36. "Radioactive waste" means solid waste containing radioactive material and subject to the requirements of article 33-10.

~~39.~~ 37. "Refuse" means any municipal waste, trade waste, rubbish, or garbage, exclusive of industrial waste, special waste, radioactive waste, hazardous waste, and infectious waste.

~~40.~~ 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]).

~~41.~~ 39. "Salvage operation" means any operation conducted in whole or in part for the salvaging or reclaiming of any product or material.

~~42.~~ 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.

~~43.~~ 41. "Source" means any property, real or personal, or person contributing to air pollution.

~~44.~~ 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.

~~45.~~ 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.

~~46.~~ 44. "Stack or chimney" means any flue, conduit, or duct arranged to conduct emissions.

~~47.~~ 45. "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].

~~48.~~ 46. "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.

~~49.~~ 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.

~~50.~~ 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.

~~51.~~ 49. ~~"Volatile organic compounds" means any compound 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); 1,1,2-trichloro-1,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (HCFC-22); trifluoromethane (HFC-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); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; perchloroethylene (tetrachloroethylene); 3,3-dichloro-1,1,1,2,2-pentafluoropropane (HCFC-225ca); 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb); 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee); difluoromethane (HFC-32); ethylfluoride (HFC-161); 1,1,1,3,3,3-hexafluoropropane (HFC-236fa); 1,1,2,2,3-pentafluoropropane (HFC-245ca); 1,1,2,3,3-pentafluoropropane (HFC-245ea); 1,1,1,2,3-pentafluoropropane (HFC-245eb); 1,1,1,3,3-pentafluoropropane (HFC-245fa); 1,1,1,2,3,3-hexafluoropropane (HFC-236ea); 1,1,1,3,3-pentafluorobutane (HFC-365mfc); chlorofluoromethane (HCFC-31); 1-chloro-1-fluoroethane (HCFC-151a); 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane ($C_4F_9OCH_3$); 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane~~

~~$(CF_3)_2CFCF_2OCH_3$); 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane ($C_4F_9OC_2H_5$); 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OC_2H_5$);---methylacetate;----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.~~ "Volatile organic compounds" means the definition of volatile organic compounds in 40 Code of Federal Regulations 51.100(s) as it exists on August 1, 2000, which is incorporated by reference.

~~52.~~ 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; January 1, 1996; September 1, 1997; September 1, 1998; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-01-12. Measurement of emissions of air contaminants.

~~1. Sampling-and-testing-methods.--All-tests-shall-be-made-and-the results-calculated-in-accordance-with-test-procedures-approved~~

~~by--the--department.---All--tests--shall--be--made--under--the direction-of-persons-qualified-by-training--or--experience--in the--field--of--air--pollution--control--as--approved--by--the department.~~

~~2.--Responsible-persons-to-have-tests-made.~~ Sampling and testing. The department may reasonably require any person responsible for emission of air contaminants to make or have made tests, at a reasonable time or interval, to determine the emission of air contaminants from any source, ~~whenever-the-department-has reason-to-believe-that-an-emission-in-excess-of--that--allowed by--this--article--is--occurring.---The-department-may-specify testing--methods--to--be--used---in---accordance---with---good professional-practice.--The-department-may-observe-the-testing~~ for the purpose of determining whether the person is in violation of any standard under this article or to satisfy other requirements under the North Dakota Century Code chapter 23-25. All tests shall be made and the results calculated in accordance with test procedures approved or specified by the department. All tests shall be conducted by reputable, qualified personnel. The department shall be given a copy of the test results in writing and signed by the person responsible for the tests.

The owner or operator of a source shall notify the department using forms supplied by the department, or its equivalent, at least thirty calendar days in advance of any tests of emissions of air contaminants required by the department. Advanced notification for all other testing will be consistent with the requirements of the appropriate regulations but in no case will be less than thirty calendar days. If the owner or operator of a source is unable to conduct the performance test on the scheduled date, the owner or operator of a source shall notify the department as soon as practicable when conditions warrant and shall coordinate a new test date with the department.

Failure to give the proper notification may prevent the department from observing the test. If the department is unable to observe the test because of improper notification, the test results may be rejected.

~~3.~~ 2. **The department may make tests.** The department may conduct tests of emissions of air contaminants from any source. Upon request of the department, the person responsible for the source to be tested shall provide necessary holes in stacks or ducts and such other safe and proper sampling and testing facilities, exclusive of instruments and sensing devices as may be necessary for proper determination of the emission of air contaminants.

History: Amended effective June 1, 2001.
General Authority: NDCC 23-25-03, 23-25-04

Law Implemented: NDCC 23-25-03, 23-25-04

33-15-01-15. Prohibition of air pollution.

1. No person shall permit or cause air pollution, as defined in ~~subsection 3 of~~ section 33-15-01-04.

2. ~~No person shall permit or cause a public nuisance, as defined in subsection 35 of section 33-15-01-04.~~

3. ~~No person shall cause or permit the discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any person or to the public or which endanger the comfort, repose, health, or safety of any such person or the public or which cause injury or damage to business or property.~~

4. Nothing in any other part of this article concerning emission of air contaminants or any other regulation relating to air pollution shall in any manner be construed as authorizing or legalizing the creation or maintenance of air pollution, ~~a public nuisance, or a nuisance as described in subsection 3~~.

History: Amended effective June 1, 1990; September 1, 1997; June 1, 2001.
General Authority: NDCC 23-25-03, 23-25-04.1
Law Implemented: NDCC 23-25-03, 23-25-04.1

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

1.--Applicability.---This--section-is-applicable-to-any-infectious waste-incinerator-for-which-construction-was-commenced--before June-21,-1996.

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--June-21, 1996.

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.~~ Repealed effective July 12, 2000.

~~**History:** Effective-August-1,-1995;-amended-effective-September-1,-1998.~~
General Authority: ~~ND66-23-25-03~~
Law Implemented: ~~ND66-23-25-04,-23-25-04.1~~

33-15-05-04. Methods of measurement.

1. The reference methods in appendix A to chapter 33-15-12, its replacement or other methods, as approved by the department shall be used to determine compliance with sections 33-15-05-01, 33-15-05-02, and 33-15-05-03 as follows:

   a. Method 1 for selection of sampling site and sample traverses.

   b. Method 2 for determination of stack gas velocity and volumetric flow rate.

   c. Method 3 for gas analysis.

   d. Method 4 for determination of moisture in the stack gas.

   e. Method 5 for concentration of particulate matter and the associated moisture content. The sampling time for each

run shall be at least sixty minutes and the minimum sampling volume shall be thirty dry cubic feet at standard conditions [0.85 dry cubic meter at standard conditions] except that smaller sampling times or volumes when necessitated by process variables or other factors may be approved by the department.

(1) For each run using method 5 for fuel burning equipment, the emissions expressed in pounds per million British thermal units [nanograms per joule] shall be determined by the following procedures:

$$E = CF \frac{CF_d}{20.9 - \%O_2} \left(\frac{20.9}{\ } \right) \text{ or } E = CF_c \left(\frac{100}{\% CO_2} \right)$$

where:

(a) E = pollutant emission, lb/million Btu [ng/j].

(b) C = pollutant concentration, lb/dscf [ng/dscm].

(c) $\%O_2$ = oxygen content by volume, dry basis.

(d) $\%CO_2$ = carbon dioxide content by volume, dry basis.

The percent oxygen and percent carbon dioxide shall be determined by using the integrated or grab sampling and analysis procedures of method 3 by traversing the duct at the same sampling locations used for each run of method 5.

(e) F F_d and F_c = factors ~~listed in the following table:~~ as listed in method 19 of 40 CFR 60, appendix A.

~~F-FACTORS-FOR-VARIOUS-FUELS~~

~~FUEL TYPE~~	F ~~dscf/10^6 Btu~~	F_c ~~scf/10^6 Btu~~
~~Coal~~		
~~Anthracite~~	~~10140~~	~~1980~~
~~Bituminous~~	~~9820~~	~~1810~~
~~Lignite~~	~~9900~~	~~1920~~
~~Oil~~	~~9220~~	~~1430~~
~~Gas~~		
~~Natural~~	~~8740~~	~~1040~~
~~Propane~~	~~8740~~	~~1200~~
~~Butane~~	~~8740~~	~~1260~~
~~Wood~~	~~9280~~	~~1860~~
~~Wood-Bark~~	~~9640~~	~~1840~~

~~For--facilities-firing-combinations-of-fuels-for-F-or F_c factors--designated--in--this--section--shall--be prorated-in-accordance-with-the-applicable-formula-as follows:~~

$$F \text{ or } F_c = \sum_{i=1}^{n} x_i F_i \text{ or } F_c = \sum_{i=1}^{n} x_i (F_c)_i$$

~~where:~~

~~x_i =--the--fraction-of-total-heat-input-derived-from each-type-of-fuel;~~

~~F_i or-$(F_c)_i$ =-the-applicable-F-or-F_c factor-for-each fuel-type;~~

~~n--=-the-number-of-fuels-being-burned-in-combination;~~

(2) For each run using method 5 for industrial processes, the emission rate expressed in pounds per hour shall be determined by the equation, lb/hr = (Q_s) (c) where:

Q_s = volumetric flow rate of the total effluent in dscf/hr and

c = particulate concentration in lb/dscf.

2. The heat content of fuels shall be determined in accordance with A.S.T.M. methods D2015-66(72) (solid fuels), D240-64(73) (liquid fuels), or D1826-64(70) (gaseous fuels) as applicable.

3. The determination of particulate matter emissions with an aerodynamic diameter less than ten micrometers [PM_{10}] must be made in accordance with the methods established in 40 Code of Federal Regulations, part 51, appendix M as applicable.

History: Amended effective October 1, 1987; June 1, 1992; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

CHAPTER 33-15-12

33-15-12-01.1. Scope. Except as noted below the title of the subpart, the subparts and appendices of title 40, Code of Federal Regulations, part 60, as they exist on ~~November 1, 1997~~ August 1, 2000, which are listed under section 33-15-12-02 are incorporated into this chapter by reference. Any changes to the standards of performance are listed below the title of the standard.

History: Effective June 1, 1992; amended effective December 1, 1994; January 1, 1996; September 1, 1997; September 1, 1998; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-12-02. Standards of performance.

Subpart A - General provisions.

*60.2. 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.

Subpart C - Emission guidelines and compliance times.

Subpart Cc - Emissions guidelines and compliance times for municipal solid waste landfills.

Designated facilities to which this subpart applies shall comply with the requirements for state plan approval in 40 CFR parts 60.33c, 60.34c, and 60.35c, except that quarterly surface monitoring for methane under part 60.34c shall only be required during the second, third, and fourth quarters of the calendar year.

Designated facilities under this subpart shall:

1. Submit a final control plan for department review and approval within twelve months of the date of the United States environmental protection agency's approval of this rule, or within twelve months of becoming subject to this rule, whichever occurs later.

2. Award contracts for control systems/process modification within twenty-four months of the date of the United States environmental protection agency's approval of this rule,

or within twenty-four months of becoming subject to the rule, whichever occurs later.

3. Initiate onsite construction or installation of the air pollution control device or process changes within twenty-seven months of the date of the United States environmental protection agency's approval of this rule, or within twenty-seven months of becoming subject to the rule, whichever occurs later.

4. Complete onsite construction or installation of the air pollution control device or devices or process changes within twenty-nine months of the United States environmental protection agency's approval of this rule, or within twenty-nine months of becoming subject to the rule, whichever is later.

5. Conduct the initial performance test within one hundred eighty days of the installation of the collection and control equipment. A notice of intent to conduct the performance test must be submitted to the department at least thirty days prior to the test.

6. Be in final compliance within thirty months of the United States environmental protection agency's approval of this rule, or within thirty months of becoming subject to the rule, whichever is later.

Subpart Ce - Emission guidelines and compliance times for hospital/medical/infectious waste incinerators.

Except as noted below, ~~subpart Ce, as published in the federal register on September 15, 1997, is incorporated by reference.~~ ~~Designated~~ designated facilities to which this rule applies shall comply with the minimum requirements for state plan approval listed in subpart Ce.

*60.32e(i) The following is added:

Title V permit to operate applications shall be submitted by September 15, 1999.

*60.39e(a) is deleted in its entirety.

*60.39e(b) is deleted in its entirety and replaced with the following:

(b) Except as provided in paragraphs c and d of this section, designated facilities shall comply with all requirements of this subpart within one year of the United States environmental protection agency's approval of the state plan for hospital/medical/infectious waste incinerators regardless of whether a designated facility is identified

in the state plan. Owners or operators of designated facilities who will cease operation of their incinerator to comply with this rule shall notify the department of their intention within six months of state plan approval.

*60.39e(c) is deleted in its entirety and replaced with the following:

(c) Owners or operators of designated facilities planning to install the necessary air pollution control equipment to comply with the applicable requirements may petition the department for an extension of the compliance time of up to three years after the United States environmental protection agency's approval of the state plan, but not later than September 16, 2002, provided the facility owner or operator complies with the following:

1. Submits a petition to the department for site specific operating parameters under 40 CFR 60.56c(i) of subpart Ec within thirty months of approval of the state plan and sixty days prior to the performance test.

2. Provides proof to the department of a contract for obtaining services of an architectural or engineering firm or architectural and engineering firm regarding the air pollution control device within nine months of state plan approval.

3. Submits design drawings to the department of the air pollution control device within twelve months of state plan approval.

4. Submits to the department a copy of the purchase order or other documentation indicating an order has been placed for the major components of the air pollution control device within sixteen months after state plan approval.

5. Submits to the department the schedule for delivery of the major components of the air pollution control device within twenty months after state plan approval.

6. Begins initiation of site preparation for installation of the air pollution control device within twenty-two months after state plan approval.

7. Begins initiation of installation of the air pollution control device within twenty-five months after state plan approval.

8. Starts up the air pollution control device within twenty-eight months after state plan approval.

9. Notifies the department of the performance test thirty days prior to the test.

10. Conducts the performance test within one hundred eighty days of the installation of the air pollution control device.

11. Submits a performance test report which demonstrates compliance within thirty-six months of state plan approval.

*60.39e(d) is deleted in its entirety and replaced with the following:

1. Designated facilities petitioning for an extension of the compliance time in paragraph b of this section shall:

   i. Within six months after the United States environmental protection agency's approval of the state plan, submit documentation of the analyses undertaken to support the need for more than one year to comply, including an explanation of why up to three years after United States environmental protection agency approval of the state plan is sufficient to comply with this subpart while one year is not. The documentation shall also include an evaluation of the option to transport the waste offsite to a commercial medical waste treatment and disposal facility on a temporary or permanent basis; and

   ii. Documentation of measurable and enforceable incremental steps of progress to be taken toward compliance with this subpart.

2. The department shall review any petitions for the extension of compliance times within thirty days of receipt of a complete petition and make a decision regarding approval or denial. The department shall notify the petitioner in writing of its decision within forty-five days of the receipt of the petition. All extension approvals must include incremental steps of progress. For those sources planning on installing air pollution control equipment to comply with this subpart, the incremental steps of progress included in 40 CFR 60.39e(c) shall be included as conditions of approval of the extension.

3. Owners or operators of facilities which received an extension to the compliance time in this subpart shall be

in compliance with the applicable requirements on or before the date three years after United States environmental protection agency approval of the state plan but not later than September 16, 2002.

*60.39e(f) is deleted in its entirety.

After the compliance dates specified in this subpart, an owner or operator of a facility to which this subpart applies shall not operate any such unit in violation of this subpart.

Subpart D - Standards of performance for fossil-fuel fired steam generators for which construction is commenced after August 17, 1971.

Subpart Da - Standards of performance for electric utility steam generating units for which construction is commenced after September 18, 1978.

Subpart Db - Standards of performance for industrial-commercial-institutional steam generating units.

Subpart Dc - Standards of performance for small industrial-commercial-institutional steam generating units.

Subpart E - Standards of performance for incinerators.

Subpart Ea - Standards of performance for municipal waste combustors.

Subpart Ec - Standards of performance for hospital/medical/infectious waste incinerators for which construction is commenced after June 20, 1996.

~~The---subpart---as---published--in--the--federal--register--on September-15,-1997,-is-incorporated-by-reference.~~

Subpart F - Standards of performance for portland cement plants.

Subpart G - Standards of performance for nitric acid plants.

Subpart H - Standards of performance for sulfuric acid plants.

Subpart I - Standards of performance for asphalt concrete plants.

Subpart J - Standards of performance for petroleum refineries.

Subpart K - Standards of performance for storage vessels for petroleum liquids for which construction, reconstruction, or modification commenced after June 11, 1973, and prior to May 19, 1978.

*60.110(c) is deleted in its entirety and replaced with the following:

(c) Any facility under part 60.110(a) that commenced construction, reconstruction, or modification after July 1, 1970, and prior to May 19, 1978, is subject to the requirements of this subpart.

Subpart Ka - Standards of performance for storage vessels for petroleum liquids for which construction, reconstruction, or modification commenced after May 18, 1978, and prior to July 23, 1984.

Subpart Kb - Standards of performance for volatile organic liquid storage vessels (including petroleum liquid storage vessels) for which construction, reconstruction, or modification commenced after July 23, 1984.

Subpart L - Standards of performance for secondary lead smelters.

Subpart M - Standards of performance for secondary brass and bronze production plants.

Subpart N - Standards of performance for primary emissions from basic oxygen process furnaces for which construction is commenced after June 11, 1973.

Subpart Na - Standards of performance for secondary emissions from basic oxygen process steelmaking facilities for which construction is commenced after January 20, 1983.

Subpart O - Standards of performance for sewage treatment plants.

Subpart P - Standards of performance for primary copper smelters.

Subpart Q - Standards of performance for primary zinc smelters.

Subpart R - Standards of performance for primary lead smelters.

Subpart S - Standards of performance for primary aluminum reduction plants.

Subpart T - Standards of performance for the phosphate fertilizer industry: wet-process phosphoric acid plants.

Subpart U - Standards of performance for the phosphate fertilizer industry: superphosphoric acid plants.

Subpart V - Standards of performance for the phosphate fertilizer industry: diammonium phosphate plants.

Subpart W - Standards of performance for the phosphate fertilizer industry: triple superphosphate plants.

Subpart X - Standards of performance for the phosphate fertilizer industry: granular triple superphosphate storage facilities.

Subpart Y - Standards of performance for coal preparation plants.

Subpart Z - Standards of performance for ferroalloy production facilities.

Subpart AA - Standards of performance for steel plants: electric arc furnaces: constructed after October 21, 1974, and before August 17, 1983.

Subpart AAa - Standards of performance for steel plants: electric arc furnaces and argon-oxygen decarburization vessels constructed after August 17, 1983.

Subpart BB - Standards of performance for kraft pulp mills.

Subpart CC - Standards of performance for glass manufacturing plants.

Subpart DD - Standards of performance for grain elevators.

Subpart EE - Standards of performance for surface coatings of metal furniture.

Subpart FF - [Reserved]

Subpart GG - Standards of performance for stationary gas turbines.

Subpart HH - Standards of performance for lime manufacturing plants.

Subpart KK - Standards of performance for lead-acid battery manufacturing plants.

Subpart LL - Standards of performance for metallic mineral processing plants.

Subpart MM - Standards of performance for automobile and light-duty truck surface coating operations.

Subpart NN - Standards of performance for phosphate rock plants.

Subpart PP - Standards of performance for ammonium sulfate manufacture.

Subpart QQ - Standards of performance for the graphic arts industry: publication rotogravure printing.

Subpart RR - Standards of performance for pressure-sensitive tape and label surface coating operations.

Subpart SS - Standards of performance for industrial surface coating: large appliances.

Subpart TT - Standards of performance for metal coil surface coating.

Subpart UU - Standards of performance for asphalt processing and asphalt roofing manufacture.

Subpart VV - Standards of performance for equipment leaks of ~~VOCs~~ volatile organic compound (VOC) emissions in the synthetic organic chemicals manufacturing industry.

Subpart WW - Standards of performance for the beverage can surface coating industry.

Subpart XX - Standards of performance for bulk gasoline terminals.

Subpart AAA - Standards of performance for new residential wood heaters.

Subpart BBB - Standards of performance for the rubber tire manufacturing industry.

Subpart CCC - [Reserved]

Subpart DDD - Standards of performance for volatile organic compound (VOC) emissions for the polymer manufacturing industry.

Subpart EEE - [Reserved]

Subpart FFF - Standards of performance for flexible vinyl and urethane coating and printing.

Subpart GGG - Standards of performance for equipment leaks of ~~VOCs~~ volatile organic compound (VOC) emissions in petroleum refineries.

Subpart HHH - Standards of performance for synthetic fiber production facilities.

Subpart III - Standards of performance for volatile organic compound (VOC) emissions from the synthetic organic chemical manufacturing industry (SOCMI) air oxidation unit processes.

Subpart JJJ - Standards of performance for petroleum drycleaners.

Subpart KKK - Standards of performance for equipment leaks of ~~VOCs~~ volatile organic compound (VOC) emissions from onshore natural gas processing plants.

Subpart LLL - Standards of performance for onshore natural gas processing; SO_2 emissions.

Subpart NNN - Standards of performance for volatile organic compound (VOC) emissions from synthetic organic chemical manufacturing industry (SOCMI) distillation operations.

Subpart OOO - Standards of performance for nonmetallic mineral processing plants.

Subpart PPP - Standards of performance for wool fiberglass insulation manufacturing plants.

Subpart QQQ - Standards of performance for volatile organic compound (VOC) emissions from petroleum refinery wastewater systems.

Subpart RRR - Standards of performance for volatile organic compound (VOC) emissions from synthetic organic chemical manufacturing industry (SOCMI) reactor processes.

Subpart SSS - Standards of performance for magnetic tape coating facilities.

Subpart TTT - Standards of performance for industrial surface coating: surface coating of plastic parts for business machines.

Subpart UUU - Standards of performance for calciners and dryers in mineral industries.

Subpart VVV - Standards of performance for polymetric coating of supporting substrates facilities.

Subpart WWW - Standards of performance for municipal solid waste landfills.

Appendix A - Test methods.

Appendix B - Performance specifications.

Appendix C - Determination of emission rate changes.

Appendix D - Required emission inventory information.

Appendix E - [Reserved]

Appendix F - Quality assurance procedures.

Appendix I - Removable label and owner's manual.

History: Effective June 1, 1992; amended effective March 1, 1994; December 1, 1994; January 1, 1996; September 1, 1997; September 1, 1998; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

CHAPTER 33-15-15

33-15-15-01. General provisions.

1. **Definitions.** For the purposes of this chapter:

   a. "Actual emissions" means the actual rate of emissions of a contaminant from an emissions unit, as determined in accordance with paragraphs 1 through 4.

      (1) In general, actual emissions as of a particular date must equal the average rate, in tons per year, at which the unit actually emitted the contaminant during a two-year period which precedes the particular date and which is representative of normal source operation. The department may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions must be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

      (2) The department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

      (3) For any emissions unit (other than an electric utility steam generating unit specified in paragraph 4) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

      (4) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of five years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed ten years, may be required by the department if it determines such a period to be more representative of normal source postchange operations.

b. "Allowable emissions" means the emission rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to enforceable construction permit conditions which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(1) Applicable standards of performance or emission limitations as set forth in this article.

(2) The emission rate specified as an enforceable permit condition.

c. "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107 (d)(1)(D) or (E) of the Federal Clean Air Act [Pub. L. 95-95] in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than one ug/m^3 (annual average) of the contaminant for which the minor source baseline date is established. Any baseline area established originally for the total suspended particulate increments shall remain in effect and shall apply for purposes of determining the amount of available PM_{10} increments, except that such baseline area shall not remain in effect if the department rescinds the corresponding minor source baseline date in accordance with paragraph 4 of subdivision e. North Dakota is divided into two intrastate areas under section 107 (d)(1)(D) or (E) of the Federal Clean Air Act [Pub. L. 95-95]: the Cass County portion of Region No. 130, the Metropolitan Fargo-Moorhead Interstate Air Quality Control Region; and Region No. 172, the North Dakota Intrastate Air Quality Control Region (the remaining fifty-two counties).

d. (1) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each contaminant for which a minor source baseline date is established and includes:

(a) The actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in paragraph 2;

(b) The allowable emissions of major stationary sources which commenced construction before the major source baseline date but were not in operation by the applicable minor source baseline date.

(2) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increases:

(a) Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and

(b) Actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.

e. (1) "Major source baseline date" means:

(a) In the case of particulate matter and sulfur dioxide, January 6, 1975; and

(b) In the case of nitrogen dioxide, February 8, 1988.

(2) "Minor source baseline date" means the earliest date after the trigger date on which a major stationary source or a major modification subject to requirements of this chapter submits a complete application under the relevant regulations. The trigger date is:

(a) In the case of particulate matter and sulfur dioxide, August 7, 1977; and

(b) In the case of nitrogen dioxide, February 8, 1988.

(3) The baseline date is established for each contaminant for which increments or other equivalent measures have been established if:

(a) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107 (d)(1)(D) or (E) of the Federal Clean Air Act [Pub. L. 95-95] for the contaminant on the date of its complete application under this chapter; and

(b) In the case of a major stationary source, the contaminant would be emitted in significant amounts or, in the case of a major modification, there would be a significant net emissions increase of the contaminant.

(4) Any minor source baseline date established originally for the total suspended particulate increments shall

remain in effect and shall apply for purposes of determining the amount of available PM_{10} increments, except that the department may rescind any such minor source baseline date where it can be shown by the applicant, to the satisfaction of the department, that the emissions increase from the major stationary source, or the net emissions increase from the major modification, responsible for triggering that date did not result in a significant amount of PM_{10} emissions.

(5) The department shall provide a list of baseline dates for each contaminant for each baseline area.

f. "Begin actual construction" means, in general, initiation of physical onsite construction activities on an emissions unit which are of a permanent nature. Such activities include installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those onsite activities, other than preparatory activities, which mark the initiation of the change.

g. "Best available control technology" means an emission limitation (including a visible emission standard) based on the maximum degree of reduction for each contaminant subject to regulation under North Dakota Century Code chapter 23-25 which would be emitted from any proposed major stationary source or major modification which the department, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques including fuel cleaning or treatment or innovative fuel combustion techniques for control of such contaminant. In no event may application of "best available control technology" result in emissions of any contaminant which would exceed the emissions allowed by any applicable standards of performance under chapters 33-15-12 and 33-15-13. If the department determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emission standard infeasible, a design, equipment, work practice or operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard must, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice, or operation, and shall provide for compliance by means which achieve equivalent results.

h. "Clean coal technology" means any technology, including technologies applied at the precombustion, combustion, or postcombustion stage, at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam which was not in widespread use as of November 15, 1990.

i. "Clean coal technology demonstration project" means a project using funds appropriated under the heading "department of energy-clean coal technology", up to a total amount of two billion five hundred million dollars for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States environmental protection agency. The federal contribution for a qualifying project shall be at least twenty percent of the total cost of the demonstration project.

j. "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has obtained all necessary preconstruction permits and either has (1) begun, or caused to begin, a continuous program of actual onsite construction of the source, to be completed within a reasonable time; or (2) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the source to be completed within a reasonable time.

k. "Complete" means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the reviewing authority from requesting or accepting any additional information.

l. "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

m. "Electric utility steam generating unit" means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than twenty-five megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in

determining the electrical energy output capacity of the affected facility.

n. "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any air contaminant regulated under North Dakota Century Code chapter 23-25; or

o. "Enforceable" means all limitations and conditions which are enforceable by the department pursuant to this article and any applicable requirements within the North Dakota state implementation plan.

p. "Facility, building, structure, or installation" means all of the air contaminant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Air contaminant emitting activities shall be considered as part of the same industrial grouping if they belong to the same "major group" (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (United States government printing office stock numbers 4101-0066 and 003-005-00176-0, respectively).

q. "Federal land manager" means, with respect to any lands in the United States, the secretary of the department with authority over such lands.

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

s. "High terrain" means any area having an elevation nine hundred feet [271.32 meters] or more above the base of the stack of a source.

t. "Indian governing body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

u. "Indian reservation" means any federally recognized reservation established by treaty, agreement, executive order, or Act of Congress.

v. "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or

of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

w. "Low terrain" means any area other than high terrain.

x. "Major modification" means any physical change in, or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any air contaminant subject to regulation under North Dakota Century Code chapter 23-25.

(1) Any net emissions increase that is significant for volatile organic compounds must be considered significant for ozone.

(2) A physical change or change in the method of operation does not include:

(a) Routine maintenance, repair, and replacement.

(b) Use of an alternate fuel or raw material by reason of any order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act.

(c) Use of an alternate fuel or raw material by a stationary source which:

[1] The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any state enforceable permit condition which was established after January 6, 1975, pursuant to this chapter or under regulations approved pursuant to North Dakota Century Code chapter 23-25; or

[2] The source is approved to use under any permit issued under regulations approved pursuant to North Dakota Century Code chapter 23-25.

(d) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any enforceable permit condition which was established after January 6, 1975, pursuant to this chapter under regulations approved pursuant to North Dakota Century Code chapter 23-25.

(e) Any change in ownership of a stationary source.

(f) Use of an alternative fuel by reason of an order or rule under section 125 of the Federal Clean Air Act [Pub. L. 95-95].

(g) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste.

(h) The addition, replacement, or use of a pollution control project at an existing electric utility steam generating unit, unless the administrator of the United States environmental protection agency determines that such addition, replacement, or use renders the unit less environmentally beneficial, or except:

[1] When the administrator of the United States environmental protection agency has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emissions of any criteria pollutant over levels used for that source in the most recent air quality impact analysis in the area conducted, if any; and

[2] The administrator of the United States environmental protection agency determines that the increase will cause or contribute to a violation of any national ambient air quality standard or PSD increment, or visibility limitation.

(i) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

[1] The North Dakota state implementation plan; and

[2] Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(j) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant

emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis.

(k) The reactivation of a very clean coal-fired electric utility steam generating unit.

y. "Major stationary source" means:

(1) Any of the following stationary sources of air contaminants which emit, or have the potential to emit, one hundred tons [90718.17 kilograms] per year or more of any air contaminant regulated under North Dakota Century Code chapter 23-25: coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mills, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than two hundred fifty tons [226796.19 kilograms] of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers and fossil fuel-fired steam electric plants (or combinations thereof) of more than two hundred fifty million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, and charcoal production facilities.

(2) Notwithstanding the source sizes in paragraph 1, such term also includes any stationary source which emits, or has the potential to emit, two hundred fifty tons [226796.19 kilograms] per year or more of any air contaminant regulated under North Dakota Century Code chapter 23-25 or as outlined in paragraph 3.

(3) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph 1 as a major stationary source, if the changes would constitute a major stationary source by itself.

(4) A major source that is major for volatile organic compounds shall be considered major for ozone.

(5) The fugitive emissions of a stationary source may not be included in determining for any of the purposes of this subdivision whether it is a major stationary

source unless the source belongs to one of the categories of stationary sources in paragraph 1 and any other stationary source category which as of August 7, 1980, is being regulated under section 111 or 112 of the Federal Clean Air Act.

z. "Necessary preconstruction permits" means those permits required under this article.

aa. "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(1) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(2) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(a) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

[1] The date five years before construction on the particular change commences; and

[2] The date that the increase from the particular change occurs.

(b) An increase or decrease in actual emissions is creditable only if the department has not relied on it in issuing a permit for the source under this article, which permit is in effect when the increase in actual emissions from the particular change occurs.

(c) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or nitrogen oxides which occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available. With respect to particulate matter, only PM_{10} emissions can be used to evaluate the net emissions increase for PM_{10}.

(d) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(e) A decrease in actual emissions is creditable only to the extent that:

[1] The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

[2] It is enforceable at and after the time that actual construction on the particular change begins; and

[3] It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(f) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed one hundred eighty days.

bb. "Pollution control project" means any activity or project undertaken at an existing electric utility steam generating unit for purposes of reducing emissions from each unit. Such activities or projects are limited to:

(1) The installation of conventional or innovative pollution control technology, including advanced flue gas desulfurization, sorbent injection for sulfur dioxide and nitrogen oxides controls, and electrostatic precipitators.

(2) An activity or project to accommodate switching to a fuel which is less polluting than the fuel used prior to the activity or project, including natural gas or coal reburning, or the cofiring of natural gas and other fuels for the purpose of controlling emissions.

(3) A permanent clean coal technology demonstration project conducted under title II, section 101(d) of the Further Continuing Appropriations Act of 1985 (section 5903(d) of title 42 of the United States Code), or subsequent appropriations, up to a total amount of two billion five hundred million dollars for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States environmental protection agency.

(4) A permanent clean coal technology demonstration project that constitutes a repowering project.

cc. "Potential to emit" means the maximum capacity of a stationary source to emit an air contaminant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, must be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

dd. "Reactivation of a very clean coal-fired electric utility steam generating unit" means any physical change or change in the method of operation associated with the commencement of commercial operations by a coal-fired utility unit after a period of discontinued operation where the unit:

(1) Has not been in operation for the two-year period prior to the enactment of the Clean Air Act Amendments of 1990, and the emissions from such unit continue to be carried in the department's emissions inventory at the time of enactment.

(2) Was equipped prior to shutdown with a continuous system or emissions control that achieves a removal efficiency of sulfur dioxide of no less than eighty-five percent and a removal efficiency of particulates of no less than ninety-eight percent.

(3) Is equipped with low-nitrogen oxide burners prior to the time of commencement of operations following reactivation.

(4) Is otherwise in compliance with the requirements of the Clean Air Act.

ee. "Representative actual annual emissions" means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit (or a different consecutive two-year period within ten years after that change, where the department determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the department shall:

(1) Consider all relevant information, including historical operational data, the company's own

representations, filings with the state or federal regulatory authorities, and compliance plans under title IV of the Federal Clean Air Act.

(2) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

ff. "Repowering" means replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combination cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the administrator of the United States environmental protection agency, in consultation with the secretary of energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990.

(1) Repowering shall also include any unit fired by oil or gas, or both, which has been awarded clean coal technology demonstration funding as of January 1, 1991, by the department of energy.

(2) The administrator of the United States environmental protection agency shall give expedited consideration to permit applications for any source that satisfies the requirements of this subsection and is granted an extension under section 409 of the Federal Clean Air Act.

gg. "Secondary emissions" means emissions which occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general areas as the major stationary source or major modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which

would not otherwise be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source.

hh. "Significant" means:

(1) In reference to a net emissions increase or the potential of a source to emit any of the following air contaminants, a rate of emissions that would equal or exceed any of the following rates:

Air Contaminant and Emissions Rate

Carbon monoxide: 100 tons per year
Nitrogen oxides: 40 tons per year
Sulfur dioxide: 40 tons per year
Particulate matter: 25 tons per year of particulate matter emissions; 15 tons per year of PM_{10} emissions
Ozone: 40 tons per year of volatile organic compounds
Lead: 0.6 ton per year
~~Asbestos: 0.007 ton per year~~
~~Beryllium: 0.0004 ton per year~~
~~Mercury: 0.1 ton per year~~
~~Vinyl chloride: 1 ton per year~~
Fluorides: 3 tons per year
Sulfuric acid mist: 7 tons per year
Hydrogen sulfide (H_2S): 10 tons per year
Total reduced sulfur (including H_2S): 10 tons per year
Reduced sulfur compounds (including H_2S): 10 tons per year
Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2 10^{-6} megagrams per year (3.5 10^{-6} tons per year)
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tons per year)
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)
<u>Municipal solid waste landfill emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tons per year)</u>

(2) In reference to a net emissions increase or the potential of a source to emit an air contaminant subject to regulation under North Dakota Century Code chapter 23-25 that paragraph 1 does not list, any emissions rate.

(3) Notwithstanding paragraph 1, any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within ten kilometers [6.21 miles] of a class I area, and have an impact on such area equal to or greater than one ug/m3 (twenty-four-hour average).

ii. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air contaminant regulated under North Dakota Century Code chapter 23-25.

jj. "Total suspended particulate (TSP)" means particulate matter as measured by the method described in appendix B of 40 CFR 50.

2. **Significant deterioration of air quality - Area designation and deterioration increment.**

a. The provisions of this chapter apply to those counties or other functionally equivalent areas that are designated as attainment or unclassifiable for any of the national ambient air quality standards.

b. For purposes of this chapter, areas designated as class I, II, or III shall be limited to the following increases in contaminant concentration over the baseline concentration:

Area Designations

Pollutant	Class I ($\mu g/m^3$)	Class II ($\mu g/m^3$)	Class III ($\mu g/m^3$)
Particulate matter:			
PM_{10}, Annual arithmetic mean	4	17	34
PM_{10}, 24-hour maximum	8	30	60
Sulfur dioxide:			
Annual arithmetic mean	2	20	40
24-hour maximum	5	91	182
3-hour maximum	25	512	700
Nitrogen dioxide:			
Annual arithmetic mean	2.5	25	50

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any receptor site.

Any conflict between an applicable increment and an applicable ambient air quality standard shall be resolved in favor of the more stringent limitation and the source shall be limited to such more stringent limitation.

c. All of the following areas which were in existence on August 7, 1977, are hereby designated class I areas and may not be redesignated:

(1) The Theodore Roosevelt National Park - north and south units in Billings and McKenzie Counties, and the Theodore Roosevelt Elkhorn Ranch Site in Billings County.

(2) The Lostwood National Wilderness Area in Burke County.

All other areas of the state are hereby designated class II areas but may be redesignated as provided in this subsection.

d. The following areas may be redesignated only as class I or II:

(1) An area which as of August 7, 1977, exceeds ten thousand acres [4046.86 hectares] in size and is a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wildlife refuge, a national lakeshore, or seashore.

(2) A national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres [4046.86 hectares] in size.

e. Exclusions from increment consumption:

(1) The following concentrations shall be excluded in determining compliance with a maximum allowable increase in contaminant concentration:

(a) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both, by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the

emissions from such sources before the effective date of such order;

(b) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(c) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(d) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(e) Concentrations attributable to the temporary increase in emissions of sulfur dioxide, particulate matter, or nitrogen oxides from stationary sources which increases have been approved in advance by the department under an approved state implementation plan revision.

(2) No exclusion of such concentrations shall apply more than five years after the effective date of the order to which subparagraph a or b of paragraph 1 refers, whichever is applicable. If both such order and plan are applicable, no such exclusion applies more than five years after the later of such effective dates.

(3) For purposes of excluding concentrations pursuant to subparagraph e of paragraph 1:

(a) The time over which the temporary emissions increase of sulfur dioxide, particulate matter, or nitrogen oxides would occur must be specified. Such time may not exceed two years in duration unless a longer time is approved by the administrator of the United States environmental protection agency.

(b) The time period for excluding certain contributions in accordance with subparagraph a is not renewable.

(c) No emissions increase from a stationary source may:

[1] Impact a class I area or an area where an applicable increment is known to be violated; or

[2] Cause or contribute to the violation of any ambient air quality standards.

(d) The emission levels from the stationary sources effected at the end of the time period specified in accordance with subparagraph a may not exceed those levels occurring from such sources before the temporary increases in emissions were approved.

f. The class I area increment limitations of the Theodore Roosevelt Elkhorn Ranch Site of the Theodore Roosevelt National Park shall apply to sources or modifications for which complete applications were filed after July 1, 1982. The impact of emissions from sources or modifications for which permits under this chapter have been issued or complete applications have already been filed will be counted against the increments after July 1, 1982.

~~g.--Any--applicant--whose--emissions--will--consume--more-than one-half-of-the-available-increment-in-another--state--may not--be--granted-a-permit-in-accordance-with-this-chapter, unless-approved-by-the-department-after-consultation--with the-other-state.~~

3. **Stack heights.** The stack height for any source subject to this chapter must meet the requirements of chapter 33-15-18.

4. **Review of new major stationary sources and major modifications.**

a. Applicability. The requirements of this chapter shall apply to any major new stationary source or modification which:

(1) Had not been issued a permit to construct or modify prior to March 1, 1978;

(2) Had not commenced construction prior to March 19, 1979; or

(3) Has discontinued construction for a period of eighteen months or more and has not completed construction within a reasonable time.

Review of these sources or modifications must be conducted in conjunction with the issuance of permits to construct pursuant to section 33-15-14-02.

b. Permits - general.

(1) No source subject to this chapter may be constructed in any area unless:

(a) A permit has been issued for such proposed source in accordance with this chapter setting forth emission limitations or equipment standards for such source which conform to the requirements of this chapter and any conditions necessary to ensure that the proposed source will meet such limits or standards;

(b) The requirements of subdivisions c through k, as applicable, have been met; and

(c) The proposed permit has been subject to a review in accordance with this chapter, the required analysis has been conducted in accordance with the requirements of this chapter, and the procedures for public participation as defined in subsection 5 have been followed.

(2) Provided that all necessary requirements of this article have been met, permits will be issued on a first-come, first-served basis as determined by the completion date of the applications.

c. Control technology review.

(1) A major stationary source or major modification shall meet all applicable emission limitations under the state implementation plan and all applicable emission standards and standards of performance of this article.

(2) A new major stationary source shall apply best available control technology for each air contaminant subject to regulation under North Dakota Century Code chapter 23-25 that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each air contaminant subject to regulation under North Dakota Century Code chapter 23-25 for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the air contaminant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology must be reviewed and modified as appropriate at the latest reasonable time which occurs no later than eighteen months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

d. Exemptions from impact analysis.

(1) The requirements of subdivisions e, g, and i do not apply to a major stationary source or major modification with respect to a particular air contaminant, if the allowable emissions from the source, or the net emissions increase of that contaminant from the modification:

(a) Would impact no class I area and no area where an applicable increment is known to be violated; and

(b) Would be temporary.

(2) The requirements of subdivisions e, g, and i as they relate to any maximum allowable increase for a class II area do not apply to a major modification at a stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each air contaminant regulated under North Dakota Century Code chapter 23-25 from the modification after the application of best available control technology would be less than fifty tons [45359.24 kilograms] per year.

(3) The department may exempt a stationary source or modification from the requirements of subdivision g with respect to monitoring for a particular air contaminant if:

(a) The emissions increase of the air contaminant from the new source or the net emissions increase of the air contaminant from the modification would cause, in any area, air quality impacts less than the following amounts:

Carbon monoxide - 575 $\mu g/m^3$, 8-hour average
Nitrogen dioxide - 14 $\mu g/m^3$, annual average
Particulate matter - 10 $\mu g/m^3$ of PM_{10}, 24-hour average
Sulfur dioxide - 13 $\mu g/m^3$, 24-hour average
Ozone - No de minimus level
Lead - 0.1 $\mu g/m^3$, 3-month average
Mercury - 0.25 $\mu g/m^3$, 24-hour average
Beryllium - 0.001 $\mu g/m^3$, 24-hour average
Fluorides - 0.25 $\mu g/m^3$, 24-hour average
Vinyl chloride - 15 $\mu g/m^3$, 24-hour average
Total reduced sulfur - 10 $\mu g/m^3$, 1-hour average
Hydrogen sulfide - 0.2 $\mu g/m^3$, 1-hour average
Reduced sulfur compounds - 10 $\mu g/m^3$, 1-hour average; or

(b) The concentrations of the air contaminant in the area that the source or modification would affect are less than the concentrations listed in subparagraph a or the air contaminant is not listed in subparagraph a.

(4) The requirements for best available control technology in subdivision c and the requirements for air quality analyses in paragraph 1 of subdivision g do not apply to a particular stationary source or modification that was subject to this chapter if the owner or operator of the source or modification submitted an application for a permit before May 7, 1981, and the department subsequently determines the application as submitted before that date was complete. Instead, the requirements of subdivisions c and h as in effect prior to May 7, 1981, apply to any such source or modification.

(5) The requirements for air quality monitoring in subparagraphs b, c, and d of paragraph 1 of subdivision g do not apply to:

(a) A particular source or modification that was subject to this chapter as in effect prior to May 7, 1981, if the owner or operator of the source or modification submitted an application for a permit under this chapter on or before June 8, 1981, and the department subsequently determined that the application as submitted before that date was complete with respect to the requirements of this chapter other than those in subparagraphs b, c, and d of paragraph 1 of subdivision g and with respect to the requirements for such analyses in

paragraph 2 of subdivision g as in effect prior to May 7, 1981. Instead, the requirements of this chapter prior to May 7, 1981, shall apply to any source or modification.

(b) A particular source or modification that was not subject to this chapter as in effect prior to May 7, 1981, if the owner or operator of the source or modification submitted an application for a permit under this chapter on or before June 8, 1981, and the department subsequently determined that the application as submitted before that date was complete, except with respect to the requirements in subparagraphs b, c, and d of paragraph 1 of subdivision g.

(6) The requirements of subdivisions c, e, f, g, h, i, and j and subsections 5 and 6 in their entirety do not apply to a particular major stationary source or major modification, if:

(a) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the stationary sources of air contaminants listed in subdivision u of subsection 1 and any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Federal Clean Air Act [Pub. L. 95-95].

(b) The source is a portable stationary source which has previously received a permit under this chapter and:

[1] The owner or operator proposes to relocate the source and emissions of the source at the new location would be temporary.

[2] The emissions from the source would not exceed its allowable emissions.

[3] The emissions from the source would impact no class I area and no area where an applicable increment is known to be violated.

[4] Reasonable notice is given to the department prior to the relocation identifying the proposed new location and

the probable duration of operation at the new location. Such notice shall be given to the department not less than ten days in advance of the proposed relocation unless a different time duration is previously approved by the department.

(c) With respect to a particular air contaminant, the owner or operator demonstrates that the source or modification is located in an area designated as nonattainment by the administrator of the United States environmental protection agency, as to that air contaminant, under this article.

(d) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor requests that it be exempt from such requirements.

e. Source impact analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions) from any other sources, will not cause or contribute to air pollution in violation of:

(1) Any ambient air quality standard in any area; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

f. Air quality models.

(1) All estimates of ambient concentrations required under this section must be based on the applicable air quality models, data bases, and other requirements specified in the "Guidelines on Air Quality Models" (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.

(2) Where an air quality impact model specified in the documents incorporated by reference in paragraph 1 is inappropriate, the model may be modified or another model substituted provided:

(a) Any modified or nonguideline model must be subjected to notice and opportunity for public comment under subsection 5.

(b) The applicant must provide to the department adequate information to evaluate the applicability of the modified or nonguideline model. Such information must include methods like those outlined in the "Workbook for the Comparison of Air Quality Models" (United States environmental protection agency, office of air quality planning and standards, Research Triangle Park, North Carolina 27711).

(c) Written approval from the department must be obtained for any modification or substitution prior to an application being designated complete by the department.

(d) 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.

g. Air quality analysis.

(1) Preapplication analysis.

(a) Any application for a permit under this section must contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following air contaminants:

[1] For the source, each air contaminant that it would have the potential to emit in a significant amount;

[2] For the modification, each air contaminant for which it would result in a significant net emissions increase.

(b) With respect to any such air contaminant for which no ambient air quality standard exists, the analysis must contain such air quality monitoring data as the department determines is necessary to assess ambient air quality for that air contaminant in any area that the emissions of that air contaminant would affect.

(c) With respect to any such air contaminant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis must contain

continuous air quality monitoring data gathered for purposes of determining whether emissions of that air contaminant would cause or contribute to a violation of the standard or any maximum allowable increase.

(d) In general, the continuous air quality monitoring data that are required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application except that if the department determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that are required shall have been gathered over at least that shorter period.

(e) For any application which becomes complete, except as to the requirements of subparagraphs c and d, between June 8, 1981, and February 9, 1982, the data that subparagraph c requires shall have been gathered over at least the period from February 9, 1981, to the date the application becomes otherwise complete, except that:

[1] If the source or modification would have been major for that air contaminant under this chapter as in effect prior to May 7, 1981, any monitoring data shall have been gathered over at least the period required by those rules.

[2] If the department determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than four months), the data that subparagraph c requires shall have been gathered over at least that shorter period.

[3] If the monitoring data would relate exclusively to ozone and would not have been required under this chapter as in effect prior to May 7, 1981, the department may waive the otherwise applicable requirements of this subparagraph to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

(f) The owner or operator of a proposed stationary source or modification of volatile organic compounds who satisfies all conditions of 40 CFR, part 51, appendix S, section IV may provide postapproved monitoring data for ozone in lieu of providing preconstruction data as required under paragraph 1.

(2) Postconstruction monitoring. The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the department determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(3) Operations of monitoring stations. The owner or operator of a major stationary source or major modification shall meet the requirements of 40 CFR, part 58, appendix B during the operation of monitoring stations for purposes of satisfying subdivision g.

h. Source information. The owner or operator of a proposed major stationary source or major modification shall submit all information necessary to perform any analysis to make any determination required under this article. Such information must include:

(1) A description of the nature, location, design capacity, and typical operating schedule of the proposed source or modification, including specifications and drawings showing the design and plant layout.

(2) A detailed schedule for construction of the source or modification.

(3) A detailed description as to what system of continuous emission reduction is planned by the source or modification, emission estimates, and any other information necessary to determine that best available control technology as specified in the "North Dakota Guidelines for Determining Best Available Control Technology" (North Dakota state department of health ~~and--consolidated--laboratories~~, division of environmental engineering). This document is incorporated by reference.

(4) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate such impact.

(5) Information on the air quality impacts and the nature and extent of general commercial, residential, industrial, and other growth which has occurred since the baseline date in the area the source or modification would affect.

i. Additional impact analyses.

(1) The owner or operator shall provide an analysis of the impairment to visibility, (in accordance with chapter 33-15-19) soils and vegetation, and wildlife that would occur as a result of the source or modification and general commercial, residential, industrial, and other growth associated with the source or modification. The owner or operator need not provide an analysis on vegetation or wildlife having no significant commercial or recreational value except for endangered and threatened species as identified by the United States fish and wildlife service.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of the general commercial, residential, industrial, and other growth associated with the source or modification.

j. Sources impacting federal class I areas - additional requirements.

(1) Notice to the United States environmental protection agency. The department shall transmit to the administrator of the United States environmental protection agency region VIII regional administrator a copy of each permit application relating to a major stationary source or major modification received by the department and provide notice to the administrator of every action related to the consideration of such permit.

(2) Notice to federal land managers. The department shall provide written notice of any permit application for a proposed major stationary source or major modification, the emissions from which may affect a class I area, to the federal land manager and the federal official charged with direct responsibility for management of any lands within any such area. Such notification must include a copy of all information relevant to the permit application and must be given within thirty days of receipt and at least sixty days prior to any public hearing on the application for a permit to construct. Such notification must include an analysis of the proposed

source's anticipated impacts on visibility in the federal class I area. The department shall also provide the federal land manager and such federal officials with a copy of the preliminary determination required under subsection 5 and shall make available to them any materials used in making that determination, promptly after the department makes such determination. Finally, the department shall also notify all affected federal land managers within thirty days of receipt of any advance notification of any such permit application.

(3) Denial -- impact on air quality-related values. A federal land manager may present to the department, after reviewing the department's preliminary determination required under subsection 5, a demonstration that the emission from an applicable source will have an adverse impact on the air quality-related values (including visibility) of federal mandatory class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area. If the department concurs with such demonstration, the permit may not be issued.

(4) Class I variances.

(a) The owner or operator of a proposed source may demonstrate to the federal land manager that the emissions from such source or modification will have no adverse impact on the air quality-related values of any such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification will cause or contribute to concentrations which exceed the maximum allowable increases for a class I area. If the federal land manager concurs with such demonstration and the manager so certifies to the department, the department may issue the permit pursuant to the requirements of subparagraph b; provided, that the applicable requirements of this chapter are otherwise met.

(b) In the case of a permit issued pursuant to subparagraph a, such source or modification shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides will not exceed the following maximum allowable increases over the

minor source baseline concentration for such contaminants:

	Maximum allowable increase (micrograms per cubic meter)
Particulate matter:	
PM_{10}, Annual arithmetic mean	17
PM_{10}, 24-hour maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hour maximum	91
3-hour maximum	325
Nitrogen dioxide:	
Annual arithmetic mean	25

(5) Sulfur dioxide variance by governor with federal land manager's concurrence. The owner or operator of a proposed source or modification which cannot be approved under paragraph 4 may demonstrate to the governor, that the source or modification cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of federal mandatory class I areas, that a variance under this clause would not adversely affect the air quality-related values of the area (, including visibility). The governor, after consideration of the federal land manager's recommendation (, if any) and subject to the federal land manager's concurrence, may, after notice and public hearing, grant a variance from such maximum allowable increase. If such variance is granted, the department shall issue a permit to such source or modification pursuant to the requirements of paragraph 7; provided, that the applicable requirements of this chapter are otherwise met.

(6) Variance by the governor with the president's concurrence. In any case where the governor recommends a variance under this subdivision in which the federal land manager does not concur, the recommendations of the governor and the federal land manager must be transmitted to the president. The president may approve the governor's recommendation if the president finds that such variance is in the national interest. If such a variance is approved, the department shall issue a permit pursuant to the requirements of paragraph 7; provided, that the applicable requirements of this chapter are otherwise met.

(7) Emission limitations for presidential or gubernatorial variances. In the case of a permit issued pursuant to paragraph 5 or 6, the source or modification shall comply with emission limitations under such permit as may be necessary to assure that emissions of sulfur dioxide from such source or modification ~~will not (~~, during any day on which the otherwise applicable maximum allowable increases are exceeded~~)~~, will not cause or contribute to concentrations which exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions will not cause or otherwise contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of twenty-four hours or less for more than eighteen days, not necessarily consecutive, during any annual period:

Maximum allowable increase
(micrograms per cubic meter)

Period of exposure	Low terrain areas	High terrain areas
24-hour maximum	36	62
3-hour maximum	130	221

k. Proposed redesignations. Where an owner or operator applies for permission to construct pursuant to this chapter and the proposed source or modification would impact on an area which has previously been proposed for redesignation to a more stringent class by the department, an Indian governing body, or another state ~~(~~, or the state or Indian governing body has announced such consideration~~)~~, approval may not be granted until the proposed redesignation has been acted upon. However, approval must be granted if, in the department's judgment, the proposed source would not violate the increments that would be applicable if the redesignation is approved. The department shall withhold approval under this subdivision only so long as another state or Indian governing body is actively and expeditiously proceeding toward redesignation.

Where an owner or operator has applied for permission to construct pursuant to this chapter and whose application has been deemed complete by the department prior to the public announcement of a proposed redesignation of an area to a more stringent class and where such facility would impact on the area proposed for redesignation, the application shall be processed considering the

classification of the area which existed at the time the application was deemed complete.

5. **Public participation.**

a. Within thirty days after receipt of an application to construct a source or modification subject to this chapter, or any addition to such application, the department shall advise the applicant as to the completeness of the application or of any deficiency in the application or information submitted. In the event of such a deficiency, the date of receipt of the application, for the purpose of this chapter, shall be the date on which all required information to form a complete application is received by the department.

b. Within one year after receipt of a completed application, the department shall:

(1) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved pursuant to the requirements of this chapter.

(2) Make available in at least one location in each region in which the proposed source or modification would be constructed, a copy of all materials submitted by the applicant, a copy of the department's preliminary determination, and a copy or summary of other materials, if any, considered by the department in making a preliminary determination.

(3) Notify the public, by prominent advertisement in newspapers of general circulation in each region in which the proposed source or modification would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and the opportunity for comment at a public hearing as well as written public comment on the information submitted by the owner or operator and the department's preliminary determination on the approvability of the source.

(4) Send a copy of the notice required in paragraph 3 to the applicant, the United States environmental protection agency administrator, and to officials and agencies having cognizance over the locations where the source or modification will be situated as follows: local air pollution control agencies, the chief executive of the city and county where the source or modification would be located; any comprehensive regional land use planning agency; and

any state, federal land manager, or Indian governing body whose lands may be significantly affected by emissions from the source or modification.

(5) Hold a public hearing whenever, on the basis of written requests, a significant degree of public interest exists or at its discretion when issues involved in the permit decision need to be clarified. A public hearing would be held during the public comment period for interested persons {, } including representatives of the United States environmental protection agency administrator}, to appear and submit written or oral comments on the air quality impact of the source or modification, alternatives to the source or modification, the control technology required, and other appropriate considerations.

(6) Consider all public comments submitted in writing within a time specified in the public notice required in paragraph 3 and all comments received at any public hearing conducted pursuant to paragraph 5 in making its final decision on the approvability of the application. No later than ten days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The department shall consider the applicant's response in making its final decision. All comments must be made available for public inspection in the same locations where the department made available preconstruction information relating to the source or modification.

(7) Make a final determination whether the source should be approved, approved with conditions, or disapproved pursuant to the requirements of this chapter.

(8) Notify the applicant in writing of the department's final determination. The notification must be made available for public inspection in the same locations where the department made available preconstruction information and public comments relating to the source or modification.

6. **Source obligation.**

a. Any owner or operator who constructs or operates a stationary source or modification not in accordance with the application, submitted pursuant to subsection 4 or with the terms of any permit to construct; or any owner or operator of a stationary source or modification subject to this chapter who commences construction after the effective date of this chapter without applying for and receiving a permit to construct hereunder, shall be

subject to enforcement action under North Dakota Century Code section 23-25-10.

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.

c. A permit to construct does not relieve any owner or operator of the responsibility to comply fully with the applicable provisions of the state implementation plan and any other requirements under local, state, or federal law.

d. At such time that a particular source or modification becomes a major stationary source or modification solely by virtue of a relaxation in any enforceable limit which was established after May 7, 1980, on the capacity of the source or modification otherwise to emit an air contaminant, such as a restriction on hours of operation, then the requirements of subdivisions c, e, f, g, h, i, and j and the requirements of subsections 5, 6, and 7 shall apply to the source or modification as though construction had not yet commenced on the source or modification.

7. **Innovative control technology.**

a. An owner or operator of a proposed major stationary source or major modification may request the department in writing to approve a system of innovative control technology.

b. The department shall, with the consent of the governors of all affected states, determine that the source or modification may employ a system of innovative control technology, if:

(1) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(2) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph 2 of subdivision c of subsection 4 by a date specified by the department. Such date may not be later than four years from the time of startup or seven years from permit issuance.

(3) The source or modification would meet the requirements of subdivisions c and e of subsection 4 based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the department.

(4) The source or modification would not before the date specified by the department:

(a) Cause or contribute to a violation of an applicable ambient air quality standard; or

(b) Impact any area where an applicable increment is known to be violated.

(5) The provisions of subdivision j of subsection 4 ~~{~~, relating to class I areas~~}~~, have been satisfied with respect to all periods during the life of the source or modification.

(6) All other applicable requirements including those for public participation have been met.

c. The department shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(1) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate;

(2) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(3) The department decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

d. If a source or modification fails to meet the required level of continuous emission reduction within the specified time period or the approval is withdrawn in accordance with subdivision c, the department may allow

the source or modification up to an additional three years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

History: Amended effective July 1, 1982; October 1, 1987; January 1, 1989; June 1, 1990; June 1, 1992; March 1, 1994; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03, 23-25-04.1

CHAPTER 33-15-16

33-15-16-01. General provisions.

1. An odor will be considered objectionable when a department-certified inspector or at least thirty percent of a randomly selected group of persons, or an odor panel exposed to the odor would deem that odor objectionable if the odor were present in their place of residence.

2. An "odor concentration unit" ~~means--the--maximum-number-of standard-units-of-odor-free-air-diluting-a--standard--unit--of odorous--air--so--that--a-department-certified-inspector-or-at least-fifty-percent-of-an-odor-panel--can--still--detect--that objectionable--odor--in--the--diluted--mixture~~ is defined as a volume of odor-free air mixed with an equal volume of odorous air such that the combination would be at the threshold level of the olfactory senses. The intensity of an odor is determined by the ratio of the volume of odor-free air that must be mixed with a standard volume of odorous air so that a department-certified inspector or at least fifty percent of an odor panel can still detect the odor in the diluted mixture.

3. A department-certified inspector is any person designated by the department who has successfully completed a department-sponsored odor certification course and demonstrated the ability to distinguish various odorous samples and concentrations. In the case of hydrogen sulfide (H_2S) complaints, the inspector will be competent with the hydrogen sulfide (H_2S) detection equipment being used.

4. An odor panel, if used, must consist of a minimum of five persons who have successfully completed a department-sponsored odor certification course and demonstrated the ability to distinguish various odorous samples and concentrations.

5. Odor emissions in excess of the limits stated in section 33-15-16-02 or 33-15-16-02.1, or both, will be addressed on a complaint basis.

History: Amended effective October 1, 1987; June 1, 1990; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-16-02. Emissions of odorous substances restricted. ~~No person-may-discharge-into-the-ambient-air-any-objectionable-odorous--air contaminant--which--is-in-excess-of-two-odor-concentration-units-outside the-property-boundary.~~

1. In areas located within a city or the area over which a city has exercised extraterritorial zoning as defined in North Dakota Century Code section 40-47-01.1, a person may not discharge into the ambient air any objectionable odorous air contaminant that measures seven odor concentration units or higher outside the property boundary where the discharge is occurring.

2. In areas located outside a city or outside the area over which a city has exercised extraterritorial zoning as defined in North Dakota Century Code section 40-47-01.1, a person may not discharge into the ambient air any objectionable odorous air contaminant that causes odors that measure seven odor concentration units or higher as measured at any of the following locations:

   a. Within one hundred feet [30.48 meters] of any residence, church, school, business, or public building, or within a campground or public park. An odor measurement may not be taken at the residence of the owner or operator of the source of the odor, or at any residence, church, school, business, or public building, or within a campground or public park, that is built or established within one-half mile [.80 kilometer] of the source of the odor after the source of the odor has been built or established; or

   b. At any point located beyond one-half mile [.80 kilometer] from the source of the odor, except for property owned by the owner or operator of the source of the odor, or over which the owner or operator of the source of the odor has purchased an odor easement.

3. A person is exempt from this section while spreading or applying animal manure or other recycled agricultural material to land in accordance with a nutrient management plan approved by the department. A person is exempt from this section while spreading or applying animal manure or other recycled agricultural material to land owned or leased by that person in accordance with rules adopted by the department including articles 33-16 and 33-20. An owner or operator of a lagoon or waste storage pond permitted by the department is exempt from this section in the spring from the time when the cover of the permitted lagoon or pond begins to melt until fourteen days after all the ice cover on the lagoon or pond has completely melted. Notwithstanding these exemptions, all persons shall manage their property and systems to minimize the impact of odors on their neighbors.

4. This section does not apply to chemical compounds that can be individually measured by instruments, other than a scentometer, that have been designed and proven to measure the individual chemical or chemical compound, such as hydrogen sulfide, to a reasonable degree of scientific certainty, and

for which the department has established a specific limitation by rule.

5. For purposes of this section, a public park is a park established by the federal government, the state, or a political subdivision of the state in the manner prescribed by law. For purposes of this section, a campground is a public or private area of land used exclusively for camping and open to the public for a fee on a regular or seasonal basis.

History: Amended effective June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-16-04. Method of measurement. ~~A---Barnebey-Cheney Scentometer--properly--maintained,--or--other--instrumental--method---as approved--by--the--department,--must-be-used-in-the-determination-of-the intensity-of-an-odor.~~ An odor measurement may be taken only with a properly maintained scentometer, by an odor panel, or by another instrument or method approved by the state department of health, and only by inspectors certified by the department who have successfully completed a department-sponsored odor certification course and demonstrated the ability to distinguish various odor samples and concentrations. In the case of hydrogen sulfide (H_2S) emissions, an ambient air analyzer designed for monitoring hydrogen sulfide (H_2S) must be the method used for determining the concentrations of emissions at the point of measurement, or other instrumental methods as approved by the department.

History: Amended effective October 1, 1987; June 1, 1990; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-16-05. Method of selection and training. ~~Selection-and training-of-the-department-certified-inspectors-or--odor--panel--members must---follow---the---"North--Dakota--state--department--of--health--and consolidated-laboratories-odor-certification--guideline"--(North--Dakota state--department--of--health-and-consolidated-laboratories,-division-of environmental-engineering).~~ Repealed effective June 1, 2001.

History: ~~Effective-October-1,-1987;-amended-effective-June-1,-1990.~~
General Authority: ~~NDCC-23-25-03~~
Law Implemented: ~~NDCC-23-25-03~~

CHAPTER 33-15-17

33-15-17-01. General provisions - Applicability and designation of affected facilities.

1. The provisions of this chapter apply to the owner or operator of any source of fugitive emissions whatsoever.

2. No person shall cause or permit fugitive emissions from any source whatsoever, including a building, its appurtenances, or a road, to be used, constructed, altered, repaired, or demolished; or activities such as loading, unloading, storing, handling, or transporting of materials without taking reasonable precautions to prevent such emissions ~~which:---may cause--injury,-detriment,-nuisance,-or-annoyance-to-any-person or-to-the-public--or--which--endangers--the--comfort,--repose, health,-or-safety-of-any-such-person-or-public-or-which-causes injury-or-damage-to-business--or--property~~ from causing air pollution as defined in section 33-15-01-04.

History: Amended effective January 1, 1996; June 1, 2001.
General Authority: NDCC 23-25-03, 28-32-02
Law Implemented: NDCC 23-25-03

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 ~~November 1, 1997~~ August 1, 2000, which are listed in section 33-15-22-03 are incorporated into this chapter by reference. Any changes to an emissions standard are listed below the title of the standard.

History: Effective December 1, 1994; amended effective August 1, 1995; January 1, 1996; September 1, 1997; April 1, 1998; September 1, 1998; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-22-03. Emissions standards.

Subpart A - General provisions.

Subpart B - Requirements for control technology determinations for major sources in accordance with Federal Clean Air Act sections 112(g) and 112(j).

*Sections 63.42(a) and 63.42(b) are deleted in their entirety.

Subpart C - List of hazardous air pollutants, petitions process, lesser quantity designations, and source category list.

Subpart D - Regulations governing compliance extensions for early reductions of hazardous air pollutants.

Subpart F - National emissions standards for organic hazardous air pollutants from the synthetic organic chemical manufacturing industry.

Subpart G - National emissions standards for organic hazardous air pollutants from synthetic organic chemical manufacturing industry for process vents, storage vessels, transfer operations, and wastewater.

Subpart H - National emissions standards for organic hazardous air pollutants for equipment leaks.

Subpart I - National emissions standards for organic hazardous air pollutants for certain processes subject to the negotiated regulation for equipment leaks.

Subpart M - National perchloroethylene air emissions standards for drycleaning facilities.

Subpart N - National emissions standards for chromium emissions from hard and decorative chromium electroplating and chromium anodizing tanks.

Subpart O - Ethylene oxide emissions standards for sterilization facilities.

Subpart Q - National emissions standards for hazardous air pollutants for industrial process cooling towers.

Subpart R - National emissions standards for gasoline distribution facilities (bulk gasoline terminals and pipeline breakout stations).

Subpart T - National emissions standards for halogenated solvent cleaning.

Appendix A to subpart T - Test of solvent cleaning procedures.

Appendix B to subpart T - General provisions applicability to subpart T.

Subpart W - National emissions standards for hazardous air pollutants for epoxy resins production and non-nylon polyamides production.

Table 1 to subpart W - General provisions applicability to subpart W.

Subpart X - National emissions standards for hazardous air pollutants from secondary lead smelting.

Subpart CC - National emissions standards for hazardous air pollutants from petroleum refineries.

Subpart EE - National emissions standards for magnetic tape manufacturing operations.

Subpart GG - National emissions standards for aerospace manufacturing and rework facilities.

Subpart HH - National emissions standards for hazardous air pollutants from oil and natural gas production facilities.

Subpart JJ - National emissions standards for wood furniture manufacturing operations.

Subpart KK - National emissions standards for the printing and publishing industry.

Table 1 to subpart KK - Applicability of general provisions to subpart KK.

Appendix A to subpart KK - Data quality objective and lower confidence limit approaches for alternative capture efficiency protocols and test methods.

Subpart OO - National emissions standards for tanks - Level 1.

Subpart PP - National emissions standards for containers.

Subpart QQ - National emissions standards for surface impoundments.

Subpart RR - National emissions standards for individual drain systems.

Subpart SS - National emissions standards for closed vent systems, control devices, recovery devices, and routing to a fuel gas system or a process.

Subpart TT - National emissions standards for equipment leaks - Control level 1.

Subpart UU - National emissions standards for equipment leaks - Control level 2 standards.

Subpart VV - National emissions standards for oil-water separators and organic water separators.

Subpart WW - National emissions standards for storage vessels (tanks) - Control level 2.

Subpart YY - National emissions standards for hazardous air pollutants for source categories: generic maximum achievable control technology standards.

Subpart RRR - National emissions standards for hazardous air pollutants for secondary aluminum production.

Subpart HHH - National emissions standards for hazardous air pollutants from natural gas transmission and storage facilities.

Appendix A to part 63 - Test methods.

Appendix B to part 63 - Sources defined for early reduction provisions.

Appendix C to part 63 - Determination of the fraction biodegraded (f_{bio}) in a biological treatment unit.

Appendix D to part 63 - Alternative validation procedure for environmental protection agency waste and wastewater methods.

Authority: 42 U.S.C. 7401 et seq.

History: Effective December 1, 1994; amended effective August 1, 1995; January 1, 1996; September 1, 1997; April 1, 1998; September 1, 1998; June 1, 2001.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

TITLE 48

Board of Animal Health

April 2001

STAFF COMMENT: Article 48-14 contains all new material and is not underscored so as to improve readability.

ARTICLE 48-14

FARMED ELK

CHAPTER 48-14-01
DEFINITIONS - GENERAL REQUIREMENTS

48-14-01-14 Intrastate Movement Restrictions to Protect Genetic Purity

48-14-01-01. Definitions. Unless otherwise defined, or made inappropriate by context, all words used in this article have the meanings given to them under North Dakota Century Code chapter 36-25. For purposes of this article:

1. "Herd" means two or more elk, or a herd of elk commingled with other hoof stock maintained on common ground, or two or more herds of elk and other hoof stock under common ownership or supervision that are geographically separated but can have an interchange or movement without regard to health status.

2. "Hybrid" means an animal produced by interbreeding species or subspecies.

3. "Importation permit" means authorization obtained from the board for the movement of animals into the state and within the state if needed.

4. "Person" means any individual, partnership, limited partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.

5. "Trace herd" means a herd in which an animal affected by chronic wasting disease has resided up to thirty-six months before its death, or any herd that has received animals from an affected herd within thirty-six months prior to the death of the affected animal.

6. "Zone 1" means that area bordered by a line that begins at the junction of the Montana border and Missouri River, runs east along the Missouri River to highway 49, south to highway 21, west to highway 22, to the Slope-Bowman County line, and west to Montana.

7. "Zone 2" means that area bordered by a line that begins at the Minnesota state line on highway 2 and runs west to Towner and north along the Souris River to the Canadian border.

8. "Zoo" means an organization with a class C exhibitor's permit, which follows United States department of agriculture regulations and is inspected by the United States department of agriculture - animal and plant health inspection service.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-01-02. Release or abandonment. A person may not release or abandon any farmed elk without prior written authorization from the state veterinarian.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-01-03. Escaped farmed elk.

1. The owner of farmed elk, or the owner's agent, must report an escape to the board within one business day of discovery.

2. The owner shall cause any farmed elk to be recaptured or destroyed within ten days of the animal escape except when public safety or the health of the domestic or wild population is at risk, in which case the animal may be disposed of immediately. The state veterinarian may grant a ten-day extension. The state veterinarian may authorize an agent to seize, capture, or destroy farmed elk that have escaped their possessor's control.

3. The owner, or the owner's agent, shall notify the board within one business day of the capture or death of an escaped animal.

4. The board or its designated agent may inspect any recaptured animal before it is returned to the elk farm.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-05

48-14-01-04. Identification.

1. Farmed elk must be individually identified as prescribed by the board. The form of identification must be permanent and unique to each animal. The permanent identification shall be a tattoo, microchip, or other approved form.

2. When loss of an animal identification is discovered, the animal must be identified with approved identification as soon as reasonably possible.

3. Identification assigned to an individual farmed elk may not be transferred to any other animal.

4. All newborn farmed elk must be individually identified prior to removal of the animal from the farmed elk premises or within twenty-four months of birth, whichever comes first.

History: Effective April 1, 2001.

General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-08

48-14-01-05. Fencing requirements.

1. A farmed elk owner shall comply with fencing standards that will assure containment. Conventional perimeter fences must be at least twelve and one-half gauge and must be at least seven feet [2.13 meters] high. The fence must be a mesh of a size to prevent escape. Any supplemental wires must be at least twelve and one-half gauge and spaced no more than six inches [152.40 millimeters] apart.

2. Electric fencing materials may be used on perimeter fences only as a supplement to conventional fencing materials.

3. All gates in the perimeter fence must be secured.

4. Posts must be of sufficient strength to keep farmed elk securely contained. The posts of the perimeter fence must extend to the upper limits of the height requirement and be spaced no more than twenty-four feet [7.32 meters] apart.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-05

48-14-01-06. Farmed elk reporting.

1. An owner of farmed elk shall submit an annual farmed elk inventory report by January first of each year. An owner who fails to submit the report to the board by March first of each year is in violation of this section.

2. An owner shall record inventory information on the forms provided by the board and such forms must be filled out completely and accurately.

3. An owner must report all purchases, sales, or other animal transfers, escapes, recaptures, births, deaths, or diseased farmed elk on the inventory report form.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-01-07. Farmed elk premises description. An owner, before acquiring or possessing farmed elk on such owner's premises, shall provide to the board a sketch or map of the proposed exterior boundary, holding and handling facilities, location of quarantine area, and

proposed location of all gates. A person owning farmed elk as of April 1, 2001, who has not previously furnished such information to the board shall submit such information with the person's first annual inventory report under section 48-14-01-06.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-05

48-14-01-08. Holding and handling facilities. All farmed elk operators shall have holding and handling facilities that enable handling, marketing, and individual identification of all farmed elk on the premises. A permanent or portable handling facility must be accessible to the elk farm at all times.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-05

48-14-01-09. Quarantine area.

1. Every farmed elk premises must have an approved quarantine facility within its boundary or submit an action plan to the state veterinarian that guarantees access to an approved quarantine facility within the state of North Dakota.

2. The quarantine area must meet standards set by the state veterinarian concerning isolation, separate feed and water, escape security, and allowance for the humane holding and care of its occupants for extended periods of time.

3. Should the state veterinarian impose a quarantine, the farmed elk owner shall provide an onsite quarantine facility or make arrangements at the owner's expense to transport the animals to the approved quarantine facility named in the quarantine action plan.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-01-10. Welfare of animals. A farmed elk operator may not display or house any elk in such a manner as to endanger the health and safety of the public or the elk, as determined by an agent of the board.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-01-11. Auction sales. A farmed elk auction permit is required to conduct auctions where farmed elk are offered for sale or trade. The application for an auction permit must be submitted to the board at least thirty days before the date of auction. Once issued, the permit is valid for that date and an alternate date. Information concerning reporting requirements, disease testing, certificates of veterinary inspection, and animal welfare must be clearly stated in the auction announcement. All potential buyers and sellers shall register at the auction and provide their name, address, and phone number. An attending veterinarian shall be available during the auction. Animals unfit for sale as defined in North Dakota Century Code section 36-05-10.1 must receive veterinary care and may not be offered for sale. All animals present at the auction must be maintained in a humane manner. The auction sale permitholder shall submit to the board records from the sale within thirty days after the sale. Access to the auction ground must be controlled at all times. All animals must be checked in and out by auction personnel. The auction sale permitholder shall notify the board within twenty-four hours of any unexplained diseases or deaths that occur in farmed elk while on the permitholder's premises. Any documents required by the board must be provided.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-01-12. Bill of sale and transportation.

1. Farmed elk to be transferred, bought, or sold must have a bill of sale or manifest duly witnessed prior to movement to show proof of ownership.

2. Farmed elk may be transported from out of state through North Dakota only if:

   a. Animals proceed directly through North Dakota and the owner or transporter has no intent to unload the animals; and

   b. Animals are not sold, bartered, traded, or otherwise transferred while in the state. Transfer does not include moving animals to another transport vehicle.

3. Farmed elk transported within North Dakota which have been harvested on a private elk farm must be accompanied by a bill of sale if there is a change of ownership.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-01-13. Inspection by board personnel. A farmed elk owner shall allow inspection of records, holding facilities, and farmed elk by a board agent during normal working hours. The owner may accompany the person conducting the inspection. The board shall schedule the inspection.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-09

48-14-01-14. Intrastate movement restrictions to protect genetic purity. A person may not move farmed elk into zone 1 or zone 2 from points inside North Dakota until such person obtains an importation permit from the state veterinarian's office.

Genetic testing for purity is required for all farmed elk before such animals may enter zone 1 or zone 2. A person may not transport, attempt to transport, accept, or receive farmed elk into zone 1 or zone 2 until the person making application for the permit furnishes sufficient proof to the state veterinarian's office that the elk are genetically pure.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

CHAPTER 48-14-02
IMPORTATION REQUIREMENTS

48-14-02-01. Importation requirements. Farmed elk may be imported into North Dakota only after the owner of the farmed elk:

1. Obtains an importation permit from the state veterinarian's office;

2. Submits to the state veterinarian's office proof of a physical examination by an accredited veterinarian accompanied by an approved certificate of veterinary inspection. The certificate of veterinary inspection must include the minimum, specific disease test results, vaccinations, and health statements required by this chapter;

3. Submits to the state veterinarian's office the genetic purity test results in compliance with section 48-14-02-02. The genetic purity test results must be included with the certificate of veterinary inspection;

4. Submits to the state veterinarian's office a chronic wasting disease risk assessment form in compliance with section 48-14-02-07, unless the state veterinarian waives such requirement under subsection 2 of section 48-14-02-07; and

5. Completes and submits satisfactory proof of additional disease testing or vaccinations as may be required from the state veterinarian's office if it has reason to believe other diseases, parasites, or other health risks are present.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-02-02. Genetic purity requirements for imported farmed elk. A person may not import farmed elk into zone 1 or zone 2 from points outside North Dakota until such person obtains an importation permit from the state veterinarian's office. Genetic testing for purity is

required for all farmed elk before such animals may enter zone 1 or zone 2. A person may not transport, attempt to transport, accept, or receive farmed elk into zone 1 or zone 2 until the person making application for the permit furnishes sufficient proof to the state veterinarian's office that the elk are genetically pure.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-02-03. Farmed elk from quarantined area prohibited. Farmed elk may not be imported without approval from the board if the animal originated in a herd or area that has been quarantined for a reportable disease or was under other regulatory action by a state, federal, provincial, or other government agency for a disease-related matter.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-02-04. Tuberculosis. All farmed elk in a shipment must test negative for tuberculosis within ninety days before importation occurs and the entire herd of origin must test negative within twelve months before importation occurs using the single cervical tuberculin test. But, if the farmed elk originate from an accredited, free herd, the state veterinarian may require that only the animals in the shipment must be tested, or the state veterinarian may require other or additional testing in accordance with the uniform methods and rules for the control of bovine tuberculosis in cervidae as published by the United States department of agriculture - animal and plant health inspection service.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-02-05. Brucellosis. All farmed elk in a shipment must test negative for brucellosis by two official brucellosis tests administered within thirty days before importation. One brucellosis test must be the complement fixation test, and the second may be any other approved test. The state veterinarian may require other or additional testing in accordance with the uniform methods and rules for the control of brucellosis in cervidae as published by the United States Department of agriculture - animal and plant health inspection service.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-02-06. Paratuberculosis (Johne's disease). The following statement, signed by an accredited veterinarian in the state or province of origin, must appear on the certificate of veterinary inspection:

> "To the best of my knowledge, animals listed herein are not infected with paratuberculosis (Johne's disease) and have not been exposed to animals infected with paratuberculosis."

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-02-07. Chronic wasting disease.

1. Except as provided herein, all farmed elk, before importation, must pass a satisfactory risk assessment for chronic wasting disease conducted by the state veterinarian's office. The state veterinarian's office will mail, fax, or otherwise deliver a risk assessment form to any person seeking an importation permit for farmed elk. The risk assessment form will contain such information and questions as prescribed by the state veterinarian. The state veterinarian's office may refuse entry into this state of any farmed elk based upon the risk assessment and any other information available. Persons seeking an importation permit for farmed elk must be notified of the decision by the state veterinarian's office within ten days of submitting the risk assessment form.

2. The state veterinarian's office may waive the requirement for a risk assessment if:

   a. The risks to be assessed are minimal and the person applying the importation permit has met all other statutory and rule requirements; or

   b. The herd of origin has been under surveillance for chronic wasting disease for at least thirty-six months. The surveillance must meet the standards set by the state veterinarian.

3. The following statement must be included on the certificate of veterinary inspection:

   > "These animals and the herd they originate from have no history of emaciation, depression, excessive salivation or thirst, or neurological disease. In the event of these signs, appropriate diagnostic measures were taken to rule out a transmissible spongioform encephalopathy. These animals have not been exposed to an elk or deer diagnosed positive for a transmissible spongioform encephalopathy."

4. A person may not import farmed elk from a herd in which chronic wasting disease has been diagnosed or which is a herd that has had chronic wasting disease traced to it unless that herd has undergone forty-eight months of surveillance after the last case of chronic wasting disease without finding any signs of chronic wasting disease. The state veterinarian may extend the required surveillance if epidemiological information indicates that it is warranted. The surveillance shall meet the standards set by the state veterinarian.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

CHAPTER 48-14-03
CHRONIC WASTING DISEASE

48-14-03-01. Mandatory submission of brain tissue. The owner of any dead farmed elk, including those farmed elk that have died due to accident, natural causes, disease, slaughter, or euthanasia, shall cause the appropriate brain tissue to be submitted to an approved laboratory for chronic wasting disease surveillance as soon as practicable. This requirement applies only to those farmed elk that are twelve months of age or older at the time of death. The animal's owner shall cause the official identification to accompany the sample to the laboratory. The state veterinarian may grant exemptions to this surveillance. A chronic wasting disease diagnosis will be based on postmortem brain testing confirmed by the national veterinary services laboratory.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

48-14-03-02. Herd disposition upon diagnosis with chronic wasting disease.

1. A herd containing farmed elk diagnosed with chronic wasting disease, or that has had chronic wasting disease traced back to the herd, shall be quarantined until the herd is depopulated or until a herd plan is established. The preferred method of eradicating chronic wasting disease is depopulation of the affected herd.

2. If depopulation is not practicable, the owner and the state veterinarian shall develop a herd plan according to the following:

   a. If the herd displays no evidence of disease transmission within the herd as determined by an epidemiological investigation by the state veterinarian or a validated test, the herd plan shall include provisions for:

      (1) Herd inspection by board agents;

      (2) Herd inventory with annual verification;

      (3) Herd surveillance (mandatory death reporting and chronic wasting disease testing for five years from the last case);

(4) Separation of high-risk animals (high-risk animals are penmates of an affected animal for one year prior to the death of the affected animal and all animals related to the affected animal); and

(5) All high-risk animals shall be quarantined for forty-eight months from the last case or euthanized and tested for chronic wasting disease.

b. If the herd displays evidence of disease transmission within the herd as determined by an epidemiological investigation by the state veterinarian or a validated test, the herd plan shall include provisions for:

(1) Herd inspection by board agents;

(2) Herd surveillance (mandatory death reporting and chronic wasting disease testing for five years from the last case);

(3) Separation of high-risk animals;

(4) All high-risk animals shall be quarantined for sixty months from the last case; and

(5) The entire herd shall be quarantined for forty-eight months from the last case.

c. If the herd is a trace herd as determined by an epidemiological investigation by the state veterinarian or a validated test, the herd plan shall include provisions for:

(1) Herd inspection by board agent;

(2) Herd inventory with annual verification;

(3) Herd surveillance (mandatory death reporting and chronic wasting disease testing for three years from the last case); and

(4) Separation of high-risk animals and quarantine for forty-eight months from the last exposure or euthanization of high-risk animals and testing for chronic wasting disease.

History: Effective April 1, 2001.
General Authority: NDCC 36-25-02
Law Implemented: NDCC 36-25-02

TITLE 49

Massage, Board of

JANUARY 2001

CHAPTER 49-01-01

49-01-01-01. Organization of board of massage.

1. **History and function.** The 1959 legislative assembly passed the Massage Registration Act, codified as North Dakota Century Code chapter 43-25. This chapter requires the governor to appoint the board of massage. The board, generally speaking, ~~stands~~ monitors the relationship and interaction between the ~~massage-school-graduate~~ licenseholder and the public. It is the responsibility of the board to protect the public against poorly trained massage therapists.

2. **Board membership.** The board consists of three members appointed by the governor. Members of the board serve three-year terms, and not more than one term expires each year.

3. **Executive secretary-treasurer.** The executive secretary-treasurer of the board is appointed by the board and is responsible for administration of the board's activities.

4. **Inquiries.** Inquiries regarding the board may be addressed to the executive secretary-treasurer:

~~Mr.-Albert-E.-Dahlgren~~
~~Executive-Secretary-Treasurer~~
~~North-Dakota-Board-of-Massage~~
~~22-Fremont-Drive~~
~~Fargo,-North-Dakota-58103~~

Mr. Phil J. Reisenauer

P.O. Box 701
Dickinson, ND 58602-0701

History: Amended effective May 1, 1988; February 1, 1993; January 1, 2001.
General Authority: NDCC 28-32-02.1
Law Implemented: NDCC 28-32-02.1, 43-25-05

STAFF COMMENT: Chapter 49-01-02 contains all new material and is not underscored so as to improve readability.

CHAPTER 49-01-02
LICENSURE AND FEES

49-01-02-01. Fees. The board charges the following fees:

1. To receive a license, one hundred and fifty dollars.

2. To renew an annual license, fifty dollars. This fee must be paid on or before January first of each year.

3. To retake an examination within six months of the initial failure to pass the board's examination, fifty dollars.

History: Effective January 1, 2001.
General Authority: NDCC 43-25-07, 43-25-08, 43-25-09
Law Implemented: NDCC 43-25-07, 43-25-08, 43-25-09

49-01-02-02. License applications. To receive a license as a massage therapist, the applicant must complete an application provided by the board and must include the following additional information:

1. Sufficient proof to the board that the applicant has satisfied the education requirements in article 49-02.

2. A copy of the applicant's high school diploma or proof of equivalent education.

3. A statement from a licensed physician, written in the last year, that the applicant is free of contagious diseases or that the applicant has been trained in taking sufficient precautions to prevent the spread of communicable diseases.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-25-07, 43-25-09

49-01-02-03. Expired licenses.

1. A license as a massage therapist is issued on an annual basis. A license expires on January first if the required renewal fee has not been paid on or by that date.

2. Practicing massage after a massage therapist's license has expired constitutes the unauthorized practice of massage. Practicing massage under an expired license is a violation of North Dakota Century Code section 43-25-03 and is grounds for the board to refuse to renew the person's license under subsection 3.

3. A license that has expired may be renewed within one year from the date of expiration upon payment of the required renewal fee. The fee will not be prorated for any period during which the license was expired.

4. An application for renewal of a license more than one year after the license expired will be considered an application for initial licensure.

5. A licenseholder shall notify the board of any change in the licenseholder's name or mailing address, or of any change in the physical address of one of the licenseholder's places of business, within sixty days after the change occurs.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-25-03, 43-25-09

49-01-02-04. Grounds for discipline. A licensed massage therapist may be subject to disciplinary action by the board for any of the grounds authorized in North Dakota Century Code chapter 43-25, including:

1. Failure by the licensee to identify himself or herself before beginning the massage and failure to provide sufficient supervision of massage by students; or

2. Commission of one or more acts which indicate the licensee lacks good moral character and is therefore ineligible to be licensed by the board, including:

   a. Engaging in criminal conduct involving the client as a victim; and

   b. Initiating or engaging in any sexual conduct, sexual activities, or sexualizing behavior involving a current

massage client of the licensee, even if the client attempts to sexualize the relationship.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-25-07, 43-25-10

49-01-02-05. Continuing education.

1. To renew a license as a massage therapist, the licenseholder must submit sufficient proof to the board of completion of at least eighteen hours of continuing education within the last year, including the date, time, and location of the instruction.

2. To qualify as continuing education under this section, the instruction must be offered by a qualified instructor and be directly related to the practice of massage therapy. Unless the course of instruction has been approved in advance by the board, the licenseholder must identify the instructor of the course and describe the qualifications of the instructor, the topics covered during the course, and the total hours for which the licenseholder seeks approval.

3. Continuing education by remote means such as telephone, internet, correspondence course, or videotape, will not be approved by the board.

History: Effective January 1, 2001.
General Authority: NDCC 43-25-09
Law Implemented: NDCC 43-25-09

STAFF COMMENT: Articles 49-02 and 49-03 contain all new material and are not underscored so as to improve readability.

ARTICLE 49-02

EDUCATIONAL REQUIREMENTS FOR LICENSURE

CHAPTER 49-02-01
GENERAL EDUCATION REQUIREMENTS

49-02-01-01. Hours of instruction.

1. To be eligible for a license as a massage therapist, an applicant must present a diploma or credentials issued by one or more schools of massage which indicate a cumulative total of seven hundred and fifty hours of supervised instruction as determined under this article, or a total of five hundred hours for students who were enrolled in a school of massage on or before April 8, 1999.

2. As used in this article, a "clock-hour" or hour of classroom or practical instruction means a sixty-minute block of time consisting of a minimum of fifty minutes of instruction with appropriate breaks.

3. The instruction received by the applicant must cover the elements of massage therapy, technique, and practice which include gliding strokes, kneading, direct pressure, deep friction, superficial warming techniques, percussion, compression (pumping), vibration, jostling, shaking, and rocking.

4. The instruction received by the applicant must include elements of contraindications, benefits of massage, universal precautions, body mechanics, business, history, ethics, legalities of massage, and professional standards regarding draping and modesty.

5. This article does not apply to applicants who were enrolled in a school of massage on the effective date of this article.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

49-02-01-02. Location of instruction. The education requirements in this article may be satisfied by instruction provided at a single school of massage or by attendance at more than one school, as long as the hours of total instruction provided to the student are not redundant and satisfy the other requirements in this article. An applicant shall submit a diploma or other credentials from each school attended.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

49-02-01-03. Eligible instruction. Unless waived by the board for good cause, instruction must be provided within the five years immediately preceding the date of the license application to be counted toward the total hours of instruction.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

CHAPTER 49-02-02
CLASSROOM INSTRUCTION

49-02-02-01. Hours of classroom instruction. The seven hundred fifty total hours of supervised instruction required under this article must include at least four hundred fifty hours of classroom instruction as determined under this chapter. "Hours of classroom instruction" means actual hours in attendance in class under supervised instruction in the presence of an instructor.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

49-02-02-02. Eligible classroom instruction.

1. Except as otherwise provided in this section or waived by the board for good cause, classroom instruction under this chapter must be provided by a licensed massage therapist at a recognized and approved school of massage and credit may not be given for prior educational instruction.

2. An instructor of anatomy, physiology, and pathology is not required to be a licensed massage therapist but must have earned a recognized postsecondary degree in the field of study in which the instructor is providing instruction.

3. A school of massage may give a student credit for prior educational instruction which was provided by a secondary or vocational institution. To receive credit, the prior instruction must have been provided by a qualified instructor within the five-year period immediately preceding the date of the application for licensure. The maximum credit for prior instruction which may be given under this subsection is provided in subsection 4 of section 49-02-02-03.

4. Correspondence courses are not recognized by the board under this section.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

49-02-02-03. Required curriculum.

1. The supervised classroom instruction received by an applicant must satisfy the following curriculum requirements:

   a. At least one hundred fifty hours of anatomy.

   b. At least sixty hours of physiology.

   c. At least thirty hours of neurology.

   d. At least thirty hours of pathology.

   e. At least sixty hours of kinesiology, including origin, insertion, action, and innervation.

   f. At least, but not more than, ten hours of first aid, hygiene, and CPR. At the time of graduation, the applicant must hold a valid current card certifying the completion of these courses under the instruction of a person who is certified by a nationally recognized organization to provide first aid and CPR instruction.

   g. At least twenty-five hours of business practices and professional ethics.

2. Each hour of instruction may be applied to only one of the above categories.

3. To be counted under this section, the instruction must reflect current scientific knowledge and standards.

4. The number of classroom hours specified in subdivisions a through e of subsection 1 also is the maximum amount of prior education credits in each subject which may be given under section 49-02-02-02.

5. Hours of instruction for programs which measure their instruction in credit hours per semester or per quarter shall be determined as follows:

   a. For semester credits, fifteen clock-hours of lecture equals one credit hour and thirty clock-hours of practical instruction (clinical or lab) equals one credit hour.

   b. For quarter credits, ten clock-hours of lecture equals one credit hour and twenty clock-hours of practical instruction (clinical or lab) equals one credit hour.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

CHAPTER 49-02-03
PRACTICAL INSTRUCTION AND SUPERVISION OF STUDENTS

49-02-03-01. Hours of practical instruction. The seven hundred fifty total hours of supervised instruction required under this article must include at least three hundred hours of practical instruction. "Hours of practical instruction" means actual hours of providing massage to another person, or receiving massage from a fellow student, under the direct supervision of a licensed massage therapist.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

49-02-03-02. Direct supervision of students. As used in this chapter and in North Dakota Century Code chapter 43-25, "direct supervision of a licensed massage therapist" has the following meaning:

1. For a student receiving practical instruction in the classroom setting, the supervising massage therapist must be in the same room as the student at all times during the massage. A massage therapist may supervise up to eight massages at a time (sixteen students) under this subsection.

2. For a student receiving practical instruction through field experience or a student clinic, the supervising massage therapist must be present on the premises at all times during the massage. A massage therapist may supervise up to six massages at a time under this subsection.

3. Notwithstanding any other provision in this section, a supervising massage therapist must exercise an appropriate degree of supervision at all times. Failure to do so is grounds for disciplinary action by the board.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-04, 43-25-07

49-02-03-03. Required curriculum. Before providing a massage to a member of the public, a student must have completed, or received prior education credit for, at least two hundred twenty-five hours of classroom instruction and at least one hundred fifty hours of practical instruction in the classroom setting.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-07
Law Implemented: NDCC 43-25-07

ARTICLE 49-03

MASSAGE ESTABLISHMENTS

CHAPTER 49-03-01
REQUIREMENTS FOR MASSAGE ESTABLISHMENTS

49-03-01-01. Sanitation, location, and conditions.

1. The portion of a massage establishment in which a massage is provided, and any waiting room and hallway leading to that area, must be in a clean and sanitary condition at all times. This subsection does not apply when the massage is provided to a person in the person's own home, or when the massage is provided as a public demonstration in a location other than the massage therapist's usual establishment.

2. If the massage establishment is also the residence of the massage therapist providing the massage, the massage may not be provided in a bedroom.

3. Any mirrors or windows in the massage establishment will be located and covered in a manner to maintain the privacy of the person receiving the massage at all times during the massage and while the client is dressing and undressing.

4. A therapist must provide draping and treatment in a way that ensures the personal safety, comfort, and privacy of the client.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 43-25-03
Law Implemented: NDCC 43-25-03

TITLE 50

Medical Examiners, Board of

DECEMBER 2000

CHAPTER 50-02-01

50-02-01-01. License for interval between board meetings. A provisional temporary license may be granted by the ~~credentials committee~~ chairman and the executive secretary to be in effect in the interval between board meetings. This license will be effective only when the holder thereof is practicing within the state, who is otherwise qualified to receive a North Dakota license.

History: Amended effective December 1, 2000.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-21

50-02-05-09. Exception to statutory qualifications for license - When available. ~~Any applicant for licensure under the exception set out in subsection 3 of North Dakota Century Code section 43-17-18 will be considered if the applicant is American board certified or recertified within the last ten years, or the applicant has passed the SPEX (special purpose examination) promulgated by the federation of state medical boards.~~ Repealed effective December 1, 2000.

History: ~~Effective November 1, 1993.~~
General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 43-17-18~~

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 of the national board examination or steps 1 and 2 of the United States medical licensing examination 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, or be enrolled in an approved postgraduate training program within the state of North Dakota.

History: Effective November 1, 1993; amended effective November 1, 1995; December 1, 1996; December 1, 2000.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-18

50-02-11-02. Successful completion of examination - Time limitation. The examination requirements for licensure must be successfully completed within a seven-year period. The board may grant an exception to this requirement for applicants who have concurrently pursued both MD and PhD degrees provided that the applicant's PhD studies have been in a field of the biological sciences, and provided that the applicant presents a verifiable and rational explanation for not meeting the seven-year time limit.

History: Effective November 1, 1993; amended effective December 1, 2000.

General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-18

TITLE 54

Nursing, Board of

JUNE 2001

CHAPTER 54-02-01

54-02-01-06. Examination fees. The board shall set the fee for licensure by examination. The fee for licensure by examination shall be ~~seventy-five~~ ninety dollars. The application is valid for a period of time not to exceed twelve months from the determination of eligibility and the fee is nonrefundable. The candidate shall be responsible for any payment of fees charged by the national council of state boards of nursing for use of the national council licensure examination.

History: Amended effective November 1, 1979; March 1, 1986; March 1, 1992; January 1, 1994; September 1, 1994; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(4)

54-02-02-09. ~~Maximum--number--of~~ Unlimited attempts to write the licensing examination. Candidates will have ~~a-maximum--number--of--five~~ unlimited attempts to pass the licensing examination. The candidate must have completed the nursing education program within three years of the scheduled appointment to write the examination.

History: Effective January 1, 1994; amended effective May 1, 1996; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(5)

CHAPTER 54-02-05

54-02-05-01. Residency or employment requirement. ~~Any applicant for renewal of license must be a North Dakota resident or practicing nursing in North Dakota or with a federal agency.~~ Repealed effective June 1, 2001.

History: ~~Amended effective November 1, 1990; May 1, 1996.~~
General Authority: ~~NDCC 43-12.1-08~~
Law Implemented: ~~NDCC 43-12.1-10~~

54-02-05-03. Renewal fees. The renewal fee for the registered nurse license will be sixty dollars. The renewal fee for the practical nurse license will be ~~fifty~~ sixty dollars.

History: Amended effective November 1, 1979; July 1, 1987; November 1, 1990; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(4)

CHAPTER 54-02-06

54-02-06-01. Application and fee for license by endorsement. Applicants for license by endorsement must submit a completed notarized application and pay the endorsement fee of ~~seventy-five~~ ninety dollars. Applicants for licensure by endorsement must have completed a state-approved nursing education program which meets or exceeds those requirements outlined in article 54-03, 54-03.1, or 54-03.2 according to the date the applicant enrolled in the nursing education program. Nursing practice to demonstrate continued competency must meet or exceed five hundred hours within the preceding five years.

History: Amended effective November 1, 1979; March 1, 1986; March 1, 1992; May 1, 1996; February 1, 1998; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-09(2)

54-02-06-03. Exceptions ~~for students~~.

1. North Dakota nurse licensure is not a legal requirement for students enrolled in a board-approved program of nursing education which involves nursing practice such as:

   a. A program leading to licensure at another level of nursing or to a higher degree;

   b. A program conducted by a North Dakota health care facility to allow nurses licensed by another jurisdiction to receive short-term clinical education that involves direct patient contact. The North Dakota health care facility that will provide short-term clinical education to persons who do not have a license to practice in North Dakota must submit to and receive written approval from the board for the following information every twenty-four months or as changes occur:

      (1) The syllabus and objectives for the short-term clinical education activity;

      (2) The health care facility policy that addresses the following:

         (a) That patient care is under the direct supervision and responsibility of a registered nurse with a current, unencumbered North Dakota license;

         (b) The method the facility uses to verify that the nurse receiving the short-term clinical

education has a current, unencumbered license in another jurisdiction;

(c) The method the facility uses to ensure that no independent or unsupervised nursing practice occurs; and

(d) That the short-term clinical education activity does not exceed eighty hours in a calendar year;

(3) The name and qualifications of the North Dakota registered nurse who is responsible for providing the clinical education; and

(4) The name of the person receiving the short-term clinical education and proof of a current, unencumbered license from another jurisdiction;

c. A program leading to certification in a nursing specialty; or

d. Previously licensed nurses enrolled in a board-approved refresher course to update nursing skills.

2. This section shall not preclude programs of nursing or affiliating institutions from requiring licensure. A North Dakota license shall be required if the individual:

a. Practices as a nurse, either voluntarily or for monetary compensation, during spare hours while enrolled in an educational program of study; or

b. Exceeds eighty hours of short-term clinical nursing education in North Dakota per year.

History: Effective November 1, 1979; amended effective June 1, 1982; September 1, 1996; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-04(2), 43-12.1-08(20)

CHAPTER 54-05-03.1

54-05-03.1-03. Definitions. The terms used in this chapter have the same meaning as in North Dakota Century Code chapter 43-12.1, except:

1. "Advanced practice registered nurse license" means the document issued to the registered nurse who has met the qualifications outlined in these rules.

2. "Certification" means a process of voluntary recognition by a national nursing organization of the applicant's advanced knowledge, skills, and abilities in a defined area of nursing practice. The certification process measures the theoretical and clinical content denoted in the advanced scope of practice, and is developed in accordance with generally accepted standards of validity and reliability. The certification examination is open only to registered nurses who have successfully completed an advanced nursing education program.

   a. If a certification examination is not available, another appropriate examination may be substituted as approved by the board; or

   b. If no appropriate certifying examination is available, an alternate mechanism to assure initial competence may be substituted as approved by the board.

3. "Competence maintenance program" means the ongoing application and integration of knowledge, skills, application, and judgment necessary to meet standards of practice.

4. "Health care team" means any health care professional licensed under North Dakota Century Code title 43.

5. "Initial competence" means the possession of knowledge, skills, application, and judgment necessary to meet standards of practice.

~~4.~~ 6. "Scope of practice" means the delineation of the applicant's practice which identifies the nature and extent of the applicant's practice and includes focus of care, elements of care, type of client, and consultation patterns with members of the health care team.

History: Effective March 1, 1992; amended effective November 1, 1996; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(6)

54-05-03.1-04. Initial requirements for advanced practice registered nurse licensure. Applicants for advanced practice registered nurse licensure must:

1. Possess a current license to practice as a registered nurse in North Dakota;

2. Submit evidence of completion of an advanced nursing education program through December 31, 2000, or submit evidence of completion of the requirements for a graduate education program with a nursing focus beginning January 1, 2001. The exception is the women's health care nurse practitioner who must submit evidence of completion of an advanced nursing education program through December 31, 2006, or submit evidence of completion of the requirements for a graduate education program with a nursing focus beginning January 1, 2007;

3. Submit evidence of current certification by a national nursing certifying body in the specific area of nursing practice or other evidence verifying initial competence as established by the board;

4. Submit a completed notarized application and pay the fee of one hundred dollars; and

5. Submit a scope of practice statement according to established board guidelines for review and approval by the board of nursing.

Applicants who have been issued a registered nurse temporary permit and meet all of the qualifications for advanced licensure may be issued a temporary advanced practice registered nurse license with the same date of expiration. The advanced practice registered nurse license will be issued to coincide with the renewal date of the initial registered nurse license.

History: Effective March 1, 1992; amended effective November 1, 1996; December 1, 1997; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-09(4)(5)

54-05-03.1-06. Requirements for advanced practice registered nurse licensure renewal. The advanced practice registered nurse license is valid for the same period of time as the applicant's registered nurse license. Applicants for renewal of the advanced practice registered nurse license must:

1. Renew their registered nurse license;

2. Complete the advanced practice registered nurse license renewal application;

3. Pay an advanced practice registered nurse licensure renewal fee of forty dollars;

4. Submit evidence of current certification or participate in a competence maintenance program as established by the board; and

5. Submit a scope of practice statement for review and approval by the board.

History: Effective March 1, 1992; amended effective November 1, 1996; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-10(1)

54-05-03.1-07. ~~Termination---of~~ Disciplinary action against **advanced practice registered nurse** ~~license~~ license. The advanced practice registered nurse ~~license~~ licensee may be ~~terminated~~ subject to discipline by the board when the licensee has:

1. Been found in violation of any provision of North Dakota Century Code section 43-12.1-14~~.~~ ; or

2. Failed to maintain national nursing certification or a competence maintenance program.

History: Effective March 1, 1992; amended effective November 1, 1996; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(6)

54-05-03.1-08. Prescriptive authority committee. Prior to the first regular meeting after July first of each year, the board will request an appointment of a physician who holds a collaborative agreement with an advanced practice registered nurse, to the prescriptive authority committee from the board of medical examiners and the board of pharmacy. The board shall appoint two committee members, at least one of whom must be a registered nurse board member and one must be an advanced practice registered nurse with prescriptive authority, at the July board meeting. The committee will meet at least once each year to review rules for prescriptive authority; oversee the process of granting prescriptive authority; and recommend changes to the board. Reimbursement for the costs associated with attending the meetings will be the responsibility of the respective boards appointing the members.

History: Effective March 1, 1992; amended effective November 1, 1996; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08.1

54-05-03.1-11. Prescriptive authority renewal. Prescriptive authority is valid for the same period of time as the applicant's advanced practice registered nurse and registered nurse license. The applicant for renewal must:

1. Renew the applicant's registered nurse license.

2. Submit evidence of current certification by a national nursing certification body in the specific area of nursing practice.

3. Submit a completed advanced practice registered nurse with prescriptive authority renewal application.

4. Pay the advanced practice registered nurse renewal fee of forty dollars and the fifty dollar renewal fee for prescriptive authority.

5. Submit a scope of practice statement that complies with requirements of section 54-05-03.1-06 and addresses all of the following areas:

   a. Broad classifications of drugs or devices to be commonly prescribed by the advanced practice registered nurse;

   b. Methods and frequency of the collaboration for prescriptive practices, which must occur as client needs dictate, but no less than once every two months;

   c. Methods of documentation of the collaboration process regarding prescriptive practices; and

   d. Alternative arrangements for collaboration regarding prescriptive practices in the temporary or extended absence of the physician.

6. Provide evidence of completion of fifteen contact hours of education during the previous two years in pharmacotherapy related to the scope of practice. The education may be obtained from one or more of the following methods:

   a. One academic semester hour credit in pharmacotherapy related to scope of practice is the equivalent of fifteen contact hours;

   b. Evidence of attendance at an approved pharmacotherapy seminar, lecture, workshop, class, or course either in person or via a telecommunication network may be submitted for part or all of the fifteen contact hours;

   c. Evidence of participation in an approved pharmacotherapy correspondence or home study continuing education course may be submitted for no more than one-half of the fifteen contact hours;

d. Evidence of publication of one article related to pharmacotherapy in a refereed journal, one book chapter, or research project published within the license renewal timeframe may be submitted for a case-by-case review. Credit may be submitted for no more than one-sixth of the fifteen contact hours;

e. Evidence of participation as a presenter or lecturer for content related to pharmacotherapy is allowable, but credits may not total more than one-sixth of the requirement. A presentation or lecture of fifty minutes or more may not be used more than once in the two years. The presentation or lecture must be approved for contact hours or be offered as part of an academic course; and

f. Other methods that may be approved by the board.

7. Submit an affidavit from the licensed physician who will be participating in the collaborative prescriptive agreement acknowledging the manner of review and approval of the planned prescriptive practices. Information in the affidavit must also indicate that the advanced practice registered nurse's scope of prescriptive practice is appropriately related to the collaborating physician's medical specialty or practice.

History: Effective March 1, 1992; amended effective November 1, 1996; June 1, 2001.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-10(1)

TITLE 60

Pesticide Control Board

JANUARY 2001

CHAPTER 60-03-02

60-03-02-01. Definitions.

1. "Agricultural commodity" means any distinctive type of agricultural, horticultural, vegetable, or animal product, including products qualifying as organic food products, bees, and honey.

2. "IR-4 program" means interregional research project number four, clearances of chemicals and biologics for minor or special uses, established in 1963 by the cooperative state research service of the United States department of agriculture, the coordinated national program involving land-grant universities, and the United States department of agriculture to provide data required for the registration of pesticides needed for the production of minor crops.

3. "Laboratory" means the IR-4 satellite laboratory established at ~~the~~ North Dakota state university.

4. "Minor crop" means an agricultural crop considered to be minor in the national context of registering pesticides.

5. "Minor use" means a pesticide use considered to be minor in the national context of registering pesticides, including a use for a special local need.

6. "Other uses" means registration, reregistration, or modification of a registration of a pesticide for minor crops, minor uses, major crops, and major uses. "Other uses" includes research and other factfinding efforts relative to

pesticide registration and use, but not nonresearch efforts such as persuading legislators or regulators to change current law or regulation on the registration and use of pesticides.

7. "Pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest; and any substance or mixture of substances intended for use as a plan regulator, defoliant, or dessicant.

~~7.~~ 8. "Registration" means the authorized use of a pesticide approved by the North Dakota department of agriculture.

History: Effective April 1, 1998; amended effective January 1, 2001.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06.3

60-03-02-02. Purpose. Minor use pesticide funding grants may be used for evaluations, studies, activities, or investigations approved by the pesticide control board to obtain or maintain pesticide registrations for minor uses and other uses in North Dakota. These evaluations, studies, activities, or investigations may be conducted by the North Dakota state university IR-4 laboratory or may be secured by the board from other qualified laboratories, researchers, or contractors by contract.

History: Effective April 1, 1998; amended effective January 1, 2001.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06.3

TITLE 69

Public Service Commission

JANUARY 2001

CHAPTER 69-02-01

69-02-01-02. Address - Sessions. The office of the public service commission is in the state capitol, 600 east boulevard, department 408, Bismarck, North Dakota 58505-0480. The commission is continually in session.

History: Amended effective September 1, 1992; January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-02-02. Formal complaints.

1. **Complaints.** Complaints may be made by the commission on its own motion, or by any person. Complaints will be in writing and set forth the act or omission complained of. If the complaint is against the reasonableness of any rate or charge of any heat, gas, or electrical public utility, the commission cannot entertain it unless it is signed by the governing body of the county or city, if any, within which the alleged violation occurred, or by not less than ten percent of the consumers or purchasers of such heat, gas, or electrical service.

2. **Form and content.** A formal complaint must show the venue, "Before the Public Service Commission of North Dakota" and will contain a heading showing the name of the complainant and the name of each respondent. The complaint must include the name, address, and ~~phone~~ telephone number of each complainant's attorney, if any. The complaint will be drawn to fully advise the respondent and the commission of the factual and legal grounds of the complaint, the injury complained of, and the specific relief sought.

3. ~~**Verification.** All formal complaints will be verified by the person filing same or other person having knowledge of the facts set forth.~~

4. ~~**Number of copies.**~~ At the time the complaint is filed, the complainant must also file a copy for each respondent plus seven additional copies.

5. 4. **Sufficiency of complaint.** Upon the filing of a formal complaint, the commission will determine whether it states a prima facie case and conforms to this article. If the complaint does not state a prima facie case or does not conform to this article, the commission will notify the complainant and provide the complainant an opportunity to amend within a specified time. If the complaint is not amended, it will be dismissed. The filing of an answer is not an admission of the sufficiency of the complaint.

6. 5. **Service.**

   a. If the complaint is sufficient, the commission will serve a copy of the complaint and the commission's notice on each respondent.

   b. The commission will serve the complaint and notice of hearing personally, or by certified mail at least

forty-five days before the time specified for hearing. Service of a complaint and notice of hearing may be waived, in writing, by the respondent. The parties may agree upon a time and place for hearing, with the consent of the commission. In case of an emergency the commission may notice a proceeding for hearing upon its merits upon less than forty-five days' notice. The time provided for the respondent's answer must be adjusted accordingly. However, hearings on a renewal, suspension, or revocation of a license may not be held on less than ten days' notice, unless a statute specifically allows or requires suspension or revocation without a hearing.

History: Amended effective September 1, 1992; January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-05, 49-01-07

69-02-02-03. Answers.

1. **Filing.** Answers to complaints must be filed within twenty days after service of the notice of hearing and complaint.

2. **Content.** Each answer must contain: ~~(a)~~ ~~the~~

   a. The title of the proceeding and docket number; ~~(b)~~ ~~the~~

   b. The name and address of each answering party; ~~(c)~~ a

   c. A specific denial of each material allegation of the complaint which is controverted by the respondent; ~~(d)~~ a

   d. A statement of any new matter which may constitute a defense; and ~~(e)~~ ~~the~~

   e. The name, address, and ~~phone~~ telephone number of each of the respondent's attorneys, if any.

   If the answering party has no information or belief upon the subject sufficient to enable the party to answer an allegation of the complaint, the party may so state in the answer and place the denial upon that ground.

3. ~~Verification.---An--answer--must-be-signed-and-verified-by-the person-filing-the-same-or-other-person-having-knowledge-of-the facts-set-forth.~~

4. **Service and number of copies.** The original answer and seven copies thereof must be filed with the executive secretary of the commission. The respondent shall serve a copy of its answer personally, or by certified mail, upon each complainant. The respondent shall certify to the commission that the service has been made.

History: Amended effective September 1, 1992; January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-05, 49-01-07

69-02-02-04. Application. An application is a proceeding seeking some right, privilege, or authorization which the commission may give under statutory or other authority administered by it.

1. **Contents.** Applications must be in writing and~~,-under-oath,~~ must: ~~(a)-set~~

   a. Set forth the full name and post-office address of the applicant; ~~(b)-state~~

   b. State clearly and concisely the authorization or permission sought; and ~~(c)-cite~~

   c. Cite by appropriate reference the statutory provision or other authority under which the commission authorization or permission is sought.

2. ~~Verification.--Applications-must-be-signed-and-verified-by-the party-filing-the-application.~~

3. **Number of copies.** An original and seven copies of an application must be filed.

4. 3. **Articles of incorporation or partnership agreement.**

   a. Corporations. If the applicant is a corporation, a certified copy of its articles of incorporation must be annexed to the application. An original certificate of good standing must also be filed.

   b. Partnerships. If the applicant is a partnership, the partnership agreement and any fictitious name certificate must be filed.

   c. If the applicant's articles of incorporation or partnership agreement have already been filed with the commission in some prior proceeding, it is sufficient if this fact is stated in the application and reference is made to the case number and number of the prior proceeding.

5. 4. **Financial statement.** Whenever the commission requires the filing of a financial statement by any utility, ~~this-statement must--be--prepared--as--of-the-last-day-of~~ the applicant shall file consolidated financial statements for the most recent ~~calendar--quarter--unless-a-more-recent-statement-is-available~~ fiscal year using generally accepted accounting principals or, if applicable, accounting standards required by federal

regulatory jurisdictions. Each financial statement must include:

~~a.--A--balance-sheet-of-the-form-and-style-usually-followed-in the--particular--industry.---Sufficient--detail--must---be included-so-as-to-provide-the-following-information:~~

~~(1)--Amount-and-kinds-of-stock-authorized.~~

~~(2)--Amount-and-kinds-of-stock-issued-and-outstanding.~~

~~(3)--Terms--of--preference--of--preferred--stock,--whether cumulative--or---participating,---preferred---as---to dividends,-assets,-or-otherwise.~~

~~(4)--A--brief--description--of--each--mortgage-showing-the amount,-date-of-maturity,-rate-of-interest,-and--name of-mortgagee-or-trustee.~~

~~(5)--Number-and-amount-of-bonds-authorized,-and-number-and amount-issued,-giving-the-name-of-the-public--utility which---issued---the---same,--describing--each--class separately,-and-giving-date-of-issue,-par-value,-rate of-interest,-date-of-maturity,-and-how-secured.~~

~~(6)--Each--note-outstanding,-giving-date-of-issue,-amount, date-of-maturity,-rate--of--interest,--and--in--whose favor.~~

~~(7)--Other--indebtedness,--giving--detail--by--classes-and describing-security,-if-any,-with-a--brief--statement of--the--devolution--or--assumption-of-any-portion-of such--indebtedness--upon--or---by---any---person---or corporation---if--the--original--liability--has--been transferred,-together-with--the--amount--of--interest paid--thereon--during--the--year--terminated--by--the balance-sheet.~~

~~b.--An-income-statement-of-the-form-and-style-usually-followed in-the-particular-industry-and-covering--the--twelve-month period-the-balance-sheet-terminates.~~

~~c.--A--schedule-showing-a-detail-of-the-interest-and-dividends paid-during-the-period-covered-by-the-income-statement.~~

a. A balance sheet of the form and style usually followed in the industry.

b. An income statement of the form and style usually followed in the industry.

c. If available, an independent accountant's financial opinion.

d. Any other information requested by the commission.

History: Amended effective September 1, 1992; January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-04-01. Notice. In those proceedings in which a hearing is to be held, the commission will assign a time and place for hearing. Notice of the hearing must be posted in the office of the commission, and must be served on the parties and other persons entitled to receive notice at least twenty days prior to the date set for the hearing except in cases of emergency or as otherwise provided by law.

In any proceeding, except rulemaking proceedings, involving the rights of persons who are members of the public generally, notice of hearing must be given by legal publication in the North Dakota daily newspaper of the affected area. Notice must be published at least twenty days prior to the date of the hearing.

~~Middlewest---motor---freight---bureau--and--national--bus--traffic association-shall,-when-filing-general-increases--in--rates,--fares,--or charges--with--the--public--service--commission,--prepare--news-releases indicating-the-amount-of-the-increase-(both-in-terms-of--percentage--and dollars--annualized),--the--geographic--scope--of--the--increase-and-any general-exceptions-to-the-increase.--The-press-releases-must-be-sent--to the--editors--of--the-newspapers-of-general-circulation-in-the-following counties:--Burleigh,-Cass,-Grand-Forks,-Stark,-Ward,-and-Williams.~~

~~When--determined--by--the--commission--to--be--appropriate,--an~~ An electric, gas, or telecommunications public utility ~~proposing--a--change in--rates~~ shall ~~notify--its--subscribers--individually-of-the-proposed change~~ provide individual customer notice as required below by billing insert, newsletter, or other appropriate method approved by the commission. ~~If-a-hearing~~ The notice must indicate the place and date of the commencement of any hearing, informal hearing, or public input session that has been ordered by the commission, ~~the--notice--must indicate--the-place-and-date-of-the-commencement-of-the-hearing~~ and that the public is invited to attend. Subject to the power of the commission to modify its contents and when applicable, the notice must include a summary sheet describing the absolute dollar and percentage impact of ~~the~~ any proposed rate or price changes ~~upon-revenues~~ by the various classes of services offered by the ~~petitioning~~ utility and must include a list of ~~petitioner's~~ the utility's business office locations where the proposed rate or price schedules and a comparison of present and proposed rates or prices can be examined by the public. The notice must also contain in bold type the following statement when applicable: The rate changes described in this notice have been requested by (specific utility).

For electric and gas utilities, individual customer notice is required for an application for approval of a rate increase, purchase or sale, merger, or acquisition filed by the utility, and applications by the utility for alternative regulation. For electric and gas utilities, the commission may require the utility to provide individual customer

notice to potentially affected customers in other rate proceedings, complaint cases, and fuel and purchased gas adjustment proceedings.

For telecommunications utilities, individual customer notice is required for an application for a certificate of public convenience and necessity resulting from the sale, merger, or acquisition of an incumbent telecommunications company. The commission may require a telecommunications utility to provide individual customer notice to potentially affected customers in complaint cases.

The individual customer notices required by this section are separate from and in addition to any other customer notices required by law or rule, unless the commission authorizes the utility to satisfy multiple notice requirements with one notice.

History: Amended effective October 1, 1980; September 1, 1982; September 1, 1992; January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-05, 28-32-08, 49-01-07

69-02-07-02. Notice.

1. The commission will issue a notice that the rules are proposed and set for hearing which will include:

   a. ~~Furnish--a--brief~~ A short, specific explanation of the proposed rule;

   b. A brief explanation of the purpose of the proposed rule~~.~~;

   ~~b.~~ c. ~~Specify--a~~ A determination of whether the proposal impacts the regulated community in excess of fifty thousand dollars;

   d. A location where the text of the proposed rule may be reviewed~~.~~;

   ~~c.~~ e. ~~Advise--all~~ Notice to interested persons of the opportunity to submit written comments and to appear and testify at the hearing to offer oral testimony~~.~~;

   ~~d.~~ f. ~~Provide--the~~ The address to which written comments may be sent~~.~~;

   ~~e.~~ g. ~~Specify--the~~ The address and telephone number at which a copy of the proposed rules and regulation analysis may be requested; and

   h. The date, time, and place of the hearing.

2. The commission will publish an abbreviated newspaper notice ~~of hearing twice~~ in each ~~daily~~ official county newspaper ~~of general circulation~~ in the state.

3. The commission will file the notice of hearing and a copy of the proposed rules with the legislative council~~.----The commission will cause the first publication and the filing with the legislative council to occur~~ at least thirty days before the hearing.

~~3.~~ 4. The public comment period on the proposed adoption, amendment, or repeal of any rule under this article will close ~~at the end of the~~ thirty days after conclusion of the public hearing, unless extended by the commission.

~~4.~~ 5. The commission will consider all written comments and oral testimony received before adoption, amendment, or repeal of any rule under this article and make a written record of its consideration.

History: Effective December 1, 1990; amended effective January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-02, 49-01-07

69-02-09-12. Disposal of trade secret information. When a case containing trade secret information has been closed for one year the commission will dispose the trade secret information by shredding.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-06, 47-25.1

CHAPTER 69-02-10

69-02-10-01. Definitions. As used in this chapter:

1. "Act" means the federal Telecommunications Act of 1996 [Pub. L. No. 104-104].

2. "Arbitration" is a dispute resolution process by which a neutral third party renders a decision on disputed issues which is binding on the parties, subject to commission approval.

3. "Arbitrator" is the term used to identify the arbitration decisionmaker.

4. "Commission" means the North Dakota public service commission.

5. "Entire package final offer arbitration" is a procedure under which the arbitrator must select, without modification, the entire proposal of one of the parties.

6. "Final offer arbitration" is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects, without modification, one of the final offers by the parties to the arbitration, or portions of both such offers.

7. "Issue-by-issue final offer arbitration" is a procedure under which the arbitrator must select, without modification, on an issue-by-issue process, one of the proposals of either party on each issue.

8. "Modified final offer arbitration" is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator may select and modify one of the final offers by the parties to the arbitration, or portions of both such offers.

History: Effective July 1, 1997; amended effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-02-11
Law Implemented: NDCC 28-32-05.1, 49-01-07

69-02-10-26. ~~Final~~ Commission to determine final offer arbitration process. The arbitrator shall use final offer arbitration or modified final offer arbitration as directed by the commission, except as otherwise provided in this section:

1. At the discretion of the arbitrator, the final offer arbitration process may take the form of either entire package

final offer arbitration or issue-by-issue final offer arbitration.

2. Negotiations between the parties may continue after final arbitration offers are submitted and the parties may submit subsequent final offers following such negotiations.

3. The arbitrator may allow up to fifteen days after submission of the initial final offers before making a decision in order to provide the opportunity for parties to conduct postoffer negotiations.

4. The arbitrator may request the commission to change the final arbitration process at any time prior to issuance of the arbitrator's decision.

History: Effective July 1, 1997; amended effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-02-11
Law Implemented: NDCC 28-32-05.1, 49-01-07

CHAPTER 69-09-05

69-09-05-00.1. Definitions.

1. "Competitive local exchange company" means any telecommunications company providing local exchange service, other than an incumbent local exchange carrier, whether by its own facilities, interconnection, or resale.

2. "Eligible telecommunications carrier" means a telecommunications company designated under section 214(e) of the Telecommunications Act of 1996 as eligible to receive universal service support in accordance with section 254 of the Telecommunications Act of 1996.

3. "End user" means a person who uses telecommunications service for the person's own use.

4. "Incumbent local exchange company" means a telecommunications company that meets the definition of section 251(h) of the Telecommunications Act of 1996.

5. "Lifeline service" means a retail local telecommunications offering for which qualifying low-income consumers pay reduced recurring charges for universal service.

6. "Link-up service" means a reduction in the carrier's customary charge for commencing telecommunications service for a single telecommunications connection at a consumer's principal place of residence.

7. "Local exchange company" means an incumbent or competitive local exchange company.

8. "Telecommunications Act of 1996" means the Telecommunications Act of 1996 [Pub. L. 104-104; 110 Stat. 56; 47 U.S.C. 151 et seq.].

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-21, 49-21-01.7

69-09-05-01. Lowest priced service alternatives. Upon request of a residential customer or prospective customer for service, the utility shall ask if such customer wishes to be informed of the lowest priced service alternatives available from the utility, and upon an affirmative response shall inform such customer of the lowest priced service alternatives available from the utility at the customer's location, giving full consideration to grades of service, equipment options, and

installation charges incident thereto. The lowest price service alternative includes service under the lifeline and link-up plans.

History: Amended effective January 1, 2001.
General Authority: NDCC 49-02-11 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-02-11, 49-21-01.4, 49-21-01.7, 49-21-07

69-09-05-02. Discontinuance of telecommunications services. A utility may not discontinue telecommunications services, except as provided in this section.

1. A utility may discontinue the essential services it provides:

   a. If the customer is delinquent in payment for essential services, then essential services may be discontinued even though discontinuing the services results in the discontinuance of all telecommunication telecommunications services.

   b. If the customer is delinquent in payment for long-distance services rendered by a local exchange company or another company and billed by the local exchange company, but is not delinquent in payment for essential services rendered by the local exchange company, the local exchange company may discontinue the customer's local exchange services only at central offices lacking the technical ability to discontinue long-distance services while continuing to provide local exchange services.

2. A utility may discontinue nonessential services:

   a. If the customer is delinquent in payment for nonessential services.

   b. If the customer is delinquent in payment for long-distance telecommunications services rendered by another company and billed by the local exchange company, then the local exchange company may deny the customer all forms of access to the network of the telecommunications company to which the customer is delinquent in payment. However, if, due to technical limitations, a local exchange company must also deny the customer all forms of access to the long-distance networks of all telecommunications companies, including its own, in order to deny the customer access to the network of the company to which the customer is delinquent, the local exchange company may do so.

3. A utility may discontinue service to a customer for failure to comply with regulations of the utility on file with the commission pertaining to installation and use of equipment, or for use of equipment which interferes with or adversely

affects the service to other customers, provided the customer has first been notified and afforded reasonable opportunity to change or disconnect such equipment.

4. A utility may not discontinue service to a customer for failure of the customer to pay for merchandise purchased from the utility, to pay for a different class of service furnished by the utility, to pay for service rendered to a previous occupant of the premises, or to pay the bill of another customer as guarantor thereof.

5. A utility may not discontinue service to a customer for failure to pay for service until the utility first gives the customer notice of its intention to discontinue such service on account of delinquency. The notice must:

   a. Be sent by first-class mail addressed to the billing name and address of the affected account.

   b. Show the amount of the delinquency.

   c. Include the telephone number of the public service commission.

   d. Advise the customer of the customer's rights and remedies, including the customer's right to work out a satisfactory deferred installment agreement for delinquent accounts.

   e. Inform the customer that service will be discontinued if the delinquent account is not paid within ten calendar days from the date of mailing or personal delivery of the notice, or if a satisfactory installment agreement is not made with the utility for payment of the delinquent bill. The utility may discontinue service without further notice if the customer fails to pay the delinquent account by the due date.

6. a. A deferred installment agreement for essential services may not be combined with a deferred installment agreement for any other services.

   b. A utility may not discontinue essential services if the utility and the customer make a mutually agreed upon deferred installment agreement for essential services. A utility may discontinue essential services without further notice if the customer fails to pay the delinquent account in accordance with the deferred installment agreement.

   c. A utility may not discontinue nonessential services if the utility and the customer make a mutually agreed upon deferred installment agreement for nonessential services. A utility may discontinue nonessential services without further notice if the customer fails to pay the delinquent

account in accordance with the deferred installment agreement.

7. The customer may pay the delinquent account at any time prior to the actual discontinuance of service.

8. Whenever service has been discontinued for nonpayment of a bill, service must be resumed if the customer:

   a. Pays the fee for resuming service established in the utility's rate schedules;

   b. Makes a deposit under section 69-09-05-03 (if required by the company); and

   c. Makes a satisfactory settlement for the delinquent bill and for the service rendered to the date the service was discontinued.

   Interexchange carriers are not required to resume long-distance service if local service is not connected.

9. If the customer disputes the amount of a bill for service, the customer may, to prevent discontinuance for nonpayment, pay the disputed bill under protest to the utility. Alternatively, the customer may request a formal hearing pursuant to section 69-02-02-02 in which case the utility may not discontinue service for nonpayment of the disputed bill until a final decision has been issued by the commission. The utility shall immediately give the commission notice of the dispute and the commission may investigate the dispute. The utility shall refund to the customer any part of such payment made under protest found by the commission to be excessive.

10. The commission may order the discontinuance of services where a reseller or operator services provider violates commission rules. The commission will provide ten days' notice of a deficiency or violation and provide an opportunity for the noncomplying reseller or operator services provider to respond or correct the deficiency. A reseller or operator services provider disputing the alleged violation or discontinuance may request a formal hearing under section 69-02-02-02, in which case the discontinuance will be stayed until final decision by the commission.

11. a. Except for discontinuance due to delinquency, a competitive local exchange company may not discontinue service to a customer without first providing the customer with twenty days' written notice of the intent to discontinue service. The notice of intent to discontinue service shall inform the customer of its right to choose between local exchange companies, if more than one local exchange company is providing essential services.

b. A telecommunications company may not interfere with a competitive local exchange company's obligation to provide notice to a customer; provided that a telecommunications company may disconnect service to a competitive local exchange company under the terms of a resale or interconnection agreement.

12. Except in the case of discontinuance for nonpayment, if a telecommunications company providing interexchange service intends to discontinue service or is forced to discontinue service due to abandonment, acquisition, bankruptcy, or for other reasons, the company must provide reasonable advance notice of the discontinuance to each customer. The notice must inform the customer that the customer must choose another primary interexchange carrier or use an alternative service.

History: Effective April 1, 1985; amended effective January 1, 1993; May 1, 1996; July 1, 1997, amendments voided by the Administrative Rules Committee effective, August 16, 1997; January 1, 2001.
General Authority: NDCC 49-02-11 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-02-11, 49-21, 49-21-01.4, 49-21-01.7, 49-21-07

69-09-05-03. Deposits and guarantees.

1. Each telephone utility subject to the public service commission's jurisdiction may require each applicant for service to make a deposit not to exceed two times the estimated amount of one month's average bill. The utility shall each year pay interest on such deposit at the rate paid by the Bank of North Dakota on a six-month certificate of deposit. Such rate will be determined as of the first business day of each year on a six-month certificate of deposit with the smallest deposit required. The interest may be paid to the depositor or may be deducted from the depositor's indebtedness to the utility for telephone service. The payment or deduction for interest must be made during each calendar year, or whenever a deposit is refunded or service discontinued. The utility may accept in lieu of a cash deposit a contract signed by a guarantor, satisfactory to the utility, whereby the payment of a specified sum not to exceed the required cash deposit is guaranteed. The term of such contract must be indeterminate, but it must automatically terminate when the customer gives notice of service discontinuance to the utility or a change in location covered by the guarantee agreement or thirty days after written request for termination is made to the utility by the guarantor. However, no agreement may be terminated without the customer having made satisfactory settlement for any balance which the customer owes the utility. Upon termination of a guarantee contract, a new contract or a cash deposit may be required by the utility.

2. An eligible telecommunications carrier may not collect a service deposit in order to initiate lifeline service, if the qualifying low-income consumer voluntarily elects toll blocking from the carrier, where available. If toll blocking is unavailable, the carrier may charge a service deposit.

History: Effective April 1, 1985; amended effective August 1, 1994; January 1, 2001.
General Authority: NDCC ~~49-02-11~~ 28-32-02, 49-21-01.7
Law Implemented: NDCC ~~49-02-11~~, 49-21, 49-21-01.4, 49-21-01.7, 49-21-07

69-09-05-04. Rules for resale of telecommunications services.

1. Definitions.

   a. ~~"End-user"--means--a--person--who-uses-telecommunications service-for-the-person's-own-use.~~

   ~~b.~~ "Premise cable" means telecommunications cable or channels on the reseller's side of the point of connection to the local exchange company (demarcation point).

   ~~c.~~ b. "Prepayment" means payments made by customers of a reseller in advance of receiving service.

   ~~d.~~ c. "Resale" means the subscription to local or long-distance telecommunications services and facilities by one entity, and reoffered for profit or with markup to others with or without enhancements. Where reoffered service is part of a package, and the package is offered for profit or markup, it is resale.

   ~~e.~~ d. "Reseller" means a person reselling local or long-distance telecommunications services. The definition does not include pay telephone providers, but does include cellular ~~services~~ and personal communication service providers who resell wireline service as part of their celluar or personal communication service.

   ~~f.~~ e. "Same continuous property" is contiguous real estate owned by the same individual, group of individuals, or other legal entity having title to the property. The property may be traversed by streets, ditches, or other similar manmade or natural terrain features provided that, but for terrain features, the property would be contiguous and provided that such terrain features are of a nature and dimension that it is reasonable to treat the property as contiguous.

   ~~g.~~ f. "Shared tenant service provider" means a person reselling telecommunications services to the tenants of a building

complex on the same continuous property or to parties with a community of interest.

2. ~~Resellers~~ A reseller may not operate in North Dakota except in compliance with ~~these rules~~ applicable laws and rules. ~~Each~~ A reseller shall:

   a. Obtain a certificate of registration from the commission, on a form provided by the commission, authorizing the provision of local resale or long-distance resale services in the state of North Dakota.

   b. If ~~they require~~ a reseller requires prepayment for service:, it shall:

      (1) Submit a performance bond in an amount specified by the commission; or

      (2) Establish an escrow account in a North Dakota bank containing an amount equal to the prepayments collected at any given time, and file monthly reports showing escrow account activities and call completion data.

      (3) The requirements of paragraphs 1 and 2 are waived for any company that has provided cellular or personal communication service in North Dakota for one year without a formal complaint having been filed against it. The commission may revoke the waiver after notice and opportunity for hearing if necessary to protect the public interest.

      (4) The requirements of paragraphs 1 and 2 are subject to a twenty-five thousand dollar minimum for resellers of local service other than by means of a prepaid calling card.

   c. Forfeit its registration certificate if it is voluntarily dissolved or involuntarily dissolved under North Dakota ~~Century Code section 10-23-02.2~~ law. A reseller may not operate and its registration certificate is void on the effective date of involuntary dissolution under North Dakota Century Code section 10-23-02.2.

3. A reseller may not ~~appear on an equal access ballot~~ be identified as an optional intrastate interexchange carrier without a certificate of registration from the commission.

4. Except for residents of dormitories or residence halls of schools, colleges, or universities, the end user has the unrestricted right to choose service from the incumbent local exchange company.

5. A shared tenant service provider shall allow the tenant to use the shared tenant service provider's premise cable and wire in the event an end user wants to receive service from the local exchange company.

6. The reseller is responsible for the charges incurred for telecommunications services to which it subscribes for serving its end users.

7. A reseller is subject to reregulation by the commission, revocation of its certificate, and the penalties provided in North Dakota Century Code chapter 49-07 for violation of any applicable law or rule.

History: Effective March 1, 1989; amended effective August 1, 1991; December 1, 1993; February 1, 1995; July 1, 1997; January 1, 2001.
General Authority: NDCC 28-32-02, ~~49-02-11~~ 49-21-01.7
Law Implemented: NDCC ~~49-02-11~~ 49-03.1-01, 49-03.1-03, 49-21, 49-21-01.7, 49-21-07

69-09-05-04.1. ~~Equal-access-ballot-placement~~ Identification of intraLATA interexchange carriers. ~~A-local-exchange-company-may-not place-a-reseller-on-that-company's-equal-access-ballot-for-intrastate calling-unless-the-reseller-has-a-certificate-of-registration-from-the commission.~~

1. A local exchange carrier shall not identify a telecommunications company as an optional intrastate interexchange carrier unless the telecommunications company provides the local exchange company with evidence of an effective certificate of public convenience and necessity or a current certificate of registration authorizing the provision of intrastate interexchange service.

2. A telecommunications company shall immediately notify in writing all local exchange companies for which it has requested identification as an optional intrastate interexchange carrier if the telecommunications company's authority to provide interexchange service is revoked or abandoned. A local exchange company shall cease to identify a telecommunications company as an optional intrastate interexchange carrier upon receipt of a written notice that the telecommunications company's authority to provide interexchange service has been revoked or abandoned.

History: Effective February 1, 1995; amended effective January 1, 2001.
General Authority: NDCC 28-32-02, ~~49-02-11~~ 49-21-01.7
Law Implemented: NDCC ~~49-02-11~~ 49-03.1-01, 49-03.1-03, 49-21

69-09-05-05. Rules for the provision of operator services.

1. Definitions.

   a. "End user" means the person to whom operator service is provided.

   b. "Operator service" means service provided to assist in the completion or billing of telephone calls through the use of a live operator or automated equipment. "Operator service" does not include completion of calls through an 800 number or an access code when billed to an account previously established with the carrier by the end user, or the automated operator services provided by pay telephone sets with built-in automated operator messages.

   c. "Operator service provider" means the person providing operator service.

2. Operator service providers shall:

   a. Obtain a certificate of registration from the commission authorizing the provision of operator services in the state of North Dakota.

   b. Provide written material for use in disclosing to the end user the name and toll free telephone number of the operator service provider. This material must be provided to all coin telephone operators, motels, hospitals, and any other locations where end users may use telephone service not billable to their home or business ~~phones~~ telephones without operator service.

   c. Require operators to clearly identify the operator service provider to all end users and when requested, provide rate information.

   d. Provide emergency call service that is equal to that provided by the local exchange telephone company and, if unable to meet this requirement, provide emergency call service by immediate transfer of such calls to the local exchange company.

   e. For billing purposes, itemize, identify, and rate calls from the point of origination to the point of termination. No call may be transferred to another carrier by an operator service provider which cannot or will not complete the call, unless the call can be billed in accordance with this subsection.

   f. Not charge for incompleted calls.

   g. Disclose their names on bills which include charges for services they provided.

History: Effective March 1, 1989; amended effective August 1, 1991; May 1, 1996; January 1, 2001.
General Authority: NDCC 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-03.1-01, 49-03.1-03, 49-21, 49-21-01.7, 49-21-07

69-09-05-07. Customer trouble reports. When a customer's service is found to be out of order or a customer reports trouble, the local exchange telecommunications company shall test its facilities to determine if the problem is with the local exchange company's facilities. If it is, the local exchange company shall correct the trouble promptly. There may be no charge to the customer ~~for testing or correcting a problem found on the local exchange company's facilities~~ to test to determine if the problem is on the local exchange company's facilities or to correct a problem on the local exchange company's facilities. A local exchange company shall inform a customer in advance what charges will be assessed to identify or correct a problem located on the customer's facilities.

History: Effective August 1, 1991; amended effective January 1, 2001.
General Authority: NDCC 28-32-02~~, 49-02-11~~
Law Implemented: NDCC ~~49-02-11,~~ 49-21, 49-21-01.7

69-09-05-09. 911 and E-911 service. Each competitive local exchange company shall provide 911 or E-911 service that is comparable to the 911 or E-911 service provided by the incumbent local exchange company operating in each respective service area in which the competitive local exchange company offers service.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-21, 49-21-01.7, 49-21-07, 49-21-24

69-09-05-10. Certificate of registration - Procedure.

1. A reseller applying for a certificate of registration shall file an application on a form provided by the commission. The application shall include evidence of the applicant's authority to do business in North Dakota.

2. An applicant for a certificate of registration as a reseller shall follow the procedure set forth in section 69-09-05-04.

3. When the holder of a certificate of registration intends to assign the authority to provide telecommunications service in North Dakota to another entity, the assignee must first obtain a certificate of registration from the commission.

4. A reseller may voluntarily, without commission approval, surrender its certificate of registration by notifying the commission in writing.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-03.1-01, 49-03.1-03, 49-21

69-09-05-11. Certificate of public convenience and necessity - Procedure.

1. An applicant for a certificate of public convenience and necessity shall file an application with the commission which includes evidence of the applicant's authority to do business in North Dakota, conforms to the commission's rules of practice and procedure under article 69-02, and which identifies:

   a. The type of service the applicant intends to provide.

   b. The service area or areas in which the applicant intends to provide service.

   c. How the applicant meets the issues to be considered in the application.

2. An applicant for a certificate of public convenience and necessity must also file consolidated financial statements for the most recent year available, including:

   a. A balance sheet of the form and style usually followed in the industry.

   b. An income statement of the form and style usually followed in the industry.

   c. If available, an independent accountant's financial opinion.

   d. Any other information requested by the commission.

3. In order to implement North Dakota Century Code chapter 49-03.1 consistent with the Telecommunications Act of 1996, issues to be considered in an application for a certificate of public convenience and necessity for a facilities-based provider of telecommunications services are:

   a. Fitness and ability of the applicant to provide service.

   b. Adequacy of the proposed service.

c. The technical, financial, and managerial ability of the applicant to provide service.

4. If the application is to be decided on a notice of opportunity for hearing, the applicant shall file affidavits sufficient to meet the applicant's burden of proof on the issues.

5. When the holder of a certificate of public convenience and necessity intends to assign the authority to provide telecommunications service in North Dakota to another entity, the assignee must first obtain a certificate of public convenience and necessity from the commission.

6. Abandonment of a certificate of public convenience and necessity for a competitive local exchange company requires prior written notice to the commission and thirty days' prior written notice to the company's customers. Abandonment of a certificate of public convenience and necessity for an incumbent local exchange company requires prior commission approval.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-03.1-01, 49-03.1-03, 49-21, 49-21-01.7(7)

69-09-05-12. Eligible carrier applications and advertising.

1. Eligible carrier applications:

a. A telecommunications company that desires designation as an eligible carrier as that term is defined in the Telecommunications Act of 1996 shall make application for such designation with the commission.

b. An application for designation as an eligible carrier must specifically identify:

(1) The applicant's service area;

(2) How the applicant meets the requirements for designation as an eligible carrier;

(3) Whether the applicant requires a waiver of any eligible carrier requirement; and

(4) If a waiver is required, the specific reasons for the waiver and the length of time for which the waiver is required.

2. Eligible carrier advertising. The following forms of advertising of the availability of universal service are required of an eligible carrier:

a. A full description of available services in the eligible carrier's official telephone directory, including the process to be used by customers to qualify for lifeline and link-up service.

b. Advertising of the availability of universal services in media of general circulation in each eligible carrier's service areas. Availability may be advertised in newspapers, company newsletters, company or civic internet sites, bill stuffers, direct mailings, or other means intended to convey availability throughout the service area.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-21-01.7
Law Implemented: NDCC 49-21, 49-21-01.7, 49-21-07

69-09-05-13. Essential service provider bills. A provider of essential service, on any bill issued for the provision of essential services, shall:

1. Clearly disclose its name, business address, and a toll-free customer inquiry telephone number. The company name and business address must also be made available via the toll-free customer inquiry number;

2. Clearly and separately identify the essential services for which the bill is issued;

3. Clearly identify all taxes, fees, and surcharges associated with the essential services for which the bill is issued; and

4. Disclose that the provision of essential services may not be discontinued by the provider for nonpayment of charges for nonessential services or use other language that complies with federal billing rules.

History: Effective January 1, 2001.
General Authority: NDCC 28-32-02, 49-02-01.1, 49-21-01.7
Law Implemented: NDCC 49-21, 49-21-01.4, 49-21-01.7, 49-21-07

CHAPTER 69-09-01

69-09-01-18.1. Discontinuance of gas service.

1. A utility may disconnect service if the customer is delinquent in payment for services rendered. However, no utility shall discontinue service to a customer for failure to pay for such service until the utility shall first have given the customer notice of its intention to discontinue such service on account of delinquency. The notice shall:

   a. Be sent by first-class mail addressed to the customer at the place where service is rendered, except that in the case of residential customers sixty-five years of age or older, or for handicapped customers, personal notice by delivery is required. A copy of each notice must also be mailed to the nearest social service office and to any other appropriate financial assistance agency, providing that prior approval has been given by the customer pursuant to subsection 2.

   b. Show the amount of the delinquency.

   c. Include the telephone number of the public service commission.

   d. Advise the customer of the customer's rights and remedies, including but not limited to the right of the customer to stay termination for up to thirty days if the customer advises the utility within the ten-day notice period that dangerous health conditions exist or that the customer is sixty-five years of age or older or that the customer is

handicapped. In addition, the notice shall advise the customer of the customer's right to work out a satisfactory deferred installment agreement for delinquent accounts and of the opportunity to enter into equal monthly payment plans for future service.

e. Inform the customer that service will be discontinued if the delinquent account is not paid within ten calendar days from the date of mailing or personal delivery of the notice, or if a satisfactory installment agreement is not made with the utility for payment of the delinquent bill.

If the customer elects to enter into a deferred installment agreement for delinquent accounts, service may not be terminated; however, the utility may discontinue service without further notice if the customer fails to pay the delinquent account on or before the date specified in the notice, or in accordance with the deferred installment agreement. The customer shall have the privilege of paying the delinquent account at any time prior to the actual disconnection of service, and the person directed by the utility to make the disconnection shall be deemed authorized and shall accept payment of the delinquent account if tendered to the person by the customer before actual disconnection of service is made.

2. It shall be the responsibility of all residential customers sixty-five years of age or older, handicapped, or having an emergency medical problem in the household, including life sustaining appliances, such as kidney dialysis, to notify the utility of such status. To assist in such notification, all utilities shall annually include a preaddressed postage-paid postcard in the monthly billing mailed to all residential customers during the billing period ending October first. Such notice shall also be provided to all new customers in that service area when they are first provided service by the utility.

The postcard shall include the following questions:

	YES	NO
1. Is any member of your household 65 years of age or older, or handicapped?	—	—
2. Do you have any emergency medical problem in your household?	—	—
3. Do you desire that the area social service office or other appropriate financial assistance agency be notified in the event of a proposed disconnect?	—	—
4. Do you desire that some other third party		

be contacted in the event of a disconnect? __ __
If so, name and address of person _____
_____

5. If you are having difficulty paying your utility bill, please contact our local service representative or business office so that we can work with you on your problem.
Utility Telephone Number _____
Office Address _____

Date _____ Name _____
Address _____
_____
Signature

3. Service shall not be disconnected under this section on weekends, Fridays, state holidays, the day before a state holiday, or after twelve noon on any day. A report describing the total number of actual disconnects, date and time, type of customer, and amount of delinquency for each disconnected customer shall be filed monthly with the commission within ten days after the last day of each month.

4. Whenever service has been disconnected for nonpayment of a bill, before reconnection is made the customer shall pay the reconnection fee established in the utility's rate schedules; make a deposit pursuant to section 69-09-02-04 if all or a part of the previous deposit was used in settlement of the delinquent bill; and make a satisfactory settlement for the delinquent bill and for service rendered between the last meter reading date and the date service was disconnected.

5. In the event the customer disputes the amount of a bill for service, the customer may, to prevent disconnection for nonpayment, pay the disputed bill under protest to the utility. Alternatively, the customer may request a formal hearing pursuant to section 69-02-02-02 in which case the utility shall not disconnect service for nonpayment of the disputed bill until a final decision has been issued by the commission. The utility shall immediately give the commission notice of the dispute and the commission may investigate the dispute. The utility shall refund to the customer any part of such payment made under protest found by the commission to be excessive.

6. A utility may not disconnect service to a customer for failure of the customer: to pay for merchandise purchased from the utility; to pay for a different class of service furnished by the utility; to pay for service rendered to a previous occupant of the premises; or to pay the bill of another customer as guarantor thereof.

7. A utility may discontinue service to a customer for failure to comply with regulations of the utility on file with the commission pertaining to installation and operation of utilization equipment, or for use of equipment which interferes with, or adversely affects, the service to other customers, provided the customer has first been notified and afforded reasonable opportunity to change or disconnect such equipment.

8. A utility may discontinue service to a customer upon ten days written notice if it is determined that the meter or other equipment installed by the utility has been tampered with, or if there has been a diversion of service, or if the customer is utilizing gas before the energy has passed through a meter installed by the utility, or if a condition dangerous to life and property exists on the customer's premises.

9. Where a customer who has tenants is including the cost of utility services in the rent charged and the utility bill becomes delinquent, the utility before disconnecting service must also notify the tenants in writing at least ten days prior to the proposed termination date. The utility must allow each tenant to apply to become the customer of the utility in the tenant's own name, to have the service to the rental facility continued or resumed, and to pay the pro rata share of future bills. Such tenant-customer shall be subject to all the provisions of this chapter.

10. A utility may not discontinue service to a customer for nonpayment of a deposit.

History: Effective October 1, 1980; amended effective May 1, 1996; July 1, 1997; April 1, 2001.
General Authority: NDCC 49-02-11
Law Implemented: NDCC 49-02-11

69-09-01-20. Information ~~for~~ to customers. A utility shall:

1. ~~Each utility shall at any time, on request, give its customers such information and assistance as is reasonably possible in order that customers may secure safe and efficient service. Each utility shall inform each customer of any change made or proposed change to be made in any condition as to its service, as would affect the efficiency of the service, or the operation of the appliances which may be in use by the customer.~~ Keep copies of its rate schedules, rules, and regulations on file in every office where payments are received.

2. ~~Each utility shall with the first billing each year and at the time of any change in the applicable rate schedule deliver to each customer the schedule of rate applicable to the~~

~~customer's type of service.~~ Send a statement to each customer containing a clear and concise explanation of the existing rate schedule, and any rate schedule applied for, that is applicable to that customer.

a. The statement shall be sent:

(1) Not later than sixty days after the date of commencement of service to the customer;

(2) Not later than thirty days after filing an increase in a rate schedule applicable to such customer. This statement must include for each of the major classes of customers for which there is a separate rate, a summary analysis which shows the economic impact of the proposed rate change and rate design changes, if any, for an average customer within the class based upon an average annual consumption and a statement that the rates are proposed only and, if the rates are suspended by the commission, the new rates will not be effective until commission action has been taken; and

(3) As required by the commission under 69-02-04-01.

b. The statement must include notice to customers regarding the availability and location of the information required in subsection 1.

3. ~~The rate schedule shall be so delivered at the time of the first billing date after these standards become effective.~~ Include with each customer bill, at least once each year:

a. A clear and concise summary of the existing rate schedules applicable to each of the major classes of customers for which there is a separate rate;

b. An identification of any classes whose rates are not summarized; and

c. A notice calling the attention of the customer to the availability of alternative rate schedules for the customer's particular class of service and that, upon request, the utility will assist the customer in determining the billing for load conditions specified by the customer under various rate schedules. The customer, after selecting a particular rate schedule, shall take service under the rate schedule for a period of not less than twelve months, unless the rates are changed or there is a material change in the customer's load.

4. Send each customer upon request, without charge, a clear and concise statement of the actual consumption and cost of energy

by the customer for each billing period during the prior year, unless the consumption and cost data is not reasonably ascertainable by the utility.

5. Provide, upon request, information and assistance to the extent reasonably possible so that customers may secure safe and efficient service. A utility must inform each customer of any change made or proposed to be made in any condition of service that would affect the efficiency of the service or the operation of appliances which may be in use by the customer.

6. File with the commission a sample copy of the statement format required by subsections 2 and 4 and a copy of the summary and notice required by subsection 3. Any format changes in statements or notices under this section must be filed immediately with the commission.

History: Amended effective April 1, 2001.
General Authority: NDCC 49-02-11
Law Implemented: NDCC 49-02-11

69-09-02-02.1. Information to ~~electric~~ customers. A utility shall:

1. ~~Each--utility--shall--keep~~ Keep copies of its rate schedules, rules, and regulations on file in every office ~~of-the--utility~~ where payments are received ~~copies-of-its-rate-schedules-and rules-and-regulations-applicable--thereto.---Notice--shall--be given-customers-as-to-where-this-information-is-available-as-a part-of-the-statement-required-by-subsection-2.~~

2. ~~Each--utility--shall--send~~ Send a statement to each ~~of-its electric-customers-a-statement~~ customer containing a clear and concise explanation of the existing rate schedule, and any rate schedule applied for, that is applicable to ~~such~~ that customer.

   a. The statement shall be sent:

      ~~a.~~ (1) Not later than sixty days after the date of commencement of service to ~~such~~ the customer ~~or ninety--days--after-October-1,-1980,-whichever-occurs last~~; and

      ~~b.~~ (2) Not later than thirty days after ~~such-utility's application-for-any-change~~ filing an increase in a rate schedule applicable to such customer. The statement ~~addressing-the-rate--schedule--applied--for~~ shall must include for each of the major classes of ~~its-electric~~ customers for which there is a separate rate, a summary analysis which shows the economic impact of the proposed rate change and rate design changes, if any, for an average customer within a class based upon an average annual consumption and a statement that the rates applied for are proposed only and that, if the rates are suspended by the commission, the new rates will not be effective until commission action has been taken~~.~~; and

      (3) As required by the commission under 69-02-04-01.

   b. The statement must include notice to customers regarding the availability and location of the information required in subsection 1.

3. ~~Each--utility--shall-send-to~~ Include with each ~~of-its-electric customers-not-less-frequently-than~~ customer bill, at least once each year ~~together-with-the-customer's-billing~~:

a. A clear and concise summary of the existing rate schedules applicable to each of the major classes of ~~its--electric~~ customers for which there is a separate rate;

b. An identification of any classes whose rates are not summarized; and

c. A notice calling the attention of the customer to the availability of alternative rate schedules for the customer's particular class of service and that, upon request, the utility will assist the customer in determining the billing for load conditions specified by the customer under various rate schedules. The customer, after selecting a particular rate schedule, shall take service under the rate schedule for a period of not less than twelve months, unless the rates are changed or there is a material change in the customer's load.

4. ~~Each--utility,~~ Send each customer upon request ~~of-an-electric customer,-shall~~, without charge, ~~send-the-customer~~ a clear and concise statement of the actual consumption and cost of ~~electric~~ energy by ~~such~~ the customer for each billing period during the prior year, unless ~~such~~ the consumption and cost data is not reasonably ascertainable by the utility.

5. ~~Each-utility-shall-file~~ Provide, upon request, information and assistance to the extent reasonably possible so that customers may secure safe and efficient service. A utility must inform each customer of any change made or proposed to be made in any condition of service that would affect the efficiency of the service or the operation of appliances which may be in use by the customer.

6. File with the commission a sample copy of the statement format required by subsections 2 and 4 and a copy of the summary and notice required by subsection 3. Any format changes in statements or notices under this section ~~shall~~ must be filed immediately with the commission.

History: Effective October 1, 1980; amended effective April 1, 2001.
General Authority: NDCC 49-02-11
Law Implemented: NDCC 49-02-11

69-09-02-05.1. Discontinuance of electric service.

1. A utility may disconnect service if the customer is delinquent in payment for services rendered. However, no utility shall discontinue service to a customer for failure to pay for such service until the utility shall first have given the customer notice of its intention to discontinue such service on account of delinquency. The notice shall:

a. Be sent by first-class mail addressed to the customer at the place where service is rendered, except that in the case of residential customers sixty-five years of age or older, or for handicapped customers, personal notice by delivery is required. A copy of each notice must also be mailed to the nearest social service office and to any other appropriate financial assistance agency, providing that prior approval has been given by the customer pursuant to subsection 2.

b. Show the amount of the delinquency.

c. Include the telephone number of the public service commission.

d. Advise the customer of the customer's rights and remedies, including, but not limited to, the right of the customer to stay termination for up to thirty days if the customer advises the utility within the ten-day notice period that dangerous health conditions exist or that the customer is sixty-five years of age or older or that the customer is handicapped. In addition, the notice shall advise the customer of the customer's right to work out a satisfactory deferred installment agreement for delinquent accounts and of the opportunity to enter into equal monthly payment plans for future service.

e. Inform the customer that service will be discontinued if the delinquent account is not paid within ten calendar days from the date of mailing or personal delivery of the notice, or if a satisfactory installment agreement is not made with the utility for payment of the delinquent bill.

If the customer elects to enter into a deferred installment agreement for delinquent accounts, service may not be terminated; however, the utility may discontinue service without further notice if the customer fails to pay the delinquent account on or before the date specified in the notice, or in accordance with the deferred installment agreement. The customer shall have the privilege of paying the delinquent account at any time prior to the actual disconnection of service, and the person directed by the utility to make the disconnection shall be deemed authorized and shall accept payment of the delinquent account if tendered to the person by the customer before actual disconnection of service is made.

2. It shall be the responsibility of all residential customers sixty-five years of age or older, handicapped, or having an emergency medical problem in the household, including life-sustaining appliances, such as kidney dialysis, to notify the utility of such status. To assist in such notification, all utilities shall annually include a preaddressed

postage-paid postcard in the monthly billing mailed to all residential customers during the billing period ending October first. Such notice shall also be provided to all new customers in that service area when they are first provided service by the utility.

The postcard shall include the following questions:

	YES	NO
1. Is any member of your household 65 years of age or older, or handicapped?	___	___
2. Do you have any emergency medical problem in your household?	___	___
3. Do you desire that the area social service office or other appropriate financial assistance agency be notified in the event of a proposed disconnect?	___	___
4. Do you desire that some other third party be contacted in the event of a disconnect? If so, name and address of person _____ _____	___	___
5. If you are having difficulty paying your utility bill, please contact our local service representative or business office so that we can work with you on your problem.		

Utility Telephone Number _____
Office Address _____

Date _____ Name _____
Address _____
_____
Signature

3. Service shall not be disconnected under this section on weekends, Fridays, state holidays, the day before a state holiday, or after twelve noon on any day. A report describing the total number of actual disconnects, date and time, type of customer, and amount of delinquency for each disconnected customer shall be filed monthly with the commission within ten days after the last day of each month.

4. Whenever service has been disconnected for nonpayment of a bill, before reconnection is made the customer shall pay the reconnection fee established in the utility's rate schedules; make a deposit pursuant to section 69-09-02-04 if all or a part of the previous deposit was used in settlement of the delinquent bill; and make a satisfactory settlement for the

delinquent bill and for service rendered between the last meter reading date and the date service was disconnected.

5. In the event the customer disputes the amount of a bill for service, the customer may, to prevent disconnection for nonpayment, pay the disputed bill under protest to the utility. Alternatively, the customer may request a formal hearing pursuant to section 69-02-02-02 in which case the utility shall not disconnect service for nonpayment of the disputed bill until a final decision has been issued by the commission. The utility shall immediately give the commission notice of the dispute, and the commission may investigate the dispute. The utility shall refund to the customer any part of such payment made under protest found by the commission to be excessive.

6. A utility may not disconnect service to a customer for failure of the customer: to pay for merchandise purchased from the utility; to pay for a different class of service furnished by the utility; to pay for service rendered to a previous occupant of the premises; or to pay the bill of another customer as guarantor thereof.

7. A utility may discontinue service to a customer for failure to comply with regulations of the utility on file with the commission pertaining to installation and operation of utilization equipment, or for use of equipment which interferes with, or adversely affects, the service to other customers, provided the customer has first been notified and afforded reasonable opportunity to change or disconnect such equipment.

8. A utility may discontinue service to a customer upon ten days' written notice if it is determined that the meter or other equipment installed by the utility has been tampered with, or if there has been a diversion of service, or if the customer is utilizing electricity before the energy has passed through a meter installed by the utility, or if a condition dangerous to life and property exists on the customer's premises.

9. Where a customer who has tenants is including the cost of utility services in the rent charged and the utility bill becomes delinquent, the utility before disconnecting service must also notify the tenants in writing at least ten days prior to the proposed termination date. The utility must allow each tenant to apply to become the customer of the utility in the tenant's own name, to have the service to the rental facility continued or resumed, and to pay the pro rata share of future bills. Such tenant-customer shall be subject to all the provisions of this chapter.

10. A utility may not discontinue service to a customer for nonpayment of a deposit.

History: Effective October 1, 1980; amended effective May 1, 1996; July 1, 1997; April 1, 2001.
General Authority: NDCC 49-02-11
Law Implemented: NDCC 49-02-11

MAY 2001

CHAPTER 69-05.2-01

69-05.2-01-03. Promulgation of rules - Notice - Hearing.

1. The commission may propose new rules under this article or propose amendments or repealers of any rule under this article and will hold a public hearing in accordance with the procedures of this section.

2. Any person or governmental agency may petition the commission to adopt, amend, or repeal any rule under this article. Upon receipt of the petition, the commission will determine if the petition provides a reasonable basis for proposing the issuance, amendment, or repeal of a rule.

3. If the petition has a reasonable basis, the commission will propose the rule, amendment, or repealer and hold a public hearing on the proposal.

4. The commission will issue a notice of the public hearing which will:

   a. Furnish a brief explanation of the purpose of the proposed rule.

   b. Specify a location where the text of the proposed rule may be reviewed.

   c. Advise all interested persons of the opportunity to submit written comments and to appear and testify at the hearing to offer oral testimony.

d. Provide the address to which written comments may be sent.

e. Specify the date, time, and place of the hearing.

5. The commission will publish notice of hearing ~~twice in the official newspapers of each county in which surface coal mining operations occur and each daily newspaper of general circulation in the state. The commission will file the notice of hearing with the legislative council. The commission will cause the last publication and the filing with the legislative council to occur at least thirty days before the hearing~~ and provide a copy of the proposed rules and notice to the legislative council as required by subsection 4 of North Dakota Century Code section 28-32-02.

6. The public comment period on the proposed adoption, amendment, or repeal of any rule under this article will close at the end of the public hearing, unless extended by the commission.

7. The commission will consider all written comments and oral testimony received before adoption, amendment, or repeal of any rule under this article and make a written record of its consideration.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; May 1, 1999; May 1, 2001.
General Authority: NDCC 28-32-02, 38-14.1-03
Law Implemented: NDCC 28-32-02, 38-14.1-34, 38-14.1-41

69-05.2-09-15. Permit applications - Operation and reclamation plans - Prime farmlands. If appropriate, the applicant shall submit a mining and restoration plan for prime farmland containing:

1. The cooperative soil survey that identified the prime farmland, soil mapping units, and representative soil profile descriptions. The plan must include soil horizon depths, pH, and range of soil densities for each prime farmland soil mapping unit.

2. The method and equipment for removing, storing, and respreading suitable plant growth materials.

3. Locations for separate stockpiling and plans for soil stabilization before redistribution.

4. The postmining topographic map showing the prime farmland respread areas.

5. Applicable documentation that supports the use of other suitable strata, instead of the A, B, or C soil horizon, to obtain equivalent or higher levels of productivity as nonmined prime farmlands in the surrounding area under equivalent management levels.

6. Plans for seeding or cropping the area and conservation practices. Proper adjustments for seasons must be proposed so that final graded land is not exposed to erosion when vegetation or conservation practices cannot be established or implemented.

7. Available agricultural school studies or other scientific data for areas with comparable soils, climate, and management (including water management) that affirmatively demonstrate achievement of postmining productivity equal to or greater than premining productivity.

8. If a reclaimed cropland tract will contain a mixture of prime and nonprime farmlands and commission approval of a single yield standard for the entire tract is requested as allowed by subdivision 1 of subsection 4 of section 69-05.2-22-07, a detailed description and comparison of the soil mapping units and acreages occurring in the prime and nonprime parcels must be provided. The comparison must include the appropriate yield calculations for the prime and nonprime parcels as well as the single yield standard that is proposed.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-14

69-05.2-10-03. Permit applications - Criteria for permit approval or denial.

1. The commission will not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of any law or rule of this state, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201, et seq.], or any law or rule in any state enacted under federal law or regulation pertaining to air or water environmental protection, incurred in connection with any surface coal mining and reclamation operation, or if any of the following are outstanding:

   a. Delinquent civil penalties under North Dakota Century Code sections 38-12.1-08 and 38-14.1-32, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201, et seq.], or any law or rule in any state enacted under federal law or regulation pertaining to air or water environmental protection, incurred in connection with any surface coal mining and reclamation operation.

   b. Bond forfeitures where violations upon which the forfeitures were based have not been corrected.

   c. Delinquent abandoned mine reclamation fees.

   d. Unabated violations of federal and state laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining and reclamation operation.

   e. Unresolved federal and state failure-to-abate cessation orders.

   f. Unresolved imminent harm cessation orders.

2. If a current violation exists, the commission will require the applicant or person who owns or controls the applicant, before the permit is issued, to:

   a. Submit proof that the violation has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation; or

   b. Establish that the applicant, or any person owned or controlled by either the applicant or any person who owns

or controls the applicant, has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of that violation. If the administrative or judicial authority either denies a stay applied for in the appeal or affirms the violation, then any operations being conducted under a permit issued under this section must immediately cease, until the provisions of subdivision a are satisfied.

3. Any permit issued on the basis of proof submitted under subdivision a of subsection 2 that a violation is being corrected, or pending the outcome of an appeal under subdivision b of subsection 2, will be conditionally issued.

4. The commission will not issue a permit if it finds the applicant, anyone who owns or controls the applicant, or the operator specified in the application, controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of any law or rule of this state, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201, et seq.], or any state or federal program approved under the Surface Mining Control and Reclamation Act of 1977, of such nature and duration, and with resulting irreparable damage to the environment as to indicate an intent not to comply with those laws, rules, or programs. The applicant, anyone who owns or controls the applicant, or the operator must be given an opportunity for hearing on the determination under North Dakota Century Code section 38-14.1-30.

5. After an application is deemed ready for approval, but before the permit is issued, the commission's decision to approve or disapprove the application will be made, based on the compliance review required by subsection 1, in light of any new information submitted under subsection 2 of section 69-05.2-06-01 and subsection 6 of section 69-05.2-06-02.

6. In addition to the requirements of subsection 3 of North Dakota Century Code section 38-14.1-21, no permit or significant revision will be approved, unless the application affirmatively demonstrates and the commission finds, in writing, on the basis of information in the application or otherwise available, which is documented in the approval and made available to the applicant, that:

   a. The permit area is not on any lands subject to the prohibitions or limitations of North Dakota Century Code section 38-14.1-07 or the area has met the application review procedures of section 69-05.2-04-01.

   b. For alluvial valley floors:

(1) The applicant has obtained either a negative determination; or

(2) If the permit area or adjacent area contains an alluvial valley floor:

(a) The operations would be conducted according to chapter 69-05.2-25 and all applicable requirements of North Dakota Century Code chapter 38-14.1.

(b) Any change in the use of the lands covered by the permit area from its premining use in or adjacent to alluvial valley floors will not interfere with or preclude the reestablishment of the essential hydrologic functions of the alluvial valley floor.

(3) The significance of the impact of the operations on farming will be based on the relative importance of the vegetation and water of the developed grazed or hayed alluvial valley floor area to the farm's production, or any more stringent criteria established by the commission as suitable for site-specific protection of agricultural activities in alluvial valley floors.

(4) Criteria for determining whether a mining operation will materially damage the quantity or quality of waters include:

(a) Potential increases in the concentration of total dissolved solids of waters supplied to an alluvial valley floor to levels above the threshold value at which crop yields decrease, based on crop salt tolerance research studies approved by the commission, unless the applicant demonstrates compliance with subdivision e of subsection 3 of North Dakota Century Code section 38-14.1-21.

(b) The increases in subparagraph a will not be allowed unless the applicant demonstrates, through testing related to local crop production that the operations will not decrease crop yields.

(c) For types of vegetation specified by the commission and not listed in approved crop tolerance research studies, a consideration must be made of any observed correlation between total dissolved solids concentrations in water and crop yield declines.

(d) Potential increases in the average depth to water saturated zones (during the growing season) within the root zone that would reduce the amount of subirrigated land compared to premining conditions.

(e) Potential decreases in surface flows that would reduce the amount of irrigable land compared to premining conditions.

(f) Potential changes in the surface or ground water systems that reduce the area available to agriculture as a result of flooding or increased root zone saturation.

(5) For the purposes of this subsection, a farm is one or more land units on which agricultural activities are conducted. A farm is generally considered to be the combination of land units with acreage [hectarage] and boundaries in existence prior to July 1, 1979, or, if established after July 1, 1979, with boundaries based on enhancement of the farm's agricultural productivity not related to mining operations.

(6) If the commission determines the statutory exclusions of subsection 3 of North Dakota Century Code section 38-14.1-21 do not apply and that any of the findings required by this section cannot be made, the commission may, at the applicant's request:

(a) Determine that mining is precluded and deny the permit without the applicant filing any additional information required by this section; or

(b) Prohibit surface coal mining and reclamation operations in all or part of the area to be affected by mining.

c. The applicant has, with respect to prime farmland, obtained either a negative determination or if the permit area contains prime farmlands:

(1) The postmining land use will be cropland.

(2) The permit specifically incorporates the plan submitted under section 69-05.2-09-15 after consideration of any revisions suggested by the natural resource conservation service.

(3) The operations will be conducted in compliance with chapter 69-05.2-26 and other standards required by

this article and North Dakota Century Code chapter 38-14.1.

(4) The permit demonstrates that the applicant has the technological capability to restore prime farmland, within a reasonable time, to equivalent or higher yields as nonmined prime farmland in the surrounding area under equivalent management practices.

(5) The aggregate total prime farmland acreage will not be decreased from that which existed prior to mining based on the cooperative soil survey. Any postmining water bodies that are part of the reclamation must be located within the nonprime farmland portions of the permit area. If any such water bodies reduce the amount of prime farmland that a surface owner had before mining, the affected surface owners must consent to the creation of the water bodies and the plans must be approved by the commission.

d. The operations will not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitats.

e. The applicant has submitted proof that all reclamation fees required by 30 CFR subchapter R have been paid.

f. The applicant has, if applicable, satisfied the requirements for approval of a cropland postmining land use under section 69-05.2-22-01.

7. The commission may make necessary changes in the permit to avoid adverse effects on finding that operations may adversely affect any publicly owned park or places included on the state historic sites registry or the national register of historic places. Operations that may adversely affect those parks or historic sites will not be approved unless the federal, state, or local governmental agency with jurisdiction over the park or site agrees, in writing, that mining may be allowed.

History: Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; May 1, 1992; June 1, 1994; July 1, 1995; June 1, 1997; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-21, 38-14.1-33

69-05.2-12-09. Performance bond - Period of liability.

1. The bond liability period is the time necessary to meet the requirements of North Dakota Century Code chapter 38-14.1, this article, and the permit and shall continue a minimum of ten years as specified in subsection 2 of section 69-05.2-22-07. The period of extended responsibility begins again whenever augmented seeding, fertilization, irrigation, or other work is required or conducted on the site prior to bond release, unless the management practice conducted is a part of normal management for that particular land use and is approved by the commission.

2. If the commission approves a long-term postmining land use of developed water resources, recreation, residential, industrial, or commercial, the commission may approve a liability period of less than ten years if the other requirements of this subsection and the requirements of ~~subdivision~~ subdivisions j and k of subsection 4 of section 69-05.2-22-07 are met prior to the final release of bond.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; July 1, 1995; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-16

69-05.2-12-12. Release of performance bond - Bond release application.

1. The permittee may request the commission release all or part of a bond for lands disturbed after July 1, 1975, as follows:

   a. For lands disturbed between July 1, 1975, and June 30, 1979, the application must comply with subsection 1 of North Dakota Century Code section 38-14.1-17 and subsections 3 and 4 of this section. The criteria for release of all or part of the bond will be according to the reclamation requirements in effect at the time of the disturbance.

   b. For lands disturbed after June 30, 1979, the application must comply with the requirements of this section and section 69-05.2-12-11.

2. The permittee may file bond release applications only at times and seasons that allow the commission to properly evaluate the completed reclamation operations. Each application for bond release shall include a notarized statement by the permittee

which certifies that all applicable reclamation activities have been accomplished in accordance with this article, North Dakota Century Code chapter 38-14.1, and the approved reclamation plan.

3. Within thirty days after filing a request for bond release, the permittee shall submit proof of the publication required by North Dakota Century Code section 38-14.1-17. The advertisement published must include the permittee's name.

4. Lands for which the permittee requests bond release must be legally described and delineated on maps of the permit area.

5. When the permittee requests a partial release of bond after regrading under subdivision a of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must, unless waived by the commission, include surface profiles or topographic maps in accordance with section 69-05.2-21-06.

6. When the permittee requests a partial release of bond after respreading suitable plant growth material under subdivision b of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must include the thickness of the respread first lift and second lift suitable plant growth materials.

7. When the permittee requests a partial release of bond after vegetation has been established under subdivision c of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must include:

   a. The data collected, analyses conducted, and a narrative demonstrating vegetation establishment as required by subsection 3 of section 69-05.2-22-07.

   b. Documentation that the lands to which the release would be applicable are not contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by section 69-05.2-16-04.

   c. A discussion of how the provisions of a plan approved by the commission for the sound future management of any permanent impoundment by the permittee or landowner have been implemented.

8. When the permittee requests final bond release under subdivision d of subsection 7 of North Dakota Century Code section 38-14.1-17, the application must include:

   a. The data collected, analyses conducted, and a narrative detailing compliance with subsection 4 of section 69-05.2-22-07.

b. The history of initial and subsequent seedings and fertilization including mixtures and rates, appropriate soil tests, supplemental irrigation, or other management practices employed.

c. Documentation showing the reestablishment of essential hydrologic functions of alluvial valley floors.

9. When the permittee requests release of bond for any combination of release stages detailed in subsection 7 of North Dakota Century Code section 38-14.1-17, the application must contain all the information required at each bond release stage.

10. Requests for a reduction in bond amount for reclamation work performed according to subsection 4 of section 69-05.2-12-08 must include a detailed description of the work performed and a new reclamation cost estimate.

11. The commission may request any additional information necessary to evaluate the bond release application.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; May 1, 1992; January 1, 1993; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-17

69-05.2-16-05. Performance standards - Hydrologic balance - Surface water monitoring.

1. Surface water monitoring must be conducted in accordance with the monitoring program and based on the probable hydrologic consequences determination submitted under section 69-05.2-08-04. The commission will approve the nature of data that relate to the hydrologic reclamation plan in section 69-05.2-09-12, frequency of collection, and determine reporting requirements.

   a. For locations in surface water bodies, such as streams, lakes, and impoundments, monitoring must:

      (1) Be adequate to measure accurately and record quantity and quality of discharges from the permit area and identify the extent to which mining affects water quality and quantity in the adjacent area. Water samples taken from all monitoring sites must be analyzed for the parameters specified in subdivision b of subsection 3 of section 69-05.2-08-07. Results must be submitted quarterly to the commission.

      (2) Be conducted to assure reliable test data according to existing standard procedures and analytical methods.

   b. For point source discharges, monitoring must:

      (1) Be conducted according to state department of health standards.

      (2) Result in notifying the commission within five days in any cases in which analytical results of the sample collections indicate noncompliance with a permit condition or applicable standard. Where a North Dakota pollutant discharge elimination system permit effluent limitation noncompliance has occurred, the operator or permittee shall forward the analytical results concurrently with the written notice of noncompliance.

      (3) Result in quarterly reports to the commission, to include analytical results from each sample taken during the quarter. Any sample results which indicate a permit violation must be reported to the commission as specified in ~~subdivision c~~ paragraph 2. In those cases where the discharge for which water

monitoring reports are required is also subject to regulation by a North Dakota pollutant discharge elimination system (NDPDES) permit and where that permit includes provisions for equivalent reporting requirements and requires filing of the water monitoring reports within ninety days or less of sample collection, the operator or permittee shall submit to the commission on the same time schedule as required by the North Dakota pollutant discharge elimination system permit or within ninety days following sample collection, whichever is earlier, a copy of the completed North Dakota pollutant discharge elimination system reporting form along with analytical results from each sample taken during the quarter.

2. If violation of a permit condition occurs, the operator shall, if appropriate, immediately take the actions provided for in subdivision a of subsection 3 of section 69-05.2-10-05 and subsection 2 of section 69-05.2-09-12.

3. After disturbed areas have been regraded and stabilized, the permittee shall continue to monitor surface water flow and quality within the permit and adjacent areas. Data from this monitoring may be used to demonstrate that the quality and quantity of runoff without treatment is consistent with the requirements to minimize disturbance to the prevailing hydrologic balance and attain the approved postmining land use. These data may also provide a basis for commission approval to remove water quality or flow control systems.

4. Equipment, structures, and other devices necessary to measure and sample accurately the quality and quantity of surface water discharges from the disturbed area must be properly installed, maintained, and operated and must be removed when no longer required.

History: Effective August 1, 1980; amended effective May 1, 1990; June 1, 1997; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-27

69-05.2-22-07. Performance standards - Revegetation - Standards for success.

1. Success of revegetation must be measured by using statistically valid techniques approved by the commission. Comparison of ground cover and productivity may be made on the basis of reference areas, through the use of standards in technical guides published by the United States department of agriculture, or through the use of other approved standards. If reference areas are used, the management of the reference area during the responsibility period required in subsection 2 must be comparable to that required for the approved postmining land use of the permit area. If standards are used, they must be approved by the commission and the office of surface mining reclamation and enforcement. Approved standards are contained in the commission's Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments.

2. The period of responsibility under the performance bond requirements of section 69-05.2-12-09 will begin following augmented seeding, planting, fertilization, irrigation, or other work, except for cropland and prime farmland where the period of responsibility begins at the date of initial planting of the crop being grown or a precropland mixture of grasses and legumes, and must continue for not less than ten years.

3. Vegetation establishment, for the purpose of the third stage bond release provided for in subdivision c of subsection 7 of North Dakota Century Code section 38-14.1-17, will be determined for each postmining land use according to the following procedures:

   a. For native grassland, tame pastureland, and fish and wildlife habitat where the vegetation type is grassland, ground cover on the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence. All species used in determining ground cover must be perennial species not detrimental to the approved postmining land use.

   b. For cropland, vegetation will be considered established after the successful seeding of the crop being grown or a precropland mixture of grasses and legumes.

   c. For prime farmland, annual average crop production from the permit area must be equal to or greater than that of

the approved reference area or standard with ninety percent statistical confidence for a minimum of three crop years.

d. For woodland, shelterbelts, and fish and wildlife habitat where the vegetation type is woodland, the number of trees and shrubs must be equal to or greater than the approved standard. Understory growth must be controlled. Erosion must be adequately controlled by mulch or site characteristics.

e. For fish and wildlife habitat where the vegetation type is wetland, the basin must exhibit the capacity to hold water and support wetland vegetation. Ground cover of the contiguous areas must be adequate to control erosion.

4. The success of revegetation on the permit area at the time of final bond release must be determined for each postmining land use according to the following:

a. For native grassland, the following must be achieved for the last two consecutive years of the responsibility period:

(1) Ground cover and productivity of the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence; and

(2) Diversity, seasonality, and permanence of the vegetation of the permit area must be equivalent to that of the approved standard.

b. For tame pastureland, ground cover and productivity of the permit area must be equal to or greater than that of the approved standard with ninety percent statistical confidence for the last two consecutive growing seasons of the responsibility period.

c. For cropland, crop production from the permit area must be equal to or greater than that of the approved reference area or standard with ninety percent statistical confidence for the last two consecutive growing seasons of the responsibility period.

d. For prime farmlands, a showing that the requirements for the restoration of productivity as specified in subdivision c of subsection 3 have been met and that the ten-year period of responsibility has elapsed.

e. For woodlands and fish and wildlife habitat where the vegetation type is woodland, the following must be

achieved during the last two consecutive years of the responsibility period:

(1) The number of woody plants established on the permit area must be equal to or greater than the number of live woody plants of the same life form of the approved standard with ninety percent statistical confidence. Trees, shrubs, half-shrubs, root crowns, or root sprouts used in determining success of stocking must meet the following criteria:

(a) Be healthy;

(b) Be in place for at least two growing seasons; and

(c) At least eighty percent of those counted must have been in place at least six years. This provision will be deemed satisfied if the operator demonstrates that no tree, shrub, or half-shrub replanting has occurred during the last six years of the revegetation responsibility period;

(2) The ground cover must be equal to or greater than ninety percent of the ground cover of the approved standard with ninety percent statistical confidence and must be adequate to control erosion; and

(3) Species diversity, seasonal variety, and regenerative capacity of the vegetation on the permit area must be evaluated on the basis of species stocked and expected survival and reproduction rates.

f. For shelterbelts, the following must be achieved during the last two consecutive years of the responsibility period:

(1) Trees, shrubs, half-shrubs, root crowns, or root sprouts used in determining success of stocking must meet the following criteria:

(a) Be healthy;

(b) Be in place for at least two growing seasons; and

(c) At least eighty percent of those counted must have been in place at least six years. This provision will be deemed satisfied if the operator demonstrates that no tree, shrub, or half-shrub replanting has occurred during the

last six years of the revegetation responsibility period;

(2) Shelterbelt density and vigor must be equal to or greater than that of the approved standard; and

(3) Erosion must be adequately controlled.

g. For fish and wildlife habitat, where the vegetation type is wetland, vegetation zones and dominant species must be equal to those of the approved standard the last two consecutive years of the responsibility period. In addition, wetland permanence and water quality must meet approved standards.

h. For fish and wildlife habitat, where the vegetation type is grassland, the following must be achieved during the last two consecutive years of the responsibility period:

(1) Ground cover must be equal to or greater than that of the approved standard with ninety percent statistical confidence and must be adequate to control erosion.

(2) Species diversity, seasonal variety, and regenerative capacity of the vegetation must meet the approved standard.

i. For previously mined areas that were not reclaimed to the requirements of this chapter, any reclamation requirements in effect when the areas were mined must be met. In addition, the ground cover may not be less than can be supported by the best available plant growth material in the reaffected area, nor less than the ground cover existing before redisturbance. Adequate measures must be in place to control erosion as approved by the commission.

j. For areas to be developed for water, residential, or industrial and commercial uses within two years after the completion of grading or soil replacement, the ground cover on these areas may not be less than required to control erosion.

k. For areas to be developed for recreation, woody plants must meet the stocking and plant establishment standards for woodlands or shelterbelts found in paragraph 1 of subdivision e or in subdivision f as applicable. In addition, ground cover must not be less than required to achieve the approved postmining land use.

l. As an alternative to meeting revegetation success standards for the last two consecutive growing seasons of the responsibility period, an operator may demonstrate that the applicable standards have been achieved for <u>any</u>

three ~~out--of--five--consecutive~~ years starting no sooner than the ~~eighth~~ sixth year of the responsibility period and with one year being the last year of the responsibility period. This alternative does not pertain to success standards for prime farmlands unless a reclaimed tract contains both prime and nonprime farmlands. If a reclaimed tract contains a mixture of prime and nonprime farmlands, the commission may approve a single yield standard for the entire tract based on the soil types that occurred on the prime and nonprime areas prior to mining. The operator must provide a detailed description and comparison of the soil mapping units, acreages and yield calculations in the reclamation plan as required by subsection 8 of section 69-05.2-09-15. When a single yield standard is approved, the operator must demonstrate that the standard has been achieved for any three years starting no sooner than the sixth year of the responsibility period and with one year being the last year of the responsibility period. If this option is approved, the operator must also meet the applicable requirements of section 69-05.2-26-05 for the entire tract.

5. Throughout the liability period the permittee shall:

   a. Maintain any necessary fences and use proper management practices; and

   b. Conduct periodic measurements of vegetation, soils, and water prescribed or approved by the commission.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; May 1, 1992; January 1, 1993; June 1, 1997; May 1, 1999; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-24

69-05.2-26-05. Performance standards - Prime farmland - Revegetation and restoration of productivity. The following revegetation requirements must be met for areas being returned to prime farmland after mining:

1. Following soil replacement, the operator shall establish a vegetative cover capable of stabilizing the soil surface. All revegetation must comply with the plan approved by the commission and be carried out in a manner that encourages prompt vegetative cover and recovery of productive capacity. The timing and mulching provisions of sections 69-05.2-22-04 and 69-05.2-22-05 must be met.

2. Measurement of success in prime farmland revegetation will be determined in accordance with section 69-05.2-22-07.

3. Prime farmland productivity must be restored in accordance with the following:

   a. Measurement of productivity must be initiated within ten years after completion of soil replacement.

   b. Productivity must be measured on a representative sample or on all of the mined and reclaimed prime farmland area using the crop determined under subdivision f. The permittee shall use a statistically valid sampling technique approved by the commission. Approved techniques are found in the commission's Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments.

   c. The measurement period for determining average annual crop production is specified in subdivision c of subsection 3 of section 69-05.2-22-07.

   d. The level of management applied during the measurement period must be the same as that used on nonmined prime farmland in the surrounding area.

   e. Restoration of prime farmland productivity will be considered achieved when the average yield equals or exceeds that of the crop established on nonmined prime farmland soils in the surrounding areas. The soil series, texture, and slope of the nonmined prime farmlands must be the same or similar to the prime farmlands that were mined and management practices must be equivalent.

   f. The crop on which restoration of productivity is proven must be selected from the crops most commonly produced on

the surrounding prime farmland. Where row crops are the dominant crops grown on prime farmland in the area, the row crop requiring the greatest rooting depth must be used as one of the crops.

g. Crop yields for the same or similar nonmined prime farmland soils during a given crop season must be determined by methods contained in Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessment or other methods approved by the commission and the office of surface mining reclamation and enforcement.

h. If a reclaimed tract contains a mixture of prime and nonprime farmlands, the commission may approve a single yield standard for the entire tract as allowed under subdivision 1 of subsection 4 of section 69-05.2-22-07.

History: Effective August 1, 1980; amended effective May 1, 1990; May 1, 1992; June 1, 1997; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-24

69-05.2-29-03. Small operator assistance - Eligibility for assistance. An applicant is eligible for assistance if the applicant:

1. Intends to apply for a permit under North Dakota Century Code chapter 38-14.1.

2. Establishes that the probable total actual and attributed production for each year of the permit will not exceed three hundred thousand tons [272155.41 metric tons]. Production from the following will be attributed to the permittee:

   a. All coal produced by operations beneficially owned entirely by the applicant or controlled, by reason of ownership, direction of the management or in any other manner, by the applicant.

   b. The pro rata share, based upon percentage of beneficial ownership, of coal produced by operations in which the applicant owns more than a ~~five~~ ten percent interest.

   c. All coal produced by persons who own more than ~~five~~ ten percent of the applicant or who, directly or indirectly, control the applicant by reason of stock ownership, direction of the management, or in any other manner.

   d. The pro rata share of coal produced by operations owned or controlled by the person who owns or controls the applicant.

   e. All coal produced by operations owned by members of the applicant's family or relatives unless it is established that there is no direct or indirect business relationship between or among them.

3. Is not restricted in any manner from receiving a permit.

4. Does not organize or reorganize the applicant's company solely for the purpose of obtaining assistance under the small operator assistance program.

5. Will be required to pay reclamation fees under the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1202 et seq.].

History: Effective August 1, 1980; amended effective May 1, 1990; October 1, 1994; May 1, 2001.
General Authority: NDCC 38-14.1-03
Law Implemented: NDCC 38-14.1-03, 38-14.1-37

TITLE 74

Seed Commission

MAY 2001

CHAPTER 74-02-01

74-02-01-01. Seed testing fees - Sample size. The definition of terms used in this section shall be the same as those defined in North Dakota Century Code section 4-09-01.

The following schedule of fees shall apply to tests on all samples of seed subject to change by the seed commission. All fees must accompany samples unless previous credit arrangements have been made.

	Germination Test	Seed Purity Test
Alfalfa	$7.00	$10.00
Bluegrass	10.00	13.00
Bromegrass	10.00	13.00
Buckwheat	6.00	6.00
Cereals	7.00	8.00
Clovers	7.00	10.00
Corn	7.00	8.00
Edible beans	7.00	8.00
Fescues	10.00	13.00
Flax	7.00	8.00
Green needlegrass	25.00	13.00
Indiangrass	15.00	25.00
Creeping foxtail	10.00	25.00
Millet	7.00	10.00
Mustard	7.00	10.00
Orchardgrass	10.00	13.00
Peas (field)	7.00	8.00
Reed canarygrass	10.00	13.00
Ryegrass	10.00	13.00

Sideoats-grama----------15.00--------------------15.00
Sorghum----------7.00--------------------8.00
Soybeans----------7.00--------------------8.00
Sudangrass----------7.00--------------------8.00
Sunflowers----------7.00--------------------8.00
Switchgrass----------15.00--------------------13.00
Timothy----------10.00--------------------13.00
Trefoil----------7.00--------------------10.00
Western-wheatgrass--------15.00--------------------15.00
Other-wheatgrasses--------10.00--------------------13.00
Trees-and-shrubs----------11.00--------------------6.00
Rape-or-canola----------7.00--------------------13.00

Charge-For-Tests-on-Kinds-of-Seed-Not-Listed:

Fees-for-tests-not-listed-will-be-established-by-the-seed-commission.

"Rush"-service:--$10.00-per-test.

Samples--which-require-excessive-time---screenings,-low-grade,-dirty,-or unusually-difficult-sample---$20.00-per-hour.

Mixtures:

Mixtures--of-two-or-more-kinds-of-seeds-shall-carry-a-fee-equal-to the-fees-for-testing-each-component-in-the-mixture.

Examinations:

For-noxious-weeds---$6.00.

150-gram-noxious---$6.00.

Copper-sulfate,-ammonia-for-sweet-clover---$20.00.

Weed--check:---identify--weeds--present-in-sample;-preconditioning test-(not-for-labeling)---$5.00.

Size-of-sample:

The--minimum--weights--of--samples-submitted-for-tests-shall-be-as follows:

1.--Seed-purity-tests:

a.--Four--ounces--[113.4-grams]-of-grass-seed,-white-or-alsike clover,-or-seeds-of-similar-size.

b.--Eight--ounces--[226.8-grams]--of-sweet-clover,-red-clover, alfalfa,-grasses,-millet,--rape,--flaxseed,--or--seeds--of similar-size.

c.--One---and---one-half--pounds--[680.38-grams]--of--cereals, soybeans,-or-seeds-of-similar-size.

2.--Germination-tests:

The-minimum-size-of-samples-for-a-germination-test-shall-be-at least-eight-hundred-seeds-for-testing-(send-one-cup-of-seed-to ensure-best-results).

Special-tests:

Embryo-test:-------To-determine-loose-smut-in barley----------$18.00
Tetrazolium-test:--To-give-a-quick-estimate-of potential-seed-viability---(not-for-labeling)
Cereals----------$-9.00
Other-Seeds----------$20.00
Seed-Count:--------Must-have-a-purity-test-done-at-the-same-time
Soybeans----------$-2.00
Wheat,-Durum,-Barley--------$-2.00
Purity-Analysis-on-a-Treated-Sample:--additional-$-2.00

Repealed effective May 1, 2001.

History: Amended-effective-September-1,-1981;-May-1,-1988;-December-18, 1989;-December-1,-1997.
General Authority: NDCC-4-09-03,-4-09-08
Law Implemented: NDCC-4-09-08

74-03-01-10. Fees. Charges for fees and services are subject to change. For current fees contact the state seed department.

1. **Field inspection fees.**

Each applicant for field seed certification must pay a grower fee of five dollars once annually plus:

	To June 15	After June 15-July 5
Small grains, grasses, legumes, flax, and other annual and perennial crops	$1.50 per acre for the first 100 acres $1.25 per acre for additional acreage (per field)	$2.00 per acre for the first 100 acres $1.75 per acre for additional acreage (per field)
Sunflower		
open pollinated	$2.25 per acre	$2.75 per acre
hybrids	$3.50 per acre	$4.00 per acre
Dry field bean	$2.50 per acre	$3.00 per acre
	To July 15	**After July 15-August 1**
Late crops - soybean, millet, field peas, buckwheat	$1.50 per acre for the first 100 acres $1.25 per acre for additional acreage (per field)	$2.00 per acre for the first 100 acres $1.75 per acre for additional acreage (per field)

Minimum all crops $20.00 per farm - $10.00 per field

EXAMPLE

185-acre wheat field:

100-A x $1.50 = $150.00		Grower fee	
85-A x $1.25 = 106.25		(once annually)	5.00
	$256.25		$261.25

2. ~~Laboratory fees.~~

~~Germination--tests:---grains--six-dollars;-soybean;-sunflower;~~
~~dry-field-bean-six-dollars--and--fifty--cents;--and--flax--six~~
~~dollars.~~

~~Seed-purity-tests:--grains;-soybean;-sunflower;-dry-field-bean~~
~~six-dollars;-and-flax-eight-dollars.~~

~~Barley--embryo--test-for-loose-smut:--twelve-dollars-(one-test~~
~~required-for-each-lot).~~

~~Bacterial--bean--blight--test:---forty--dollars.---Each-lot-of~~
~~edible-beans-passing-field-inspection--must--be--tested.---See~~
~~current-price-list-for-all-laboratory-charges.~~

~~3.~~ **Final certification fees.**

Minimum fee is two dollars. Two cents per bushel [35.24 liters] plus four cents per tag for annual crops including grains, flax, and row crops.

Six cents per one hundred pounds [45.36 kilograms] plus four cents per tag for alfalfa, clovers, and perennial grasses.

(The two cents for each bushel [35.24 liters] and six cents for each hundred pounds [45.36 kilograms] of alfalfa, clovers, and perennial grasses will be used to promote North Dakota certified seed.)

Bulk certification: ten dollars per lot plus four cents per bushel [35.24 liters].

Organization for economic cooperation and development (OECD) certification fees: a ten dollar processing fee and final certification fees. An additional twelve dollar growout fee on all crops where required by organization for economic cooperation and development (OECD) standards.

~~4.~~ 3. **Carryover seed tagging.** New certification tags will be furnished for carryover seed at a cost of four cents per tag. All carryover seed must be retested for germination before new certified tags will be issued.

~~5.~~ 4. **Carryover bulk seed.** All carryover bulk seed must be retested for germination before new bulk certificates will be issued at ten dollars per lot (four certificates - extra copies twenty-five cents per copy). Carryover bulk seed cannot be recertified in bags unless new samples are submitted for analysis.

History: Amended effective May 1, 1986; May 1, 1987; May 1, 1988; December 18, 1989; May 1, 2001.
General Authority: NDCC 4-09-03, 4-09-05, 4-09-16, 28-32-01
Law Implemented: NDCC 4-09-16, 4-09-17, 4-09-18

TITLE 75

Department of Human Services

FEBRUARY 2001

AGENCY SYNOPSIS: The department proposed new North Dakota Administrative Code Chapter 75-03-33, and conducted a public hearing on those rules on July 20, 2000, and received written comment on those proposed rules until the end of the day on August 21, 2000.

75-03-33-01, Definitions: This section is created to add definitions of the terms "assisted living facility," "basic care facility," "construction," "conversion," "department," "entity," "individual eligible for assistance," "medical assistance," "nursing facility," "qualified service provider," "project," "reasonable cost," "related organization," and "unit."

75-03-33-02, General: This section is created to outline the criteria the department may use in awarding grants or approving loans.

75-03-33-03, Application approval process: This section is created to address the application approval process.

75-03-33-04, Eligible applicants: This section is created to identify eligible applicants.

75-03-33-05, Grants and loans: This section is created to establish criteria for grants and loans.

75-03-33-06, Limits: This section is created to determine limits for distribution from the trust fund for grants and loans.

75-03-33-07, Participation requirements: This section is created to outline participation requirements.

75-03-33-08, Startup costs: This section is created to allow startup costs.

75-03-33-09, Operating loss: This section is created to provide for operating loss.

75-03-33-10, Records and reporting: This section is created to add requirements for recordkeeping and reporting.

STAFF COMMENT: Chapter 75-03-33 contains all new material and is not underscored so as to improve readability.

CHAPTER 75-03-33
INTERGOVERNMENTAL TRANSFER PROGRAM

75-03-33-01. Definitions.

1. "Advisory committee" means a committee established by the department to review loan and grant applications.

2. "Alternative to nursing facility care" means services described in the department's home and community-based service waiver for aged and disabled individuals eligible for medical assistance.

3. "Assisted living facility" has the meaning provided in North Dakota Century Code section 50-24.5-01.

4. "Basic care facility" has the meaning provided in North Dakota Century Code section 23-09.3-01.

5. "Construction" means the building of new space to accommodate basic care services, assisted living services, or other alternative to nursing facility care.

6. "Conversion" means:

   a. The remodeling of existing space and, if necessary, the construction of additional space required to accommodate basic care facility services, assisted living facility services, or other alternative to nursing facility care; or

b. Construction of a basic care facility, assisted living facility, or other alternative to nursing facility care if existing nursing facility beds are no longer licensed and the department determines that construction is more cost-effective than the remodeling of existing space.

7. "Department" means the North Dakota department of human services.

8. "Entity" means a corporation, unincorporated association, business, trust, estate, partnership, state, or two or more individuals having a joint or common economic interest.

9. "Individual eligible for assistance" means an individual who meets the qualifying criteria for participation in programs funded by the department, including the medical assistance program, Medicaid waiver for the aged and disabled, service payments for the elderly and disabled, expanded services payments for the elderly and disabled, and the basic care assistance program.

10. "Medical assistance" means a program established under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] and North Dakota Century Code chapter 50-24.1.

11. "Nursing facility" has the same meaning as provided in North Dakota Century Code section 50-24.4-01 for the term "nursing home".

12. "Project" means a plan or proposal to develop the ability to provide a basic care level of care, assisted living level of care, or other alternative to nursing facility care, including the construction of a new facility or the conversion or remodeling of an existing building.

13. "Qualified service provider" means a county agency or independent contractor who has met standards for services and operations established by the department.

14. "Reasonable cost" means the cost that must be incurred by an efficiently and economically operated facility to provide services in conformity with applicable state and federal laws, regulations, and quality and safety standards. Reasonable cost takes into account that the entity seeks to minimize its costs and that its actual costs do not exceed what a prudent and cost-conscious buyer pays for a given item or services.

15. "Related organization" means a close relative or individual or an organization which an entity is, to a significant extent, associated with, affiliated with, able to control, or controlled by, and which furnishes services, facilities, or supplies to the entity. Control exists when an individual or an organization has the power, directly or indirectly, to

significantly influence or direct the policies of an organization or entity.

16. "Underserved areas" means those areas where the current or projected number of elderly and individuals with disabilities requiring services exceeds or is projected to exceed services available.

17. "Unit" means a residential living space for one or more individuals within an assisted living facility.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-01

75-03-33-02. General.

1. The department shall award grants or approve loans to the extent funds are available based on the criteria set forth in this chapter. The department's denial of an application for a grant or loan in one year does not preclude an entity from making future applications. The denial of an application or other adverse action is not appealable.

2. A nursing facility or other entity is eligible for a grant or loan to develop a basic care facility, assisted living facility, or other alternative to nursing facility care only to the extent that such services or facilities are developed or located in an underserved area.

3. The department may consider information gathered through its own research or submitted by the applicant in making a final determination that an area is underserved. This information may include:

   a. The number of elderly and individuals with disabilities in the area and the projected number of those individuals;

   b. The current number of elderly and individuals with disabilities requiring services in the area and the projected number of those individuals;

   c. The current and projected availability in the area of alternative to nursing facility care in the area; or

   d. The availability of access to alternative to nursing facility care in the area by individuals eligible for assistance.

4. No grant or loan application shall be approved by the department unless the applicant can demonstrate that:

a. The basic care services, assisted living services, or other alternative to nursing facility care are affordable to individuals eligible for assistance;

b. The basic care services, assisted living services, or other alternative to nursing facility care are unlikely to be available in the area for individuals eligible for assistance; and

c. The resulting reduction in the availability of nursing facility service is not expected to cause undue hardship on those individuals requiring nursing facility services.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-04

75-03-33-03. Application approval process.

1. At least annually, the department shall request applications for grants and loans to develop alternative long-term care services. The department shall establish a calendar for receiving and evaluating proposals. Applicants shall submit documents outlined in the request for applications by the dates indicated by the calendar.

2. For each stage of the application process, the advisory committee shall review the documents submitted by the applicants and make a recommendation to the department regarding the proposed projects.

3. The Bank of North Dakota shall review all loan applications prior to final approval by the department. The Bank of North Dakota may request any financial information it deems necessary for its review of a loan application.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-04, 50-30-05

75-03-33-04. Eligible applicants. The department may approve loans or award grants to the following entities developing a basic care level of care, assisted living level of care, or other alternative to nursing facility care:

1. A nursing facility located in North Dakota which has been enrolled for at least the last three years as of the date of the application, as a provider under the medical assistance program;

2. An entity licensed, as of the date of the application, as a basic care provider in this state;

3. An entity enrolled, as of the date of application, as a qualified service provider with the state of North Dakota and providing alternatives to nursing facility care;

4. An entity providing, as of the date of application, assisted living services in this state; or

5. An entity considered by the department as appropriate to develop a basic care level of care, assisted living level of care, or other alternative to nursing facility care.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-04

75-03-33-05. Grants and loans.

1. Subject to limitations in this chapter, the department may award grants for:

   a. Professional fees such as architectural, research, financial, and legal fees that are directly associated with determining the structural and financial viability of a project;

   b. Startup costs related to a project developing and providing a basic care level of care, assisted living level of care, or other alternative to nursing facility care level of care;

   c. First-year operating losses associated with a project developing and providing a basic care level of care, assisted living level of care, or other alternative to nursing facility care level of care;

   d. Training and community education costs associated with a project developing and providing a basic care level of care, assisted living level of care, or other alternative to nursing facility care level of care; or

   e. A portion of construction, remodeling, or conversion costs when the interest rate for loan funds exceeds four percent per annum.

2. The maximum amount of grant funds that the department may award for construction, remodeling, or conversion costs is limited to the amount needed to reduce loan funds to a level where the monthly payment would be equivalent to the monthly payment had all money requested for construction, remodeling,

or conversion been financed with loan funds at an interest rate of four percent per annum.

3. Subject to limitations in this chapter, the department may approve loans for construction, remodeling, or conversion costs related to basic care services, assisted living services, or other alternative to nursing facility care.

4. The interest rate for loans distributed from the trust fund shall be the thirty-year treasury bill rate effective on the date of notification of initial approval of an entity's application.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-04

75-03-33-06. Limits.

1. Distribution from the trust fund, whether a grant, loan, or a combination thereof, may not exceed the lesser of one million dollars or the actual cost of the project.

2. To be eligible for a grant or loan for construction or remodeling, an entity shall provide at least twenty percent of the total cost of the construction or remodeling. Grant or loan funds available for construction or remodeling are limited to the lesser of one million dollars or eighty percent of the actual cost of the construction or remodeling.

3. Grants for architectural, research, financial, and legal fees that are directly associated with determining the financial and structural viability of a project may be paid by the department up to a maximum of twenty thousand dollars, not to exceed actual costs. Grants awarded for these fees shall be considered as part of the total cost of a project subject to any limitations set forth in this chapter.

4. Grant or loan funds may not be awarded for costs that are payable through other state, local, or federal programs.

5. Grant or loan funds may not be awarded to refinance nursing facility debt or to construct or remodel nursing facility space that will continue to be used to provide nursing facility care.

6. Grant funds are payable upon receipt of a claim or submission of a cost report identifying expenses incurred. An entity shall request grant funds within six months after incurring the cost, except when requesting grant funds for operating losses. Grant funds awarded for operating losses are payable on a quarterly or yearly basis upon submission of a cost report. If reimbursement is requested on a quarterly basis,

the amount reimbursed for the first three quarters cannot exceed ninety percent of the total amount of the grant awarded for the first-year operating loss. A final cost report must be filed no later than eighteen months following the start of operation for final reimbursement. Grant funds reimbursed in excess of the allowable first-year operating loss must be refunded to the department within thirty days of notification by the department to the entity. In addition to other remedies provided by law, the department may deduct the amount of any refund due from an entity from any money owed by the department to the entity or the entity's successor in interest.

7. The department may not award grants or approve loans for costs incurred by an entity for services or items furnished by a related organization that exceed the lower of:

   a. The cost to the related organization;

   b. The amount charged the entity by the related organization; or

   c. The price of comparable services, facilities, or supplies purchased elsewhere primarily in the local market.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-04

75-03-33-07. Participation requirements.

1. The department may not disburse grant funds if the entity discontinues services on or before the date the entity submits a claim requesting payment.

2. The entity shall expend grant or loan funds for costs that are directly attributable to the project, in accordance with the application approved by the department.

3. The entity shall separately identify related party costs included in any amounts requested from the department.

4. The entity may not give preferential treatment to individuals who are not eligible for assistance over individuals eligible for assistance when determining admission or to whom services will be provided.

5. An entity accepting loan or grant funds to develop a particular service must enroll or have a provider agreement with the department to provide those services.

6. The entity shall make available a minimum of thirty percent of licensed capacity or units constructed, remodeled, or converted, to individuals eligible for assistance, except when the entity can demonstrate that the minimum occupancy cannot be met because of a lack of individuals eligible for assistance requiring accommodations.

7. The entity shall comply with all applicable rules, regulations, policies, or procedures established by the department pertaining to the department's assistance programs from which the entity is receiving payment.

8. The entity shall comply with all local, state, and national laws and regulations pertaining to construction.

9. The entity shall relinquish the nursing facility bed license on facility space converted to assisted living, basic care, or other alternative to nursing facility care.

10. The entity shall be responsible for all incidental costs related to project completion.

11. The entity shall refund to the North Dakota health care trust fund any grant awarded for construction, remodeling, or conversion if the entity or its successor in interest ceases to operate a basic care facility, assisted living facility, or facility providing other alternative to nursing facility care or does not meet the minimum occupancy requirements during the ten-year period following the date grant funds were awarded. The amount of the grant to be refunded shall be reduced by ten percent per year for each year the entity operated a basic care facility, assisted living facility, or provided other alternative to nursing facility care.

12. All loans become immediately due and payable if the entity or its successor in interest ceases to operate a basic care facility, assisted living facility, or provide other alternative to nursing facility care or does not meet the minimum occupancy requirements during the ten-year period following the date the loan was awarded.

13. In addition to other remedies provided by law, the department may deduct the amount of any refund due from an entity from any money owed by the department to the entity or the entity's successor in interest.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-03, 50-30-04

75-03-33-08. Startup costs.

1. The department may award grant funds for startup costs. Startup costs are those costs incurred by an entity prior to providing services and while developing the ability to provide services. Startup costs generally include the costs of obtaining staff, training and education, and other operating costs incurred while developing the ability to provide services. Startup costs must be reasonable, necessary, and related to assisted living, basic care, or other alternative to nursing facility care.

2. An entity awarded a grant for startup costs must request payment of grant funds no later than six months following the date the entity begins providing services.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-04

75-03-33-09. Operating loss.

1. The department may award grant funds for operating losses incurred by an entity after July 1, 1999, for the first twelve months of operation following the date an entity begins providing basic care services, assisted living services, or other alternative to nursing facility care. Grants for operating losses shall not exceed the difference between expenses and revenues related to providing the services.

2. Operating expenses shall include only necessary, reasonable, and actual expenses related to the project and incurred while providing services.

3. Operating expenses shall not include costs that are not appropriate, necessary, or proper for the development or operation of the project. These costs include personal expenses of the owners or employees, good will, donations, startup costs, political contributions, fines, or penalties, bad debt, fundraising costs, loss contingencies, or extraordinary losses.

4. Principal and interest rather than depreciation and interest shall be used when determining the operating loss.

5. Operating revenue shall include all revenue received for providing services, but does not include donation income.

6. An entity awarded a grant for operating losses may request payment of grant funds on a quarterly or yearly basis by submitting a cost report on forms prescribed by the department. The entity shall submit a final cost report no later than eighteen months following the start of operation.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-04

75-03-33-10. Records and reporting.

1. An entity that receives loan funds shall annually submit to the department cost reports, on forms prescribed by the department, for a period of ten years after the date the entity begins providing basic care services, assisted living services, or other alternative to nursing facility care.

2. When services are provided in a facility sharing services with a licensed nursing facility or basic care facility, the allocation methods set forth in chapter 75-02-06 or 75-02-07 shall apply.

3. The entity shall maintain, for a period of not less than three years following the date of submission of the cost report to the department, accurate financial and statistical records of the period covered by the cost report in sufficient detail to substantiate the cost data reported. The entity shall make such records available to the department upon demand.

4. The entity shall maintain complete and separate records regarding loan and grant expenditures.

5. The entity shall maintain occupancy or use statistics that separately identify individuals who are not eligible for assistance from individuals eligible for assistance.

6. The entity shall request payment of grant funds on forms prescribed by the department.

History: Effective May 31, 2000.
General Authority: NDCC 50-30-05
Law Implemented: NDCC 50-30-07

JULY 2001

CHAPTER 75-04-01

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code Chapter 75-04-01 Licensing of Programs and Services for Individuals With Developmental Disabilities.

The department proposed amendments to North Dakota Administrative Code Chapter 75-04-01, Licensing of Programs and Services for Individuals With Developmental Disabilities, and conducted a public hearing on those rules on January 4, 2001, and received written comment on those proposed rules until the end of the day on February 6, 2001.

75-04-01-01, Definitions: This section deletes the definitions for "Adult day care", "Developmental day activity", and "Developmental work activity"; adds a definition for "Day supports"; changes the term "mental retardation - developmental disabilities" to "developmental disabilities"; and changes "rehabilitation accreditation commission" to "commission on accreditation of rehabilitation facilities".

75-04-01-02, License required: This section is amended to replace "developmental day activity or developmental work activity services" with "day supports".

75-04-01-06.1, Criminal conviction - Effect on operation of facility or employment by facility: This section is created to include determinations of what constitute direct bearing offenses and sufficient rehabilitation.

75-04-01-17, Identification of basic services subject to licensure: This section is amended to replace "developmental day activity or developmental work activity services" with "day supports".

75-04-01-01. Definitions. In this chapter, unless the context or subject matter requires otherwise:

1. "Accreditation" means recognition by a national organization of a licensee's compliance with a set of specified standards.

2. ~~"Adult---day---care"---means---comprehensive--and--coordinated activities--provided--on--an--ongoing--basis--to--adults--with developmental---disabilities---residing---in---the--community. Programs-involve-social,-physical,-recreational,-and--personal care--training--and--activity--with--emphasis--on-stimulation, exposure,-community-orientation,-and-participation.~~

3. "Applicant" means an entity which has requested licensure from the North Dakota department of human services pursuant to North Dakota Century Code chapter 25-16.

4. 3. "Basic services" means those services required to be provided by an entity in order to obtain and maintain a license.

5. 4. "Case management" means a process of interconnected steps which will assist a client in gaining access to needed services, including medical, social, educational, and other services, regardless of the funding source for the services to which access is gained.

6. 5. "Client" means an individual found eligible as determined through the application of North Dakota Administrative Code chapter 75-04-06 for services coordinated through ~~mental retardation~~-- developmental disabilities case management.

7. 6. "Congregate care" means a specialized program to serve elderly individuals with developmental disabilities whose health and medical conditions are stable and do not require continued nursing and medical care, and are served within a community group-living arrangement.

7. "Day supports" means a day program to assist individuals in acquiring, retaining, and improving skills necessary to successfully reside in a community setting. Services may include assistance with acquisition, retention, or improvement in self-help, socialization, and adaptive skills; provision of social, recreational, and therapeutic activities to maintain physical, recreational, personal care, and community integration skills; and development of non-job task-oriented prevocational skills such as compliance, attendance, task completion, problem solving, and safety; and supervision for health and safety.

8. "Department" means the North Dakota department of human services.

9. ~~"Developmental--day--activity"-means-a-program-with-identified space,-separate-supervision,-and--separate--records--in--which functional---habilitative---skills--are--developed.---Training emphasis-is-focused-on-acquisition,-retention,-or--improvement in--self-help,--socialization,-and-adaptive-skills-which-takes place-in-a-nonresidential-setting.~~

~~10.~~ "Developmental disability" means a severe, chronic disability of an individual which:

a. Is attributable to a mental or physical impairment or combination of mental and physical impairments;

b. Is manifested before the individual attains age twenty-two;

c. Is likely to continue indefinitely;

d. Results in substantial functional limitations in three or more of the following areas of major life activity:

(1) Self-care;

(2) Receptive and expressive language;

(3) Learning;

(4) Mobility;

(5) Self-direction;

(6) Capacity for independent living; and

(7) Economic sufficiency; and

e. Reflects the individual's needs for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

~~11.--"Developmental--work-activity"-means-a-program-with-identified space,-separate-supervision,-and--separate--records--in--which prevocational--services-are-provided-to-clients-or-individuals with-developmental-disabilities-not-expected--to--be--able--to join--the--general--work--force--within-one-year.--Training-is habilitative-and-directed-at-goals,-including--attention--span and---motor---skills---improvement---and--concepts,--including compliance,-attending,-task-completion,-problem--solving,--and safety.---When-compensated,-clients-are-generally-paid-at-less than-fifty-percent-of-the-minimum--wage.---Developmental--work activity-does-not-include-supported-employment-programs.~~

~~12.~~ 10. "Extended services" means a federally mandated component designed to provide employment-related, ongoing support for an individual in supported employment upon completion of training; or on or off the job employment-related support for individuals needing intervention to assist them in maintaining employment. This may include job development, replacement in the event of job loss, and, except for those individuals with serious mental illness, must include a minimum of two onsite job skills training contacts per month and other support services as needed to maintain employment. It may also mean providing other support services at or away from the worksite. If offsite monitoring is appropriate, it must, at a minimum, consist of two meetings with the individual and one contact with the employer each month.

~~13.~~ 11. "Family support services" means a family-centered support service contracted for a client based on the primary caregiver's need for support in meeting the health, developmental, and safety needs of the client in order for the client to remain in an appropriate home environment.

~~14.~~ 12. "Governing body" means the individual or individuals designated in the articles of incorporation of a corporation or constitution of a legal entity as being authorized to act on behalf of the entity.

~~15.~~ 13. "Group home" means any community residential service facility, licensed by the department pursuant to North Dakota Century Code chapter 25-16, housing more than four individuals with developmental disabilities. "Group home" does not include a community complex with self-contained rental units.

~~16.~~ 14. "Individualized supported living arrangements" means a residential support services option in which services are contracted for a client based on individualized needs resulting in an individualized ratesetting process and are provided to a client in a residence rented or owned by the client.

~~17.~~ 15. "Infant development" means a systematic application of an individualized family service plan designed to alleviate or mediate developmental delay of the client from birth through age two.

~~18.~~ 16. "Intermediate care facility for the mentally retarded" means a residential health facility operated pursuant to regulation under 42 CFR 442 and 483, et seq.

~~19.~~ 17. "License" means authorization by the department to provide a service to individuals with developmental disabilities, pursuant to North Dakota Century Code chapter 25-16.

~~20.~~ 18. "Licensee" means that entity which has received authorization by the department, pursuant to North Dakota Century Code chapter 25-16, to provide a service or services to individuals with developmental disabilities.

~~21.~~ 19. "Mental retardation" means a diagnosis of the condition of mental retardation, based on an individually administered standardized intelligence test and standardized measure of adaptive behavior, and made by an appropriately licensed professional.

~~22.~~ 20. "Minimally supervised living arrangements" means either:

a. A group home with an available client adviser; or

b. A community complex that provides self-contained rented units with an available client adviser.

~~23.~~ 21. "Principal officer" means the presiding member of a governing body, a chairperson, or president of a board of directors.

~~24.~~ 22. "Resident" means an individual receiving services provided through any licensed residential facility or service.

~~25.~~ 23. "Standards" means requirements which result in accreditation by the council on quality and leadership in supports for people with disabilities, certification as an intermediate care facility for the mentally retarded, or for extended service results in accreditation by the ~~rehabilitation~~ commission on accreditation ~~commission----(carf)~~ of rehabilitation facilities.

~~26.~~ 24. "Supported living arrangement" means a program providing a variety of types of living arrangements that enable individuals with disabilities to have choice and options comparable to those available to the general population. Clients entering this service shall have the effects of any skill deficits subject to mitigation by the provision of individualized training and follow-along services.

~~27.~~ 25. "Transitional community living facility" means a residence for clients with individualized programs consisting of social, community integration, and daily living skills development preliminary to entry into less restrictive settings.

History: Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; April 1, 2000; July 1, 2001.
General Authority: NDCC 25-01.2-18, 25-16-06, 50-06-16
Law Implemented: NDCC 25-01.2-18, 25-16-06

75-04-01-02. License required. No individual, association of individuals, partnership, limited liability company, or corporation

shall offer or provide a service or own, manage, or operate a facility offering or providing a service to more than four individuals with developmental disabilities without first having obtained a license from the department unless the facility is:

1. Exempted by subsection 1 or 2 of North Dakota Century Code section 15-59.3-02;

2. A health care facility, as defined in North Dakota Century Code section 23-17.2-02, other than an intermediate care facility for the mentally retarded; or

3. Operated by a nonprofit corporation that receives no payments from the state or any political subdivision and provides only ~~developmental--day--activity--or--developmental--work-activity services~~ day supports for six or fewer individuals with developmental disabilities. "Payment" does not include donations of goods and services or discounts on goods and services.

Licensure does not create an obligation for the state to purchase services from the licensed facility.

History: Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 25-16-06, 50-06-16
Law Implemented: NDCC 25-01.2-18, 25-16-02

75-04-01-06.1. Criminal conviction - Effect on operation of facility or employment by facility.

1. A facility operator may not be, and a facility may not employ in any capacity that involves or permits contact between the employee and any individual cared for by the facility, an individual who is known to have been found guilty of, pled guilty to, or pled no contest to:

   a. An offense described in North Dakota Century Code chapters 12.1-16, homicide; 12.1-17, assaults - threats - coercion if a class A misdemeanor or a felony; or 12.1-18, kidnapping; North Dakota Century Code sections 12.1-20-03, gross sexual imposition; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-22-01, robbery; or 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; North Dakota Century Code chapter 12.1-27.2, sexual performances by children; or North Dakota Century Code sections 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; or 12.1-31-05, child procurement; or an offense under the laws of another jurisdiction which requires proof of substantially similar

elements as required for conviction under any of the enumerated North Dakota statutes; or

b. An offense, other than an offense identified in subdivision a, if the department determines that the individual has not been sufficiently rehabilitated.

2. For purposes of subdivision b of subsection 1, an offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community correction, or imprisonment, without subsequent conviction, is prima facie evidence of sufficient rehabilitation.

3. The department has determined that the offenses enumerated in subdivision a of subsection 1 have a direct bearing on the individual's ability to serve the public in a capacity involving the provision of services to individuals with developmental disabilities.

4. An individual is known to have been found guilty of, pled guilty to, or pled no contest to an offense when it is:

a. Common knowledge in the community;

b. Acknowledged by the individual; or

c. Reported to the facility as the result of an employee background check.

History: Effective July 1, 2001.
General Authority: NDCC 25-01.2-18, 25-16-06, 50-06-16
Law Implemented: NDCC 25-16-03, 25-16-03.1

75-04-01-17. Identification of basic services subject to licensure. Services provided to more than four individuals with developmental disabilities in treatment or care centers must be identified and licensed by the following titles:

1. Residential services:

a. Individualized supported living arrangement;

b. Community intermediate care facility for the mentally retarded of fifteen beds or less;

c. Institutional intermediate care facility for the mentally retarded of sixteen or more beds;

d. Minimally supervised living arrangement;

e. Transitional community living facility;

f. Supported living arrangement;

g. Family support services; or

h. Congregate care.

2. Day services:

a. ~~Developmental day activity~~ Day supports;

b. ~~Developmental work activity;~~

c. Extended service; or

~~d.~~ c. Infant development; ~~or~~

~~e. Adult day care.~~

History: Effective April 1, 1982; amended effective June 1, 1986; December 1, 1995; July 1, 1996; July 1, 2001.
General Authority: NDCC 25-16-06, 50-06-16
Law Implemented: NDCC 25-16-06

Corrected synopsis submitted at committee meeting

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code Chapter 75-04-05 Reimbursement for Providers of Services to Individuals With Developmental Disabilities.

75-04-05-01(2), Definitions: This subsection adds a new definition "Administrative costs".

75-04-05-01(6), formerly (5), Definitions: This subsection is amended to change the definition of "Census" to the actual number of hours of job coach intervention to an individual enrolled in extended services, the actual number of hours of attendance by an individual enrolled in a day supports program, or the number of days of residential services authorized by an individual service plan for an individual in residential services within the provider's fiscal year.

75-04-05-01(7) formerly (6), (8) formerly (7), (9) formerly (8), and (15) formerly (14), Definitions: These subsections are revised to change "person" to "individual".

75-04-05-01(10) formerly (9), Definitions: This subsection is deleted to remove the definition of "Cost finding".

75-04-05-01(11), Definitions: This is a new subsection to add a definition for "Day supports".

75-04-05-01(12) formerly (11), Definitions: The definition of "Department" is revised to insert the words "the North Dakota" department of human services.

75-04-05-01(20) formerly (19), Definitions: This subsection is amended to replace the term "mental retardation-development disabilities" with "developmental disabilities".

75-04-05-01(21) formerly (20), Definitions: This subsection is amended to replace "contracted" with "authorized".

75-04-05-01(29) formerly (28), Definitions: This subsection is amended to replace "person" with "individual"; to replace "8-hour day, Monday through Friday" with "hour"; and to add "for residential services. Day of death is also treated as a day of service."

75-04-05-02(7), Eligibility for reimbursement: This subsection is amended to replace "persons with developmental disabilities" with "individuals with developmental disabilities".

75-04-05-08(2)(d), Financial reporting requirements: This subdivision is amended to change the date the statement of budgeted costs must be submitted to the disabilities services division; deletes the provision that the department may invoke a penalty of five percent of a provider's administrative costs for the period of deficiency for intermediate care facilities for the mentally retarded; and corrects a grammatical error.

75-04-05-08(4)(b)(3), Financial reporting requirements: This paragraph is deleted.

75-04-05-09(1), Rate payments: This subsection is amended to replace "rate limits" with "rates" and "services" to "training".

75-04-05-09(8), Rate payments: This subsection is amended to replace "person" with "individual".

75-04-05-09(11)(a), Rate payments: This subdivision is amended to replace "Rate" with "Rates".

75-04-05-09(12)(c), Rate payments: This subdivision is amended to replace "disabilities" with "disability" and to replace "rate notification of the final rate determination" with "final rate notification".

75-04-05-10(1), Reimbursement: This subsection is amended to add "Providers are required to submit a statement of budgeted costs to the department no less than annually so an interim rate may be determined" and to replace "the previous" with "that" fiscal year.

75-04-05-10(3)(e), Reimbursement: This subdivision is amended to include "eight hours a day" and to replace "Costs and budget data must be reported on this basis and rates of reimbursement will be established on the same basis. Providers will not be reimbursed for those days services are not offered to the clients. State recognized holidays will be treated as days in which services are offered." with "The budgeted units of service for a full-time client will be equivalent to two hundred thirty days per year at eight hours per day."

75-04-05-10(3)(g)(2), Reimbursement: This paragraph is deleted.

75-04-05-11(1)(a), Cost report: This subdivision is amended to insert the word "to" between "staff client"; replaces the language "Time studies may be performed for one week at least quarterly for allocation." with "If a provider that has not direct allocated costs as of the effective date of this subsection chooses to direct allocate costs, the provider must keep track of all staff members' time for three full months by performing a time study. Thereafter, time studies may be performed one week per quarter as long as this is comparable to the initial extended three-month time study. The week of the time study must be selected randomly for each staff member doing time studies by one provider staff member in charge of coordinating the time studies. The provider's staff member in charge of time studies shall notify the staff members of the need to track their time for the week on the first working day of that week and not before"; replaces "will" with "shall"; and adds "Once an allocation method has been chosen by the provider, it may not be changed without prior written approval of the department."

75-04-05-11(1)(h), Cost report: This subdivision is amended to insert "or vehicle insurance costs applicable to vehicles used for one or more basic services,".

75-04-05-11(1)(j), Cost report: This subdivision is amended to replace "Production costs. Total expenses for facility-based day and work activity must be allocated in part to production using the facility-based mean productivity percentage for each service where production occurred. If the provider's records do not identify total expenses for nonfacility-based activities from total expenses for facility-based activities, the department will use total expenses and total mean productivity percentage for each service where production occurred." with "General client costs. Total general client expenses must be allocated to service categories, exclusive of production, room, board, supported living arrangements, family support services, and extended services based on actual census units. When determining the day support ratio of general client costs, total day support units will be divided by eight and rounded to the nearest whole number."

75-04-05-11(1)(k), formerly (l), Cost report: This subdivision is amended to replace "must" with "may"; to remove "exclusive of room, board, and production"; and to replace "upon the ratio of the basic service cost to total cost excluding administrative and production costs" with "on time studies done in compliance with subdivision a of subsection 1 of section 75-04-05-11. If time studies are not available, total administrative expenses must be allocated to all service categories, exclusive of room, board, and production, based upon the ratio of the basic service cost to total cost excluding administrative and production costs."

75-04-05-11(1)(m), Cost report: This subdivision is deleted.

75-04-05-11(2)(d), Cost report: This subdivision is amended to replace "facility-based production activities where contract income is realized shall not exceed the percentage difference between the mean productivity of the clients, as determined pursuant to 29 CFR 525, and one hundred percent" with "day supports shall not include production costs".

75-04-05-12(1), Adjustment to cost and cost limitation: This subsection is amended to replace "persons" with "individuals"; to insert "to the department"; to replace "costs" with "actual costs"; and to remove ", both current and estimated,".

75-04-05-13(6), Nonallowable costs: This subsection is deleted.

75-04-05-13(11), formerly (12), Nonallowable costs: This subsection is amended to replace "person" with "individual".

75-04-05-13(12), formerly (13), Nonallowable costs: This subsection is amended to add "except local chambers of commerce".

75-04-05-13(13), formerly (14), Nonallowable costs: This subsection is amended to delete ", by way of illustration and not by way of limitation,".

75-04-05-13(14), formerly (15), Nonallowable costs: This subsection is amended to replace "would have not been allowable" with "would not have been allowable".

75-04-05-13(19), Nonallowable costs: This subsection is deleted.

75-04-05-13(23), formerly (25), Nonallowable costs: This subsection is amended to include "long-term disability, dental, vision, life".

75-04-05-13(29), Nonallowable costs: This subsection is amended to replace "In-state travel" with "Travel".

75-04-05-13(40), Nonallowable costs: This subsection is deleted.

75-04-05-13(38)(a), formerly (41)(a), Nonallowable costs: This subdivision is amended to replace "persons" with "individuals".

75-04-05-13(38)(c), formerly (41)(c), Nonallowable costs: This subdivision is amended to replace "person" with "individual".

75-04-05-13(43)(a), formerly (46)(a), Nonallowable costs: This subdivision is amended to replace "Production" with "For facility-based day supports programs, production"; replaces "the cost of the" with "client salaries and benefits supplies, and materials representing unfinished or"; and removes ", square footage that the department determines is primarily for nontraining or production purposes, and property, equipment, supplies and materials used in nonfacility-based day and work activity".

75-04-05-13(43)(b), Nonallowable costs: This subdivision is created to include "For nonfacility-based day supports programs, production costs, such as client salaries and benefits, supplies, and materials representing unfinished or finished goods or products that are assembled, altered, or modified, square footage, and equipment."

75-04-05-13(43)(c), Nonallowable costs: This subdivision is amended to replace "subdivision" with "subdivisions" and to insert "and b".

75-04-05-13(45), formerly (48), Nonallowable costs: This subdivision is amended to remove ", except when such costs are incurred on behalf of persons who have been found not to be disabled by the social security administration, but who are certified by the department as indigent and appropriately placed. Allowable room and board cost must not exceed the room and board rate established pursuant to subsections 2 and 3 of section 75-04-05-09. Services offering room and board temporarily, to access medical care, vocational evaluation, respite care, or similar time limited purposes are or may be exempt from the effect of this provision."

75-04-05-15(1), Depreciation: This subsection is amended to insert "personal property"; to replace "in excess of" with "different than"; to replace "excess" with "difference"; replaces "overstatement" with "incorrect allocation"; and inserts "and must be included as a gain or

loss on the cost report. The facility shall use the sale price in computing the gain or loss on the disposition of assets."

75-04-05-15(2), Depreciation: This subsection is created to insert "Special assessments on land which represent capital improvements, such as sewers, water, and pavements, should be capitalized and may be depreciated."

75-04-05-15(6), formerly (5), Depreciation: This subsection is amended to replace "as follows: a. The amount of historical costs must not exceed the lower of: (1) current reproduction costs less straight-line depreciation over the life of the asset to the time of purchase; or (2) Fair" with "the lower of the purchase price or fair"; and replaces "the historical cost" with "fair market value".

75-04-05-16(1)(a)(6), Interest expense: This paragraph is amended to replace "representative of borrowing" with "borrowed".

75-04-05-16(4)(f), Interest expense: This subdivision is amended to replace "three hundred" with "one thousand".

75-04-05-19(2)(e), Taxes: This subdivision is deleted.

75-04-05-20(6)(f), Personal incidental funds: This subdivision is amended to replace "persons" with "individuals".

75-04-05-22, Staff-to-client ratios: This section is amended to replace "direct care" with "direct contact"; and replaces "persons" with "individuals".

75-04-05-22(2), Staff-to-client ratios: This subsection is amended to replace "direct care" with "direct contact".

75-04-05-22(6), Staff-to-client ratios: This subsection is amended to replace "Developmental day activity" with "Day supports".

75-04-05-22(7), Staff-to-client ratios: This subsection is deleted.

75-04-05-22(9), Staff-to-client ratios: This subsection is deleted.

75-04-05-23(2)(a), Staff hours: This subdivision is amended to replace "persons" with "members".

75-04-05-23(2)(b), Staff hours: This subdivision is amended to replace "persons" with "members".

75-04-05-24(1), Application: This subsection is amended to replace "persons" with "individuals"; removes the word "applicable"; and corrects several incorrect Administrative Code cites.

75-04-05-24(2), Application: This subsection corrects several incorrect Administrative Code cites.

75-04-05-24(2)(b), Application: This subdivision is amended to replace "disabilities" with "disability".

75-04-05-24(2)(c), Application: This subdivision is amended to replace "disabilities" with "disability".

75-04-05-24(2)(d), Application: This subdivision is amended to replace "person" with "individual".

75-04-05-24(3), Application: This subsection is amended to correct several incorrect Administrative Code cites.

75-04-05-24(3)(a)(2), Application: This paragraph is replaced with "Copayment responsibility of an individual receiving individualized supported living arrangement services, and;".

75-04-05-24(4), Application: This subsection is amended to correct several incorrect Administrative Code cites.

75-04-05-24(4)(a)(2) through 75-04-05-24(3)(c)(5), Application: These paragraphs are deleted.

CHAPTER 75-04-05

75-04-05-01. Definitions. In this chapter, unless the context or subject matter requires otherwise:

1. "Accrual basis" means the recording of revenue in the period when it is earned, regardless of when it is collected, and the recording of expenses in the period when incurred, regardless of when they are paid.

2. "Allowable cost" means the program's actual and reasonable cost after appropriate adjustments for nonallowable costs, income, offsets, and limitations.

3. "Bad debts" means those amounts considered to be uncollectible from accounts and notes receivable which were created or acquired in providing services.

4. "Board" means all food and dietary supply costs.

5. ~~"Census"--means--the--number--of--days--that-the-individual-is enrolled-in-extended-services,-within--the--provider's--fiscal year.---The--number--of--days--are--based--on-a-five-day-week, beginning-with-the-start-date-of-the-individual-service--plan, the--individual--treatment--plan,--or--the--individual-written rehabilitation-program.--The-maximum-number-of--days--are--two hundred--sixty.--This-definition-applies-only-to-the-supported employment-extended-service-program.~~

6. "Clients" means eligible ~~persons~~ individuals with developmental disabilities on whose behalf services are provided or purchased.

7. 6. "Consumer" means ~~a--person~~ an individual with developmental disabilities.

8. 7. "Consumer representative" means a parent, guardian, or relative, to the third degree of kinship, of ~~a--person~~ an individual with developmental disabilities.

9. 8. "Cost center" means a division, department, or subdivision thereof, group of services or employees or both, or any unit or type of activity into which functions of a providership are divided for purposes of cost assignment and allocations.

10. ~~"Cost-finding"-means-the-process-of-analyzing-the-data-derived from-the-accounts-ordinarily-kept-by-the-provider-to-ascertain costs--of--the--various--types-of-services-rendered;-it-is-the determination-of-these-costs-by-the-allocation-of-direct-costs and-proration-of-indirect-costs.~~

9. "Day supports" means a day program to assist individuals acquiring, retaining, and improving skills necessary to successfully reside in a community setting. Services may include assistance with acquisition, retention, or improvement in self-help, socialization, and adaptive skills; provision of social, recreational, and therapeutic activities to maintain physical, recreational, personal care, and community integration skills; development of non-job task oriented prevocational skills such as compliance, attendance, task completion, problem solving, and safety; and supervision for health and safety.

~~11.~~ 10. "Department" means the North Dakota department of human services.

~~12.~~ 11. "Documentation" means the furnishing of written records including original invoices, contracts, timecards, and workpapers prepared to complete reports or for filing with the department.

~~13.~~ 12. "Extended services" means a federally mandated component designed to provide employment-related, ongoing support for an individual in supported employment upon completion of training, or on or off the job employment-related support for individuals needing intervention to assist them in maintaining employment. This may include job development, replacement in the event of job loss and, except for those individuals with serious mental illness, must include a minimum of two onsite job skills training contacts per month and other support services as needed to maintain employment. It may also mean providing other support services at or away from the worksite. If offsite monitoring is appropriate, it must, at a minimum, consist of two meetings with the individual and one contact with the employer each month.

~~14.~~ 13. "Facility-based" means a workshop for ~~persons~~ individuals with developmental disabilities licensed by the department to provide day services. This definition is not to be construed to include areas of the building determined by the department to exist primarily for nontraining or for production purposes.

~~15.~~ 14. "Fair market value" means value at which an asset could be sold in the open market in an arm's-length transaction between unrelated parties.

~~16.~~ 15. "Family support services" means a family-centered support service ~~contracted~~ authorized for a client based on the primary caregiver's need for support in meeting the health, developmental, and safety needs of the client in order for the client to remain in an appropriate home environment.

~~17.~~ 16. "Generally accepted accounting principles" means the accounting principles approved by the American institute of certified public accountants.

~~18.~~ 17. "Historical cost" means those costs incurred and recorded on the facility's accounting records as a result of an arm's-length transaction between unrelated parties.

~~19.~~ 18. "Individual service plan" means an individual plan that identifies service needs of the eligible client and the services to be provided, and which is developed by the ~~mental retardation development disabilities~~ developmental disabilities case manager and the client or that client's legal representative, or both, considering all relevant input.

~~20.~~ 19. "Individualized supported living arrangements" means a residential support services option in which services are ~~contracted~~ authorized for a client based on individualized needs resulting in an individualized ratesetting process and are provided to a client in a residence rented or owned by the client.

~~21.~~ 20. "Interest" means the cost incurred with the use of borrowed funds.

~~22.~~ 21. "Net investment in fixed assets" means the cost, less accumulated depreciation and the balance of notes and mortgages payable.

~~23.~~ 22. "Reasonable cost" means the cost that must be incurred by an efficiently and economically operated facility to provide services in conformity with applicable state and federal laws, regulations, and quality and safety standards.

~~24.~~ 23. "Related organization" means an organization which a provider is, to a significant extent, associated with, affiliated with, able to control, or controlled by, and which furnishes services, facilities, or supplies to the provider. Control exists ~~where~~ when an individual or an organization has the power, directly or indirectly, significantly to influence or direct the action or policies of an organization or institution.

~~25.~~ 24. "Room" means the cost associated with the provision of shelter and the maintenance thereof, including depreciation and interest or lease payments of a vehicle used for transportation of clients.

~~26.~~ 25. "Service" means the provision of living arrangements and programs of daily activities subject to licensure by the department.

~~27.~~ 26. "Staff training" means an organized program to improve staff performance.

~~28.~~ 27. "Units of service" for billing purposes means~~,~~ ~~in~~:

a. In residential settings, one ~~person~~ individual served for one 24-hour day ~~and~~ ~~in~~;

b. In day service settings, one ~~person~~ individual served for one ~~8-hour-day,~~ ~~Monday through Friday~~ hour; and

c. In extended services, one individual served for one hour of job coach intervention.

The day of admission and the day of death, but not the day of discharge, ~~is~~ are treated as a day served for residential services.

~~29.~~ 28. "Units of service in infant development" means, for billing purposes, one child enrolled for service Monday through Friday.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-02. Eligibility for reimbursement. Providers of service are eligible for reimbursement for the costs of rendered services contingent upon the following:

1. The provider, other than a state-owned or state-operated provider, holds, and is required to hold, a current valid license, issued pursuant to the provisions of chapter 75-04-01 authorizing the delivery of the service, the cost of which is subject to reimbursement.

2. The provider's clients have on file with the department a current individual service plan.

3. The provider has a current valid purchase of service agreement with the department authorizing the reimbursement.

4. The provider adopts and uses a system of accounting prescribed by the department.

5. The provider participates in the program audit and utilization review process established by the department.

6. The provider is in compliance with chapter 75-04-02.

7. Providers, as a condition of eligibility for reimbursement for the cost of services for ~~persons~~ individuals with developmental disabilities, must accept, as payment in full, sums paid in accordance with the final rate of reimbursement.

8. Providers must obtain approval from the department for addition of square footage if the cost of the additional space is to be reimbursed by the department.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-08. Financial reporting requirements.

1. **Records.**

   a. The provider shall maintain on the premises the required census records and financial information sufficient to provide for a proper audit or review. For any cost being claimed on the cost report, sufficient data must be available as of the audit date to fully support the report item.

   b. ~~Where~~ If several programs are associated with a group and their accounting and reports are centrally prepared, additional fiscal information shall be submitted for costs, undocumented at the reporting facility, with the cost report or provided prior to the audit or review of the facility. Accounting or financial information regarding related organizations must be readily available to substantiate cost.

   c. Each provider shall maintain, for a period of not less than five years following the date of submission of the cost report to the department, financial and statistical records of the period covered by such cost report which are accurate and in sufficient detail to substantiate the cost data reported. If an audit has begun, but has not been finally resolved, the financial and statutory records relating to the audit shall be retained until final resolution. Each provider shall make such records available upon reasonable demand to representatives of the department or to the secretary of health and human services or representatives thereof.

2. **Accounting and reporting requirements.**

   a. The accounting system must be double entry.

b. The basis of accounting for reporting purposes must be accrual in ~~accord~~ accordance with generally accepted accounting principles. Ratesetting procedures will prevail if conflicts occur between ratesetting procedures and generally accepted accounting principles.

c. To properly facilitate auditing, the accounting system must be maintained in a manner that will allow cost accounts to be grouped by cost center and readily traceable to the cost report.

d. The forms for annual reporting for reimbursement purposes must be the report forms designated by the department. The statement of budgeted costs must be submitted to the ~~disabilities~~ disability services division ~~at least~~ within sixty days ~~before the end of the facility's normal accounting year~~ of the date of the letter containing the budget instructions provided by the department reflecting budgeted costs and units of service for establishing an interim rate in the subsequent year. The statement of actual costs must be submitted on or before the last day of the third month following the end of the facility's normal accounting year. The cost report must contain the actual costs, adjustments for nonallowable costs, and units of service for establishing the final rate.

e. The mailing of cost reports by registered mail, return receipt requested, will ensure documentation of the filing date.

f. Costs reported must include all actual costs and adjustments for nonallowable costs. Adjustments made by the audit unit, to determine allowable cost, though not meeting the criteria of fraud or abuse on their initial identification, could, if repeated on future cost filings, be considered as possible fraud or abuse. The audit unit will forward all such items identified to the appropriate investigative unit.

3. **Auditing.** In order to properly validate the accuracy and reasonableness of cost information reported by the service provider, the department ~~will~~ shall provide for audits as necessary.

4. **Penalties.**

a. If a provider fails to file the required statement of budgeted costs and cost report on or before the due date, the department may invoke the following provisions:

(1) After the last day of the first month following the due date, there ~~will~~ may be a nonrefundable penalty

of ten percent of any amount claimed for reimbursement.

(2) The penalty continues through the month in which the statement or report is received.

b. At the time of audit and final computation for settlement, the department may invoke a penalty of five percent of a provider's administrative costs for the period of deficiency if:

(1) Poor or no daily census records are available to document client units. Poor census records exist if those records are insufficient for audit verification of client units against submitted claims for reimbursement.

(2) After identification and notification through a previous audit, a provider continues to list items exempted in audit as allowable costs on the cost report.

~~(3) For intermediate care facilities for the mentally retarded, the provider fails the certification requirements one hundred twenty days after the initial startup date or is decertified after having been previously certified.~~

c. Penalties may be separately imposed for each violation.

d. A penalty may be waived by the department upon a showing of good cause.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-09. Rate payments.

1. Except for intermediate care facilities for the mentally retarded, payment ~~rate limits~~ rates will be established for ~~services~~ training, room, and board.

2. Interim rates based on factors including budgeted data, as approved, will be used for payment of services during the year.

3. Room and board charges to clients may not exceed the maximum supplemental security income payment less twenty-five dollars for the personal incidental expenses of the client, plus the average dollar value of food stamps to the eligible clientele

in the facility. If the interim room and board rate exceeds the final room and board rate, the provider shall reimburse clients in a manner approved by the department.

4. In residential facilities where rental assistance is available to individual clients or the facility, the rate for room costs chargeable to individual clients will be established by the governmental unit providing the subsidy.

5. In residential facilities where energy assistance program benefits are available to individual clients or the facility, room and board rates will be reduced to reflect the average annual dollar value of such benefits.

6. Income from client production must be applied to client wages and the cost of production. The department will not participate in the gains or losses associated with client production conducted pursuant to the applicable provision of 29 CFR 525.

7. The final rate established is payment of all allowable, reasonable, and actual costs for all elements necessary to the delivery of a basic service to eligible clients subject to limitations and cost offsets of this chapter.

8. No payments may be solicited or received by a provider from a client or any other ~~person~~ individual to supplement the final rate of reimbursement.

9. The rate of reimbursement established must be no greater than the rate charged to a private payor for the same or similar service.

10. The department will determine interim and final rates of reimbursement for continuing contract providers based upon cost data from the:

    a. Submission requirements of section 75-04-05-02; and

    b. Field and desk audits.

11. Rates of continuing service providers, except for those identified in subdivision f of subsection 3 of section 75-04-05-10, will be based on the following:

    a. ~~Rate~~ Rates for continuing contract providers, who have had no increase in the number of clients the provider is licensed to serve, will be based upon ninety-five percent of the rated occupancy established by the department or actual occupancy, whichever is greater.

b. Rates for continuing service providers, who have an increase in the number of clients the provider is licensed to serve in an existing service, will be based upon:

(1) Subdivision a of subsection 11 of section 75-04-05-09 for the period until the increase takes effect; and

(2) Ninety-five percent of the projected units of service for the remaining period of the fiscal year based upon an approved plan of integration or actual occupancy, whichever is greater.

c. When establishing the final rates, the department may grant nonenforcement of subdivisions a and b of subsection 11 of section 75-04-05-09 when it determines the provider implemented cost containment measures consistent with the decrease in units, or when it determines that the failure to do so would have imposed a detriment to the well-being of its clients.

(1) Acceptable cost containment measures include a decrease in actual salary and fringe benefit costs from the approved salary and fringe ~~benefits~~ benefit costs for the day service or group home proportionate to the decrease in units.

(2) Detriment to the well-being of clients includes a forced movement from one group home to another or obstructing the day service movement of a client in order to maintain the ninety-five percent rated occupancy requirement.

12. Adjustments and appeal procedures are as follows:

a. Rate adjustments may be made to correct errors.

b. A final adjustment will be made for those facilities which have terminated participation in the program and have disposed of all its depreciable assets. Federal medicare regulations pertaining to gains and losses on disposable assets will be applied.

c. Any requests for reconsideration of the rate must be submitted in writing to the ~~disabilities~~ disability services division within ten days of the date of the final rate notification ~~of-the-final--rate--determination~~. The department may redetermine the rate on its own motion.

d. A provider may appeal a decision within thirty days after mailing of the written notice of the decision on a request for reconsideration of the final rate.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 1995; April 1, 1996; August 1, 1997; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-10. Reimbursement. Reported allowable costs will be included in determining the interim and final rate. The method of finalizing the reimbursement rate per unit will be through the use of the retrospective ratesetting system.

1. Retrospective ratesetting requires that an interim rate be established prior to the year in which it will be effective. Providers are required to submit a statement of budgeted costs to the department no less than annually so an interim rate may be determined. The determination of a final rate for all services begins with the reported cost of the provider's operations for ~~the--previous~~ that fiscal year. Once it has been determined that reported costs are allowable, reasonable, and client-related, those costs are compared to the reimbursements received through the interim rate.

2. a. Settlements will be made through a recoupment or refund to the department for an overpayment; or an additional payment to the provider for an underpayment.

   b. Interprovider settlements between intermediate care facilities for the mentally retarded and day services will be made through a recoupment or refund to the department from the day service provider to correct an overpayment; or a payout to the intermediate care facilities for the mentally retarded, for the day service provider, to correct an underpayment.

3. Limitations.

   a. The department shall accumulate and analyze statistics on costs incurred by providers. Statistics may be used to establish reasonable ceiling limitations for needed services. Limitations may be established on the basis of cost of comparable facilities and services, or audited costs, and may be applied as ceilings on the overall costs, on the costs of providing services, or on the costs of specific areas of operations. The department may implement ceilings at any time, based upon the statistics available, or as required by guidelines, regulations, rules, or statutes.

   b. Providers, to maintain reasonable rates of reimbursement, must deliver units of service at or near their rated capacity. Upon a finding by the department that an excess idle capacity exists and has existed, the cost of which is borne by the department, the provider ~~will~~ shall be

notified of the department's intention to reduce the level of state financial participation or invoke the cancellation provisions of the provider agreement. The provider ~~must~~, within ten days of such notification, must demonstrate~~,~~ to the satisfaction of the department~~,~~ that the department should not invoke its authority under this provision, or must accept the department's finding.

c. Providers ~~will~~ shall not be reimbursed for services, rendered to clients, which exceed the rated occupancy of any facility as established by a fire prevention authority.

d. Providers of residential services must offer services to each client three hundred sixty-five days per year, except for leap years in which three hundred sixty-six days must be offered. Costs and budget data must be reported on this basis and rates of reimbursement will be established on the same basis. Providers ~~will~~ may not be reimbursed for those days in which services are not offered to clients.

e. Providers of day services must offer services to each client eight hours per day two hundred sixty days per year less any state-recognized holidays, except for leap years in which two hundred sixty-one days must be offered. ~~Costs--and--budget-data-must-be-reported-on-this-basis-and rates-of-reimbursement-will-be--established--on--the--same basis.---Providers--will--not-be-reimbursed-for-those-days services-are-not-offered-to-the-clients.--State-recognized holidays--will--be--treated--as-days-in-which-services-are offered.~~ The budgeted units of service for a full-time client will be equivalent to two hundred thirty days per year at eight hours per day.

f. Services exempted from the application of subdivisions d and e are:

(1) Emergency services.

(2) Infant development.

(3) Family subsidy.

(4) Supported living.

g. (1) Days of services in facilities subject to the application of subdivision d must be provided for a minimum of three hundred thirty-five days per year per client. A reduction of payment to the provider in an amount equal to the rate times the number of days of service less than the minimum will be made unless the regional developmental disability program

administrator determines that a failure to meet the minimum was justified.

(2) ~~Days---of--services--in--facilities--subject--to--the application-of-subdivision-e-must-be-provided--for--a minimum--of--two--hundred--forty--days--per--year-per client.--A-reduction-of-payment-to-the-provider-in-an amount--equal-to-the-rate-times-the-number-of-days-of service-less-than-the-minimum-will-be-made-unless-the regional-----developmental-----disability-----program administrator-determines-that-a-failure-to--meet--the minimum-was-justified.~~

~~(3)~~ For purposes of this subdivision, the fiscal year of the facility will be used, and all days before the admission, or after the discharge of the client, will be counted toward meeting the minimum.

h. Salary and fringe benefit cost limits, governing the level of state financial participation, may be established by the department by calculating:

(1) Comparable salaries and benefits for comparable positions, by program size and numbers served, and programs in and out of state;

(2) Comparable salaries and benefits for comparable positions in state government;

(3) Comparable salaries and benefits for comparable positions in the community served by the provider; or

(4) Data from paragraphs 1, 2, and 3, taken in combination.

By using private funds, providers may establish higher salaries and benefit levels than those established by the department.

i. Management fees and costs may not exceed the lesser of two percent of administrative costs or the price of comparable services, facilities, or supplies purchased elsewhere, primarily in the local market.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 1995; April 1, 1996; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-11. Cost report.

1. The cost report provides for the identification of the allowable expenditures and basic services subject to reimbursement by the department. ~~Where~~ When costs are incurred solely for a basic service, the costs must be assigned directly to that basic service. ~~Where~~ When costs are incurred jointly for two or more basic services, the costs will be allocated as follows:

   a. Personnel. The total cost of all staff identified in payroll records must be listed by position title and distributed to basic services subject to the approval of staff-to-client ratios by the department. Time studies may be performed for one week at least quarterly for allocation. ~~Where~~ When no time studies exist, the applicable units must be used for allocation. ~~Where~~ When there is no definition of a unit of service, the department will use the unit of service for billing purposes for residential settings.

   b. Fringe benefits. The cost of fringe benefits must be allocated to basic services based on the ratio of the basic service personnel costs to total personnel costs. Personnel costs on which no fringe benefits are paid will be excluded.

   c. Equipment. The total cost of all equipment, whether rented, leased, purchased, or depreciated, must be distributed to basic service based on usage or applicable units.

   d. Real property expense. The total of all property costs, whether rented, leased, purchased, or depreciated, must be allocated based on direct square footage. ~~Where~~ When multiple usage of direct use area occurs, the allocation will first be done by square footage and then by applicable units.

   e. Travel. The total of all unassigned travel costs, which must not exceed the state rate of reimbursement, must be included in administrative costs.

   f. Supplies. The total of all unassigned supply costs must be included with administrative costs.

   g. Food services. The total of all food costs should be allocated based on meals served. ~~Where~~ When the number of meals served has not been identified, applicable units must be used.

   h. Insurance and bonds. The total of all such costs, except insurance costs representing real property expense or vehicle insurance costs applicable to vehicles used for

one or more basic services, must be included as administrative costs.

i. Contractual services. The total of all contractual costs must be allocated based upon applicable units or, if appropriate, included as part of the administrative costs.

j. ~~Production--costs.---Total-expenses-for-facility-based-day and-work-activity-must-be-allocated-in-part-to--production using--the-facility-based-mean-productivity-percentage-for each-service-where-production-occurred.--If-the-provider's records----do----not----identify----total---expenses---for nonfacility-based--activities--from--total--expenses---for facility-based--activities,--the-department-will-use-total expenses-and-total-mean-productivity-percentage--for--each service-where-production-occurred.~~

k. General client costs. Total general client expenses must be allocated to service categories, exclusive of production, room, board, and supported living arrangements, family support services, and extended services based on actual ~~census-days~~ units of service. When determining the day support ratio of general client costs, total day support units will be divided by eight and rounded to the nearest whole number.

~~l.~~ k. Administrative costs. Total administrative expenses ~~must~~ may be allocated to all service categories, on time studies done in compliance with subdivision a. If time studies are not available, total administrative expenses must be allocated to all service categories, exclusive of room, board, and production, based upon the ratio of the basic service cost to total cost excluding administrative and production costs. The percentage calculated for residential services must be based on total costs for training, room, and board for the specific residential service with the allocation made only to training.

~~m.--Administrative--costs--to--production.---A--portion-of-the administrative-expense-allocated-to-facility-based-day-and work--activity--must-be-allocated-to-production-based-upon the-facility-based-mean-productivity-percentage--for--each service--wherein--production--occurred.--If-the-provider's records---do---not----identify----total----expenses----for nonfacility-based---activities--from--total--expenses--for facility-based-activities,-the-department-will--use--total expenses--and--total-mean-productivity-percentage-for-each service-where-production-occurred.~~

2. Identification of the means of financing is to be as follows:

a. Budget reports require the disclosure of all revenues currently used to finance costs and those estimated to

finance future costs, inclusive of the provider's estimate of state financial participation.

b. Revenues must be distributed on the appropriate budget report by program. ~~Where~~ When private contributions are used to supplement or enrich services, the sum may be distributed accordingly. ~~Where~~ When contributions are held in reserve for special purposes, it may be described by narrative.

c. The disclosure of contract income and production costs is required to establish a rate of reimbursement supplemental to, and not duplicative of, these revenues and costs.

d. State financial participation in the habilitative costs associated with ~~facility-based-production-activities-where contract---income---is---realized--shall--not--exceed--the percentage-difference-between-the-mean-productivity-of-the clients,--as--determined--pursuant--to-29-CFR-525,-and-one hundred-percent~~ day supports shall not include production costs.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-12. Adjustment to cost and cost limitation.

1. Providers under contract with the department to provide services to ~~persons~~ individuals with developmental disabilities must submit to the department, no less than annually, a statement of actual costs~~,--both--current--and estimated,~~ on the cost report.

2. Providers must disclose all costs and all revenues.

3. Providers must identify income to offset costs ~~where~~ when applicable in order that state financial participation not supplant or duplicate other funding sources. These sources, and the cost to be offset, must include the following:

   a. Fees, the cost of the service or time for which the fee was imposed excluding those fees based on cost as established by the department.

   b. Insurance recoveries income, costs reported in the current year to the extent of costs allowed in the prior or current year for that loss.

   c. Rental income, cost of space in facilities or for equipment included in the rate of reimbursement.

d. Telephone and telegraph income from clients, staff, or guests, cost of the service.

e. Rental assistance or subsidy when not reported as third-party income, total costs.

f. Interest or investment income, interest expense.

g. Medical payments, cost of medical services included in the rate of reimbursement as appropriate.

h. Respite care income when received for a reserved bed, room, board, and staff costs.

i. Other income to the provider from local, state, or federal units of government may be determined by the department to be an offset to cost.

4. Payments to a provider by its vendor will be considered as discounts, refunds, or rebates in determining allowable costs under the program even though these payments may be treated as "contributions" or "unrestricted grants" by the provider and the vendor. However, such payments may represent a true donation or grant, and as such ~~will~~ <u>may</u> not be offset against costs. Examples include when:

a. Payments are made by a vendor in response to building or other fundraising campaigns in which communitywide contributions are solicited.

b. Payments are in addition to discounts, refunds, or rebates, which have been customarily allowed under arrangements between the provider and the vendor.

c. The volume or value of purchases is so nominal that no relationship to the contribution can be inferred.

d. The contributor is not engaged in business with the provider or a facility related to the provider.

5. ~~Where~~ <u>If</u> an owner or other official of a provider directly receives from a vendor monetary payments or goods or services for the owner's or official's own personal use as a result of the provider's purchases from the vendor, the value of such payments, goods, or services constitutes a type of refund or rebate and must be applied as a reduction of the provider's costs for goods or services purchased from the vendor.

6. ~~Where~~ <u>If</u> the purchasing function for a provider is performed by a central unit or organization, all discounts, allowances, refunds, and rebates should be credited to the costs of the provider in accordance with the instructions above. These should not be treated as income of the central purchasing

function or used to reduce the administrative costs of that function. Such administrative costs are, however, properly allocable to the facilities serviced by the central purchasing function.

7. Purchase discounts, allowances, refunds, and rebates are reductions of the cost of whatever was purchased. They should be used to reduce the specific costs to which they apply. If possible, they should accrue to the period to which they apply. If not, they will reduce expenses in the period in which they are received. The reduction to expense for supplies or services must be used to reduce the total cost of the goods or services for all clients without regard to whether the goods or supplies are designated for all clients or a specific group.

   a. "Purchase discounts" include cash discounts, trade, and quantity discounts. "Cash discount" is for prepaying or paying within a certain time of receipt of invoice. "Trade discount" is a reduction of cost granted certain customers. "Quantity discounts" are reductions of price because of the size of the order.

   b. Allowances are reductions granted or accepted by the creditor for damage, delay, shortage, imperfection, or other cause, excluding discounts and refunds.

   c. Refunds are amounts paid back by the vendor generally in recognition of damaged shipments, overpayments, or return purchases.

   d. Rebates represent refunds of a part of the cost of goods or services. Rebates differ from quantity discounts in that ~~it--is~~ they are based on the dollar value of purchases, not the quantity of purchases.

   e. "Other cost-related income" includes amounts generated through the sale of a previously expensed item, e.g., supplies or equipment.

History: Effective July 1, 1984; amended effective June 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-13. Nonallowable costs. Nonallowable costs include:

1. Advertising to the general public exclusive of procurement of personnel and yellow page advertising limited to the information furnished in the white page listing.

2. Amortization of noncompetitive agreements.

3. Bad debt expense.

4. Barber and beautician services.

5. Basic research.

6. ~~Capital--improvements--by--the--provider-to-the-buildings-of-a lessor;~~

~~7.~~ Compensation of officers, directors, or stockholders other than reasonable and actual expenses related to client services.

~~8.~~ 7. Concession and vending machine costs.

~~9.~~ 8. Contributions or charitable donations.

~~10.~~ 9. Corporate costs, such as organization costs, reorganization costs, and other costs not related to client services.

~~11.~~ 10. Costs for which payment is available from another primary third-party payor or for which the department determines that payment may lawfully be demanded from any source.

~~12.~~ 11. Costs of functions performed by clients in a residential setting which are typical of functions of any ~~person~~ individual living in ~~their~~ the individual's own home, such as keeping the home sanitary, performing ordinary chores, lawnmowing, laundry, cooking, and dishwashing. These activities shall be an integral element of an individual program plan consistent with the client's level of function.

~~13.~~ 12. Costs of participation in civic, charitable, or fraternal organizations except local chambers of commerce.

~~14.~~ 13. Costs, including~~,--by--way--of-illustration-and-not-by-way-of limitation,~~ legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies, attributed to the negotiation or settlement of the sale or purchase of any capital assets, whether by sale or merger, when the cost of the asset has been previously reported and included in the rate paid to the vendor.

~~15.~~ 14. Costs incurred by the provider's subcontractors, or by the lessor of property which the provider leases, and which becomes an element in the subcontractor's or lessor's charge to the provider, if such costs would not have ~~not~~ been allowable under this section had they been incurred by a provider directly furnishing the subcontracted services, or owning the leased property.

~~16.~~ 15. Costs exceeding the approved budget unless the written prior approval of the department has been received.

~~17.~~ 16. Depreciation on assets acquired with federal or state grants.

~~18.~~ 17. Education costs incurred for the provision of services to clients who are, could be, or could have been, included in a student census. Education costs do not include costs incurred for a client, defined as a "child with disabilities" by subsection 2 of North Dakota Century Code section 15-59-01, who is ~~no longer~~ enrolled in a school district pursuant to an interdepartmental plan of transition.

~~19.--Education or training costs, for provider staff, which exceed the provider's approved budget costs.~~

~~20.~~ 18. Employee benefits not offered to all full-time employees.

~~21.~~ 19. Entertainment costs.

~~22.~~ 20. Equipment costs for any equipment, whether owned or leased, not exclusively used by the facility except to the extent that the facility demonstrates to the satisfaction of the department that any particular use of the equipment was related to client services. Equipment used for client services, other than developmental disabilities contract services, will be allocated by time studies, mileage, client census, percentage of total operational costs, or otherwise as determined appropriate by the department.

~~23.~~ 21. Expense or liabilities established through or under threat of litigation against the state of North Dakota or any of its agencies; provided, that reasonable insurance expense shall not be limited by this subsection.

~~24.~~ 22. Federal and other governmental income taxes.

~~25.~~ 23. Fringe benefits exclusive of Federal Insurance Contributions Act, unemployment insurance, medical insurance, ~~workers~~ workers' compensation, retirement, long-term disability, dental, vision, life, and other benefits which have received written prior approval of the department.

~~26.~~ 24. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose.

~~27.~~ 25. Funeral and cemetery expenses.

~~28.~~ 26. Goodwill.

~~29.~~ 27. Home office costs when unallowable if incurred by facilities in a chain organization.

~~30.~~ 28. Housekeeping staff or service costs.

~~31.~~ 29. ~~In-state--travel~~ Travel not directly related to industry conferences, state or federally sponsored activities, or client services.

~~32.~~ 30. Interest cost related to money borrowed for funding depreciation.

~~33.~~ 31. Items or services, such as telephone, television, and radio, located in a client's room and furnished primarily for the convenience of the clients.

~~34.~~ 32. Key man insurance.

~~35.~~ 33. Laboratory salaries and supplies.

~~36.~~ 34. Staff matriculation fees and fees associated with the granting of college credit.

~~37.~~ 35. Meals and food service in day service programs.

~~38.~~ 36. Membership fees or dues for professional organizations exceeding five hundred dollars in any fiscal year.

~~39.~~ 37. Miscellaneous expenses not related to client services.

~~40.--Out-of-state--travel--expense-which-is-not-directly-related-to client-services--or--which--has--not--received--written--prior approval-by-the-department.~~

~~41.~~ 38. a. Except as provided in subdivisions b and c, payments to members of the governing board of the provider, the governing board of a related organization, or families of members of those governing boards, including spouses and ~~persons~~ individuals in the following relationship to those members or to spouses of those members: parent, stepparent, child, stepchild, grandparent, step-grandparent, grandchild, step-grandchild, brother, sister, half brother, half sister, stepbrother, and stepsister.

b. Payments made to a member of the governing board of the provider to reimburse that member for allowable expenses incurred by that member in the conduct of the provider's business may be allowed.

c. Payments for a service or product unavailable from another source at a lower cost may be allowed except that this subdivision may not be construed to permit the employment of any ~~person~~ individual described in subdivision a.

~~42.~~ 39. Penalties, fines, and related interest and bank charges other than regular service charges.

43. 40. Personal purchases.

44. 41. Pharmacy salaries.

45. 42. Physician and dentist salaries.

46. 43. a. ~~Production~~ For facility-based day supports programs, production costs, such as ~~the cost of the~~ client salaries and benefits, supplies, and materials representing unfinished or finished goods or products that are assembled, altered, or modified~~; square footage that the department determines is primarily for nontraining or production purposes, and property, equipment, supplies, and materials used in nonfacility-based day and work activity~~.

b. For non-facility-based day supports programs, production costs, such as client salaries and benefits, supplies, and materials representing unfinished or finished goods or products that are assembled, altered, or modified, square footage, and equipment.

c. For extended services, in addition to ~~subdivision~~ subdivisions a and b, costs of employing clients, including preproduction and postproduction costs for supplies, materials, property, and equipment, and property costs other than an office, office supplies, and equipment for the supervisor, job coach, and support staff.

~~c~~ d. Total production-related legal fees in excess of five thousand dollars in any fiscal period.

47. 44. Religious salaries, space, and supplies.

48. 45. Room and board costs in residential services other than an intermediate care facility for the mentally retarded~~, except when such costs are incurred on behalf of persons who have been found not to be disabled by the social security administration, but who are certified by the department as indigent and appropriately placed. Allowable room and board cost must not exceed the room and board rate established pursuant to subsections 2 and 3 of section 75-04-05-09. Services offering room and board temporarily, to access medical care, vocational evaluation, respite care, or similar time limited purposes are or may be exempt from the effect of this provision~~.

49. 46. Salary costs of employees determined by the department to be inadequately trained to assume assigned responsibilities, but where when an election has been made to not participate in appropriate training approved by the department.

~~50.~~ 47. Salary costs of employees who fail to meet the functional competency standards established or approved by the department.

~~51.~~ 48. Travel of clients visiting relatives or acquaintances in or out of state.

~~52.~~ 49. Travel expenses in excess of state allowances.

~~53.~~ 50. Undocumented expenditures.

~~54.~~ 51. Value of donated goods or services.

~~55.~~ 52. Vehicle and aircraft costs not directly related to provider business or client services.

~~56.~~ 53. X-ray salaries and supplies.

History: Effective July 1, 1984; amended effective June 1, 1985; January 1, 1989; August 1, 1992; June 1, 1995; July 1, 1995; April 1, 1996; August 1, 1997; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-15. Depreciation.

1. The principles of reimbursement for provider costs require that payment for services include depreciation on depreciable assets that are used to provide allowable services to clients. This includes assets that may have been fully or partially depreciated on the books of the provider, but are in use at the time the provider enters the program. The useful lives of these assets are considered not to have ended and depreciation calculated on the revised extended useful life is allowable. Likewise, a depreciation allowance is permitted on assets that are used in a normal standby or emergency capacity. Depreciation is recognized as an allocation of the cost of an asset over its estimated useful life. If any depreciated personal property asset is sold or disposed of for an amount ~~in excess of~~ different than its undepreciated value, the ~~excess~~ difference represents an ~~overstatement~~ incorrect allocation of the cost of the asset to the facility and must be included as a gain or loss on the cost report. The facility shall use the sale price in computing the gain or loss on the disposition of assets.

2. Special assessments on land which represent capital improvements, such as sewers, water, and pavements, should be capitalized and may be depreciated.

3. Depreciation methods:

a. The straight-line method of depreciation must be used. All accelerated methods of depreciation, including depreciation options made available for income tax purposes, such as those offered under the asset depreciation range system, may not be used. The method and procedure for computing depreciation must be applied on a basis consistent from year to year and detailed schedules of individual assets must be maintained. If the books of account reflect depreciation different than that submitted on the cost report, a reconciliation must be prepared.

b. For all assets obtained prior to August 1, 1997, depreciation will be computed using a useful life of ten years for all items except vehicles, which must be four years, and buildings, which must be twenty-five years or more. For assets other than vehicles and buildings obtained after August 1, 1997, a provider may use the American hospital association guidelines as published by the American hospital publishing, inc., in "Estimated Useful Lives of Depreciable Hospital Assets", revised ~~1993~~ 1998 edition, to determine the useful life or the composite useful life of ten years. Whichever useful life methodology is chosen, the provider may not thereafter use the other option without the department's prior written approval. A useful life of ten years must be used for all equipment not identified in the American hospital association depreciation guidelines.

c. A provider acquiring assets as an ongoing operation shall use as a basis for determining depreciation:

(1) The estimated remaining life, as determined by a qualified appraiser, for land improvements, buildings, and fixed equipment; and

(2) (a) A composite remaining useful life for movable equipment, determined from the seller's records; or

(b) The remaining useful life for movable equipment, determined from the seller's records.

(3) Movable equipment means movable care and support services equipment generally used in a facility, including equipment identified as major movable equipment in the American hospital association depreciation guidelines.

~~3.~~ 4. Acquisitions are treated as follows:

a. If a depreciable asset has, at the time of its acquisition, a historical cost of at least one thousand

dollars, its cost must be capitalized and depreciated in accordance with subdivision b of subsection 2 3. Cost during the construction of an asset, such as architectural, consulting and legal fees, interest, etc., should be capitalized as a part of the cost of the asset.

b. Major repair and maintenance costs on equipment or buildings must be capitalized if they exceed five thousand dollars per project and will be depreciated in accordance with subdivision b of subsection 2 3.

4. 5. Proper records will provide accountability for the fixed assets and also provide adequate means by which depreciation can be computed and established as an allowable client-related cost.

5. 6. The basis for depreciation is as follows:

a. The amount of historical costs must not exceed the lower of:

(1) Current reproduction costs less straight-line depreciation over the life of the asset to the time of purchase; or

(2) Fair the lower of the purchase price or fair market value at the time of purchase.

In the case of a trade-in, the historical cost fair market value will consist of the sum of the book value of the trade-in plus the cash paid.

b. 7. For depreciation and reimbursement purposes, donated depreciable assets may be recorded and depreciated based on their fair market value. In the case where If the provider's records do not contain the fair market value of the donated asset, as of the date of the donation, an appraisal must be made. An appraisal made by a recognized appraisal expert will be accepted for depreciation.

c. 8. No provision shall be made Provision for increased costs due to the sale of a facility may not be made.

6. 9. Providers which finance facilities pursuant to North Dakota Century Code chapter 6-09.6, subject to the approval of the department, may elect to be reimbursed based upon the mortgage principle payments rather than depreciation. Once an election is made by the provider, it may not be changed without department approval.

7. 10. Recapture of depreciation.

a. At any time that the operators of a facility sell an asset, or otherwise remove that asset from service in or to the facility, any depreciation costs asserted after June 1, 1984, with respect to that asset, are subject to recapture to the extent that the sale or disposal price exceeds the undepreciated value except:

(1) If the facility has been owned for twenty years or longer, no recapture of depreciation may be allowed; or

(2) If the facility has been owned for more than ten years but for less than twenty years, the depreciation recapture amount must be reduced by ten percent times the number of years the facility is owned after the tenth year.

If the department determines that a sale or disposal was made to a related party, or if a facility terminates participation as a provider of services in a department program, any depreciation costs asserted after June 1, 1984, with respect to that asset or facility, are subject to recapture to the extent that the fair market value of the asset or facility exceeds the depreciated value.

b. The seller and the purchaser may, by agreement, determine which shall pay the recaptured depreciation. If the parties to the sale do not inform the department of their agreement, the department will offset the amount of depreciation to be recaptured against any amounts owed, or to be owed, by the department to the seller and buyer. The department will first exercise the offset against the seller, and shall only exercise the offset against the buyer to the extent that the seller has failed to repay the amount of the recaptured depreciation.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 25-16-15, 50-24.1-01

75-04-05-16. Interest expense.

1. In general:

a. To be allowable under the program, interest must be:

(1) Supported by evidence of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required;

(2) Identifiable in the provider's accounting records;

(3) Related to the reporting period in which the costs are incurred;

(4) Necessary and proper for the operation, maintenance, or acquisition of the provider's facilities used therein;

(5) Unrelated to funds borrowed to purchase assets in excess of cost or fair market value; and

(6) When ~~representative--of--borrowing~~ borrowed for the purpose of making capital expenditures for assets that were owned by any other facility or service provider on or after July 18, 1984, limited to that amount of interest cost which such facility or service provider may have reported, for ratesetting purposes, had the asset undergone neither refinancing nor a change of ownership.

b. In ~~such~~ cases ~~where~~ when it was necessary to issue bonds for financing, any bond premium or discount shall be accounted for and written off over the life of the bond issue.

2. Interest paid by the provider to partners, stockholders, or related organizations of the provider is not allowable as a cost except when interest expense is incurred subject to North Dakota Century Code chapter 6-09.6.

3. A provider may combine or "pool" various funds in order to maximize the return on investment. ~~Where~~ If funds are pooled, proper records must be maintained to preserve the identity of each fund in order to permit the earned income to be related to its source. Income earned on gifts and grants does not reduce allowable interest expense.

4. Funded depreciation requirements are as follows:

a. Funding of depreciation is the practice of setting aside cash or other liquid assets to be used for replacement of the assets depreciated or for other capital purposes. This provision is recommended as a means of conserving funds for the replacement of depreciable assets. It is expected that the funds will be invested to earn revenues. The revenues generated by this investment will not be considered as a reduction of allowable interest expense provided such revenues remain in the fund.

b. The deposits are, in effect, made from the cash generated by the noncash expense depreciation and do not include interest income. Deposits to the funded depreciation account are generally in an amount equal to the depreciation expense charged to costs each year. In order

to qualify for all provisions of funding depreciation, the minimum deposits to the account must be fifty percent of the depreciation expensed that year. Deposits in excess of accumulated depreciation are allowable; however, the interest income generated by the "extra" deposits will be considered as a reduction of allowable interest expense.

c. Monthly or annual deposits representing depreciation must be in the funded depreciation account for six months or more to be considered as valid funding transactions. Deposits of less than six months are not eligible for the benefits of a funded depreciation account. However, if deposits invested before the six-month period remain in the account after the six-month period, the investment income for the entire period will not reduce the allowable interest expensed in that period. Total funded depreciation in excess of accumulated depreciation on client-related assets will be considered as ordinary investments and the income therefrom will be used to offset interest expense.

d. Withdrawals for the acquisition of capital assets, the payment of mortgage principal on these assets and for other capital expenditures are on a first-in, first-out basis.

e. The provider may not use the funds in the funded depreciation account for purposes other than the improvement, replacement, or expansion of facilities or equipment replacement or acquisition related to client services.

f. Existing funded depreciation accounts must be used for all capital outlays in excess of ~~three--hundred~~ one thousand dollars except with regard to those assets purchased exclusively with donated funds or from the operating fund, provided no amount was borrowed to complete the purchase. Should funds be borrowed, or other provisions not be met, the entire interest for the funded depreciation income account will be offset up to the entire interest expense paid by the facility for the year in question.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-19. Taxes.

1. **General.**

a. Taxes assessed against the provider, in accordance with the levying enactments of the several states and lower levels of government and for which the provider is liable for payment, are allowable costs. Tax expense may not include fines, penalties, or those taxes listed in subsection 2.

2. **Taxes not allowable as costs.** The following taxes are not allowable as costs:

   a. Federal income and excess profit taxes, including any interest or penalties paid thereon.

   b. State or local income and excess profit taxes.

   c. Taxes in connection with financing, refinancing, or refunding operation, such as taxes in the issuance of bonds, property transfers, issuance or transfers of stocks, etc. Generally, these costs are either amortized over the life of the securities or depreciated over the life of the asset. They are not, however, recognized as tax expense.

   d. Taxes from which exemptions are available to the provider.

   e. ~~Special---assessments--on--land--which--represent--capital improvements,-such-as-sewers,-water,-and-pavements,-should be-capitalized-and-may-be-depreciated.~~

   f. Taxes on property which is not used in the provision of covered services.

History: Effective July 1, 1984; amended effective July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-20. Personal incidental funds.

1. Each client is allowed to retain a specific monthly amount of income for personal needs. These personal needs include such items as clothes, tobacco, or other day-to-day incidentals. This monthly allowance is not to be applied toward the client's cost of care. Generally, the source of income for personal needs is from social security, ~~veterans~~ veterans' benefits, private income, economic assistance, or supplemental security income ~~(SSI)~~.

2. Providers managing client funds must maintain a current client account record in a form and manner prescribed by the department. Copies of the client account record must be provided to the client without charge.

3. The department may conduct audits of client account records in conjunction with regular field audits.

4. Adult client funds may be disbursed with the client's permission in the absence of a guardian or declaration of incompetency.

5. The department uses the amount of a client's income to determine:

   a. Eligibility for medical assistance benefits.

   b. Amount of income and other resources which must be applied toward the client's care.

   c. Amount of income and other resources which can be retained by the client.

6. The following personal incidental items, supplies, or services furnished as needed or at the request of the client, may be paid for by the client from the client's personal incidental allowance or by outside sources, such as relatives and friends:

   a. Outside barber and beautician services, if requested by the client for regular shaves, haircuts, etc.

   b. Personal supplies, such as toothbrushes, toothpaste or powder, mouthwashes, dental floss, denture cleaners, shaving soap, cosmetic and shaving lotions, dusting powder, cosmetics, personal deodorants, hair combs and brushes, and sanitary pads and belts for menstrual periods.

   c. Drycleaning of personal clothing.

   d. Recliner chairs, standard easy chairs, radios, television sets, etc., that the client desires for the client's personal use.

   e. Special type wheelchairs, e.g., motorized, permanent leg support, hand-controlled, if needed by client, recommended by the client's attending physician, and if no other payment resource is available.

   f. Personal clothing, including robes, pajamas, and nightgowns, except for clothing at distinct parts of the state institution for ~~persons~~ individuals with developmental disabilities certified as intermediate care facilities for the mentally retarded, when the ownership of the clothing is retained by the facility or the clothing is included as a part of the individual's plan of care.

g. Miscellaneous items, such as tobacco products and accessories, beverages and snacks served at other than mealtime except for supplemental nourishment, television rental for individual use, stationery supplies, postage, pens and pencils, newspapers and periodicals, cable television, and long-distance telephone services. Nonprescription vitamins or combinations of vitamins with minerals may be paid when ordered by the attending physician and the client, parent, guardian, or responsible relative approves such use of the client's funds.

7. Charges by the program for items or services furnished clients will be allowed as a charge against the client or outside sources, only if separate charges are also recorded by the facility for all clients receiving these items or services directly from the program. All such charges must be for direct, identifiable services or supplies furnished individual clients. A periodic "flat" charge for routine items, such as beverages, cigarettes, etc., will not be allowed. Charges may be made only after services are performed or items are delivered, and charges are not to exceed charges to all classes of clients for similar services.

8. A client's private property must be clearly marked by name. The facility must keep a record of private property. If items are lost, the circumstances of disappearance must be documented in the facility's records.

9. If client funds are deposited in a bank, they must be deposited in an account separate and apart from any other bank accounts of the facility. Any interest earned on this account will be credited to the applicable client's accounts.

10. A client's funds on deposit with the facility must be available to a client on the client's request. No funds may be withdrawn from accounts of a client capable of managing the client's own funds without the client's permission.

11. Should a disagreement exist as to whether a client is capable of managing the client's own funds, a joint determination will be made by the individual service plan team, parent, guardian, or responsible relative in settling this dispute. The decision must be documented in the provider's records.

12. On discharge, the facility must provide the client with a final accounting of personal funds, and remit any balance on deposit with the facility.

13. Upon death, the balance of a client's personal incidental funds along with the name and case number, will be maintained in an interest-bearing account for disposition by the client's estate. Personal property, such as television sets, radios,

wheelchairs, and other property of more than nominal value, will be maintained for disposition by the client's estate.

14. Upon sale or other transfer of ownership interest of a facility, both transferor and transferee must transfer the client's personal incidental funds moneys and records in an orderly manner.

15. Failure to properly record the receipt and disposition of personal incidental funds may constitute grounds for suspension of provider payments.

16. Client personal incidental funds must not be expended by the provider for the purchases of meals served in licensed day service programs nor may the purchase of such meals be a condition for admission to such programs.

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-22. Staff-to-client ratios. The following overall ~~direct-care~~ direct contact staff-to-client ratios shall form the basis for the determination of the rate of reimbursement for providers of service to ~~persons~~ individuals with developmental disabilities. Additional staff may be necessary to meet the needs of the clients and may be added subject to the approval of the department.

1. Intermediate care facilities for the mentally retarded shall be subject to the direct contact staffing requirements of 42 CFR 483.430.

2. Transitional community living facility shall maintain a one to eight ~~direct-care~~ direct contact staff-to-client ratio during those periods when the clients are awake and on the premises, and one direct contact staff when clients are asleep.

3. Minimally supervised living arrangements and providers of congregate care for the aged shall maintain one direct contact staff onsite when clients are present when required by the department.

4. In minimally supervised apartment living arrangements, one direct contact staff shall be onsite when clients are present when required by the department.

5. Supported living arrangements shall maintain a direct contact staff-to-client ratio of one to twenty.

6. ~~Developmental--day--activity~~ Day supports shall maintain a direct contact staff-to-client ratio of one to five.

7. ~~Developmental-and-prevocational-work-activity-shall-maintain-a direct-contact-staff-to-client-ratio-of-one-to--five--for--the first-fifteen-clients-and-one-to-ten-for-additional-clients.~~

8. Infant development shall maintain one service coordinator for every eleven children.

9. ~~--Adult-day-care-shall-maintain-a-direct-contact-staff-to-client ratio-of-one-to-eight.~~

History: Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-23. Staff hours.

1. A calculation of the total number of employees necessary to meet staff-to-client ratios is made on the basis of a full-time equivalent employee. Assuming that a full-time employee has fifty-two working weeks of five days each, twelve holidays, ten vacation days, and ten sick days per year, the actual number of days worked is two hundred twenty-eight per year. Providers who grant fewer paid absences must use a full-time equivalent calculation which reflects a higher number of working days.

2. Assuming a two hundred twenty-eight day work year:

   a. Staffing for the three hundred sixty-five day service provided by a residential service provider each year requires 1.6 full-time equivalent staff ~~persons~~ members for each shift slot to be filled at all times (two hundred twenty-eight times 1.6 equals three hundred sixty-five).

   b. Staffing for the two hundred sixty days of service provided by a day service provider each year requires 1.14 full-time equivalent staff ~~persons~~ members for each staff required by the ratio (two hundred twenty-eight times 1.14 equals two hundred sixty).

3. To calculate the number of duty hours in a week, eight hours per day for five days (day services) and eight hours per night for seven nights (sleep time) are subtracted from the total hours of the week for residential service providers.

History: Effective July 1, 1984; amended effective July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01

75-04-05-24. Application.

1. This chapter will be applied to providers of services to ~~persons~~ individuals with developmental disabilities, except distinct parts of state institutions for ~~persons~~ individuals with developmental disabilities which are certified as intermediate care facilities for the mentally retarded, starting the first day of a facility's first fiscal year which begins on or after July 1, 1985; provided, however, that neither this section, nor the effective date, shall preclude the application and implementation of some or all of the provisions of this chapter through contract or through official statements of department policy. Specific sections of this chapter will be applied to services provided in distinct parts of state institutions for ~~persons~~ individuals with developmental disabilities which are certified as intermediate care facilities for the mentally retarded. The ~~applicable~~ sections of this chapter that apply are section 75-04-05-01; subsections 1, 4, 5, 6, and 7 of section 75-04-05-02; subsections 1, 2, and 3 of section 75-04-05-08; sections 75-04-05-09, 75-04-05-10, 75-04-05-11, and 75-04-05-12; subsections 1 through ~~11~~ 10, ~~13~~ 12 through ~~22~~ 20, ~~24~~ 22 through ~~29~~ 27, ~~31~~ 29 through ~~34~~ 32, ~~36 and 37~~ 34, 35, ~~39~~ 37 through ~~43~~ 40, ~~46~~ 43, and ~~48~~ 45 through ~~55~~ 52 of section 75-04-05-13; sections 75-04-05-14, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, 75-04-05-19, 75-04-05-20, 75-04-05-21, 75-04-05-22, and 75-04-05-23; and subsection 1 of section 75-04-05-24.

2. This chapter will be applied to providers of supported employment extended services to individuals with developmental disabilities, mental illness, traumatic brain injury, and other severe disabilities, except as operated through the human service centers; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, subsections 1 through 3, ~~5,-9~~ 8 through ~~15~~ 14, ~~17~~ 16 through ~~19~~ 18, ~~21~~ 20 through ~~24~~ 23, 26, and ~~27~~ of section 75-04-05-01; section 75-04-05-02; subsection 1, subdivisions a through c and e through f of subsection 2, ~~subsection~~ and subsections 3, ~~subdivision a of subsection 4, paragraphs 1 and 2 of subdivision b of subsection 4, and subdivisions c and d of subsection~~ and 4 of section 75-04-05-08; subsections 2, 6 through 10, and subdivisions a, b, and d of subsection 12 of section 75-04-05-09; subsection 1, subsection 2, and subdivisions a, h, and i of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and ~~l~~ k of subsection 1, and subdivisions a through c of subsection 2 of section 75-04-05-11; subsections 1 and 2, subdivisions a through d, f, and i of subsection 3, and subsections 4 through 7 of section 75-04-05-12; subsections 2 through ~~11~~ 10, ~~14~~ 13 through ~~56~~ 53 of section 75-04-05-13; sections 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; and

subsections 1, 2, and 5 of section 75-04-05-21 of this chapter will be applied to supported employment extended services, with the following additions:

a. Nonallowable costs include costs of participation in charitable or fraternal organizations;

b. Report forms designed by the department must be used for annual reporting for reimbursement. The statement of budgeted costs must be submitted to the ~~disabilities~~ disability services division ~~at least~~ within sixty days ~~before the end of the facility's normal accounting year~~ of the date of the letter containing the budget instructions provided by the department reflecting budgeted costs and units of service for establishing an interim rate in the subsequent year. The statement of actual costs must be submitted on or before the last day of the third month following the end of the facility's normal accounting year. The report must contain the actual costs, adjustments for nonallowable costs, and units of service for establishing the final rate; and

c. Requests for reconsideration of the final rate of reimbursement established must be submitted in writing to the ~~disabilities~~ disability services division within ten days of the date of the rate notification;.

~~d. "Units of service" means one person served for one hour of intervention for billing purposes.~~

3. This chapter will be applied to providers of individualized supported living arrangements services; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, the following sections apply to the providers of individualized supported living arrangements services: sections 75-04-05-01, 75-04-05-02, and 75-04-05-08; subdivisions a and h of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and ~~j~~ k of subsection 1, and subdivisions a and b of subsection 2 of section 75-04-05-11; section 75-04-05-12; subsections 1 through ~~11~~ 10, ~~13~~ 12 through ~~15~~ 14, ~~17 and 18~~, and ~~20~~ 16 through ~~56~~ 53 of section 75-04-05-13; sections 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; subsections 1 through 7 and 9 through 16 of section 75-04-05-20; and sections 75-04-05-21, 75-04-05-23, and 75-04-05-24. The following additions apply only to the providers of individualized supported living arrangements services:

a. Each provider of individualized supported living arrangements shall maintain separate revenue records for

direct service reimbursements and for administrative reimbursement. Records must distinguish revenues from the department from all other revenue sources. Direct service revenues are:

(1) Direct service reimbursements from the department;

(2) ~~Interest-income-from-excess-department-direct-service payments-as-provided-for-by-section-18--of--article-X of--the-Constitution-of-North-Dakota.--If-no-interest has-been-earned-on-the-overpayment--amount,--then--no return--of--interest--will-be-required;-and~~ Copayment responsibility of an individual receiving individualized supported living arrangements services; and

(3) Intended to cover direct service costs.

b. Each provider of individualized supported living arrangements shall maintain cost records distinguishing costs attributable to the department from other cost sources. Private pay client revenues and cost records are to be separately maintained from revenue and cost records whose payment source is the department.

c. When direct service reimbursements from the department exceed direct service costs attributable to the department by the margin established by department policy, payback to the department is required. In these situations, the entire overpayment must be refunded.

d. A provider may appeal the department's determination of direct costs and reimbursements by requesting a hearing within thirty days after the departmental mailing of the payback notification.

4. This chapter will be applied to providers of family support services; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, the following sections apply to providers of family support services: sections 75-04-05-01, 75-04-05-02, and 75-04-05-08; subdivisions a and h of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and ~~l~~ k of subsection 1~~,~~ and subdivisions a and b of subsection 2 of section 75-04-05-11; section 75-04-05-12; subsections 1 through ~~11~~ 10, ~~13~~ 12 through ~~15~~ 14, ~~17-and-18,~~ and ~~20~~ 16 through ~~56~~ 53 of section 75-04-05-13; sections 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; subsections 1 through 7~~,~~ and 9 through 16 of section 75-04-05-20; and sections 75-04-05-21,

75-04-05-23, and 75-04-05-24. The following additions apply only to the providers of family support services:

a. Each provider of family support services shall maintain separate revenue records for direct service reimbursements and for administrative reimbursements. These cost records must distinguish revenues from the department from all other revenue sources. Direct service revenues are:

(1) Direct service reimbursements from the department; and

(2) ~~Interest income from excess department direct service payments as provided for by section 18 of article X of the Constitution of North Dakota. If no interest has been earned from the overpayment amount, then no return of interest will be required; and~~

~~(3)~~ Parental ~~financial~~ copayment responsibility as documented on the family support service ~~contract which will be determined using the following guidelines:~~

~~(a) Respite care parental financial responsibility for a nonmedicaid eligible minor under the age of eighteen shall be determined by the sliding fee scale that is established by and administered by the human service centers as provided for in North Dakota Century Code section 50-06.3-03. Copies of the "monthly income billing rate schedule", which may be updated from time to time, are available from the department upon request.~~

~~(b) Family care options parental financial responsibility for services for a minor under the age of eighteen who is receiving supplemental security income shall be determined by the following method:~~

~~[1] Subtract forty five dollars from the supplemental security income check for personal needs and extraordinary expenses determined by the parents and the agency; and~~

~~[2] Divide the amount by thirty to determine the daily rate.~~

~~(c) Family care options parental financial responsibility for services for a minor under the age of eighteen who is not receiving~~

~~supplemental-security-income-shall-be-determined by-the-following-method:~~

~~[1]--Determine-the-net-monthly-income;~~

~~[2]--Determine--the--number--of--children--under eighteen-living-in-the-household;~~

~~[3]--Apply---the---scale--of--suggested--minimum contribution-percentages--from--the--"North Dakota--child--support--guidelines-scale-of suggested-minimum-contributions";-which-may be---updated--from--time--to--time--and--is available-upon-request-from-the-department;~~

~~[4]--Divide--the--suggested--contribution-by-the number-of-children-to-derive-the-per--child contribution;-and~~

~~[5]--Divide-the-per-child-contribution-by-thirty to-determine-the-daily-rate~~ authorization.

b. Each provider of family support services shall maintain cost records distinguishing costs attributable to the department from other cost sources. Private pay client cost records are to be separately maintained from cost records for clients whose payment source is the department.

c. Payback in the form of a refund is required when direct service revenues from the department exceed direct service costs attributable to the department.

d. A provider may appeal the department's determination of direct costs and reimbursements by requesting a hearing within thirty days after the departmental mailing of the payback notification.

History: Effective July 1, 1984; amended effective July 1, 1984; June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-16-10, 50-24.1-01; 34 CFR 363

TITLE 89

Water Commission

MAY 2001

STAFF COMMENT: Article 89-14 contains all new material and is not underscored so as to improve readability.

ARTICLE 89-14

STREAM CROSSINGS

CHAPTER 89-14-01
STREAM CROSSING DESIGN

89-14-01-01. Standards. Except as provided in section 89-14-01-06, all highways constructed or reconstructed by the department of transportation, board of county commissioners, board of township supervisors, their contractors, subcontractors, or agents, or by any individual firm, corporation, or limited liability company must be designed to meet the standards contained in this chapter.

History: Effective May 1, 2001.
General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13
Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-02. Definitions.

1. "Construct" means to construct a new highway on a new location or corridor.

2. "Reconstruct" means to regrade or widen an existing roadbed on the existing highway location. For purposes of this chapter, reconstruct also includes replacing, modifying, or installing a stream crossing.

History: Effective May 1, 2001.
General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13
Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-03. Design flood frequency. The following table provides the recurrence interval of the event for which each type of crossing must be designed. This represents a minimum design standard. Nothing contained in this chapter is intended to restrict the road authority from providing greater capacity.

Type of Crossing	State Highway System						County	
	Urban System		Rural System				Rural System	
	Regional	Urban Roads	Principal Arterial		Minor Arterial	Major Collector	Major Collector	Off[4] System
			Interstate	Other				
Bridges & Reinforced Concrete Boxes	25 year[2]	25 year[2]	50 year[2]	50 year[2]	50 year[2]	25 year[2]	25 year[2,3]	15 year[2,3]
Roadway Culverts	25 year[2]	25 year[2]	50 year[2]	25 year[2]	25 year[2]	25 year[2]	25 year[2,3]	15 year[2,3]
Storm Drains	10 year[1]	5 year[1]	10 year[2]	10 year[2]	10 year[2]	10 year[2]		
Underpass Storm Drains	25 year[1]	25 year[1]	50 year[2]	25 year[2]	25 year[2]	25 year[2]		

[1]Discharges shall be computed using the rational method or other recognized hydrologic methods.

[2]Discharges shall be computed using United States geological survey report 92-4020 or other recognized hydrologic methods.

[3]If an overflow section is provided, the pipes and the overflow section, in combination, must pass the appropriate design event within the headwater limitations provided in this chapter.

[4]Off system roads include all township roads.

History: Effective May 1, 2001.
General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13
Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-04. Floodplain consideration - Upstream development. All stream crossings must comply with applicable floodplain regulations and regulatory floodway requirements. If a stream crossing is being replaced and buildings or structures are located upstream from the crossing, the stream crossing must not be constructed or reconstructed in a manner that increases the likelihood of impacts to those upstream buildings or structures from that which existed with the stream crossing being replaced, even if the capacity of the crossing being replaced was greater than the capacity otherwise required by this chapter. Any stream crossing constructed as part of a newly constructed roadway shall be constructed to pass a one hundred-year event without the resulting increase in headwater impacting any existing buildings or structures.

Structures, for the purposes of this section, include grain bins, silos, feedlots, and corrals. Structures do not include pasture fencing.

History: Effective May 1, 2001.
General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13
Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-05. Allowable headwater. The allowable maximum headwater when passing the design discharge must be measured from the bottom of the channel. For arch pipes, the maximum allowable headwater must be based on the rise of the pipe, and the pipe size category must be the equivalent round pipe size. For multiple pipe installations, the pipe diameter used to calculate the allowable headwater must be the diameter of the largest pipe. Tailwater resulting from downstream conditions, either natural or manmade, must be accounted for in the determination of the crossing's capacity and the resulting headwater. Additional guidance is provided in the North Dakota department of transportation design manual.

Streambed Slope (feet/mile)	Pipe Size	Allowable Headwater
< 5	24" - 54"	pipe diameter + 2 feet
	≥ 60"	1.5 pipe diameters
5 to 10	24" - 36"	pipe diameter + 2 feet
	42" - 54"	1.5 pipe diameters
	≥ 60"	2 pipe diameters
> 10	≥ 24"	2 pipe diameters

History: Effective May 1, 2001.
General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13

Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

89-14-01-06. Deviations. The board of county commissioners, board of township supervisors, their contractors, subcontractors, or agents, or any individual, firm, corporation, or limited liability company may deviate from the standards contained in this chapter if the deviation is approved in writing by the state engineer and the director of the department of transportation. A request to deviate from the standards must be made in writing and must set forth the reasons for the deviation. The state engineer and department of transportation may grant a deviation for good and sufficient cause after considering public safety, upstream and downstream impacts, and other relevant matters. The department of transportation may deviate from these standards if the director of the department determines it is appropriate to do so and the crossings are designed in accordance with scientific highway construction and engineering standards. The basis for the director's decision must be documented in writing. If a crossing results in less than one-half foot [15.24 centimeters] of headloss when passing the appropriate design discharge, the headwater limitations of section 89-14-01-05 do not apply.

Roads constructed as part of a surface coal mining operation for use solely as part of the mining operation are not subject to the requirements of this chapter. Roads constructed as a result of a surface coal mining operation for use by the public are bound by the requirements of this chapter, but deviations may be requested in accordance with this section.

History: Effective May 1, 2001.
General Authority: NDCC 24-02-01.1, 24-02-01.5, 28-32-02, 61-03-13
Law Implemented: NDCC 24-03-06, 24-03-08, 24-06-26.1

TITLE 92

Workers Compensation Bureau

MARCH 2001

CHAPTER 92-01-02

92-01-02-51. Amnesty period for employers, employees, and providers. A sixty-day-amnesty period provided for persons who willfully have made false claims or false statements to obtain payment from the bureau, or who willfully have misrepresented payroll and as a result have not paid the proper amount of premium, is established for the period to begin Friday, ~~May 15~~ June 1, ~~1998~~ 2001, and to end Monday, July ~~13~~ 30, ~~1998~~ 2001. The request for amnesty must be received, in writing, at the bureau no later than five p.m. central daylight time on July ~~13~~ 30, ~~1998~~ 2001.

History: Effective January 1, 1996; amended effective May 1, 1998; May 1, 2001.
General Authority: NDCC 65-02-08
Law Implemented: NDCC 65-02-25

CHAPTER 92-01-02

92-01-02-18. Experience rating system. The following system is established for the experience rating of risks of employers contributing to the fund:

1. Definitions. In this section, unless the context otherwise requires:

   a. "Five-year losses" means the total sum of ratable losses accrued on claims occurring during the first five of the six years immediately preceding the premium year being rated. ~~For payroll periods beginning between July 1, 1994, and June 30, 1995, this term means the total sum of ratable losses accrued on claims occurring during the first four of the five years immediately preceding the payroll year being rated.~~

   b. "Five-year payroll" means the total sum of limited payroll reported for the first five of the six years immediately preceding the premium year being rated. ~~For payroll periods beginning between July 1, 1994, and June 30, 1995, the term means the total sum of limited payroll reported for the first four of the five years immediately preceding the payroll year being rated.~~

   c. "Five-year premium" means the total sum of earned premium for the first five of the six years immediately preceding the premium year being rated. ~~For payroll periods beginning between July 1, 1994, and June 30, 1995, this term means the total sum of earned premium for the first~~

~~four-of-the-five-years-immediately-preceding--the--payroll year-being-rated.~~

d. "Manual premium" means the actual premium, prior to any experience rating, for the premium year immediately preceding the premium year being rated for claims experience.

2. An employer's account is not eligible for an experience rating until the account has completed three consecutive twelve-month payroll periods and has developed ~~annual--premium--of-one hundred--twenty-five--dollars--or--more,--excluding---optional coverages,--on-its-last-actual-payroll-report.--Employer's-and volunteer-coverages-are-not--eligible--for--experience--rating~~ aggregate manual premiums of at least twenty-five thousand dollars for the rating period used in developing the experience modification factor.

3. ~~For--accounts--with--manual--premium--of-less-than-twenty-five thousand-dollars:~~

~~a.--The--experience--rating--must--be--applied--prior--to--the inception-of-each-payroll-year-for-all-eligible-employers' accounts.---Notwithstanding--a--calculated-experience-rate discount,-an-employer-may-not-pay-less--than--the--minimum premium-for-the-highest-applicable-classification-rate.--A claim-is-deemed-to-occur-in-the-payroll-year-in--which--it is-accepted-by-the-bureau.~~

~~b.--Percentage--of--experience--rate--discount-or-surcharge-is computed-as-follows:~~

~~(1)--Calculate---the---basic---compensation--allowance--by multiplying-the-five-year-premium-by-forty-percent.~~

~~(2)--Subtract--the--basic--compensation-allowance-from-the five-year-losses.~~

~~(3)--Divide--this--difference--by--the--basic-compensation allowance-to-obtain-the-percentage-difference.~~

~~(4)--Multiply---thirty-five---percent--by--the--percentage difference-to-give-the-experience-rate-percentage--to be--applied--in-calculating-the-estimated-premium-for the-current-premium--year.---If--this--percentage--is greater--than--zero,--the--account--is--subject-to-an experience--rate--surcharge--in--the--amount--of--the calculated--percentage.---If--this-percentage-is-less than-zero,-the-account-is-entitled-to--an--experience rate--discount-in-the-amount-of-the-absolute-value-of the-percentage.~~

~~e.--Maximum--percent--of--surcharge--or-discount.--For-payroll periods-beginning-prior-to-August--1,--1993,--the--maximum experience--rating--surcharge--or--discount-may-not-exceed forty-percent--for--all--accounts.---For--payroll--periods beginning--between--August-1,-1993,-and-June-30,-1994,-the maximum-experience-rating-surcharge-or--discount--may--not exceed--thirty-five--percent-on-an-individual-account-with base-premium--of--five--thousand--dollars--to--twenty-four thousand--nine-hundred-ninety-nine-dollars-and-ninety-nine cents,-and-thirty-percent-on-an-account-with-base--premium of--one--hundred--dollars--to--four--thousand-nine-hundred ninety-nine-dollars-and-ninety-nine--cents.---For--payroll periods---beginning---after--June-30,--1994,--the--maximum experience-rating-surcharge-or--discount--may--not--exceed twenty--percent--on--an--account-with-base-premium-of-five thousand-dollars--to--twenty-four--thousand--nine--hundred ninety-nine--dollars--and--ninety-nine--cents,-and-fifteen percent-on-an-account-with-base--premium--of--one--hundred twenty-five---dollars---to---four--thousand--nine--hundred ninety-nine-dollars-and-ninety-nine-cents.~~

4. For accounts with <u>ratable</u> manual premium of twenty-five thousand dollars or more:

   a. The experience rating must be applied prior to the inception of each premium year for all eligible accounts. A claim is deemed to occur in the premium year in which the injury date occurs.

   b. The experience modification factor (EMF) to be applied to the current estimated portion of an employer's payroll report is computed as follows:

      (1) Calculate the actual primary losses (A_p), which consist of the sum of those five-year losses, comprising the first ten thousand dollars of each individual claim.

      (2) Calculate the actual excess losses (A_e), which consist of the sum of those five-year losses in excess of the first ten thousand dollars of losses of each individual claim.

      (3) Calculate the total expected losses (E_t), which are determined by adding the products of the actual payroll for each year of the five-year payroll times the class expected loss rate for each year. The class expected loss rates, taking into consideration the hazards and risks of various occupations, must be those contained in the most recent edition of the North Dakota workers compensation bureau summary of expected loss rates and information, which is hereby

adopted by reference and incorporated within this subsection as though set out in full.

(4) Calculate the expected excess losses (E_e), which are determined by adding the products of the actual payroll for each year of the five-year payroll times the class expected excess loss rates. The class expected excess loss rates, taking into consideration the hazards and risks of various occupations, must be those contained in the most recent edition of the North Dakota workers compensation bureau summary of expected loss rates and information, which is hereby adopted by reference and incorporated within this subsection as though set out in full.

(5) Calculate the "credibility factor" (Z) which is the quotient of the total expected losses divided by the sum of the total expected losses plus one million dollars.

(6) The experience modification factor is then calculated as follows:

(a) Add the actual primary losses to the product of the actual excess losses times the credibility factor.

(b) To this sum add the product of the expected excess losses times the difference between one dollar and the credibility factor.

(c) To this sum add twenty thousand dollars.

(d) Divide this total sum by the sum of the total expected losses plus twenty thousand dollars.

The resulting quotient is the experience modification factor to be applied in calculating the estimated premium for the current payroll year.

(7) The formula for the above-mentioned calculation is as follows:

$$EMF = \frac{A_p + (Z \times A_e) + [(1.00 - Z) \times E_e] + \$20{,}000.00}{E_t + \$20{,}000.00}$$

4. Accounts that fall below the eligibility standard for experience rating may be eligible for a loss-free credit. The rating period and ratable losses used to determine eligibility for the loss-free credit will be consistent with that used for the experience rating program. The amount of the credit will be determined annually in conjunction with the development of

experience rating expected loss rates for the prospective coverage period.

History: Effective June 1, 1990; amended effective July 1, 1993; July 1, 1994; April 1, 1997; July 1, 2001.
General Authority: NDCC 65-02-08, 65-04-17
Law Implemented: NDCC 65-04-01