NORTH DAKOTA ADMINISTRATIVE CODE

VOLUME 2

Supplements 156 through 161

June 1992
July 1992
August 1992
September 1992
October 1992
November 1992

Prepared by the Legislative Council staff
for the
Administrative Rules Committee

TABLE OF CONTENTS

Management and Budget, Office of (September 92) 1
Attorney General (August 92) 75
Game and Fish Department (June 92) 79
Health and Consolidated Laboratories, Department of
(June 92, September 92, October 92, November 92) 85
Insurance, Commissioner of (June 92, August 92) 1131
Board of Animal Health (November 92) 1157
Medical Examiners, Board of (July 92) 1161
Milk Stabilization Board (July 92) 1165
Nursing, Board of (June 92, November 92) 1177
Occupational Therapy Practice, Board of (November 92) 1189
Parks and Tourism Department (July 92) 1197
Pesticide Control Board (July 92) 1203
Pharmacy, Board of (June 92) 1213
Public Instruction, Superintendent of (November 92) 1229
Public Service Commission (September 92, November 92) 1233
Retirement Board (June 92, September 92) 1269
Seed Commission (June 92) 1283
Department of Human Services (August 92, November 92) 1305
Oilseed Council (June 92) 1447
Tax Commissioner (June 92, November 92) 1451
Water Commission (July 92) 1493
Workers Compensation Bureau (August 92) 1499
Seed Arbitration Board (July 92) 1503
Real Estate Appraiser Qualifications and Ethics Board
(October 92) 1513

~~(a)~~ ~~Scrubber pressure drop averaged over each one-hour incinerator operating period.~~

~~(b)~~ ~~Oxygen content in the incinerator exhaust averaged over each one-hour incinerator operating period.~~

~~(c)~~ ~~Temperatures of every hearth in multiple hearth incinerators; of the bed and outlet of fluidized bed incinerators; and of the drying, combustion, and cooling zones of electric incinerators averaged over each one-hour incinerator operating period.~~

~~(d)~~ ~~Rate of sludge charged to the incinerator averaged over each one-hour incinerator operating period.~~

~~(e)~~ ~~Incinerator fuel use averaged over each eight-hour incinerator operating period.~~

~~(f)~~ ~~Moisture and volatile solids content of the daily grab sample of sludge charged to the incinerator.~~

~~(3)~~ ~~The owner or operator of any sludge incinerator other than a multiple hearth, fluidized bed, or electric incinerator or any sludge incinerator equipped with a control device other than a wet scrubber shall include in the semiannual report a record of control device operation measurements, as specified in the plan approved under paragraph 5 of subdivision d.~~

~~14.~~ ~~Standards of performance for the phosphate fertilizer industry - Wet-process phosphoric acid plants.~~

~~a.~~ ~~Applicability and designation of affected facility. The affected facility to which the provisions of this subsection apply is each wet-process phosphoric acid plant having a design capacity of more than fifteen tons [13.60 metric tons] of equivalent~~ P_2O_5 ~~feed per calendar year.~~

~~For the purpose of this subsection, the affected facility includes any combination of: reactors, filters, evaporators, and hot wells. Any facility that commences construction or modification after October 22, 1974, is subject to the requirements of this subsection.~~

~~b.~~ ~~Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Equivalent P_2O_5 feed" means the quantity of phosphorus, expressed as phosphorus pentoxide, fed to the process.~~

~~(2) "Total fluorides" means elemental fluorine and all fluoride compounds as measured by reference methods specified in subdivision e, or equivalent or alternative methods.~~

~~(3) "Wet-process phosphoric acid plant" means any facility manufacturing phosphoric acid by reacting phosphate rock and acid.~~

~~c. Standard for fluorides. On and after the date of which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any affected facility any gases which contain total fluorides in excess of ten grams per metric ton of equivalent P_2O_5 feed [0.020 lb/ton].~~

~~d. Monitoring of operations.~~

~~(1) The owner or operator of any wet-process phosphoric acid plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a monitoring device which can be used to determine the mass flow of phosphorus-bearing feed material to the process. The monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~(2) The owner or operator of any wet-process phosphoric acid plant shall maintain a daily record of equivalent P_2O_5 feed by first determining the total mass rate in metric ton per hour of phosphorus-bearing feed using a monitoring device for measuring mass flow rate which meets the requirements of paragraph 1 and then by proceeding according to subparagraph c of paragraph 2 of subdivision e.~~

~~(3) The owner or operator of any wet-process phosphoric acid plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a monitoring device which continuously measures and permanently records the total pressure drop across the process scrubbing system. The monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~e. Test methods and procedures.~~

~~(1)~~ ~~In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(2)~~ ~~The owner or operator shall determine compliance with the total fluorides standard in subdivision b of this subsection as follows:~~

~~(a)~~ ~~The emission rate (E) of total fluorides must be computed for each run using the following equation:~~

$$E = \left(\sum_{i=1}^{N} C_{si} Q_{sdi}\right) / (P K)$$

~~where:~~

E = ~~emission rate of total fluorides, g/metric ton (lb/ton) of equivalent~~ P_2O_5 ~~feed.~~

C_{si} = ~~concentration of total fluorides from emission point "i", mg/dscm (mg/dscf).~~

Q_{sdi} = ~~volumetric flow rate of effluent gas from emission point "i", dscm/hr (dscf/hr).~~

N = ~~number of emission points associated with the affected facility.~~

P = ~~equivalent~~ P_2O_5 ~~feed rate, metric ton/hr (ton/hr).~~

K = ~~conversion factor, 1000 mg/g (453,600 mg/lb).~~

~~(b)~~ ~~Method 13A or 13B must be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run must be at least sixty minutes and 0.85 dry cubic meter at standard conditions (30 dscf).~~

~~(c) The equivalent P_2O_5 feed rate (P) must be computed for each run using the following equation:~~

$$P = M_p R_p$$

~~where:~~

~~M_p = total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).~~

~~R_p = P_2O_5 content, decimal fraction.~~

~~[1] The accountability system of paragraph 1 of subdivision d of this subsection shall be used to determine the mass flow rate (M_p) of the phosphorus-bearing feed.~~

~~[2] The Association of Official Analytical Chemists (AOAC) method 9 shall be used to determine the P_2O_5 content (R_p) of the feed.~~

~~15. Standards of performance for the phosphate fertilizer industry - Superphosphoric acid plants.~~

~~a. Applicability and designation of affected facility. The affected facility to which the provisions of this subsection apply is each superphosphoric acid plant having a design capacity of more than fifteen tons [13.60 metric tons] of equivalent P_2O_5 feed per calendar year. For the purpose of this subsection, the affected facility includes any combination of evaporators, hot wells, acid sumps, and cooling tanks. Any facility that commences construction or modification after October 22, 1974, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Equivalent P_2O_5 feed" means the quantity of phosphorus, expressed as phosphorus pentoxide, fed to the process.~~

~~(2) "Superphosphoric acid plant" means any facility which concentrates wet-process phosphoric acid to sixty-six percent or greater phosphorus pentoxide content by weight for eventual consumption as a fertilizer.~~

~~(3) "Total fluorides" means elemental fluorine and all fluoride compounds as measured by reference methods specified in subdivision e, or equivalent or alternative methods.~~

~~c. Standard for fluorides. On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any affected facility any gases which contain total fluorides in excess of five grams per metric ton of equivalent P_2O_5 feed [0.010 lb/ton].~~

~~d. Monitoring of operations.~~

~~(1) The owner or operator of any superphosphoric acid plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a flow monitoring device which can be used to determine the mass flow of phosphorus-bearing feed material to the process. The flow monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~(2) The owner or operator of any superphosphoric acid plant shall maintain a daily record of equivalent P_2O_5 feed by first determining the total mass rate in metric ton per hour of phosphorus-bearing feed using a flow monitoring device meeting the requirements of paragraph 1 and then by proceeding according to subparagraph c of paragraph 2 of subdivision e.~~

~~(3) The owner or operator of any superphosphoric acid plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a monitoring device which continuously measures and permanently records the total pressure drop across the process scrubbing system. The monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~e. Test methods and procedures.~~

~~(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(2)~~ ~~The owner or operator shall determine compliance with the total fluorides standard in subdivision c of this subsection as follows:~~

~~(a)~~ ~~The emission rate (E) of total fluorides must be computed for each run using the following equation:~~

$$E = \left(\sum_{i=1}^{N} C_{si} Q_{sdi}\right) / (P K)$$

~~where:~~

E = ~~emission rate of total fluorides, g/metric ton (lb/ton) of equivalent~~ P_2O_5 ~~feed.~~

C_{si} = ~~concentration of total fluorides from emission point "i", mg/dscm (mg/dscf).~~

Q_{sdi} = ~~volumetric flow rate of effluent gas from emission point "i", dscm/hr (dscf/hr).~~

N = ~~number of emission points associated with the affected facility.~~

P = ~~equivalent~~ P_2O_5 ~~feed rate, metric ton/hr (ton/hr).~~

K = ~~conversion factor, 1000 mg/g (453,600 mg/lb).~~

~~(b)~~ ~~Method 13A or 13B must be used to determine the total fluorides concentration~~ (C_{si}) ~~and volumetric flow rate~~ (Q_{sdi}) ~~of the effluent gas from each of the emission points. The sampling time and sample volume for each run must be at least sixty minutes and 0.85 dry cubic meter at standard conditions (30 dscf).~~

~~(c)~~ ~~The equivalent~~ P_2O_5 ~~feed rate (P) must be computed for each run using the following equation:~~

$$P = M_p R_p$$

~~where:~~

~~M_p = total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).~~

~~R_p = P_2O_5 content, decimal fraction.~~

~~[1] The accountability system of paragraph 1 of subdivision d of this subsection must be used to determine the mass flow rate (M_p) of the phosphorus-bearing feed.~~

~~[2] The Association of Official Analytical Chemists (AOAC) method 9 must be used to determine the P_2O_5 content (R_p) of the feed.~~

~~16. Standards of performance for the phosphate fertilizer industry - Diammonium phosphate plants.~~

~~a. Applicability and designation of affected facility. The affected facility to which the provisions of this subsection apply is each granular diammonium phosphate plant having a design capacity of more than fifteen tons [13.60 metric tons] of equivalent P_2O_5 feed per calendar year. For the purpose of this subsection, the affected facility includes any combination of reactors, granulators, dryers, coolers, screens, and mills. Any facility that commences construction or modification after October 22, 1974, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Equivalent P_2O_5 feed" means the quantity of phosphorus, expressed as phosphorus pentoxide, fed to the process.~~

~~(2) "Granular diammonium phosphate plant" means any plant manufacturing granular diammonium phosphate by reacting phosphoric acid with ammonia.~~

~~(3) "Total fluorides" means elemental fluorine and all fluoride compounds as measured by reference methods specified in subdivision e or equivalent or alternative methods.~~

~~c. Standard for fluorides. On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner or operator subject to the provisions of this subsection~~

~~may cause to be discharged into the atmosphere from any affected facility any gases which contain total fluorides in excess of thirty grams per metric ton of equivalent P_2O_5 feed [0.060 lb/ton].~~

~~d. Monitoring of operations.~~

~~(1) The owner or operator of any granular diammonium phosphate plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a flow monitoring device which can be used to determine the mass flow of phosphorus-bearing feed material to the process. The flow monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~(2) The owner or operator of any granular diammonium phosphate plant shall maintain a daily record of equivalent P_2O_5 feed by first determining the total mass rate in metric ton per hour of phosphorus-bearing feed using a flow monitoring device meeting the requirements of paragraph 1 and then by proceeding according to subparagraph c of paragraph 2 of subdivision e.~~

~~(3) The owner or operator of any granular diammonium phosphate plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a monitoring device which continuously measures and permanently records the total pressure drop across the scrubbing system. The monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~e. Test methods and procedures.~~

~~(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(2) The owner or operator must determine compliance with the total fluorides standard in subdivision c of this subsection as follows:~~

~~(a) The emission rate (E) of total fluorides shall be computed for each run using the following equation:~~

$$E = \left(\sum_{i=1}^{N} C_{si}\ Q_{sdi}\right) / (P\ K)$$

where:

E = emission rate of total fluorides, g/metric ton (lb/ton) of equivalent P_2O_5 feed.

C_{si} = concentration of total fluorides from emission point "i", mg/dscm (mg/dscf).

Q_{sdi} = volumetric flow rate of effluent gas from emission point "i", dscm/hr (dscf/hr).

N = number of emission points associated with the affected facility.

P = equivalent P_2O_5 feed rate, metric ton/hr (ton/hr).

K = conversion factor, 1000 mg/g (453,600 mg/lb).

(b) Method 13A or 13B must be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run must be at least sixty minutes and 0.85 dry cubic meter at standard conditions (30 dscf).

(c) The equivalent P_2O_5 feed rate (P) must be computed for each run using the following equation:

$$P = M_p\ R_p$$

where:

M_p = total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).

R_p = P_2O_5 content, decimal fraction.

(1) The accountability system of paragraph 1 of subdivision d must be used to determine the

~~mass flow rate (M_p) of the phosphorus-bearing feed.~~

~~(2) The Association of Official Analytical Chemists (AOAC) method 9 must be used to determine the P_2O_5 content (R_p) of the feed.~~

~~17. Standards of performance for the phosphate fertilizer industry - Triple superphosphate plants.~~

~~a. Applicability and designation of affected facility. The affected facility to which the provisions of this subsection apply is each triple superphosphate plant having a design capacity of more than fifteen tons [13.60 metric tons] of equivalent P_2O_5 feed per calendar year.~~

~~For the purpose of this subsection, the affected facility includes any combination of mixers, curing belts (dens), reactors, granulators, dryers, cookers, screens, mills, and facilities which store run-of-pile triple superphosphate. Any facility that commences construction or modification after October 22, 1974, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Equivalent P_2O_5 feed" means the quantity of phosphorus, expressed as phosphorus pentoxide, fed to the process.~~

~~(2) "Run-of-pile triple superphosphate" means any triple superphosphate that has not been processed in a granulator and is composed of particulates at least twenty-five percent by weight of which (when not caked) will pass through a sixteen-mesh screen.~~

~~(3) "Total fluorides" means elemental fluorine and all fluoride compounds as measured by reference methods specified in subdivision e, or equivalent or alternative methods.~~

~~(4) "Triple superphosphate plant" means any facility manufacturing triple superphosphate by reacting phosphate rock with phosphoric acid. A run-of-pile triple superphosphate plant includes curing and storing.~~

~~c. Standard for fluorides. On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner~~

~~or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any affected facility any gases which contain total fluorides in excess of one hundred grams per metric ton [0.20 lb/ton] of equivalent P_2O_5 feed.~~

~~d. Monitoring of operations.~~

~~(1) The owner or operator of any triple superphosphate plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a flow monitoring device which can be used to determine the mass flow of phosphorus-bearing feed material to the process. The flow monitoring device shall have an accuracy of plus or minus five percent of its operating range.~~

~~(2) The owner or operator of any triple superphosphate plant shall maintain a daily record of equivalent P_2O_5 feed by first determining the total mass rate in metric ton per hour of phosphorus-bearing feed using a flow monitoring device meeting the requirements of paragraph 1 and then by proceeding according to subparagraph c of paragraph 2 of subdivision e.~~

~~(3) The owner or operator of any triple superphosphate plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a monitoring device which continuously measures and permanently records the total pressure drop across the process scrubbing system. The monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~e. Test methods and procedures.~~

~~(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(2) The owner or operator shall determine compliance with the total fluorides standard in subdivision c of this subsection as follows:~~

~~(a) The emission rate (E) of total fluorides must be computed for each run using the following equation:~~

$$E = \left(\sum_{i=1}^{N} C_{si} Q_{sdi}\right) / (P \cdot K)$$

where:

E = emission rate of total fluorides, g/metric ton (lb/ton) of equivalent P_2O_5 feed.

C_{si} = concentration of total fluorides from emission point "i", mg/dscm (mg/dscf).

Q_{sdi} = volumetric flow rate of effluent gas from emission point "i", dscm/hr (dscf/hr).

N = number of emission points associated with the affected facility.

P = equivalent P_2O_5 feed rate, metric ton/hr (ton/hr).

K = conversion factor, 1000 mg/g (453,600 mg/lb).

(b) Method 13A or 13B must be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run must be at least sixty minutes and 0.85 dry cubic meter at standard conditions (30 dscf).

(c) The equivalent P_2O_5 feed rate (P) must be computed for each run using the following equation:

$$P = M_p R_p$$

where:

M_p = total mass flow rate of phosphorus-bearing feed, metric ton/hr (ton/hr).

R_p = P_2O_5 content, decimal fraction.

(1) The accountability system of paragraph 1 of subdivision d must be used to determine the

~~mass flow rate (M_p) of the phosphorus-bearing feed.~~

~~(2) The Association of Official Analytical Chemists (AOAC) method 9 must be used to determine the P_2O_5 content (R_p) of the feed.~~

~~10. Standards of performance for the phosphate fertilizer industry - Granular triple superphosphate storage facilities.~~

~~a. Applicability and designation of affected facility. The affected facility to which the provisions of this subsection apply is each granular triple superphosphate storage facility. For the purpose of this subsection, the affected facility includes any combination of storage or curing piles, conveyors, elevators, screens, and mills. Any facility that commences construction or modification after October 22, 1974, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Equivalent P_2O_5 stored" means the quantity of phosphorus, expressed as phosphorus pentoxide, being cured or stored in the affected facility.~~

~~(2) "Fresh granular triple superphosphate" means granular triple superphosphate produced no more than ten days prior to the date of the performance test.~~

~~(3) "Granular triple superphosphate storage facility" means any facility curing or storing granular triple superphosphate.~~

~~(4) "Total fluorides" means elemental fluorine and all fluoride compounds as measured by reference methods specified in subdivision e, or equivalent or alternative methods.~~

~~c. Standard for fluorides. On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any affected facility any gases which contain total fluorides in excess of twenty-five hundredths gram per hour per metric ton of equivalent P_2O_5 stored [5.0×10^{-4} pounds per hour per ton of equivalent P_2O_5 stored].~~

~~d. Monitoring of operations.~~

~~(1) The owner or operator of any granular triple superphosphate storage facility subject to the provisions of this subsection shall maintain an accurate account of triple superphosphate in storage to permit the determination of the amount of equivalent P_2O_5 stored.~~

~~(2) The owner or operator of any granular triple superphosphate storage facility shall maintain a daily record of total equivalent P_2O_5 stored by multiplying the percentage phosphorus pentoxide content, as determined by subparagraph c of paragraph 2 of subdivision e, times the total mass of granular triple superphosphate stored.~~

~~(3) The owner or operator of any granular triple superphosphate storage facility subject to the provisions of this subsection shall install, calibrate, maintain, and operate a monitoring device which continuously measures and permanently records the total pressure drop across the process scrubbing system. The monitoring device shall have an accuracy of plus or minus five percent over its operating range.~~

~~e. Test methods and procedures.~~

~~(1) The owner or operator shall conduct performance tests required in subsection 7 of section 33-15-12-01 only when the following quantities of product are being cured or stored in the facility.~~

~~(a) Total granular triple superphosphate is at least ten percent of the building capacity; and~~

~~(b) Fresh granular triple superphosphate is at least twenty percent of the total amount of triple superphosphate; or~~

~~(c) If the provision of subparagraph b of paragraph 1 of this subdivision exceeds production capabilities for fresh granular triple superphosphate, fresh granular triple superphosphate is equal to at least five days maximum production.~~

~~(2) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified~~

~~in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(3) The owner or operator shall determine compliance with the total fluorides standard in subdivision c of this subsection as follows:~~

~~(a) The emission rate (E) of total fluorides must be computed for each run using the following equation:~~

$$E = \left(\sum_{i=1}^{N} C_{si}\ Q_{sdi}\right) / (P\ K)$$

~~where:~~

E = ~~emission rate of total fluorides, g/metric ton (lb/ton) of equivalent~~ P_2O_5 ~~feed.~~

C_{si} = ~~concentration of total fluorides from emission point "i", mg/dscm (mg/dscf).~~

Q_{sdi} = ~~volumetric flow rate of effluent gas from emission point "i", dscm/hr (dscf/hr).~~

N = ~~number of emission points associated with the affected facility.~~

P = ~~equivalent P2O5 feed rate, metric ton/hr (ton/hr).~~

K = ~~conversion factor, 1000 mg/g (453,600 mg/lb).~~

~~(b) Method 13A or 13B must be used to determine the total fluorides concentration (C_{si}) and volumetric flow rate (Q_{sdi}) of the effluent gas from each of the emission points. The sampling time and sample volume for each run must be at least sixty minutes and 0.85 dry cubic meter at standard conditions (30 dscf).~~

~~(c) The equivalent~~ P_2O_5 ~~feed rate (P) must be computed for each run using the following equation:~~

$$P = M_p\ R_p$$

~~where:~~

M_p = ~~total mass flow rate of phosphorus bearing feed, metric ton/hr (ton/hr).~~

R_p = P_2O_5 ~~content, decimal fraction.~~

~~[1] The accountability system of paragraph 1 of subdivision d must be used to determine the mass flow rate (M_p) of the phosphorus bearing feed.~~

~~[2] The Association of Official Analytical Chemists (AOAC) method 9 must be used to determine the P_2O_5 content (R_p) of the feed.~~

~~19. Standards of performance for coal preparation plants.~~

~~a. Applicability and designation of affected facility. The provisions of this subsection are applicable to any of the following affected facilities in coal preparation plants which process more than two hundred tons [181.44 metric tons] per day: thermal dryers, pneumatic coal cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, and coal transfer and loading systems. Any facility that commences construction or modification after October 24, 1974, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Bituminous coal" means solid fossil fuel classified as bituminous coal by A.S.T.M. Designation D-388-77.~~

~~(2) "Coal" means all solid fossil fuels classified as anthracite, bituminous, subbituminous, or lignite by A.S.T.M. Designation D-388-77.~~

~~(3) "Coal preparation plant" means any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying.~~

~~(4) "Coal processing and conveying equipment" means any machinery used to reduce the size of coal or to~~

~~separate coal from refuse, and the equipment used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts.~~

~~(5) "Coal storage system" means any facility used to store coal except for open storage piles.~~

~~(6) "Cyclonic flow" means a spiraling movement of exhaust gases within a duct or stack.~~

~~(7) "Pneumatic coal cleaning equipment" means any facility which classifies bituminous coal by size or separates bituminous coal from refuse by application of airstreams.~~

~~(8) "Thermal dryer" means any facility in which the moisture content of bituminous coal is reduced by contact with a heated gas stream which is exhausted to the atmosphere.~~

~~(9) "Transfer and loading system" means any facility used to transfer and load coal for shipment.~~

~~c. Standards for particulate matter.~~

~~(1) On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, an owner or operator subject to the provisions of this subsection may not cause to be discharged into the atmosphere from any thermal dryer gases which:~~

~~(a) Contain particulate matter in excess of seven-hundredths gram per dry cubic meter at standard conditions [0.031 gr/dscf].~~

~~(b) Exhibit twenty percent opacity or greater.~~

~~(2) On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, an owner or operator subject to the provisions of this subsection may not cause to be discharged into the atmosphere from any pneumatic coal cleaning equipment, gases which:~~

~~(a) Contain particulate matter in excess of four-hundredths gram per dry cubic meter at standard conditions [0.018 gr/dscf].~~

~~(b) Exhibit ten percent opacity or greater.~~

~~(3) On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, an owner or operator subject to the provisions of this subsection may not cause to be discharged into the atmosphere from any coal processing and conveying equipment, coal storage system, or coal transfer and loading system processing coal, gases which exhibit twenty percent opacity or greater.~~

~~d. Monitoring of operations.~~

~~(1) The owner or operator of any thermal dryer shall install, calibrate, maintain, and continuously operate monitoring devices as follows:~~

~~(a) A monitoring device for the measurement of the temperature of the gas stream at the exit of the thermal dryer on a continuous basis. The monitoring device is to be certified by the manufacturer to be accurate within plus or minus three degrees Fahrenheit.~~

~~(b) For affected facilities that use venturi scrubber emission control equipment:~~

~~[1] A monitoring device for the continuous measurement of the pressure loss through the venturi constriction of the control equipment. The monitoring device is to be certified by the manufacturer to be accurate within plus or minus one inch [2.54 centimeters] water gauge.~~

~~[2] A monitoring device for the continuous measurement of the water supply pressure to the control equipment. The monitoring device is to be certified by the manufacturer to be accurate within plus or minus five percent of design water supply pressure. The pressure sensor or tap must be located close to the water discharge point. The department may be consulted for approval of alternative locations.~~

~~(2) All monitoring devices under paragraph 1 are to be recalibrated annually in accordance with procedures in subdivision b of subsection 11 of section 33-15-12-01.~~

~~e. Test methods and procedures.~~

~~(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(2) The owner or operator shall determine compliance with the particulate matter standards in subdivision c of this subsection as follows:~~

~~(a) Method 5 must be used to determine the particulate matter concentration. The sampling time and sample volume for each run must be at least sixty minutes and 0.85 dry cubic meter at standard conditions [30 dscf]. Sampling must begin no less than thirty minutes after startup and shall terminate before shutdown procedures begin.~~

~~(b) Method 9 and the procedures in subsection 9 of section 33-15-12-01 must be used to determine opacity.~~

~~20. Standards of performance for lime manufacturing plants.~~

~~a. Applicability and designation of affected facility.~~

~~(1) The provisions of this subsection are applicable to each rotary lime kiln used in the manufacture of lime.~~

~~(2) The provisions of this subsection are not applicable to facilities used in the manufacture of lime at kraft pulp mills.~~

~~(3) Any facility under paragraph 1 that commences construction or modification after May 3, 1977, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the same meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Lime manufacturing plant" includes any plant which uses a rotary lime kiln to produce lime product from limestone by calcination.~~

~~(2) "Lime product" means the product of the calcination process including, but not limited to, calcitic lime, dolomitic lime, and dead-burned dolomite.~~

~~(3) "Positive pressure fabric filter" means a fabric filter with the fans on the upstream side of the filter bags.~~

~~(4) "Rotary lime kiln" means a unit with an inclined rotating drum which is used to produce a lime product from limestone by calcination.~~

~~(5) "Stone feed" means limestone feed stock and millscale or other iron oxide additive that become part of the product.~~

~~c. Standard for particulate matter. On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any rotary lime kiln any gases which contain particulate matter in excess of 0.30 kilogram per megagram [0.60 lb/ton] of stone feed and greater than fifteen percent opacity when exiting from a dry emission control device.~~

~~d. Monitoring of emissions and operations.~~

~~(1) The owner or operator of a facility that is subject to the provisions of this subsection shall install, calibrate, maintain, and operate a continuous monitoring system, except as provided in paragraphs 2 and 3, to monitor and record the opacity of a representative portion of the gases discharged into the atmosphere from any rotary lime kiln. The span of this system must be set at forty percent opacity.~~

~~(2) The owner or operator of any rotary lime kiln having a control device with a multiple stack exhaust or a roof monitor may, in lieu of the continuous opacity monitoring requirement of paragraph 1 of subdivision d, monitor visible emissions at least once per day of operation by using a certified visible emissions observer who, for each site where visible emissions are observed, will perform three method 9 tests and record the results. Visible emission observations shall occur during normal operation of the rotary lime kiln at least once per day. For at least three 6-minute periods, the opacity shall be recorded for any points where visible emissions are observed, and the corresponding feed rate of the kiln shall also be recorded. Records shall be maintained of any six-minute average that is in excess of the emissions specified in paragraph 1 of subdivision c.~~

~~(3) The owner or operator of any rotary lime kiln using a wet scrubbing emission control device subject to the provisions of this subsection shall not be required to monitor the opacity of the gases discharged as required in paragraph 1 of this subdivision, but shall install, calibrate, maintain, operate, and record the resultant information from the following continuous monitoring devices:~~

~~(a) A monitoring device for the continuous measurement of the pressure loss of the gas stream through the scrubber. The monitoring device must be accurate within plus or minus 250 pascals [one inch of water].~~

~~(b) A monitoring device for continuous measurement of the scrubbing liquid supply pressure to the control device. The monitoring device must be accurate within plus or minus five percent of the design scrubbing liquid supply pressure.~~

~~(4) For the purpose of conducting a performance test under subsection 7 of section 33-15-12-01, the owner or operator of any lime manufacturing plant subject to the provisions of this subsection shall install, calibrate, maintain, and operate a device for measuring the mass rate of stone feed to any affected rotary lime kiln. The measuring device used must be accurate to within plus or minus five percent of the mass rate over its operating range.~~

~~(5) For the purpose of reports required under subdivision c of subsection 6 of section 33-15-12-01, periods of excess emissions that must be reported are defined as all six-minute periods during which the average opacity of the visible emissions from any lime kiln subject to paragraph 1 of this subdivision is greater than fifteen percent or, in the case of wet scrubbers, any period in which the scrubber pressure drop is greater than thirty percent below the rate established during the performance test. If visible emission observations are made according to paragraph 2 of this subdivision, reports of excess emissions must be submitted semiannually.~~

~~e. Test methods and procedures.~~

~~(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified~~

~~in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(2) The owner or operator shall determine compliance with the particulate matter standard in subdivision c of this subsection as follows:~~

~~(a) The emission rate (E) of particulate matter must be computed for each run using the following equation:~~

$$E = (C_s Q_{sd})/(P K)$$

~~where:~~

~~E = emission rate of particulate matter, kg/Mg (lb/ton) of stone feed.~~

~~C_s = concentration of particulate matter, g/dscm (g/dscf).~~

~~P = stone feed rate, mg/hr (ton/hr).~~

~~K = conversion factor, 1000 g/kg [453.6 g/lb].~~

~~(b) Method 5 must be used at negative pressure fabric filters and other types of control devices and method 5D must be used as positive pressure fabric filters to determine the particulate matter concentration (C_s) and the volumetric flow rate (Q_{sd}) of the effluent gas. The sampling time and sample volume for each run must be at least sixty minutes and 0.90 dry cubic meter at standard conditions [31.8 dscf].~~

~~(c) The monitoring device of paragraph 4 of subdivision d of this subsection must be used to determine the stone fee rate (P) for each run.~~

~~(d) Method 9 and the procedures in subsection 9 of section 33-15-12-01 must be used to determine opacity.~~

~~(3) During the particulate matter run, the owner or operator shall use the monitoring devices in subparagraph a of paragraph 3 of subdivision d of this subsection to determine the average pressure loss of the gas stream through the scrubber and the average scrubbing liquid supply pressure.~~

~~21. Standards of performance for stationary gas turbines.~~

~~a. Applicability and designation of affected facility. The provisions of this subsection are applicable to the following affected facilities; all stationary gas turbines with a heat input at peak load equal to or greater than 10.7 gigajoules per hour [10 million Btu/hour], based on the lower heating value of the fuel fired. Any facility that commences construction, modification, or reconstruction after October 3, 1977, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in section 33-15-12-01.~~

~~(1) "Base load" means the load level at which a gas turbine is normally operated.~~

~~(2) "Combined cycle gas turbine" means any stationary gas turbine which recovers heat from the gas turbine exhaust gases to heat water or generate steam.~~

~~(3) "Efficiency" means the gas turbine manufacturer's rated heat rate at peak load in terms of heat input per unit of power output based on the lower heating value of the fuel.~~

~~(4) "Electric utility stationary gas turbine" means any stationary gas turbine constructed for the purpose of supplying more than one-third of its potential electric output capacity to any utility power distribution system for sale.~~

~~(5) "Emergency fuel" is a fuel fired by a gas turbine only during circumstances, such as natural gas supply curtailment or breakdown of delivery system, that make it impossible to fire natural gas in the gas turbine.~~

~~(6) "Emergency gas turbine" means any stationary gas turbine which operates as a mechanical or electrical power source only when the primary power source for a facility has been rendered inoperable by an emergency situation.~~

~~(7) "Firefighting turbine" means any stationary gas turbine that is used solely to pump water for extinguishing fires.~~

~~(8) "Garrison facility" means any permanent military installation.~~

~~(9) "Gas turbine model" means a group of gas turbines having the same nominal air flow, combustor inlet~~

~~pressure; combustor inlet temperature; firing temperature; turbine inlet temperature; and turbine inlet pressure.~~

~~(10) "Ice fog" means an atmospheric suspension of highly reflective ice crystals.~~

~~(11) "ISO standard day conditions" means two hundred eighty-eight degrees Kelvin; sixty percent relative humidity and 101.3 kilopascals pressure.~~

~~(12) "Metropolitan statistical area" is as defined by the department of commerce.~~

~~(13) "Peak load" means one hundred percent of the manufacturer's design capacity of the gas turbine at ISO standard day conditions.~~

~~(14) "Regenerative cycle gas turbine" means any stationary gas turbine which recovers heat from the gas turbine exhaust gases to preheat the inlet combustion air to the gas turbine.~~

~~(15) "Regenerative cycle gas turbine" means any stationary gas turbine that recovers thermal energy from the exhaust gases and utilizes the thermal energy to preheat air prior to entering the combustor.~~

~~(16) "Simple cycle gas turbine" means any stationary gas turbine which does not recover heat from the gas turbine exhaust gases to preheat the inlet combustion air to the gas turbine; or which does not recover heat from the gas turbine exhaust gases to heat water or generate steam.~~

~~(17) "Stationary gas turbine" means any simple cycle gas turbine; regenerative cycle gas turbine; or any gas turbine portion of a combined cycle steam/electric generating system that is not self-propelled. It may, however, be mounted on a vehicle for portability.~~

~~(18) "Turbines employed in oil/gas production or oil/gas transportation" means any stationary gas turbine used to provide power to extract crude oil/natural gas from the earth or to move crude oil/natural gas, or products refined from the substances through pipelines.~~

~~c. Standard for nitrogen oxides.~~

~~(1) On and after the date on which the performance test required by subsection 7 of section 33-15-12-01 is~~

~~completed, every owner or operator subject to the provisions of this subsection, as specified in paragraphs 2, 3, and 4 shall comply with one of the following, except as provided in paragraphs 5, 6, 7, 8, 9, 10, and 11.~~

~~(a) No owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any stationary gas turbine, any gases which contain nitrogen oxides in excess of:~~

$$STD = \frac{0.0075\ (14.4)}{Y} + F$$

~~where:~~

~~STD = allowable NO_2 emissions (percent by volume at 15 percent oxygen and on a dry basis).~~

~~Y = manufacturer's rated load (kilojoules per watt hour) or, actual measured heat rate based on lower heating value of fuel as measured at actual peak load for the facility. The value of Y may not exceed 14.4 kilojoules per watt hour.~~

~~F = NO_2 emission allowance for fuel-bound nitrogen as defined in subparagraph c.~~

~~(b) No owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any stationary gas turbine, any gases which contain nitrogen oxides in excess of:~~

$$STD = \frac{0.0150\ (14.4)}{Y} + F$$

~~where:~~

~~STD = allowable NO_2 emissions (percent by volume at 15 percent oxygen and on a dry basis).~~

~~Y = manufacturer's rated heat rate at manufacturer's rated peak load (kilojoules per watt hour), or actual measured heat rate based on lower heating value of fuel as~~

~~measured at actual peak load for the facility. The value of Y may not exceed 14.4 kilojoules per watt hour.~~

~~F = NO_2 emission allowance for fuel bound nitrogen as defined in subparagraph c.~~

~~(c) F must be defined according to the nitrogen content of the fuel as follows:~~

~~Fuel Bound Nitrogen (percent by weight)~~	~~F (NO_x percent by volume)~~
~~$N \leq 0.015$~~	~~0~~
~~$0.015 < N \leq 0.1$~~	~~$0.04(N)$~~
~~$0.1 < N \leq 0.25$~~	~~$0.004 + 0.0067(N-0.1)$~~
~~$N \geq 0.25$~~	~~0.005~~

~~where:~~

~~N = the nitrogen content of the fuel (percent by weight)~~

~~or:~~

~~Manufacturers may develop custom fuel bound nitrogen allowances for each gas turbine model they manufacture. These fuel bound nitrogen allowances must be substantiated with data and must be approved for use by the department and administrator before the initial performance test required by subsection 7 of section 33-15-12-01.~~

~~(2) Electric utility stationary gas turbines with a heat input at peak load greater than 107.2 gigajoules per hour [100 million Btu/hour] based on the lower heating value of the fuel fired shall comply with the provisions of subparagraph a of paragraph 1.~~

~~(3) Stationary gas turbines with a heat input at peak load equal to or greater than 10.7 gigajoules per hour [10 million Btu/hour] but less than or equal to 107.2 gigajoules per hour [100 million Btu/hour] based on the lower heating value of the fuel fired, shall comply with the provisions of subparagraph b of paragraph 1.~~

~~(4) Stationary gas turbines with a manufacturer's rated base load at ISO conditions of thirty megawatts or less except as provided in paragraph 2 shall comply with subparagraph b of paragraph 1.~~

~~(5) Stationary gas turbines with a heat input at peak load equal to or greater than 10.7 gigajoules per hour [10 million Btu/hour] but less than or equal to 107.2 gigajoules per hour [100 million Btu/hour] based on the lower heating value of the fuel fired and that have commenced construction prior to October 3, 1982, are exempt from paragraph 1.~~

~~(6) Stationary gas turbines using water or steam injection for control of nitrogen oxide emissions are exempt from paragraph 1 when ice fog is deemed a traffic hazard by the owner or operator of the gas turbine.~~

~~(7) Emergency gas turbines, military gas turbines for use in other than a garrison facility, military gas turbines installed for use as military training facilities, and firefighting gas turbines are exempt from paragraph 1.~~

~~(8) Stationary gas turbines engaged by manufacturers in research and development of equipment for both gas turbine emission control techniques and gas turbine efficiency improvements are exempt from paragraph 1 on a case-by-case basis as determined by the department.~~

~~(9) Exemptions from the requirements of paragraph 1 will be granted on a case-by-case basis as determined by the department in specific geographical areas where mandatory water restrictions are required by governmental agencies because of drought conditions. These exemptions will be allowed only while the mandatory water restrictions are in effect.~~

~~(10) Stationary gas turbines with a heat input greater than or equal to 10.7 gigajoules per hour [10 million Btu/hour] when fired with natural gas are exempt from subparagraph b of paragraph 1 when being fired with an emergency fuel.~~

~~(11) Regenerative cycle gas turbines with a heat input less than or equal to 107.2 gigajoules per hour [100 million Btu/hour] are exempt from paragraph 1.~~

~~d. Standard for sulfur dioxide. On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, every~~

~~owner or operator subject to the provisions of this subsection shall comply with one or the other of the following conditions:~~

~~(1) No owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any stationary gas turbine any gases which contain sulfur dioxide in excess of 0.015 percent by volume at fifteen percent oxygen and on a dry basis.~~

~~(2) No owner or operator subject to the provisions of this subsection may burn in any stationary gas turbine any fuel which contains sulfur in excess of 0.8 percent by weight.~~

~~e. Monitoring of operations.~~

~~(1) The owner or operator of any stationary gas turbine subject to the provisions of this subsection and using water injection to control nitrogen oxide emissions shall install and operate a continuous monitoring system to monitor and record the fuel consumption and the ratio of water to fuel being fired in the turbine. This system must be accurate to within plus or minus five percent and must be approved by the department.~~

~~(2) The owner or operator of any stationary gas turbine subject to the provisions of this subsection shall monitor sulfur content and nitrogen content of the fuel being fired in the turbine. The frequency of determination of these values must be as follows:~~

~~(a) If the turbine is supplied its fuel from a bulk storage tank, the values must be determined on each occasion that fuel is transferred to the storage tank from any other source.~~

~~(b) If the turbine is supplied its fuel without intermediate bulk storage, the values must be determined and recorded daily. Owners, operators, or fuel vendors may develop custom schedules for determination of the values based on the design and operation of the affected facility and the characteristics of the fuel supply. These custom schedules must be substantiated with data and must be approved by the department before they can be used to comply with this paragraph.~~

~~(3) For the purpose of reports required under subdivision c of subsection 6 of section 33-15-12-01,~~

~~periods of excess emissions that must be reported are defined as follows:~~

~~(a) Nitrogen oxides. Any one-hour period during which the average water to fuel ratio, as measured by the continuous monitoring system, falls below the water to fuel ratio determined to demonstrate compliance with subdivision c by the performance test required in subsection 7 of section 33-15-12-01 of any period during which the fuel-bound nitrogen of the fuel is greater than the maximum nitrogen content allowed by the fuel-bound nitrogen allowance used during the performance test required in subsection 7 of section 33-15-12-01. Each report shall include the average water to fuel ratio, average fuel consumption, ambient conditions, gas turbine load, and nitrogen content of the fuel during the period of excess emissions, and the graphs or figures developed under paragraph 1 of subdivision f.~~

~~(b) Sulfur dioxide. Any daily period during which the sulfur content of the fuel being fired in the gas turbine exceeds 0.8 percent.~~

~~(c) Ice fog. Each period during which an exemption provided in paragraph 7 of subdivision c is in effect must be reported in writing to the department quarterly. For each period, the ambient conditions existing during the period, the date and time the air pollution control system was deactivated, and the date and time the air pollution control system was reactivated must be reported. All quarterly reports must be postmarked by the thirtieth day following the end of each calendar quarter.~~

~~(d) Emergency fuel. Each period during which an exception provided in paragraph 10 of subdivision c is in effect must be included in the report required in subdivision c of subsection 6 of section 33-15-12-01. For each period, the type, reasons, and duration of the firing of the emergency fuel must be reported.~~

~~f. Test methods and procedures.~~

~~(1) To compute the nitrogen oxides emissions, the owner or operator shall use analytical methods and procedures that are accurate to within five percent and are approved by the department and administrator~~

~~to determine the nitrogen content of the fuel being fired.~~

~~(2) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided for in subdivision b of subsection 7 of section 33-15-12-01. Acceptable alternative methods and procedures are given in paragraph 6 of this subdivision.~~

~~(3) The owner or operator shall determine compliance with the nitrogen oxides and sulfur dioxide standards in subdivision c and paragraph 1 of subdivision d as follows:~~

~~(a) The nitrogen oxides emission rate (NO_x) must be computed for each run using the following equation:~~

$$NO_x = (NO_{xo})(P_r/P_o)\,0.5e^{19(H_o - 0.00633)}\,(288^\circ K/T_a)^{1.53}$$

~~where:~~

~~NO_x = emission rate of NO_x at 15 percent O_2 and ISO standard ambient conditions, volume percent.~~

~~NO_{xo} = observed NO_x concentration, ppm by volume.~~

~~P_r = reference combustor inlet absolute pressure at 101.3 kilopascals ambient pressure, mm Hg.~~

~~P_o = observed combustor inlet absolute pressure at test, mm Hg.~~

~~H_o = observed humidity of ambient air, g H_2O/g air.~~

~~e = transcendental constant, 2.718.~~

~~T_a = ambient temperature, K.~~

~~(b) The monitoring device of paragraph 1 of subdivision e must be used to determine the fuel~~

~~consumption and the water-to-fuel ratio necessary to comply with subdivision c at thirty, fifty, seventy-five, and one hundred percent of peak load or at four points in the normal operating range of the gas turbine, including the minimum point in the range and peak load. All loads must be corrected to ISO conditions using the appropriate equations supplied by the manufacturer.~~

~~(c) Method 20 must be used to determine the nitrogen oxides, sulfur dioxide, and oxygen concentrations. The span values must be three hundred parts per million of nitrogen oxide and twenty-one percent oxygen. The nitrogen oxides emissions must be determined at each of the load conditions specified in subparagraph b of paragraph 3 of this subdivision.~~

~~(4) The owner or operator shall determine compliance with the sulfur content standard in paragraph 2 of subdivision d as follows: A.S.T.M. D2880-71 must be used to determine the sulfur content of liquid fuels and A.S.T.M. D1072-80, D3031-81, D4084-82 or D3246-81 shall be used for the sulfur content of gaseous fuels. The applicable ranges of some A.S.T.M. methods mentioned above are not adequate to measure the levels of sulfur in some fuel gases. Dilution of samples before analysis (with verification of the dilution ratio) may be used, subject to the approval of the department.~~

~~(5) To meet the requirements of paragraph 2 of subdivision e, the owner or operator shall use the methods specified in paragraphs 1 and 4 to determine the nitrogen and sulfur contents of the fuel being burned. The analysis may be performed by the owner or operator, a service contractor retained by the owner or operator, the fuel vendor, or any other qualified agency.~~

~~(6) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this subdivision:~~

~~(a) Instead of using the equation in subparagraph a of paragraph 2 of this subdivision, manufacturers may develop ambient condition correction factors to adjust the nitrogen oxides emission level measured by the performance test as provided in subsection 7 of section 33-15-12-01 to ISO standard day conditions. These factors are developed for each gas turbine~~

~~model they manufacture in terms of combustion inlet pressure, ambient air pressure, ambient air humidity, and ambient air temperature. They must be substantiated with data and must be approved for use by the administrator and department before the initial performance test required by subsection 7 of section 33-15-12-01. Notices of approval of custom ambient condition correction factors will be published.~~

~~22. Standards of performance for grain elevators.~~

~~a. Applicability and designation of affected facility. The provisions of this subsection apply to each affected facility at any grain terminal elevator or any grain storage elevator, except as provided under subdivision e. The affected facilities are each truck loading or unloading station, barge and ship loading or unloading station, railcar loading or unloading station, grain dryer, and all grain handling operations. Any facility which commences construction, modification, or reconstruction, after August 3, 1978, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in section 33-15-12-01.~~

~~(1) "Capture system" means the equipment such as sheds, hoods, ducts, fans, dampers, etc., used to collect particulate matter generated by an affected facility at a grain elevator.~~

~~(2) "Column dryer" means any equipment used to reduce the moisture content of grain in which the grain flows from the top to the bottom in one or more continuous packed columns between two perforated metal sheets.~~

~~(3) "Fugitive emission" means the particulate matter which is not collected by a capture system and is released directly into the atmosphere from an affected facility at a grain elevator.~~

~~(4) "Grain elevator" means any plant or installation at which grain is unloaded, handled, cleaned, dried, stored, or loaded.~~

~~(5) "Grain handling operations" include bucket elevators or legs (excluding legs used to unload barges or ships), scale hoppers and surge bins (garners), turn heads, scalpers, cleaners, trippers, and the headhouse and other such structures.~~

~~(6) "Grain loading station" means that portion of a grain elevator where the grain is transferred from the elevator to a truck, railcar, barge, or ship.~~

~~(7) "Grain" means corn, wheat, sorghum, rice, rye, oats, barley, and soybeans.~~

~~(8) "Grain storage elevator" means any grain elevator located at any wheat flour mill, wet corn mill, dry corn mill (human consumption), rice mill, or soybean oil extraction plant which has a permanent grain storage capacity of thirty-five thousand two hundred cubic meters [circa 1,000,000 bushels].~~

~~(9) "Grain terminal elevator" means any grain elevator which has a permanent storage capacity of more than eighty-eight thousand one hundred cubic meters [circa 2,500,000 bushels], except those located at animal food manufacturers, pet food manufacturers, cereal manufacturers, breweries, and livestock feedlots.~~

~~(10) "Grain unloading station" means that portion of a grain elevator where the grain is transferred from a truck, railcar, barge, or ship to a receiving hopper.~~

~~(11) "Permanent storage capacity" means grain storage capacity which is inside a building, bin, or silo.~~

~~(12) "Process emission" means the particulate matter which is collected by a capture system.~~

~~(13) "Rack dryer" means any equipment used to reduce the moisture content of grain in which the grain flows from the top to the bottom in a cascading flow around rows of baffles (racks).~~

~~(14) "Railcar" means railroad hopper car or boxcar.~~

~~(15) "Unloading leg" means a device which includes a bucket-type elevator which is used to remove grain from a barge or ship.~~

~~c. Standard for particulate matter.~~

~~(1) On and after the sixtieth day of achieving the maximum production rate at which the affected facility will be operated, but no later than one hundred eighty days after initial startup, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere any gases which exhibit greater than zero percent opacity from any:~~

~~(a) Column dryer with column plate perforation exceeding two and four tenths millimeters diameter [circa 0.094 inch].~~

~~(b) Rack dryer in which exhaust gases pass through a screen filter coarser than fifty mesh.~~

~~(2) On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any affected facility except a grain dryer any process emission which:~~

~~(a) Contains particulate matter in excess of 0.023 gram per dry cubic meter at standard conditions [circa 0.01 gr/dscf].~~

~~(b) Exhibits greater than zero percent opacity.~~

~~(3) On and after the sixtieth day of achieving the maximum production rate at which the affected facility will be operated, but no later than one hundred eighty days after initial startup, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere any fugitive emission from:~~

~~(a) Any individual truck unloading station, railcar unloading station, or railcar loading station, which exhibits greater than five percent opacity.~~

~~(b) Any grain handling operation which exhibits greater than zero percent opacity.~~

~~(c) Any truck loading station which exhibits greater than ten percent opacity.~~

~~(d) Any barge or ship loading station which exhibits greater than twenty percent opacity.~~

~~(4) The owner or operator of any barge or ship unloading station shall operate as follows:~~

~~(a) The unloading leg must be enclosed from the top (including the receiving hopper) to the centerline of the bottom pulley and ventilation to a control device must be maintained on both sides of the leg and the grain receiving hopper.~~

~~(b) The total rate of air ventilated must be at least thirty-two and one-tenth actual cubic meters per cubic meter of grain handling capacity [circa 40 cubic feet per bushel].~~

~~(c) Rather than meet the requirements of subparagraphs a and b, the owner or operator may use other methods of emission control if it is demonstrated to the administrator's and department's satisfaction that they would reduce emissions of particulate matter to the same level or less.~~

~~d. Test methods and procedures.~~

~~(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01. Acceptable alternative methods and procedures are given in paragraph 3 of this subdivision.~~

~~(2) The owner or operator shall determine compliance with the particulate matter standards in subdivision c as follows:~~

~~(a) Method 5 must be used to determine the particulate matter concentration and the volumetric flow rate of the effluent gas. The sampling time and sample volume for each run must be at least sixty minutes and 1.70 dry cubic meters of standard conditions [60 dscf]. The probe and filter holder must be operated without heaters.~~

~~(b) Method 2 must be used to determine the ventilation volumetric flow rate.~~

~~(c) Method 9 and the procedures in subsection 9 of section 33-15-12-01 must be used to determine opacity.~~

~~(3) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this subdivision: for method 5, method 17 may be used.~~

~~e. Modifications.~~

~~(1) The factor 6.5 must be used in place of "annual asset guidelines repair allowance percentage", to determine whether a capital expenditure as defined by subdivision c of subsection 2 of section 33-15-12-01 has been made to an existing facility.~~

~~(2) The following physical changes or changes in the method of operation may not by themselves be considered a modification of any existing facility:~~

~~(a) The addition of gravity loadout spouts to existing grain storage or grain transfer bins.~~

~~(b) The installation of automatic grain weighing scales.~~

~~(c) Replacement of motor and drive units driving existing grain handling equipment.~~

~~(d) The installation of permanent storage capacity with no increase in hourly grain handling capacity.~~

~~23. Standards of performance for onshore natural gas processing; sulfur dioxide emissions.~~

~~a. Applicability and designation of affected facilities.~~

~~(1) The provisions of this subsection are applicable to the following affected facilities that process natural gas: each sweetening unit, and each sweetening unit followed by a sulfur recovery unit.~~

~~(2) Facilities that have a design capacity less than two long tons [2.032 metric tons] per day (LT/D) of hydrogen sulfide (H_2S) in the acid gas (expressed as sulfur) are required to comply with paragraph 3 of subdivision h but are not required to comply with subdivisions c through g.~~

~~(3) The provisions of this subsection are applicable to facilities located on land and include facilities located onshore which process natural gas produced from either onshore or offshore wells.~~

~~(4) The provisions of this subsection apply to each affected facility identified in paragraph 1 of this subdivision which commences construction or modification after January 20, 1984.~~

~~(5) The provisions of this subsection do not apply to sweetening facilities producing acid gas that is completely reinjected into oil-bearing or gas-bearing~~

~~geologic strata or that is otherwise not released to the atmosphere.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Acid gas" means a gas stream of hydrogen sulfide (H_2S) and carbon dioxide (CO_2) that has been separated from sour natural gas by a sweetening unit.~~

~~(2) "E" equals the sulfur emission rate expressed as elemental sulfur, kilograms per hour (kg/hr) rounded to one decimal place.~~

~~(3) "Natural gas" means a naturally occurring mixture of hydrocarbon and nonhydrocarbon gases found in geologic formations beneath the earth's surface. The principal hydrocarbon constituent is methane.~~

~~(4) "Onshore" means all facilities except those that are located in the territorial seas or on the outer continental shelf.~~

~~(5) "Reduced sulfur compounds" means hydrogen sulfide (H_2S), carbonyl sulfide (COS), and carbon disulfide (CS_2).~~

~~(6) "R" equals the sulfur emission reduction efficiency achieved in percent, carried to one decimal place.~~

~~(7) "S" equals the sulfur production rate in kilograms per hour (kg/hr) rounded to one decimal place.~~

~~(8) "Sulfur production rate" means the rate of liquid sulfur accumulation from the sulfur recovery unit.~~

~~(9) "Sulfur recovery unit" means a process device that recovers element sulfur from acid gas.~~

~~(10) "Sweetening unit" means a process device that separates the hydrogen sulfide and carbon dioxide contents from the sour natural gas stream.~~

~~(11) "Total sulfur dioxide equivalents" means the sum of volumetric or mass concentrations of the sulfur compounds obtained by adding the quantity existing as sulfur dioxide to the quantity of sulfur dioxide that would be obtained if all reduced sulfur compounds were converted to sulfur dioxide (ppmv or kg/dscm).~~

~~(12) "X" equals the sulfur feed rate, i.e., the hydrogen sulfide in the acid gas (expressed as sulfur) from the sweetening unit, expressed in long tons per day (LT/D) of sulfur rounded to one decimal place.~~

~~(13) "Y" equals the sulfur content of the acid gas from the sweetening unit, expressed as mole percent hydrogen sulfide (dry basis) rounded to one decimal place.~~

~~(14) "Z" equals the minimum required sulfur dioxide emission reduction efficiency, expressed as percent carried to one decimal place. Z_i refers to the reduction efficiency required at the initial performance test. Z_c refers to the reduction efficiency required on a continuous basis after compliance with Z_i has been demonstrated.~~

~~c. Standards for sulfur dioxide.~~

~~(1) During the initial performance test required by subdivision b of subsection 7 of section 33-15-12-01, each owner or operator shall achieve at a minimum, a sulfur dioxide emission reduction efficiency (Z_i) to be determined from table 1 based on the sulfur feed rate (X) and the sulfur content of the acid gas (Y) of the affected facility.~~

~~(2) After demonstrating compliance with the provisions of paragraph 1 of this subdivision, the owner or operator shall achieve at a minimum, a sulfur dioxide emission reduction efficiency (Z_c) to be determined from table 2 based on the sulfur feed rate (X) and the sulfur content of the acid gas (Y) of the affected facility.~~

~~d. Compliance provisions.~~

~~(1) To determine compliance with the standards for sulfur dioxide specified in paragraph 1 of subdivision c, during the initial performance test as required by subsection 7 of section 33-15-12-01, the minimum required sulfur dioxide emission reduction efficiency (Z) is compared to the emission reduction efficiency (R) achieved by the sulfur recovery technology.~~

~~(a) If R = Z_i, the affected facility is in compliance.~~

~~(b) If R Z_i, the affected facility is not in compliance.~~

~~(2)~~ ~~Following the initial determination of compliance as required by subsection 7 of section 33-15-12-01, any subsequent compliance determinations that may be required by the department would compare R to Z_c.~~

~~The emission reduction efficiency (R) achieved by the sulfur recovery technology shall be determined using the procedures in subparagraph a of paragraph 3 of subdivision e.~~

~~TABLE 1.~~

~~Required Minimum Initial SO_2 Emission Reduction Efficiency (Z_i)~~

~~H_2S content of acid gas (Y), %~~	~~Sulfur feed rate (X), LT/D~~				
	~~$2.0 \le X < 5.0$~~	~~$5.0 \le X < 15.0$~~	~~$15.0 \le X \le 300.0$~~	~~$X > 300.0$~~
~~$Y \ge 50$~~	~~79.0~~	~~$88.51X^{0.0101}Y^{0.0125}$ or 99.8, whichever is smaller~~		
~~$20 \le Y$ 50~~	~~79.0~~	~~$88.51X^{0.0101}Y^{0.0125}$ or 97.9, whichever is smaller~~		~~97.9~~
~~$10 \le Y$ 20~~	~~79.0~~	~~$88.51X^{0.0101}Y^{0.0125}$ or 93.5, whichever is smaller~~	~~93.5~~	~~93.5~~
~~$Y < 10$~~	~~79.0~~	~~79.0~~	~~79.0~~	~~79.0~~

~~TABLE 2~~
~~Required Minimum SO_2 Emission~~
~~Reduction Efficiency (Z_c)~~

H_2S content of acid gas (Y), %	Sulfur feed rate (X), LT/D: $2.0 \leq X \leq 5.0$	$5.0 \leq X < 15.0$	$15.0 \leq X \leq 300.0$	$X < 300.0$
$Y \geq 50$	74.0	$85.35X^{0.0144}Y^{0.0128}$ or 99.8, whichever is smaller		
$20 \leq Y$ 50	74.0	$85.35X^{0.0144}Y^{0.0128}$ or 97.5, whichever is smaller		97.5
$10 \leq Y$ 20	74.0	$85.35X^{0.0144}Y^{0.0128}$ or 90.8, whichever is smaller	90.8	90.8
$Y < 10$	74.0	74.0	74.0	74.0

c. Test methods and procedures.

(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.

(2) During a performance test required by subsection 7 of section 33-15-12-01, the owner or operator shall determine the minimum required reduction efficiencies (Z) of sulfur dioxide emissions as required in paragraph 1 of subdivision c as follows:

(a) The average sulfur feed rate (X) must be computed as follows:

$$X = K\, Q_a\, Y$$

where:

X = average sulfur feed rate, long tons/day.

Q_a = average volumetric flow rate of acid gas from sweetening unit, dscf/day.

~~Y = average H_2S concentration in acid gas feed from sweetening unit, percent by volume.~~

~~K = (32 lb S/lb mole)/[(100%)(385.36 dscf/lb mole)(2240 lb/long ton)]~~

~~(b) The continuous readings from the process flowmeter must be used to determine the average volumetric flow rate (Q_a) in dscf/day of the acid gas from the sweetening unit for each run.~~

~~(c) The tutwiler procedure in subdivision i or a chromatographic procedure following A.S.T.M. E-260 must be used to determine the hydrogen sulfide concentration in the acid gas feed from the sweetening unit. At least one sample per hour (at equally spaced intervals) must be taken during each four-hour run. The arithmetic mean of all samples must be the average hydrogen sulfide concentration (Y) on a dry basis for the run. By multiplying the result from the tutwiler procedure by 1.62×10^{-3}, the units gr/100 cubic feet at standard conditions are converted to volume percent.~~

~~(d) Using the information from subparagraphs a and c of paragraph 2, tables 1 and 2 must be used to determine the required initial (Z_i) and continuous (Z_c) reduction efficiencies of sulfur dioxide emissions.~~

~~(3) The owner or operator shall determine compliance with the sulfur dioxide standards in paragraph 1 or 2 of subdivision c as follows:~~

~~(a) The emission reduction efficiency (R) achieved by the sulfur recovery technology must be computed for each run using the following equation:~~

~~R = (100 S)/(S+E)~~

~~(b) The level indicators or manual soundings must be used to measure the liquid sulfur accumulation rate in the product storage tanks. Readings taken at the beginning and end of each run, the tank geometry, sulfur density at the storage temperature, and sample duration must be used to determine the sulfur production rate (S) in kilogram per hour for each run.~~

~~(c) The emission rate (E) of sulfur must be computed for each run as follows:~~

$$E = C_{\sigma} Q_{sd} / K$$

~~where:~~

C_{σ} = ~~concentration of sulfur equivalent (SO2 + TRS), g/dscm.~~

Q_{sd} = ~~volumetric flow rate of effluent gas, dscm/hr.~~

K = ~~conversion factor, 1000 g/kg.~~

~~(d) The concentration (C_{σ}) of sulfur equivalent must be the sum of the sulfur dioxide and TRS concentrations, after being converted to sulfur equivalents. For each run and each of the test methods specified in paragraph 3 of this subdivision, the sampling time must be at least four hours. Method 1 must be used to select the sampling site. The sampling point in the duct must be at the centroid of the cross-section if the area is less than five square meters [54 ft^2] or at a point no closer to the walls than one meter [39 inches] if the cross-sectional area is five square meters [54 ft^2] or more, and the centroid is more than one meter [39 inches] from the wall.~~

~~[1] Method 6 must be used to determine the sulfur dioxide concentration. Eight samples of twenty minutes each must be taken at thirty-minute intervals. The arithmetic average in milligram per dry cubic meter at standard conditions must be the concentration for the run. The concentration in milligram per dry cubic meter at standard conditions must be multiplied by 0.5 to convert the results to sulfur equivalent.~~

~~[2] Method 15 must be used to determine the TRS concentration from reduction-type devices or where the oxygen content of the effluent gas is less than one percent by volume. The sampling rate must be at least three liters/minute [0.1 ft^3/min] to ensure minimum residence time in the sample line. Sixteen samples must be taken at fifteen-minute intervals. The arithmetic average of all the samples must be the~~

~~concentration for the run. The concentration in parts per million TRS as hydrogen sulfide must be multiplied by 1.352 x 10^{-6} to convert the results to sulfur equivalent.~~

~~[3] Method 16A must be used to determine the TRS concentration from oxidation-type devices or where the oxygen content of the effluent gas is greater than one percent by volume. Eight samples of twenty minutes each must be taken at thirty-minute intervals. The arithmetic average must be the concentration for the run. The concentration in parts per million TRS as hydrogen sulfide must be multiplied by 1.352 x 10^{-6} to convert the results to sulfur equivalent.~~

~~[4] Method 2 must be used to determine the volumetric flow rate of the effluent gas. A velocity traverse must be conducted at the beginning and end of each run. The arithmetic average of the two measurements must be used to calculate the volumetric flow rate (Q_{sd}) for the run. For the determination of the effluent gas molecular weight, a single integrated sample over the four-hour period may be taken and analyzed or grab samples at one-hour intervals may be taken, analyzed, and averaged. For the moisture content, two samples of at least 0.10 dry cubic meter at standard conditions [0.35 dscf] and ten minutes must be taken at the beginning of the four-hour run and near the end of the time period. The arithmetic average of the two runs must be the moisture content for the run.~~

~~(4) To comply with paragraph 4 of subdivision g, the owner or operator shall obtain the information required by using the monitoring devices in paragraph 2 of this subdivision.~~

~~f. [Reserved]~~

~~g. Monitoring of emissions and operations.~~

~~(1) The owner or operator subject to the provisions of paragraph 1 or 2 of subdivision c shall install, calibrate, maintain, and operate monitoring devices or perform measurements to determine the following operations information on a daily basis:~~

~~(a)~~ ~~The accumulation of sulfur product over each twenty-four hour period. The monitoring method may incorporate the use of an instrument to measure and record the liquid sulfur production rate, or may be a procedure for measuring and recording the sulfur liquid levels in the storage tanks with a level indicator or by manual soundings, with subsequent calculation of the sulfur production rate based on the tank geometry, stored sulfur density, and elapsed time between readings. The method shall be designed to be accurate within plus or minus two percent of the twenty-four hour sulfur accumulation.~~

~~(b)~~ ~~The hydrogen sulfide concentration in the acid gas from the sweetening unit for each twenty-four hour period. At least one sample per twenty-four hour period must be collected and analyzed using the method specified in subparagraph a of paragraph 2 of subdivision e. The department may require the owner or operator to demonstrate that the hydrogen sulfide concentration obtained from one or more samples over a twenty-four hour period is within plus or minus twenty percent of the average of twelve samples collected at equally spaced intervals during the twenty-four hour period. In instances where the hydrogen sulfide concentration of a single sample is not within plus or minus twenty percent of the average of the twelve equally spaced samples, the department may require a more frequent sampling schedule.~~

~~(c)~~ ~~The average acid gas flow rate from the sweetening unit. The owner or operator shall install and operate a monitoring device to continuously measure the flow rate of acid gas. The monitoring device reading must be recorded at least once per hour during each twenty-four hour period. The average acid gas flow rate must be computed from the individual readings.~~

~~(d)~~ ~~The sulfur feed rate (X). For each twenty-four hour period, X must be computed using the equation in subparagraph c of paragraph 2 of subdivision e.~~

~~(e)~~ ~~The required sulfur dioxide emission reduction efficiency for the twenty-four hour period. The sulfur feed rate and the hydrogen sulfide~~

~~concentration in the acid gas for the twenty-four hour period as applicable, must be used to determine the required reduction efficiency in accordance with the provisions of paragraph 2 of subdivision c.~~

~~(2)~~ ~~Where compliance is achieved through the use of an oxidation control system or a reduction control system followed by a continually operated incineration device, the owner or operator shall intall, calibrate, maintain, and operate monitoring devices and continuous emission monitors as follows:~~

~~(a)~~ ~~A continuous monitoring system to measure the total sulfur emission rate (E) of sulfur dioxide in the gases discharged to the atmosphere. The sulfur dioxide emission rate must be expressed in terms of equivalent sulfur mass flow rates (kg/hr). The span of this monitoring system must be set so that the equivalent emission limit of paragraph 2 of subdivision c will be between thirty and seventy percent of the measurement range of the instrument system.~~

~~(b)~~ ~~Except as provided in subparagraph c: A monitoring device to measure the temperature of the gas leaving the combustion zone of the incinerator, if compliance with paragraph 1 of subdivision c is achieved through the use of an oxidation control system or a reduction control system followed by a continually operated incineration device. The monitoring device must be certified by the manufacturer to be accurate to within plus or minus one percent of the temperature being measured.~~

~~When performance tests are conducted under the provisions of subsection 7 of section 33-15-12-01 to demonstrate compliance with the standards under subdivision c, the temperature of the gas leaving the incinerator combustion zone shall be determined using the monitoring device. If the volumetric ratio of sulfur dioxide to sulfur dioxide plus total reduced sulfur (expressed as SO_2) in the gas leaving the incinerator is =0.98, then temperature monitoring may be used to demonstrate that sulfur dioxide emission monitoring is sufficient to determine total sulfur emissions. At all times during the operation of the facility, the owner or operator shall maintain the average temperature of the gas leaving the combustion zone of the incinerator at or above the~~

~~appropriate level determined during the most recent performance test to ensure the sulfur compound oxidation criteria are met. Operation at lower average temperatures may be considered by the department to be unacceptable operation and maintenance of the affected facility. The owner or operator may request that the minimum incinerator temperature be reestablished by conducting new performance tests under subsection 7 of section 33-15-12-01.~~

~~(c) Upon promulgation of a performance specification of continuous monitoring systems for total reduced sulfur compounds at sulfur recovery plants, the owner or operator may, as an alternative to subparagraph b of this paragraph, install, calibrate, maintain, and operate a continuous emission monitoring system for total reduced sulfur compounds as required in paragraph 4 of this subdivision in addition to a sulfur dioxide emission monitoring system. The sum of the equivalent sulfur mass emission rates from the two monitoring systems must be used to compute the total sulfur emission rate (E).~~

~~(3) Where compliance is achieved through the use of a reduction control system not followed by a continually operated incineration device, the owner or operator shall install, calibrate, maintain, and operate a continuous monitoring system to measure the emission rate of reduced sulfur compounds as sulfur dioxide equivalent in the gases discharged to the atmosphere. The sulfur dioxide equivalent compound emission rate shall be expressed in terms of equivalent sulfur mass flow rates (kg/hr). The span of this monitoring system must be set so that the equivalent emission limit of paragraph 2 of subdivision c will be between thirty and seventy percent of the measurement range of the system. This requirement becomes effective upon promulgation of a performance specification for continuous monitoring systems for total reduced sulfur compounds at sulfur recovery plants.~~

~~(4) For those sources required to comply with paragraph 2 or 3 of this subdivision, the average sulfur emission reduction efficiency achieved (R) must be calculated for each twenty-four hour clock interval. The twenty-four hour interval may begin and end at any selected clock time, but must be consistent. The twenty-four hour average reduction efficiency (R) must be computed based on the twenty-four hour average sulfur production rate (S) and sulfur~~

~~emission rate (E), using the equation in subparagraph a of paragraph 3 of subdivision e.~~

~~(a) Data obtained from the sulfur production rate monitoring device specified in paragraph 1 of this subdivision shall be used to determine S.~~

~~(b) Data obtained from the sulfur emission rate monitoring systems specified in paragraph 2 or 3 of this subdivision must be used to calculate a twenty-four-hour average for the sulfur emission rate (E). The monitoring system must provide at least one data point in each successive fifteen-minute interval. At least two data points must be used to calculate each one-hour average. A minimum of eighteen 1-hour averages must be used to compute each twenty-four-hour average.~~

~~(5) In lieu of complying with paragraph 2 or 3 of this subdivision, those sources with a design capacity of less than one hundred fifty LT/D of hydrogen sulfide expressed as sulfur may calculate the sulfur emission reduction efficiency achieved for each twenty-four-hour period by:~~

$$R = \frac{0.0236\ S}{X}\ (100\ \text{percent})$$

~~where:~~

~~R = the sulfur dioxide removal efficiency achieved during the twenty-four-hour period, percent;~~

~~S = the sulfur production rate during the twenty-four-hour period, kg/hr;~~

~~X = the sulfur feed rate in the acid gas, LT/D; and 0.0236 = conversion factor, LT/D per kg/hr.~~

~~(6) The monitoring devices required in subparagraphs a and c of paragraph 2, and paragraph 3 of subdivision g must be calibrated at least annually according to the manufacturer's specifications, as required by subdivision b of subsection 11 of section 33-15-12-01.~~

~~(7) The continuous emission monitoring systems required in subparagraphs a and c of paragraph 2, and paragraph 3 of subdivision g shall be subject to the emission monitoring requirements of subsection 11 of~~

~~section 33-15-12-01. For conducting the continuous emission monitoring system performance evaluation required by subdivision c of subsection 11 of section 33-15-12-01, performance specification 2 shall apply, and method 6 must be used for systems required by paragraph 2 of subdivision g.~~

~~h. Recordkeeping and reporting requirements.~~

~~(1) Records of the calculations and measurements required in paragraphs 1 and 2 of subdivision c and paragraphs 1 through 7 of subdivision g must be retained for at least two years following the date of the measurements by owners or operators subject to this subsection. This requirement is included under subdivision d of subsection 6 of section 33-15-12-01.~~

~~(2) Each owner or operator shall submit a written report of excess emissions to the department semiannually. For the purpose of these reports, excess emissions are defined as:~~

~~(a) Any twenty-four-hour period (at consistent intervals) during which the average sulfur emission reduction efficiency (R) is less than the minimum required efficiency (Z).~~

~~(b) For any affected facility electing to comply with the provisions of subparagraph b of paragraph 2 of subdivision g, any twenty-four-hour period during which the average temperature of the gases leaving the combustion zone of an incinerator is less than the appropriate operating temperature as determined during the most recent performance test in accordance with the provisions of subparagraph b of paragraph 2 of subdivision g. Each twenty-four-hour period must consist of at least ninety-six temperature measurements equally spaced over the twenty-four hours.~~

~~(3) To certify that a facility is exempt from the control requirements of these standards, each owner or operator of a facility with a design capacity less than two LT/D of hydrogen sulfide in the acid gas (expressed as sulfur) shall keep, for the life of the facility, an analysis demonstrating that the facility's design capacity is less than two LT/D of hydrogen sulfide expressed as sulfur.~~

~~(4) Each owner or operator who elects to comply with paragraph 5 of subdivision g shall keep, for the life of the facility, a record demonstrating that the~~

~~facility's design capacity is less than one hundred fifty LT/D of hydrogen sulfide expressed as sulfur.~~

~~i. Optional procedure for measuring hydrogen sulfide in acid gas - tutwiler procedure. (Use procedure outlined in 40 CFR part 60, subpart LLL, standards of performance for onshore natural gas processing, SO_2 emissions, section 60.648.)~~

~~24. Standards of performance for equipment leaks of volatile organic compounds from onshore natural gas processing plants.~~

~~a. Applicability and designation of affected facility.~~

~~(1) The provisions of this subsection apply to affected facilities in onshore natural gas processing plants.~~

~~(a) A compressor in volatile organic compounds service or in wet gas service is an affected facility.~~

~~(b) The group of all equipment except compressors (defined in subdivision b) within a process unit is an affected facility.~~

~~(2) Any affected facility under paragraph 1 of this subdivision that commences construction, reconstruction, or modification after January 20, 1984, is subject to the requirements of this subsection.~~

~~(3) Addition or replacement of equipment (defined in subdivision b) for the purpose of process improvement that is accomplished without a capital expenditure may not by itself be considered a modification under this subsection.~~

~~(4) Facilities covered by subsection 25 or 26 are excluded from this subsection.~~

~~(5) A compressor station, dehydration unit, sweetening unit, underground storage tank, field gas gathering system, or liquefied natural gas unit is covered by this subsection if it is located at an onshore natural gas processing plant. If the unit is not located at the plant site, then it is exempt from the provisions of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and subsection 2 of section 33-15-12-01.~~

~~(1) "Equipment" means each pump, pressure relief device, open-ended valve or line, valve, compressor, and flange or other connector that is in volatile organic compounds service or in wet gas service and any device or system required by this subsection.~~

~~(2) "Field gas" means feed stock gas, entering the natural gas processing plant.~~

~~(3) "In light liquid service" means that the piece of equipment contains a liquid that meets the conditions specified in paragraph 5 of subdivision p of subsection 25 or subparagraph b of paragraph 7 of subdivision d of this subsection.~~

~~(4) "In wet gas service" means that a piece of equipment contains or contacts the field gas before the extraction step in the process.~~

~~(5) "Natural gas liquids" means the hydrocarbons, such as ethane, propane, butane, and pentane, that are extracted from field gas.~~

~~(6) "Natural gas processing plant" (gas plant) means any processing site engaged in the extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both.~~

~~(7) "Nonfractionating plant" means any gas plant that does not fractionate mixed natural gas liquids into natural gas products.~~

~~(8) "Onshore" means all facilities except those that are located in the territorial seas or on the outer continental shelf.~~

~~(9) "Process unit" means equipment assembled for the extraction of natural gas liquids from field gas, the fractionation of the liquids into natural gas products, or other operations associated with the processing of natural gas products. A process unit can operate independently if supplied with sufficient feed or raw materials and sufficient storage facilities for the products.~~

~~(10) "Reciprocating compressor" means a piece of equipment that increases the pressure of a process gas by positive displacement, employing linear movement of the drive shaft.~~

~~c. Standards.~~

~~(1)~~ ~~Each owner or operator subject to the provisions of this subsection shall comply with the requirements of paragraphs 1, 2, and 4 of subdivision c of subsection 25 and subdivisions d through l of subsection 25, except as provided in subdivision d of this subsection, as soon as practicable, but no later than one hundred eighty days after initial startup.~~

~~(2)~~ ~~An owner or operator may elect to comply with the requirements of subdivisions m and n of subsection 25.~~

~~(3)~~ ~~An owner or operator may apply to the department for permission to use an alternative means of emission limitation that achieves a reduction in emissions of volatile organic compounds at least equivalent to that achieved by the controls required in this subsection. In doing so, the owner or operator shall comply with the requirements of subdivision e of this subsection.~~

~~(4)~~ ~~Each owner or operator subject to the provisions of this subsection shall comply with the provisions of subdivision p of subsection 25, except as provided in paragraph 5 of subdivision d of this subsection.~~

~~(5)~~ ~~Each owner or operator subject to the provisions of this subsection shall comply with the provisions of subdivisions q and r of subsection 25, except as provided in subdivisions d, f, and g of this subsection.~~

~~(6)~~ ~~An owner or operator shall use the following provision instead of paragraph 4 of subdivision p of subsection 25. Each piece of equipment is presumed to be in volatile organic compounds service or in wet gas service unless an owner or operator demonstrates that the piece of equipment is not in volatile organic compounds service or in wet gas service. For a piece of equipment to be considered not in volatile organic compounds service, it must be determined that the percent volatile organic compounds content can be reasonably expected never to exceed ten percent by weight. For a piece of equipment to be considered in wet gas service, it must be determined that it contains or contacts the field gas before the extraction step in the process. For purposes of determining the percent volatile organic compounds content of the process fluid that is contained in or contacts a piece of equipment, procedures that conform to the methods described in A.S.T.M. methods E169, E168, or E260 must be used.~~

~~d. Exceptions.~~

~~(1) Each owner or operator subject to the provisions of this subsection may comply with the following exceptions to the provisions of subsection 25.~~

~~(2) Each pressure relief device in gas/vapor service may be monitored quarterly and within five days after each pressure release to detect leaks by the methods specified in paragraph 2 of subdivision p of subsection 25, except as provided in paragraph 3 of subdivision c, subparagraph c of paragraph 2 of this subdivision, and paragraphs 1 through 3 of subdivision f of subsection 25.~~

~~(a) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(b) When a leak is detected, it must be repaired as soon as practicable, but no later than fifteen calendar days after it is detected, except as provided in subdivision k of subsection 25. A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(c) Any pressure relief device that is located in a nonfractionating plant that is monitored only by nonplant personnel may be monitored after a pressure release the next time the monitoring personnel are onsite, instead of within five days as specified in paragraph 2 of this subdivision and paragraph 2 of subdivision f of subsection 25. No pressure relief device described in subparagraph c of paragraph 2 of this subdivision shall be allowed to operate for more than thirty days after a pressure release without monitoring.~~

~~(3) Sampling connection systems are exempt from the requirements of subdivision g of subsection 25.~~

~~(4) Pumps in light liquid service, valves in gas/vapor and light liquid service, and pressure relief devices in gas/vapor service that are located at a nonfractionating plant that does not have the design capacity to process two hundred eighty-three thousand standard cubic meters per day (scmd) [10 million standard cubic feet per day (scfd)] or more of field gas are exempt from the routine monitoring requirements of paragraph 1 of subdivision d of~~

~~subsection 25, paragraph 1 of subdivision i of subsection 25, and paragraph 2 of this subdivision.~~

~~(5) Reciprocating compressors in wet gas service are exempt from the compressor control requirements of subdivision e of subsection 25.~~

~~(6) Flares used to comply with this subsection shall comply with the requirements of subsection 14 of section 33-15-12-01.~~

~~(7) An owner or operator may use the following provisions instead of paragraph 5 of subdivision p of subsection 25:~~

~~(a) Equipment is in heavy liquid service if the weight percent evaporated is ten percent or less at one hundred fifty degrees Celsius [302 degrees Fahrenheit] as determined by A.S.T.M. method D86.~~

~~(b) Equipment is in light liquid service if the weight percent evaporated is greater than ten percent at one hundred fifty degrees Celsius [302 degrees Fahrenheit] as determined by A.S.T.M. method D86.~~

~~e. Alternative means of emission limitation.~~

~~(1) If, in the department's and administrator's judgment, an alternative means of emission limitation will achieve a reduction in volatile organic compounds emissions at least equivalent to the reduction in volatile organic compounds emissions achieved under any design, equipment, work practice, or operational standard, the department and administrator will publish a notice permitting the use of that alternative means for the purpose of compliance with that standard. The notice may condition permission on requirements related to the operation and maintenance of the alternative means.~~

~~(2) Any notice under paragraph 1 of this subdivision shall be published only after notice and an opportunity for a public hearing.~~

~~(3) The department and administrator will consider applications under this subdivision from either owners or operators of affected facilities, or manufacturers of control equipment.~~

~~(4) The department and administrator will treat applications under this subdivision according to the~~

~~following criteria, except in cases where it concludes that other criteria are appropriate:~~

~~(a) The applicant must collect, verify, and submit test data, covering a period of at least twelve months, necessary to support the finding in paragraph 1 of this subdivision.~~

~~(b) If the applicant is an owner or operator of an affected facility, the applicant must commit in writing to operate and maintain the alternative means so as to achieve a reduction in volatile organic compounds emissions at least equivalent to the reduction in volatile organic compounds emissions achieved under the design, equipment, work practice, or operational standard.~~

~~f. Recordkeeping requirements.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall comply with the requirements of paragraphs 2 and 3 of this subdivision in addition to the requirements of subdivision q of subsection 25.~~

~~(2) The following recordkeeping requirements apply to pressure relief devices subject to the requirements of paragraph 2 of subdivision d of this subsection.~~

~~(a) When each leak is detected as specified in subparagraph a of paragraph 2 of subdivision d of this subsection, a weatherproof and readily visible identification, marked with the equipment identification number, must be attached to the leaking equipment. The identification on the pressure relief device may be removed after it has been repaired.~~

~~(b) When each leak is detected as specified in subparagraph a of paragraph 2 of subdivision d of this subsection, the following information must be recorded in a log and must be kept for two years in a readily accessible location:~~

~~[1] The instrument and operator identification numbers and the equipment identification number.~~

~~[2] The date the leak was detected and the dates of each attempt to repair the leak.~~

~~[3] Repair methods applied in each attempt to repair the leak.~~

~~[4] "Above ten thousand parts per million" if the maximum instrument reading measured by the methods specified in paragraph 1 after each repair attempt is ten thousand parts per million or greater.~~

~~[5] "Repair delayed" and the reason for the delay if a leak is not repaired within fifteen calendar days after discovery of the leak.~~

~~[6] The signature of the owner or operator (or designate) whose decision it was that repair could not be effected without a process shutdown.~~

~~[7] The expected date of successful repair of the leak if a leak is not repaired within fifteen days.~~

~~[8] Dates of process unit shutdowns that occur while the equipment is unrepaired.~~

~~[9] The date of successful repair of the leak.~~

~~[10] A list of identification numbers for equipment that are designated for no detectable emissions under the provisions of paragraph 1 of subdivision f of subsection 25. The designation of equipment subject to the provisions of paragraph 1 of subdivision f of subsection 25 must be signed by the owner or operator.~~

~~(c) An owner or operator shall comply with the following requirement in addition to the requirement of paragraph 10 of subdivision q of subsection 25: Information and data used to demonstrate that a reciprocating compressor is in wet gas service to apply for the exemption in paragraph 5 of subdivision d of this subsection must be recorded in a log that is kept in a readily accessible location.~~

~~g. Reporting requirements.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall comply with the requirements of paragraphs 2 and 3 of this subdivision in addition to the requirements of subdivision r of subsection 25.~~

~~(2) An owner or operator shall include the following information in the initial semiannual report in addition to the information required in subparagraphs a through d of paragraph 2 of subdivision r of subsection 25: Number of pressure relief devices subject to the requirements of paragraph 2 of subdivision d of this subsection except for those pressure relief devices designated for no detectable emissions under the provisions of paragraph 1 of subdivision f of subsection 25 and those pressure relief devices complying with paragraph 3 of subdivision f of subsection 25.~~

~~(3) An owner or operator shall include the following information in all semiannual reports in addition to the information required in items 1 through 6 of subparagraph b of paragraph 3 of subdivision r of subsection 25:~~

~~(a) Number of pressure relief devices for which leaks were detected as required in subparagraph a of paragraph 2 of subdivision d of this subsection; and~~

~~(b) Number of pressure relief devices for which leaks were not repaired as required in subparagraph b of paragraph 2 of subdivision d of this subsection.~~

~~25. Standards of performance for equipment leaks of volatile organic compounds in the synthetic organic chemicals manufacturing industry.~~

~~a. Applicability and designation of affected facility.~~

~~(1) The provisions of this subsection apply to affected facilities in the synthetic organic chemicals manufacturing industry. The group of all equipment (defined in subdivision b) within a process unit is an affected facility.~~

~~(2) Any affected facility under paragraph 1 of this subdivision that commences construction or modification after January 5, 1981, shall be subject to the requirements of this subsection.~~

~~(3) Addition or replacement of equipment for the purpose of process improvement which is accomplished without a capital expenditure shall not by itself be considered a modification under this subsection.~~

~~(4) If an owner or operator applies for one or more of the exemptions in this paragraph, then the owner or~~

~~operator shall maintain records as required in paragraph 9 of subdivision q.~~

~~(a) Any affected facility that has the design capacity to produce less than one thousand megagrams per year is exempt from subdivision c through subdivision l.~~

~~(b) If an affected facility produces heavy liquid chemicals only from heavy liquid feed or raw materials, then it is exempt from subdivision c through subdivision l.~~

~~(c) Any affected facility that produces beverage alcohol is exempt from subdivision c through subdivision l.~~

~~(d) Any affected facility that has no equipment in volatile organic compounds service is exempt from subdivision c through subdivision l.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and subsection 2 of section 33-15-12-01.~~

~~(1) "Capital expenditure" means, in addition to the definition in subsection 2 of section 33-15-12-01, an expenditure for a physical or operational change to an existing facility that:~~

~~(a) Exceeds P, the product of the facility's replacement cost, R, and an adjusted annual asset guideline repair allowance, A, as reflected by the following equation: P = R x A, where:~~

~~[1] The adjusted annual asset guideline repair allowance, A, is the product of the percent of the replacement cost, Y, and the applicable basic annual asset guideline repair allowance, B, as reflected by the following equation:~~

$$A = Y \times \left(\frac{B}{100}\right)$$

~~[2] The percent Y is determined from the following equation: Y = 1.0 - 0.575 log X, where X is 1982 minus the year of construction; and~~

~~(3) The applicable basic annual asset guideline repair allowance, B, is selected from the following table consistent with the applicable subsection:~~

~~TABLE FOR DETERMINING APPLICABLE FOR B~~

~~Subsection applicable to facility~~	~~Value of B to be used in equation~~
~~24~~	~~4.5~~
~~25~~	~~12.5~~
~~26~~	~~7.0~~

~~(2) "Closed vent system" means a system that is not open to the atmosphere and that is composed of piping, connections, and, if necessary, flow inducing devices that transport gas or vapor from a piece or pieces of equipment to a control device.~~

~~(3) "Connector" means flanged, screwed welded, or other joined fittings used to connect two pipelines or a pipeline and a piece of process equipment.~~

~~(4) "Control device" means an enclosed combustion device, vapor recovery system, or flare.~~

~~(5) "Distance piece" means an open or enclosed casing through which the piston rod travels, separating the compressor cyclinder from the crankcase.~~

~~(6) "Double block and bleed system" means two block valves connected in series with a bleed valve or line that can vent the line between the two block valves.~~

~~(7) "Equipment" means each pump, compressor, pressure relief device, sampling connection system, open ended valve or line, valve, and flange or other connector in volatile organic compounds service and any devices or systems required by this subsection.~~

~~(8) "First attempt at repair" means to take rapid action for the purpose of stopping or reducing leakage of organic material to atmosphere using best practices.~~

~~(9) "In gas/vapor service" means that the piece of equipment contains process fluid that is in the gaseous state at operating conditions.~~

~~(10) "In heavy liquid service" means that the piece of equipment is not in gas/vapor service or in light liquid service.~~

~~(11) "In light liquid service" means that the piece of equipment contains a liquid that meets the conditions specified in paragraph 5 of subdivision p.~~

~~(12) "In situ sampling systems" means nonextractive samplers or in-line samplers.~~

~~(13) "In vacuum service" means that equipment is operating at an internal pressure which is at least five kilopascals (kPa) below ambient pressure.~~

~~(14) "In volatile organic compounds service" means that the piece of equipment contains or contacts a process fluid that is at least ten percent volatile organic compounds by weight. (The provisions of paragraph 4 of subdivision p specify how to determine that a piece of equipment is not in volatile organic compounds service).~~

~~(15) "Liquids dripping" means any visible leakage from the seal, including spraying, misting, clouding, and ice formation.~~

~~(16) "Open-ended valve or line" means any valve, except safety relief valves, having one side of the valve seat in contact with process fluid and one side open to the atmosphere, either directly or through open piping.~~

~~(17) "Pressure release" means the emission of materials resulting from system pressure being greater than set pressure of the pressure of the pressure relief device.~~

~~(18) "Process improvement" means routine changes made for safety and occupational health requirements, for energy savings, for better utility, for ease of maintenance and operation, for correction of design deficiencies, for bottleneck removal, for changing product requirements, or for environmental control.~~

~~(19) "Process unit" means components assembled to produce, as intermediate or final products, one or more of the chemicals referenced in subdivision t of this subsection. A process unit can operate independently if supplied with sufficient feed or raw materials and sufficient storage facilities for the product.~~

~~(20) "Process unit shutdown" means a work practice or operational procedure that stops production from a process unit or part of a process unit. An unscheduled work practice or operational procedure that stops production from a process unit or part of a process unit for less than twenty-four hours is not a process unit shutdown. The use of spare equipment and technically feasible bypassing of equipment without stopping production are not process unit shutdowns.~~

~~(21) "Quarter" means a three-month period; the first quarter concludes on the last day of the last full month during the one hundred eighty days following initial startup.~~

~~(22) "Repaired" means that equipment is adjusted, or otherwise altered, in order to eliminate a leak as indicated by one of the following: an instrument reading of ten thousand parts per million or greater, indication of liquids dripping, or indication by a sensor that a seal or barrier fluid system has failed.~~

~~(23) "Replacement cost" means the capital needed to purchase all the depreciable components in a facility.~~

~~(24) "Sensor" means a device that measures a physical quantity or the change in a physical quantity such as temperature, pressure, flow rate, pH, or liquid level.~~

~~(25) "Synthetic organic chemicals manufacturing industry" means the industry that produces, as intermediates or final products, one or more of the chemicals referenced in subdivision t.~~

~~(26) "Volatile organic compounds" or "VOC" means, for the purposes of this subsection, any reactive organic compounds as defined in subsection 2 of section 33-15-12-01.~~

~~c. Standards: general.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall demonstrate compliance with the requirements of subdivision c to subdivision l for all equipment within one hundred eighty days of initial startup.~~

~~(2) Compliance with subdivision c to subdivision l will be determined by review of records and reports,~~

~~review of performance test results, and inspection using the methods and procedures specified in subdivision p.~~

~~(3) An owner or operator may request a determination of equivalence of a means of emission limitation to the requirements of subdivision d, e, g, h, i, j, or l as provided in subdivision o. If the department and administrator make a determination that a means of emission limitation is at least equivalent to the requirements of subdivision d, e, g, h, i, j, or l, an owner or operator shall comply with the requirements of that determination.~~

~~(4) Equipment that is in vacuum service is excluded from the requirements of subdivision d to subdivision l if it is identified as required in subparagraph g of paragraph 5 of subdivision q.~~

~~d. Standards: pumps in light liquid service.~~

~~(1) Each pump in light liquid service shall be monitored monthly to detect leaks by the methods specified in paragraph 2 of subdivision p, except as provided in paragraph 3 of subdivision c and paragraphs 4, 5, and 6 of this subdivision. Each pump in light liquid service must be checked by visual inspection each calendar week for indications of liquids dripping from the pump seal.~~

~~(2) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected. If there are indications of liquids dripping from the pump seal, a leak is detected.~~

~~(3) When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision k. A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(4) Each pump equipped with a dual mechanical seal system that includes a barrier fluid system is exempt from the requirements of paragraph 1, provided the following requirements are met:~~

~~(a) Each dual mechanical seal system is:~~

~~[1] Operated with the barrier fluid at a pressure that is at all times greater than the pump stuffing box pressure; or~~

~~[2]~~ ~~Equipment with a barrier fluid degassing reservoir that is connected by a closed vent system to a control device that complies with the requirements of subdivision 1; or~~

~~[3]~~ ~~Equipped with a system that purges the barrier fluid into a process stream with zero volatile organic compounds emissions to the atmosphere.~~

~~(b)~~ ~~The barrier fluid system is in heavy liquid service or is not in volatile organic compounds service.~~

~~(c)~~ ~~Each barrier fluid system is equipped with a sensor that will detect failure of the seal system, the barrier fluid system, or both.~~

~~(d)~~ ~~Each pump is checked by visual inspection, each calendar week, for indications of liquids dripping from the pump seals.~~

~~(e)~~ ~~Each sensor, as described in subparagraph c of paragraph 4, is checked daily or is equipped with an audible alarm, and the owner or operator determines, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.~~

~~(f)~~ ~~If there are indications of liquids dripping from the pump seal or the sensor indicates failure of the seal system, the barrier fluid system, or both, based on the criterion determined in subparagraph e of paragraph 4, a leak is detected.~~

~~[1]~~ ~~When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision k.~~

~~[2]~~ ~~A first attempt at repair shall be made no later than five calendar days after each leak is detected.~~

~~(5)~~ ~~Any pump that is designated, as described in subparagraphs a and b of paragraph 5 of subdivision q, for no detectable emission, as indicated by an instrument reading of less than five hundred parts per million above background, is exempt~~

~~from the requirements of paragraphs 1, 3, and 4 if the pump:~~

~~(a) Has no externally actuated shaft penetrating the pump housing;~~

~~(b) Is demonstrated to be operating with no detectable emissions as indicated by an instrument reading of less than five hundred parts per million above background, as measured by the methods specified in paragraph 3 of subdivision p; and~~

~~(c) Is tested for compliance with subparagraph b of paragraph 5 initially upon designation, annually, and at other times requested by the department.~~

~~(6) If any pump is equipped with a closed vent system capable of capturing and transporting any leakage from the seal or seals to a control device that complies with the requirements of subdivision 1, it is exempt from paragraphs 1 through 5.~~

~~e. Compressors.~~

~~(1) Each compressor must be equipped with a seal system that includes a barrier fluid system and that prevents leakage of volatile organic compounds to the atmosphere, except as provided in paragraph 3 of subdivision c and paragraphs 8 and 9 of this subdivision.~~

~~(2) Each compressor seal system as required in paragraph 1 must be:~~

~~(a) Operated with the barrier fluid at a pressure that is greater than the compressor stuffing box pressure; or~~

~~(b) Equipped with a barrier fluid system that is connected by a closed vent system to a control device that complies with the requirements of subdivision 1.~~

~~(c) Equipped with a system that purges the barrier fluid into a process stream with zero volatile organic compounds emissions to the atmosphere.~~

~~(3) The barrier fluid system shall be in heavy liquid service or shall not be in volatile organic compounds service.~~

~~(4)~~ ~~Each barrier fluid system, as described in paragraph 1, must be equipped with a sensor that will detect failure of the seal system, barrier fluid system, or both.~~

~~(5)~~ ~~Each sensor, as required in paragraph 4, must be checked daily or must be equipped with an audible alarm. The owner or operator shall determine, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.~~

~~(6)~~ ~~If the sensor indicates failure of the seal system, the barrier system, or both, based on the criterion determined under paragraph 5, a leak is detected.~~

~~(7)~~ ~~When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision k. A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(8)~~ ~~A compressor is exempt from the requirements of paragraphs 1 and 2, if it is equipped with a closed vent system capable of capturing and transporting any leakage from the seal to a control device that complies with the requirements of subdivision l, except as provided in paragraph 9.~~

~~(9)~~ ~~Any compressor that is designated, as described in subparagraphs a and b of paragraph 5 of subdivision q, for no detectable emissions as indicated by an instrument reading of less than five hundred parts per million above background is exempt from the requirements of paragraphs 1 through 8 if the compressor:~~

~~(a)~~ ~~Is demonstrated to be operating with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as measured by the methods specified in paragraph 3 of subdivision p; and~~

~~(b)~~ ~~Is tested for compliance with subparagraph a of paragraph 9 initially upon designation, annually, and at other times requested by the department.~~

~~(10)~~ ~~Any existing reciprocating compressor in a process unit which becomes an affected facility under provisions of subsection 12 or 13 of section~~

~~33-15-12-01 is exempt from paragraphs 1, 2, 3, 4, 5, and 8, provided the owner or operator demonstrates that recasting the distance piece or replacing the compressor are the only options available to bring the compressor into compliance with the provisions of paragraphs 1, 2, 3, 4, 5, and 8.~~

~~f. Pressure relief devices in gas/vapor service.~~

~~(1) Except during pressure releases, each pressure relief device in gas/vapor service must be operated with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as determined by the methods specified in paragraph 3 of subdivision p.~~

~~(2) After each pressure release, the pressure relief device must be returned to a condition of no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as soon as practicable, but no later than five calendar days after the pressure release, except as provided in subdivision k. No later than five calendar days after the pressure release, the pressure relief device must be monitored to confirm the conditions of no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, by the methods specified in paragraph 3 of subdivision p.~~

~~(3) Any pressure relief device that is equipped with a closed vent system capable of capturing and transporting leakage through the pressure relief device to a control device, as described in subdivision 1, is exempted from the requirements of paragraphs 1 and 2.~~

~~g. Standards: sampling connection systems.~~

~~(1) Each sampling connection system must be equipped with a closed purge system or closed vent system, except as provided in paragraph 3 of subdivision c.~~

~~(2) Each closed purge system or closed vent system as required in paragraph 1 must:~~

~~(a) Return the purged process fluid directly to the process line with zero volatile organic compounds emissions to the atmosphere;~~

~~(b) Collect and recycle the purged process fluid with zero volatile organic compounds emissions to the atmosphere; or~~

~~(c) Be designed and operated to capture and transport all the purged process fluid to a control device that complies with the requirements of subdivision 1.~~

~~(3) In situ sampling systems are exempt from paragraphs 1 and 2.~~

~~h. Standards: open-ended valves or lines.~~

~~(1) Each open-ended valve or line must be equipped with a cap, blind flange, plug, or a second valve, except as provided in paragraph 3 of subdivision c. The cap, blind flange, plug, or second valve shall seal the open end at all times except during operations requiring process fluid flow through the open-ended valve or line.~~

~~(2) Each open-ended valve or line equipped with a second valve must be operated in a manner such that the valve on the process fluid end is closed before the second valve is closed.~~

~~(3) When a double block and bleed system is being used, the bleed valve or line may remain open during operations that require venting the line between the block valves but must comply with paragraph 1 at all other times.~~

~~i. Standards: valves in gas/vapor service in light liquid service.~~

~~(1) Each valve must be monitored monthly to detect leaks by the methods specified in paragraph 2 of subdivision p and must comply with paragraphs 2 through 5, except as provided in paragraphs 6, 7, and 8, subdivisions m, n, and paragraph 3 of subdivision c.~~

~~(2) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(3) Any valve for which a leak is not detected for two successive months may be monitored the first month of every quarter, beginning with the next quarter, until a leak is detected. If a leak is detected, the valve must be monitored monthly until a leak is not detected for two successive months.~~

~~(4)~~ ~~When a leak is detected, it must be repaired as soon as practicable, but no later than fifteen calendar days after the leak is detected, except as provided in subdivision k. A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(5)~~ ~~First attempts at repair include, but are not limited to, the following best practices where practicable:~~

~~(a)~~ ~~Tightening of bonnet bolts.~~

~~(b)~~ ~~Replacement of bonnet bolts.~~

~~(c)~~ ~~Tightening of packing gland nuts.~~

~~(d)~~ ~~Injection of lubricant into lubricated packing.~~

~~(6)~~ ~~Any valve that is designated, as described in subparagraph b of paragraph 5 of subdivision q, for no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, is exempt from the requirements of paragraph 1 if the valve:~~

~~(a)~~ ~~Has no external actuating mechanism in contact with the process fluid;~~

~~(b)~~ ~~Is operated with emissions less than five hundred parts per million above background as determined by the method specified in paragraph 3 of subdivision p; and~~

~~(c)~~ ~~Is tested for compliance with subparagraph b of paragraph 6 initially upon designation, annually, and at other times requested by the department.~~

~~(7)~~ ~~Any valve that is designated, as described in subparagraph a of paragraph 6 of subdivision q, as an unsafe to monitor valve is exempt from the requirements of paragraph 1 if:~~

~~(a)~~ ~~The owner or operator of the valve demonstrated that the valve is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of complying with paragraph 1; and~~

~~(b)~~ ~~The owner or operator of the valve adheres to a written plan that requires monitoring of the valve as frequently as practicable during safe to monitor times.~~

~~(8) Any valve that is designated, as described in subparagraph b of paragraph 6 of subdivision q, as a difficult to monitor valve is exempt from the requirements of paragraph 1 if:~~

~~(a) The owner or operator of the valve demonstrates that the valve cannot be monitored without elevating the monitoring personnel more than two meters [6.56 feet] above a support surface;~~

~~(b) The process unit within which the valve is located either becomes an affected facility through subsection 12 or 13 of section 33-15-12-01 or the owner or operator designates less than three percent of the total number of valves as difficult to monitor; and~~

~~(c) The owner or operator of the valve follows a written plan that requires monitoring of the valve at least once per calendar year.~~

~~j. Standards: pumps and valves in heavy liquid service, pressure relief devices in light liquid or heavy liquid service, and flanges and other connectors.~~

~~(1) Pumps and valves in heavy liquid service, pressure relief devices in light liquid or heavy liquid service, and flanges and other connectors shall be monitored within five days by the method specified in paragraph 2 of subdivision p if evidence of a potential leak is found by visual, audible, olfactory, or any other detection method.~~

~~(2) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(3) When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision k.~~

~~(4) The first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(5) First attempts at repair include, but are not limited to, the best practices described under paragraph 5 of subdivision i.~~

~~k. Standards: delay of repair.~~

~~(1) Delay of repair of equipment for which leaks have been detected will be allowed if the repair is technically infeasible without a process unit~~

~~shutdown. Repair of this equipment shall occur before the end of the next process unit shutdown.~~

~~(2) Delay of repair of equipment will be allowed for equipment which is isolated from the process and which does not remain in volatile organic compounds service.~~

~~(3) Delay of repair for valves will be allowed if:~~

~~(a) The owner or operator demonstrates that emissions of purged material resulting from immediate repair are greater than the fugitive emissions likely to result from delay of repair; and~~

~~(b) When repair procedures are effected, the purged material is collected and destroyed or recovered in a control device complying with subdivision 1.~~

~~(4) Delay of repair for pumps will be allowed if:~~

~~(a) Repair requires the use of a dual mechanical seal system that includes a barrier fluid system; and~~

~~(b) Repair is completed as soon as practicable, but not later than six months after the leak was detected.~~

~~(5) Delay of repair beyond a process unit shutdown will be allowed for a valve, if valve assembly replacement is necessary during the process unit shutdown, valve assembly supplies have been depleted, and valve assembly supplies had been sufficiently stocked before the supplies were depleted. Delay of repair beyond the next process unit shutdown will not be allowed unless the next process unit shutdown occurs sooner than six months after the first process unit shutdown.~~

~~1. Standards: closed vent systems and control devices.~~

~~(1) Owners or operators of closed vent systems and control devices used to comply with provisions of this subsection shall comply with the provisions of this subdivision.~~

~~(2) Vapor recovery system (for example, condensers and absorbers) shall be designed and operated to recover the volatile organic compounds emissions vented to~~

~~them with an efficiency of ninety-five percent or greater.~~

~~(3) Enclosed combustion devices shall be designed and operated to reduce the volatile organic compounds emissions vented to them with an efficiency of ninety-five percent or greater, or to provide a minimum residence time of 0.75 seconds at a minimum temperature of eight hundred sixteen degrees Celsius [1501 degrees Fahrenheit].~~

~~(4) Flares used to comply with this subsection shall comply with the requirements of subsection 14 of section 33-15-12-01.~~

~~(5) Owners or operators of control devices used to comply with the provisions of this subsection shall monitor these control devices to ensure that they are operated and maintained in conformance with their designs.~~

~~(6) Closed vent systems must be designed and operated with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background and visual inspections, as determined by the methods specified in paragraph 3 of subdivision p. Closed vent systems must be monitored to determine compliance with this subdivision initially in accordance with subsection 7 of section 33-15-12-01, annually, and at other times requested by the department.~~

~~(7) Closed vent systems and control devices used to comply with provisions of this subsection must be operated at all times when emissions may be vented to them.~~

~~m. Alternative standards for valves - Allowable percentage of valves leaking.~~

~~(1) An owner or operator may elect to comply with an allowable percentage of valves leaking of equal to or less than two percent.~~

~~(2) The following requirements must be met if an owner or operator wishes to comply with an allowable percentage of valves leaking:~~

~~(a) An owner or operator must notify the department that the owner or operator has elected to comply with the allowable percentage of valves leaking before implementing this alternative standard, as specified in paragraph 2 of subdivision r.~~

~~(b) A performance test, as specified in paragraph 3 of this subdivision, must be conducted initially upon designation, annually, and at other times requested by the department.~~

~~(c) If a valve leak is detected, it must be repaired in accordance with paragraphs 4 and 5 of subdivision i.~~

~~(3) Performance tests must be conducted in the following manner:~~

~~(a) All valves in gas/vapor and light liquid service within the affected facility must be monitored within one week by the methods specified in paragraph 2 of subdivision p.~~

~~(b) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(c) The leak percentage must be determined by dividing the number of valves for which leaks are detected by the number of valves in gas/vapor and light liquid service within the affected facility.~~

~~(4) Owners and operators who elect to comply with this alternative standard may not have an affected facility with a leak percentage greater than two percent.~~

~~n. Alternative standards for valves - Skip period leak detection and repair.~~

~~(1) An owner or operator may elect to comply with one of the alternative work practices specified in subparagraphs a and b of paragraph 2 of this subdivision. An owner or operator must notify the department before implementing one of the alternative work practices, as specified in paragraph 2 of subdivision r.~~

~~(2) An owner or operator shall comply initially with the requirements for valves in gas/vapor service and valves in light liquid service, as described in subdivision i.~~

~~(a) After two consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than two, an owner or operator may begin to skip one of the quarterly leak~~

~~detection periods for the valves in gas/vapor and in light liquid service.~~

~~(b) After five consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than two, an owner or operator may begin to skip three of the quarterly leak detection periods for the valves in gas/vapor and in light liquid service.~~

~~(c) If the percent of valves leaking is greater than two, the owner or operator shall comply with the requirements as described in subdivision i but can again elect to use this subdivision.~~

~~(d) The percent of valves leaking must be determined by dividing the sum of valves found leaking during current monitoring and valves for which repair has been delayed by the total number of valves subject to the requirements of this subdivision.~~

~~(e) An owner or operator must keep a record of the percent of valves found leaking during each leak detection period.~~

~~o. Equivalence of means of emission limitation.~~

~~(1) Each owner or operator subject to the provisions of this subsection may apply to the department and administrator for determination of equivalence for any means of emission limitation that achieves a reduction in emissions of volatile organic compounds at least equivalent to the reduction in emissions of volatile organic compounds achieved by the controls required in this subsection.~~

~~(2) Determination of equivalence to the equipment, design, and operational requirements of this subsection will be evaluated by the following guidelines:~~

~~(a) Each owner or operator applying for an equivalence determination shall be responsible for collecting and verifying test data to demonstrate equivalence of means of emission limitation.~~

~~(b) The department and administrator will compare test data for the means of emission limitation to test data for the equipment, design, and operational requirements.~~

~~(c)~~ ~~The department and administrator may condition the approval of equivalence on requirements that may be necessary to assure operation and maintenance to achieve the same emission reduction as the equipment, design, and operational requirements.~~

~~(3)~~ ~~Determination of equivalence to the required work practices in this subsection will be evaluated by the following guidelines:~~

~~(a)~~ ~~Each owner or operator applying for a determination of equivalence shall be responsible for collecting and verifying test data to demonstrate equivalence of an equivalent means of emission limitation.~~

~~(b)~~ ~~For each affected facility for which a determination of equivalence is requested, the emission reduction achieved by the required work practice must be demonstrated.~~

~~(c)~~ ~~For each affected facility, for which a determination of equivalence is requested, the emission reduction achieved by the equivalent means of emission limitation must be demonstrated.~~

~~(d)~~ ~~Each owner or operator applying for a determination of equivalence shall commit in writing to work practices that provide for emission reductions equal to or greater than the emission reductions achieved by the required work practice.~~

~~(e)~~ ~~The department and administrator will compare the demonstrated emission reduction for the equivalent means of emission limitation to the demonstrated emission reduction for the required work practices and will consider the commitment in subparagraph d of paragraph 3.~~

~~(f)~~ ~~The department may condition the approval of equivalence on requirements that may be necessary to assure operation and maintenance to achieve the same emission reduction as the required work practice.~~

~~(4)~~ ~~An owner or operator may offer a unique approach to demonstrate the equivalence of any equivalent means of emission limitation.~~

~~(5) After a request for determination of equivalence is received, the department and administrator will publish notices and provide the opportunity for public hearing if the department and administrator judges that the request may be approved.~~

~~(a) After notice and opportunity for public hearing, the department and administrator will determine the equivalence of a means of emission limitation and will publish the determination.~~

~~(b) Any equivalent means of emission limitation approved under this subdivision shall constitute a required work practice, equipment, design, or operational standard within the meaning of section III(h)(1) of the Clean Air Act.~~

~~(6) Manufacturers of equipment used to control equipment leaks of volatile organic compounds may apply to the department and administrator for determination of equivalence for any equivalent means of emission limitation that achieves a reduction in emissions of volatile organic compounds achieved by the equipment, design, and operational requirements of this subsection. The department and administrator will make an equivalence determination according to the provisions of paragraphs 2, 3, 4, and 5.~~

~~p. Test methods and procedures.~~

~~(1) In conducting the performance test required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01.~~

~~(2) The owner or operator shall determine compliance with the standards in subdivisions c through o as follows:~~

~~(a) Method 21 must be used to determine the presence of leaking sources. The instrument must be calibrated before use each day of its use by the procedures specified in method 21. The following calibration gases must be used:~~

~~[1] Zero air (less than ten parts per million of hydrocarbon in air); and~~

~~[2] A mixture of methane or n-hexane and air at a concentration of about, but less than,~~

~~ten thousand parts per million methane or n-hexane.~~

~~(3)~~ ~~The owner or operator shall determine compliance with the no detectable emission standards in subdivisions c through o as follows:~~

~~(a)~~ ~~The requirements of paragraph 2 apply.~~

~~(b)~~ ~~Method 21 must be used to determine the background level. All potential leak interfaces must be traversed as close to the interface as possible. The arithmetic difference between the maximum concentration indicated by the instrument and the background level is compared with five hundred parts per million for determining compliance.~~

~~(4)~~ ~~The owner or operator shall test each piece of equipment unless the owner or operator demonstrates that a process unit is not in volatile organic compounds service, i.e., that volatile organic compounds content would never be reasonably expected to exceed ten percent by weight. For purposes of this demonstration, the following methods and procedures must be used:~~

~~(a)~~ ~~Procedures that conform to the general methods in A.S.T.M. E-260, E-168, and E-169 must be used to determine the percent volatile organic compounds content in the process fluid that is contained in or contacts a piece of equipment.~~

~~(b)~~ ~~Organic compounds that are considered by the department to have negligible photochemical reactivity may be excluded from the total quantity of organic compounds in determining the volatile organic compounds content of the process fluid.~~

~~(c)~~ ~~Engineering judgment may be used to estimate the volatile organic compounds content, if a piece of equipment has not been shown previously to be in service. If the department disagrees with the judgment, subparagraphs a and b of paragraph 4 must be used to resolve the disagreement.~~

~~(5)~~ ~~The owner or operator shall demonstrate that an equipment is in light liquid service by showing that all the following conditions apply:~~

~~(a) The vapor pressure of one or more of the components is greater than 0.3 kilopascals at twenty degrees Celsius [68 degrees Fahrenheit]. Standard reference texts or A.S.T.M. D2879 must be used to determine the vapor pressures.~~

~~(b) The total concentration of the pure components having a vapor pressure greater than 0.3 kilopascals at twenty degrees Celsius [68 degrees Fahrenheit] is equal to or greater than twenty percent by weight.~~

~~(c) The fluid is a liquid at operating conditions.~~

~~(6) Samples used in conjunction with paragraphs 4, 5, and 7 must be representative of the process fluid that is contained in or contacts the equipment or the gas being combusted in the flare.~~

~~(7) The owner or operator shall determine compliance with the standards of flares as follows:~~

~~(a) Method 22 must be used to determine visible emissions.~~

~~(b) A thermocouple or any other equivalent device must be used to monitor the presence of a pilot flame in the flare.~~

~~(c) The maximum permitted velocity (V_{max}) for air-assisted flares must be computed using the following equation:~~

$$V_{max} = 8.706 + .7084\ H_T$$

~~where:~~

V_{max} = ~~maximum permitted velocity, m/sec.~~

H_T = ~~net heating value of the gas being combusted, MJ/scm.~~

~~(d) The net heating value (H_T) of the gas being combusted in a flare must be computed as follows:~~

$$H_T = K \sum_{i=1}^{n} C_i\ H_i$$

~~where:~~

~~K = conversion constant, 1.740 x 10^7 [(g mole)(MJ)]/[(ppm)(scm)(kcal)].~~

~~C_i = concentration of sample component "i", ppm.~~

~~H_i = net heat of combustion of sample component "i" at 25 C and 760 mm Hg, kcal/g mole.~~

~~(e) Method 18 and A.S.T.M. D2504-67 must be used to determine the concentration of sample component "i".~~

~~(f) A.S.T.M. D2382-76 must be used to determine the net heat of combustion of component "i" if published values are not available or cannot be calculated.~~

~~(g) Method 2, 2A, 2C, or 2D, as appropriate, must be used to determine the actual exit velocity of a flare. If needed, the unobstructed (free) cross-sectional area of the flare tip shall be used.~~

~~q. Recordkeeping requirements.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall comply with the recordkeeping requirements of this subdivision. An owner or operator of more than one affected facility subject to the provisions of this subsection may comply with the recordkeeping requirements for these facilities in one recordkeeping system if the system identifies each record by each facility.~~

~~(2) When each leak is detected as specified in subdivisions d, e, i, j, and n, the following requirements apply:~~

~~(a) A weatherproof and readily visible identification, marked with the equipment identification number, must be attached to the leaking equipment.~~

~~(b) The identification on a valve may be removed after it has been monitored for two successive months as specified in paragraph 3 of subdivision i and no leak has been detected during those two months.~~

~~(c) The identification on equipment, except on a valve, may be removed after it has been repaired.~~

~~(3) When each leak is detected as specified in subdivisions d, e, i, j, and n, the following information must be recorded in a log and must be kept for two years in a readily accessible location:~~

~~(a) The instrument and operator identification numbers and the equipment identification number.~~

~~(b) The date the leak was detected and the dates of each attempt to repair the leak.~~

~~(c) Repair methods applied in each attempt to repair the leak.~~

~~(d) "Above ten thousand" if the maximum instrument reading measurement by the methods specified in paragraph 1 of subdivision p after each repair attempt is equal to or greater than ten thousand parts per million.~~

~~(e) "Repair delayed" and the reason for the delay if a leak is not repaired within fifteen calendar days after discovery of the leak.~~

~~(f) The signature of the owner or operator (or designate) whose decision it was that repair could not be effected without a process shutdown.~~

~~(g) The expected date of successful repair of the leak if a leak is not repaired within fifteen days.~~

~~(h) Dates of process unit shutdown that occur while the equipment is unrepaired.~~

~~(i) The date of successful repair of the leak.~~

~~(4) The following information pertaining to the design requirements for closed vent systems and control devices described in subdivision l must be recorded and kept in a readily accessible location:~~

~~(a) Detailed schematics, design specifications, and piping and instrumentation diagrams.~~

~~(b) The dates and descriptions of any changes in the design specifications.~~

~~(c) A description of the parameter or parameters monitored, as required in paragraph 5 of subdivision l, to ensure that control devices are operated and maintained in conformance with their design and an explanation of why that parameter (or parameters) was selected for the monitoring.~~

~~(d) Periods when the closed vent systems and control devices required in subdivisions d, e, f, and g are not operated as designed, including periods when a flare pilot light does not have a flame.~~

~~(e) Dates of startups and shutdowns of the closed vent systems and control devices required in subdivisions d, e, f, and g.~~

~~(5) The following information pertaining to all equipment subject to the requirements in subdivisions c to l must be recorded in a log that is kept in a readily accessible location:~~

~~(a) A list of identification numbers for equipment subject to the requirements of this subsection.~~

~~(b) A list of identification numbers for equipment that are designated for no detectable emissions under the provisions of paragraph 5 of subdivision d, paragraph 9 of subdivision e, and paragraph 6 of subdivision i:~~

~~[i] The designation of equipment as subject to the requirements of paragraph 5 of subdivision d, paragraph 9 of subdivision e, and paragraph 6 of subdivision i must be signed by the owner or operator.~~

~~(c) A list of equipment identification numbers for pressure relief devices required to comply with subdivision f.~~

~~(d) The dates of each compliance test as required in paragraph 5 of subdivision d, paragraph 9 of subdivision e, subdivision f, and paragraph 6 of subdivision i.~~

~~(e) The background level measured during each compliance test.~~

~~(f) The maximum instrument reading measured at the equipment during each compliance test.~~

~~(g) A list of identification numbers for equipment in vacuum service.~~

~~(6) The following information pertaining to all valves subject to the requirements of paragraphs 7 and 8 of subdivision i must be recorded in a log that is kept in a readily accessible location:~~

~~(a) A list of identification numbers for valves that are designated as unsafe to monitor, an explanation for each valve stating why the valve is unsafe to monitor, and the plan for monitoring each valve.~~

~~(b) A list of identification numbers for valves that are designated as difficult to monitor, an explanation for each valve stating why the valve is difficult to monitor, and the schedule for monitoring each valve.~~

~~(7) The following information must be recorded for valves complying with subdivision n:~~

~~(a) A schedule of monitoring.~~

~~(b) The percent of valves found leaking during each monitoring period.~~

~~(8) The following information must be recorded in a log that is kept in a readily accessible location:~~

~~(a) Design criterion required in subparagraph e of paragraph 4 of subdivision d and subparagraph a of paragraph 5 of subdivision e and explanation of the design criterion; and~~

~~(b) Any changes to this criterion and the reasons for the changes.~~

~~(9) The following information must be recorded in a log that is kept in a readily accessible location for use in determining exemptions as provided in paragraph 4 of subdivision a:~~

~~(a) An analysis demonstrating the design capacity of the affected facility;~~

~~(b) A statement listing the feed or raw materials and products from the affected facilities and an analysis demonstrating whether these chemicals are heavy liquids or beverage alcohol; and~~

~~(c) An analysis demonstrating that equipment is not in volatile organic compounds service.~~

~~(10) Information and data used to demonstrate that a piece of equipment is not in volatile organic compounds service must be recorded in a log that is kept in a readily accessible location.~~

~~(11) The provisions of subdivisions b and d of subsection 6 of section 33-15-12-01 do not apply to affected facilities subject to this subsection.~~

~~r. Reporting requirements.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall submit semiannual reports to the department beginning six months after the initial startup date.~~

~~(2) The initial semiannual report to the department shall include the following information:~~

~~(a) Process unit identification.~~

~~(b) Number of valves subject to the requirements of subdivision i, excluding those valves designated for no detectable emissions under the provisions of paragraph 6 of subdivision i.~~

~~(c) Number of pumps subject to the requirements of subdivision d, excluding those pumps designated for no detectable emissions under the provisions of paragraph 5 of subdivision d and those pumps complying with paragraph 6 of subdivision d.~~

~~(d) Number of compressors subject to the requirements of subdivision e, excluding those compressors designated for no detectable emissions under the provisions of paragraph 9 of subdivision e and those compressors complying with paragraph 8 of subdivision e.~~

~~(3) All semiannual reports to the department must include the following information, summarized from the information in subdivision q:~~

~~(a) Process unit identification.~~

~~(b) For each month during the semiannual reporting period.~~

~~[1]~~ ~~Number of valves for which leaks were detected as described in paragraph 2 of subdivision i or subdivision n.~~

~~[2]~~ ~~Number of valves for which leaks were not repaired as required in paragraph 4 of subdivision i.~~

~~[3]~~ ~~Number of pumps for which leaks were detected as described in paragraph 2 of subdivision d and subparagraph f of paragraph 4 of subdivision d.~~

~~[4]~~ ~~Number of pumps for which leaks were not repaired as required in paragraph 3 of subdivision d and item 1 of subparagraph f of paragraph 4 of subdivision d.~~

~~[5]~~ ~~Number of compressors for which leaks were detected as described in paragraph 6 of subdivision e.~~

~~[6]~~ ~~Number of compressors for which leaks were not repaired as required in paragraph 7 of subdivision e.~~

~~[7]~~ ~~The facts that explain each delay of repair and, where appropriate, why a process unit shutdown was technically infeasible.~~

~~(c)~~ ~~Dates of process unit shutdowns which occurred within the semiannual reporting period.~~

~~(d)~~ ~~Revisions to items reported according to paragraph 2 if changes have occurred since the initial report or subsequent revisions to the initial report.~~

~~(4)~~ ~~An owner or operator electing to comply with the provisions of subdivisions m and n shall notify the department of the alternative standard selected ninety days before implementing either of the provisions.~~

~~(5)~~ ~~An owner or operator shall report the results of all performance tests in accordance with subsection 7 of section 33-15-12-01. The provisions of subdivision d of subsection 7 of section 33-15-12-01 do not apply to affected facilities subject to the provisions of this subsection except that an owner or operator must notify the department of the schedule for the initial performance tests at least thirty days before the initial performance tests.~~

~~s. Reconstruction. For the purpose of this subsection:~~

~~(1) The cost of the following frequently replaced components of the facility may not be considered in calculating either the "fixed capital cost of the new components" or the "fixed capital costs that would be required to construct a comparable new facility" under subsection 13 of section 33-15-12-01: pump seals, nuts and bolts, rupture disks, and packings.~~

~~(2) Under subsection 13 of section 33-15-12-01, the "fixed capital cost of new components" includes the fixed capital cost of all depreciable components (except components specified in paragraph 1) which are or will be replaced pursuant to all continuous programs of component replacement which are commenced within any two-year period following the applicability date for the appropriate subsection. (See the "Applicability and designation of affected facility" subdivision of the appropriate subsection.) For purposes of this paragraph, "commenced" means that an owner or operator has undertaken a continuous program of component replacement or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of component replacement.~~

~~t. List of chemicals produced by affected facilities. The chemicals are produced, as intermediates for final products, by process units covered under this subsection as listed in 40 CFR 60.489. The applicability date for process units producing one or more of these chemicals is January 5, 1981.~~

~~26. Standards of performance for equipment leaks of volatile organic compounds in petroleum refineries.~~

~~a. Applicability and designation of affected facility.~~

~~(1) The provisions of this subsection apply to affected facilities in petroleum refineries.~~

~~(2) A compressor is an affected facility.~~

~~(3) The group of all the equipment (defined in subdivision b) within a process unit is an affected facility.~~

~~(4) Any affected facility under paragraphs 1, 2, and 3 of this subdivision that commences construction or modifications after January 4, 1983, is subject to the requirements of this subsection.~~

~~(5) Addition or replacement of equipment (defined in subdivision b) for the purpose of process improvement which is accomplished without a capital expenditure shall not by itself be considered a modification under this subsection.~~

~~(6) Facilities subject to subsections 24 and 25 are excluded from this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25, and in subsection 2 of section 33-15-12-01.~~

~~(1) "Equipment" means each valve, pump, pressure relief device, sampling connection system, open-ended valve or line, and flange or other connector in volatile organic compounds service. For the purposes of recordkeeping and reporting only, compressors are considered equipment.~~

~~(2) "In hydrogen service" means that a compressor contains a process fluid that meets the conditions specified in paragraph 2 of subdivision d.~~

~~(3) "In light liquid service" means that the piece of equipment contains a liquid that meets the conditions specified in paragraph 3 of subdivision d.~~

~~(4) "Petroleum refinery" means any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through the distillation of petroleum, or through the redistillation, cracking, or reforming of unfinished petroleum derivatives.~~

~~(5) "Petroleum" means the crude oil removed from the earth and the oils derived from tar sands, shale, and coal.~~

~~(6) "Process unit" means components assembled to produce intermediate or final products from petroleum, unfinished petroleum derivatives, or other intermediates, a process unit can operate independently if supplied with sufficient feed or raw materials and sufficient storage facilities for the product.~~

~~c. Standards.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall comply with the requirements of subdivisions c to 1 of subsection 25 as soon as~~

~~practicable, but no later than one hundred eighty days after initial startup.~~

~~(2) An owner or operator may elect to comply with the requirements of subdivisions m and n of subsection 25.~~

~~(3) An owner or operator may apply to the department and administrator for a determination of equivalency for any means of emission limitation that achieves a reduction in emissions of volatile organic compounds at least equivalent to the reduction in emissions of volatile organic compounds achieved by the controls required in this subsection. In doing so, the owner or operator shall comply with requirements of subdivision o of subsection 25.~~

~~(4) Each owner or operator subject to the provisions of this subsection shall comply with the provisions of subdivision p of subsection 25 except as provided in subdivision d of this subsection.~~

~~(5) Each owner or operator subject to the provisions of this subsection shall comply with the provisions of subdivisions q and r of subsection 25.~~

~~d. Exceptions.~~

~~(1) Each owner or operator subject to the provisions of this subsection may comply with the following exceptions to the provisions of subsection 25.~~

~~(2) Compressors in hydrogen service are exempt from the requirements of subdivision c if an owner or operator demonstrates that a compressor is in hydrogen service.~~

~~(a) Each compressor is presumed not to be in hydrogen service unless an owner or operator demonstrates that the piece of equipment is in hydrogen service. For a piece of equipment to be considered in hydrogen service, it must be determined that the percent hydrogen content can be reasonably expected always to exceed fifty percent by volume. For purposes of determining the percent hydrogen content in the process fluid that is contained in or contacts a compressor, procedures that conform to the general method described in A.S.T.M. E 260, E 168, or E 169 must be used.~~

~~(b) An owner or operator may use engineering judgment rather than procedures in~~

~~subparagraph a of paragraph 2 of this subdivision to demonstrate that the percent content exceeds fifty percent by volume, provided the engineering judgment demonstrates that the content clearly exceeds fifty percent by volume. When an owner or operator and the department do not agree on whether a piece of equipment is in hydrogen service, however, the procedures in subparagraph a of paragraph 2 must be used to resolve the disagreement. If an owner or operator determines that a piece of equipment is in hydrogen service, the determination can be revised only after following the procedures in subparagraph a of paragraph 2.~~

~~(3) Any existing reciprocating compressor that becomes an affected facility under provisions of subsection 12 or 13 of section 33-15-12-01 is exempt from paragraphs 1, 2, 3, 4, 5, and 8 of subdivision e of subsection 25 provided the owner or operator demonstrates that recasting the distance piece or replacing the compressor are the only options available to bring the compressor into compliance with the provisions of paragraphs 1, 2, 3, 4, 5, and 8 of subdivision e of subsection 25.~~

~~(4) An owner or operator may use the following provisions in addition to paragraph 5 of subdivision p of subsection 25. Equipment is in light liquid service if the percent evaporated is greater than ten percent at one hundred fifty degrees Celsius [302 degrees Fahrenheit] as determined by A.S.T.M. method D-86.~~

~~27. Standards of performance for bulk gasoline terminals.~~

~~a. Applicability and designation of affected facility.~~

~~(1) The affected facility to which the provisions of this subsection apply is the total of all the loading racks at the bulk gasoline terminal which deliver liquid product into gasoline tank trucks.~~

~~(2) Each facility under paragraph 1 of this subdivision, the construction or modification of which is commenced after December 17, 1980, is subject to the provisions of this subsection.~~

~~(3) For purposes of this subsection, any replacement of components of an existing facility, described in paragraph 1, commenced before August 18, 1983, in order to comply with any emission standard adopted by a state or political subdivision thereof will not be~~

~~considered a reconstruction under the provisions of subsection 13 of section 33-15-12-01.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Bulk gasoline terminal" means any gasoline facility which received gasoline by pipeline, ship, or barge and has a gasoline throughput greater than seventy-five thousand seven hundred liters [19984.80 gallons] per day. Gasoline throughput shall be the maximum calculated design throughput as may be limited by compliance with an enforceable condition under federal, state, or local law and discoverable by the department and any other person.~~

~~(2) "Continuous vapor processing system" means a vapor processing system that treats total organic compounds vapors collected from gasoline tank trucks on a demand basis without intermediate accumulation in a vapor holder.~~

~~(3) "Existing vapor processing system" means a vapor processing system (capable of achieving emissions to the atmosphere no greater than eighty milligrams of total organic compounds per liter of gasoline loaded), the construction or refurbishment of which was commenced before December 17, 1980, and which was not constructed or refurbished after that date.~~

~~(4) "Gasoline" means any petroleum distillate or petroleum distillate/alcohol blend having a Reid vapor pressure of 27.6 kilopascals or greater which is used as a fuel for internal combustion engines.~~

~~(5) "Gasoline tank truck" means a delivery tank truck used at bulk gasoline terminals which is loading gasoline or which has loaded gasoline on the immediately previous load.~~

~~(6) "Intermittent vapor processing system" means a vapor processing system that employs an intermediate vapor holder to accumulate total organic compounds vapors collected from gasoline tank trucks, and treats the accumulated vapors only during automatically controlled cycles.~~

~~(7) "Loading rack" means the loading arms, pumps, meters, shutoff valves, relief valves, and other piping and valves necessary to fill delivery tank trucks.~~

~~(8) "Refurbishment" means, with reference to a vapor processing system, replacement of components of, or addition of components to, the system within any two-year period such that the fixed capital cost of the new components required for such component replacement or addition exceeds fifty percent of the cost of a comparable entirely new system.~~

~~(9) "Total organic compounds" means those compounds measured according to the procedures in subdivision d.~~

~~(10) "Vapor collection system" means any equipment used for containing total organic compounds vapors displaced during the loading of gasoline tank trucks.~~

~~(11) "Vapor processing system" means all equipment used for recovering or oxidizing total organic compounds vapors displaced from the affected facility.~~

~~(12) "Vaportight gasoline tank truck" means a gasoline tank truck which has demonstrated within the twelve preceding months that its produce delivery tank will sustain a pressure change of not more than seven hundred fifty pascals [75 millimeters of water] within five minutes after it is pressurized to four thousand five hundred pascals [450 millimeters of water]. This capability is to be demonstrated using the pressure test procedure specified in reference method 27.~~

~~c. Standard for volatile organic compound (VOC) emissions from bulk gasoline terminals. On and after the date on which subdivision a of subsection 7 of section 33-15-12-01 requires a performance test to be completed, the owner or operator of each bulk gasoline terminal containing an affected facility shall comply with the requirements of this subdivision.~~

~~(1) Each affected facility must be equipped with a vapor collection system designed to collect the total organic compounds vapors displaced from tank trucks during product loading.~~

~~(2) The emissions to the atmosphere from the vapor collection system due to the loading of liquid product into gasoline tank trucks are not to exceed thirty-five milligrams of total organic compounds per liter of gasoline loaded, except as noted in paragraph 3 of this subdivision.~~

~~(3) For each affected facility equipped with an existing vapor processing system, the emissions to the~~

~~atmosphere from the vapor collection system due to the loading of liquid product into gasoline tank trucks are not to exceed eighty milligrams of total organic compounds per liter of gasoline loaded.~~

~~(4) Each vapor collection system must be designed to prevent any total organic compounds vapors collected at one loading rack from passing to another loading rack.~~

~~(5) Loadings of liquid product into gasoline tank trucks must be limited to vaportight gasoline tank trucks using the following procedures:~~

~~(a) The owner or operator shall obtain the vaportightness documentation described in paragraph 2 of subdivision f for each gasoline tank truck which is to be loaded at the affected facility.~~

~~(b) The owner or operator shall require the tank identification number to be recorded as each gasoline tank truck is loaded at the affected facility.~~

~~(c) The owner or operator shall cross-check each tank identification number obtained in subparagraph b of paragraph 5 of this subdivision with the file of tank vaportightness documentation within two weeks after the corresponding tank is loaded.~~

~~(d) The terminal owner or operator shall notify the owner or operator of each nonvaportight gasoline tank truck loaded at the affected facility within three weeks after the loading has occurred.~~

~~(e) The terminal owner or operator shall take steps assuring that the nonvaportight gasoline tank truck will not be reloaded at the affected facility until vaportightness documentation for that tank is obtained.~~

~~(f) Alternate procedures to those described in subparagraphs a through e of paragraph 5 of this subdivision for limiting gasoline tank truck loadings may be used upon application to, and approval by, the department and administrator.~~

~~(6) The owner or operator shall act to assure that loadings of gasoline tank trucks at the affected facility are made only into tanks equipped with vapor~~

~~collection equipment that is compatible with the terminal's vapor collection system.~~

~~(7) The owner or operator shall act to assure that the terminal's and the tank truck's vapor collection systems are connected during each loading of a gasoline tank truck at the affected facility. Examples of actions to accomplish this include training drivers in the hookup procedures and posting visible reminder signs at the affected loading racks.~~

~~(8) The vapor collection and liquid loading equipment shall be designed and operated to prevent gauge pressure in the delivery tank from exceeding four thousand five hundred pascals [450 millimeters of water] during product loading. This level is not to be exceeded when measured by the procedures specified in paragraph 4 of subdivision d.~~

~~(9) No pressure-vacuum vent in the bulk gasoline terminal's vapor collection system shall begin to open at a system pressure less than four thousand five hundred pascals [450 millimeters of water].~~

~~(10) Each calendar month, the vapor collection system, the vapor processing system, and each loading rack handling gasoline must be inspected during the loading of gasoline tank trucks for total organic compounds liquid or vapor leaks. For purposes of this paragraph, detection methods incorporating sight, sound, or smell are acceptable. Each detection of a leak shall be recorded and the source of the leak repaired within fifteen calendar days after it is detected.~~

~~d. Test methods and procedures.~~

~~(1) In conducting the performance tests required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01. The three-run requirement of subdivision f of subsection 7 of section 33-15-12-01 does not apply to this subsection.~~

~~(2) Immediately before the performance test required to determine compliance with paragraphs 2, 3, and 8 of subdivision c, the owner or operator shall use method 21 to monitor for leakage of vapor all potential sources in the terminal's vapor collection~~

~~system equipment while a gasoline tank truck is being loaded. The owner or operator shall repair all leaks with readings of ten thousand parts per million (as methane) or greater before conducting the performance test.~~

~~(3) The owner or operator shall determine compliance with the standards in paragraphs 2 and 3 of subdivision c as follows:~~

~~(a) The performance test must be six hours long during which at least three hundred thousand liters [79200 gallons] of gasoline is loaded. If this is not possible, the test may be continued the same day until three hundred thousand liters [79200 gallons] of gasoline is loaded or the test may be resumed the next day with another complete six-hour period. In the latter case, the three hundred thousand-liter [79200-gallon] criterion need not be met. However, as much as possible, testing should be conducted during the six-hour period in which the highest throughput normally occurs.~~

~~(b) If the vapor processing system is intermittent in operation, the performance test must begin at a reference vapor holder level and must end at the same reference point. The test must include at least two startups and shutdowns of the vapor processor. If this does not occur under automatically controlled operations, the system must be manually controlled.~~

~~(c) The emission rate (E) of total organic compounds must be computed using the following equation:~~

$$E = K \sum_{i=1}^{n} (V_{esi} C_{ei}) / (L \, 10^6)$$

~~where:~~

E = ~~emission rate of total organic compounds, mg/liter of gasoline loaded.~~

V_{esi} = ~~volume of air-vapor mixture exhausted at each interval "i", scm.~~

C_{ei} = ~~concentration of total organic~~

~~compounds at each interval "i", ppm.~~

~~L = total volume of gasoline loaded, liters.~~

~~n = number of testing intervals.~~

~~i = emission testing interval of 5 minutes~~

~~K = density of calibration gas, 1.83×10^6 for propane and 2.41×10^6 for butane, mg/scm.~~

~~(d) The performance test must be conducted in intervals of five minutes. For each interval "i", readings from each measurement must be recorded, and the volume exhausted (V_{esi}) and the corresponding average total organic compounds concentration(C_{ei}) must be determined. The sampling system response time must be considered in determining the average total organic compounds concentration corresponding to the volume exhausted.~~

~~(e) The following methods must be used to determine the volume (V_{esi}) air-vapor mixture exhausted at each interval:~~

~~[1] Method 2B must be used for combustion vapor processing systems.~~

~~[2] Method 2A must be used for all other vapor processing systems.~~

~~(f) Method 25A or 25B must be used for determining the total organic compounds concentration (C_{ei}) at each interval. The calibration gas must be either propane or butane. The owner or operator may exclude the methane and ethane content in the exhaust vent by any method (e.g., method 18) approved by the department or administrator.~~

~~(g) To , determine the volume (L) of gasoline dispensed during the performance test period at all loading racks whose vapor emissions are controlled by the processing system being tested, terminal records or readings from gasoline dispensing meters at each loading rack must be used.~~

~~(4) The owner or operator shall determine compliance with the standard in paragraph 8 of subdivision c as follows:~~

~~(a) A pressure measurement device (liquid manometer, magnehelic gauge, or equivalent instrument), capable of measuring up to five hundred millimeters of water gauge pressure with plus or minus 2.5 millimeters of water precision, must be calibrated and installed on the terminal's vapor collection system at a pressure tap located as close as possible to the connection with the gasoline tank truck.~~

~~(b) During the performance test, the pressure must be recorded every five minutes while a gasoline truck is being loaded; the highest instantaneous pressure that occurs during each loading must also be recorded. Every loading position must be tested at least once during the performance test.~~

~~e. [Reserved]~~

~~f. Reporting and recordkeeping.~~

~~(1) The tank truck vaportightness documentation required under subparagraph a of paragraph 5 of subdivision c must be kept on file at the terminal in a permanent form available for inspection.~~

~~(2) The documentation file for each gasoline tank truck must be updated at least once per year to reflect current test results as determined by method 27. This documentation must include, as a minimum, the following information:~~

~~(a) Test title: gasoline delivery tank pressure test - EPA reference method 27.~~

~~(b) Tank owner and address.~~

~~(c) Tank identification number.~~

~~(d) Testing location.~~

~~(e) Date of test.~~

~~(f) Tester name and signature.~~

~~(g) Witnessing inspector, if any: name, signature, and affiliation.~~

~~(h) Test results: actual pressure change in five minutes, millimeter of water (average for two runs).~~

~~(3) A record of each monthly leak inspection required under paragraph 10 of subdivision c must be kept on file at the terminal for at least two years. Inspection records must include, as a minimum, the following information:~~

~~(a) Date of inspection.~~

~~(b) Findings (may indicate no leaks discovered; or location, nature, and severity of each leak).~~

~~(c) Leak determination method.~~

~~(d) Corrective action (date each leak repaired; reasons for any repair interval in excess of fifteen days).~~

~~(e) Inspector name and signature.~~

~~(4) The terminal owner or operator shall keep documentation of all notifications required under subparagraph d of paragraph 5 of subdivision c on file at the terminal for at least two years.~~

~~(5) [Reserved]~~

~~(6) The owner or operator of an affected facility shall keep records of all replacements or additions of components performed on an existing vapor processing system for at least three years.~~

~~g. Reconstruction.~~

~~(1) The cost of the following frequently replaced components of the affected facility may not be considered in calculating either the "fixed capital cost of the new components" or the "fixed capital costs that would be required to construct a comparable entirely new facility" under subsection 13 of section 33-15-12-01: pump seals, loading arm gaskets and swivels, coupler gaskets, overfill sensor couplers and cables, flexible vapor hoses, and grounding cables and connectors.~~

~~(2) Under subsection 13 of section 33-15-12-01, the "fixed capital costs of the new components" includes the fixed capital cost of all depreciable components (except components specified in paragraph 1) which are or will be replaced pursuant to all continuous~~

~~programs of component replacement which are commenced within any two-year period following December 17, 1980. For purposes of this paragraph, "commenced" means that an owner or operator has undertaken a continuous program of component replacement or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of component replacement.~~

~~28. Standards of performance for nonmetallic mineral processing plants.~~

~~a. Applicability and designation of affected facility.~~

~~(1) Except as provided in paragraphs 2, 3, and 4 of this subdivision, the provisions of this subsection are applicable to the following affected facilities in fixed or portable nonmetallic mineral processing plants: each crusher, grinding mill, screening operation, bucket elevator, belt conveyor, bagging operation, storage bin, enclosed truck, or railcar loading station.~~

~~(2) An affected facility that is subject to the provisions of subsection 3 or 7 of section 33-15-12-04 or that follows in the plant process any facility subject to the provisions of subsection 3 or 7 of section 33-15-12-04 is not subject to the provisions of this subsection.~~

~~(3) Facilities at the following plants are not subject to the provisions of this subsection:~~

~~(a) Fixed sand and gravel plants and crushed stone plants with capacities, as defined in subdivision b, of twenty-three megagrams per hour [25 tons/hr] or less;~~

~~(b) Portable sand and gravel plants and crushed stone plants with capacities, as defined in subdivision b, of one hundred thirty-six megagrams per hour [150 tons/hr] or less; and~~

~~(c) Common clay plants and pumice plants with capacities, as defined in subdivision b, of nine megagrams per hour [10 tons/hr] or less.~~

~~(4) When an existing facility is replaced by a piece of equipment of equal or smaller size, as defined in subdivision b, having the same function as the existing facility, the new facility is exempt from the provisions of subdivisions c, e, and f, except as~~

~~provided for in subparagraph b of paragraph 4 of this subdivision.~~

~~(a) An owner or operator seeking to comply with this paragraph shall comply with the reporting requirements of paragraphs 1 and 2 of subdivision g.~~

~~(b) An owner or operator replacing all existing facilities in a production line with new facilities does not qualify for the exemption described in paragraph 4 and must comply with the provisions of subdivisions c, e, and f.~~

~~(5) An affected facility under paragraph 1 that commences construction, reconstruction, or modification after August 31, 1983, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Bagging operation" means the mechanical process by which bags are filled with nonmetallic minerals.~~

~~(2) "Belt conveyor" means a conveying device that transports material from one location to another by means of an endless belt that is carried on a series of idlers and routed around a pulley at each end.~~

~~(3) "Bucket elevator" means a conveying device of nonmetallic minerals consisting of a head and foot assembly which supports and drives an endless single or double strand chain or belt to which buckets are attached.~~

~~(4) "Building" means any frame structure with a roof.~~

~~(5) "Capacity" means the cumulative rated capacity of all initial crushers that are part of the plant.~~

~~(6) "Capture system" means the equipment (including enclosures, hoods, ducts, fans, dampers, etc.) used to capture and transport particulate matter generated by one or more process operations to a control device.~~

~~(7) "Control device" means the air pollution control equipment used to reduce particulate matter emissions released to the atmosphere from one or more process operations at a nonmetallic mineral processing plant.~~

~~(8) "Conveying system" means a device for transporting materials from one piece of equipment or location to another location within a plant. Conveying systems include, but are not limited to, the following: feeders, belt conveyors, bucket elevators, and pneumatic systems.~~

~~(9) "Crusher" means a machine used to crush any nometallic minerals, and includes, but is not limited to, the following types: jaw, gyratory, cone, roll, rod, mill, hammermill, and impactor.~~

~~(10) "Enclosed truck or railcar loading station" means that portion of a nonmetallic mineral processing plant where nonmetallic minerals are loaded by an enclosed conveying system into enclosed trucks or railcars.~~

~~(11) "Fixed plant" means any nonmetallic mineral processing plant at which the processing equipment specified in paragraph 1 of subdivision a is attached by a cable, chain, turnbucket, bolt, or other means (except electrical connections) to any anchor, slab, or structure including bedrock.~~

~~(12) "Fugitive emission" means particulate matter that is not collected by a capture system and is released into the atmosphere at the point of generation.~~

~~(13) "Grinding mill" means a machine used for the wet or dry fine crushing of any nonmetallic mineral. Grinding mills include, but are not limited to, the following types: hammer, roller, rod, pebble and ball, and fluid energy. The grinding mill includes the air conveying system, air separator, or air classifier, where such systems are used.~~

~~(14) "Initial crusher" means any crusher into which nonmetallic minerals can be fed without prior crushing in the plant.~~

~~(15) "Nonmetallic mineral" means any of the following minerals or any mixture of which the majority is any of the following minerals:~~

~~(a) Crushed and broken stone, including limestone, dolomite, granite, traprock, sandstone, quartz, quartzite, marl, marble, slate, shale, oil shale, and shell.~~

~~(b) Sand and gravel.~~

~~(c) Clay, including kaolin, fireclay, bentonite, fuller's earth, ball clay, and common clay.~~

~~(d) Rock salt.~~

~~(e) Gypsum.~~

~~(f) Sodium compounds, including sodium carbonate, sodium chloride, and sodium sulfate.~~

~~(g) Pumice.~~

~~(h) Gilsonite.~~

~~(i) Talc and pyrophyllite.~~

~~(j) Boron, including borax, kernite, and colemanite.~~

~~(k) Barite.~~

~~(l) Fluorospar.~~

~~(m) Feldspar.~~

~~(n) Diatomite.~~

~~(o) Perlite.~~

~~(p) Vermiculite.~~

~~(q) Mica.~~

~~(r) Kyanite, including andalusite, sillimanite, topaz, and dumortierite.~~

~~(16) "Nonmetallic mineral processing plant" means any combination of equipment that is used to crush or grind any nonmetallic mineral wherever located, including lime plants, power plants, steel mills, asphalt concrete plants, portland cement plants, or any other facility processing nonmetallic minerals except as provided in paragraphs 2 and 3 of subdivision a.~~

~~(17) "Portable plant" means any nonmetallic mineral processing plant that is mounted on any chassis or skids and may be moved by the application of a lifting or pulling force. In addition, there may be no cable, chain, turnbuckle, bolt, or other means (except electrical connections) by which any piece of equipment is attached or clamped to any anchor, slab, or structure, including bedrock that must be removed~~

~~prior to the application of a lifting or pulling force for the purpose of transporting the unit.~~

~~(18) "Production line" means all affected facilities (crushers, grinding mills, screening operations, bucket elevators, belt conveyors, bagging operations, storage bins, and enclosed truck and railcar loading stations) which are directly connected or are connected together by a conveying system.~~

~~(19) "Screening operation" means a device for separating material according to size by passing undersize material through one or more mesh surfaces (screens) in series, and retaining oversize material on the mesh surfaces (screens).~~

~~(20) "Size" means the rated capacity in tons per hour of a crusher, grinding mill, bucket elevator, bagging operation, or enclosed truck or railcar loading station; the total surface area of the top screen of a screening operation; the width of a conveyor belt; and the rated capacity in tons of a storage bin.~~

~~(21) "Stack emission" means the particulate matter that is released to the atmosphere from a capture system.~~

~~(22) "Storage bin" means a facility for storage (including surge bins) or nonmetallic minerals prior to further processing or loading.~~

~~(23) "Transfer point" means a point in a conveying operation where the nonmetallic mineral is transferred to or from a belt conveyor except where the nonmetallic mineral is being transferred to a stockpile.~~

~~(24) "Truck dumping" means the unloading of nonmetallic minerals from movable vehicles designed to transport nonmetallic minerals from one location to another. Movable vehicles include, but are not limited to: trucks, front-end loaders, skip hoists, and railcars.~~

~~(25) "Vent" means an opening through which there is mechanically induced airflow for the purpose of exhausting from a building air carrying particulate matter emissions from one or more affected facilities.~~

~~c. Standard for particulate matter.~~

~~(1) On and after the date on which the performance test required to be conducted by subsection 7 of section 33-15-12-01 is completed, no owner or operator~~

~~subject to the provisions of this subsection may cause to be discharged into the atmosphere from any transfer point on belt conveyors or from any other affected facility any stack emissions which:~~

~~(a) Contain particulate matter in excess of 0.05 gram per dry cubic meter at standard conditions; or~~

~~(b) Exhibit greater than seven percent opacity, unless the stack emissions are discharged from an affected facility using a wet scrubbing control device. Facilities using a wet scrubber must comply with the reporting provisions of paragraphs 3, 4, and 5 of subdivision g.~~

~~(2) On and after the sixtieth day after achieving the maximum production rate at which the affected facility will be operated, but not later than one hundred eighty days after initial startup, no owner or operator subject to the provisions of this subsection may cause to be discharged into the atmosphere from any transfer point on belt conveyors or from any other affected facility any fugitive emissions which exhibit greater than ten percent opacity, except as provided in paragraphs 3, 4, and 5.~~

~~(3) On and after the sixtieth day after achieving the maximum production rate at which the affected facility will be operated, but not later than one hundred eighty days after initial startup, no owner or operator may cause to be discharged into the atmosphere from any crusher, at which a capture system is not used, fugitive emissions which exhibit greater than fifteen percent opacity.~~

~~(4) Truck dumping of nonmetallic minerals into any screening operation, feed hopper, or crusher is exempt from the requirements of this subdivision.~~

~~(5) If any transfer point on a conveyor belt or any other affected facility is enclosed in a building, then each enclosed affected facility must comply with the emission limits in paragraphs 1, 2, and 3, or the building enclosing the affected facility or facilities must comply with the following emission limits:~~

~~(a) No owner or operator may cause to be discharged into the atmosphere from any building enclosing any transfer point on a conveyor belt or any other affected facility any visible fugitive~~

~~emissions except emissions from a vent as defined in subdivision b.~~

~~(b) No owner or operator may cause to be discharged into the atmosphere from any vent of any building enclosing any transfer point on a conveyor belt or any other affected facility emissions which exceed the stack emission limits in paragraph 1.~~

~~d. Reconstruction.~~

~~(1) The cost of replacement of ore-contact surfaces on processing equipment may not be considered in calculating either the "fixed capital cost of the new components" or the "fixed capital cost that would be required to construct a comparable new facility" under subsection 13 of section 33-15-12-01. Ore-contact surfaces are crushing surfaces, screen meshes, bars, and plates, conveyor belts, and elevator buckets.~~

~~(2) Under subsection 13 of section 33-15-12-01, the "fixed capital cost of the new components" includes the fixed capital cost of all depreciable components (except components specified in paragraph 1) which are or will be replaced pursuant to all continuous programs of component replacement commenced within any two-year period following August 31, 1983.~~

~~e. Monitoring of operations. The owner or operator of any affected facility subject to the provisions of this subsection which uses a wet scrubber to control emissions shall install, calibrate, maintain, and operate the following monitoring devices:~~

~~(1) A device for the continuous measurement of the pressure loss of the gas stream through the scrubber. The monitoring device must be certified by the manufacturer to be accurate within plus or minus two hundred fifty pascals [plus or minus one inch water gauge pressure] and must be calibrated on an annual basis in accordance with manufacturer's instructions.~~

~~(2) A device for the continuous measurement of the scrubbing liquid flow rate to the wet scrubber. The monitoring device must be certified by the manufacturer to be accurate within plus or minus five percent of design scrubbing liquid flow rate and must be calibrated on an annual basis in accordance with manufacturer's instructions.~~

~~f. Test methods and procedures.~~

~~(1) In conducting the performance test required in subsection 7 of section 33-15-12-01, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this chapter or other methods and procedures as specified in this subdivision, except as provided in subdivision b of subsection 7 of section 33-15-12-01. Acceptable alternative methods and procedures are given in paragraph 5 of this subdivision.~~

~~(2) The owner or operator shall determine compliance with the particulate matter standards in paragraph 1 of subdivision c as follows:~~

~~(a) Method 5 or method 17 must be used to determine the particulate matter concentration. The sample volume must be at least 1.70 dry cubic meters at standard conditions [60 dscf]. For method 5, if the gas stream being sampled is at ambient temperature, the sampling probe and filter may be operated without heaters. If the gas stream is above ambient temperature, the sampling probe and filter may be operated at a temperature high enough, but no higher than one hundred twenty-one degrees Celsius [250 degrees Fahrenheit], to prevent water condensation on the filter.~~

~~(b) Method 9 and the procedures in subsection 9 of section 33-15-12-01 must be used to determine opacity.~~

~~(3) In determining compliance with the particulate matter standards in paragraphs 2 and 3 of subdivision c, the owner or operator shall use method 9 and the procedures in subsection 9 of section 33-15-12-01, with the following additions:~~

~~(a) The minimum distance between the observer and the emission source must be 4.57 meters [15 feet].~~

~~(b) The observer shall, when possible, select a position that minimizes interference from other fugitive emission sources (e.g., road dust). The required observer position relative to the sun (method 9, section 2.1) must be followed.~~

~~(c) For affected facilities using wet dust suppression for particulate matter control, a visible mist is sometimes generated by the spray. The water mist must not be confused with particulate matter emissions and is not to be~~

~~considered a visible emission. When a water mist of this nature is present, the observation of emissions is to be made at a point in the plume where the mist is not longer visible.~~

~~(4) In determining compliance with paragraph 5 of subdivision c, the owner or operator shall use method 22 to determine fugitive emissions. The performance test must be conducted while all affected facilities inside the building are operating. The performance test for each building must be at least seventy-five minutes in duration, with each side of the building and the roof being observed for at least fifteen minutes.~~

~~(5) The owner or operator may use the following as alternatives to the reference methods and procedures specified in this subdivision:~~

~~(a) For the method and procedure of paragraph 3 of this subdivision, if emissions from two or more facilities continuously interfere so that the opacity of fugitive emissions from an individual affected facility cannot be read, either of the following procedures may be used:~~

~~[1] Use of the combined emission stream the highest fugitive opacity standard applicable to any of the individual affected facilities contributing to the emissions stream.~~

~~[2] Separate the emissions so that the opacity of emissions from each affected facility can be read.~~

~~(6) To comply with paragraph 4 of subdivision g, the owner or operator shall record the measurements as required in paragraph 3 of subdivision 8 using the monitoring devices in paragraphs 1 and 2 of subdivision e during each particulate matter run and shall determine the averages.~~

~~g. Reporting and recordkeeping.~~

~~(1) Each owner or operator seeking to comply with paragraph 4 of subdivision a shall submit to the department the following information about the existing facility being replaced and the replacement piece of equipment.~~

~~(a) For a crusher, grinding mill, bucket elevator, bagging operation, or enclosed truck or railcar loading station:~~

~~[1] The rated capacity in tons per hour of the existing facility being replaced; and~~

~~[2] The rated capacity in tons per hour of the replacement equipment.~~

~~(b) For a screening operation:~~

~~[1] The total surface area of the top screen of the existing screening operation being replaced; and~~

~~[2] The total surface area of the top screen of the replacement screening operation.~~

~~(c) For a conveyor belt:~~

~~[1] The width of the existing belt being replaced; and~~

~~[2] The width of the replacement conveyor belt.~~

~~(d) For a storage bin:~~

~~[1] The rated capacity in tons of the existing storage bin being replaced; and~~

~~[2] The rated capacity in tons of replacement storage bins.~~

~~(2) Each owner or operator seeking to comply with paragraph 4 of subdivision a shall submit the following data to the department and to the Director of the Emission Standards and Engineering Division (MD-13), United States Environmental Protection Agency, Research Triangle Park, North Carolina 27711.~~

~~(a) The information described in paragraph 1 of subdivision a.~~

~~(b) A description of the control device used to reduce particulate matter emissions from the existing facility and a list of all other pieces of equipment controlled by the same control device.~~

~~(c) The estimated age of the existing facility.~~

~~(3) During the initial performance test of a wet scrubber, and daily thereafter, the owner or operator shall record the measurement of both the change in pressure of the gas stream across the scrubber and the scrubbing liquid flow rate.~~

~~(4) After the initial performance test of a wet scrubber, the owner or operator shall submit semiannual reports to the department of occurrences when the measurements of the scrubber pressure loss (or gain) and liquid flow rate differ by more than plus or minus thirty percent from the average determined during the most recent performance test.~~

~~(5) The reports required under paragraph 4 shall be postmarked within thirty days following the end of the second and fourth calendar quarters.~~

~~(6) The owner or operator of any affected facility shall submit written reports of the results of all performance tests conducted to demonstrate compliance with the standards set forth in subdivision c, including reports of opacity observations made using method 9 to demonstrate compliance with paragraphs 2 and 3 of subdivision c and reports of observations using method 22 to demonstrate compliance with paragraph 5 of subdivision c.~~

~~29. Standards of performance for petroleum drycleaners.~~

~~a. Applicability and designation of affected facility.~~

~~(1) The provisions of this subsection are applicable to the following affected facilities located at a petroleum drycleaning plant with a total manufacturers' rated dryer capacity equal to or greater than thirty-eight kilograms [84 pounds]: petroleum solvent drycleaning, dryers, washers, filters, stills, and settling tanks.~~

~~(a) When the affected facility is installed in an existing plant that is not expanding the manufacturers' rated capacity of its petroleum solvent dryers, the total manufacturers' rated dryer capacity is the summation of the manufacturers' rated capacity for each existing petroleum solvent dryer.~~

~~(b) When the affected facility is installed in a plant that is expanding the manufacturers' rated capacity of its petroleum solvent dryers, the total manufacturers' rated dryer capacity is the summation of the manufacturers' rated dryer~~

~~capacity for each existing and proposed new petroleum solvent dryer.~~

~~(c) When the affected facility is installed in a new plant, the total manufacturers' rated dryer capacity is the summation of the manufacturers' rated dryer capacity for each proposed new petroleum solvent dryer.~~

~~(d) The petroleum solvent dryers considered in the determination of the total manufacturers' rated dryer capacity are those new and existing dryers in the plant that will be in service at any time after the proposed new source or modification commences operation.~~

~~(2) Any facility under paragraph 1 that commences construction or modification after December 14, 1982, is subject to the requirements of this subsection.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Cartridge filter" means a discrete filter unit containing both filter paper and activated carbon that traps and removes contaminants from petroleum solvent, together with the piping and ductwork used in the installation of this device.~~

~~(2) "Dryer" means a machine used to remove petroleum solvent from articles of clothing or other textile or leather goods, after washing and removing of excess petroleum solvent, together with the piping and ductwork used in the installation of this device.~~

~~(3) "Manufacturers' rated dryer capacity" means the dryer's rated capacity of articles, in pounds or kilograms of clothing articles per load, dry basis, that is typically found on each dryer on the manufacturer's nameplate or in the manufacturer's equipment specifications.~~

~~(4) "Perceptible leaks" means any petroleum solvent vapor or liquid leaks that are conspicuous from visual observation or that bubble after application of a soap solution, such as pools or droplets of liquid, open containers or solvent, or solvent laden waste standing open to the atmosphere.~~

~~(5) "Petroleum drycleaner" means a drycleaning facility that uses petroleum solvent in a combination of washers, dryers, filters, stills, and settling tanks.~~

~~(6) "Settling tank" means a container that gravimetrically separates oils, grease, and dirt from petroleum solvent, together with the piping and ductwork used in the installation of this device.~~

~~(7) "Solvent filter" means a discrete solvent filter unit containing a porous medium that traps and removes contaminants from petroleum solvent, together with the piping and ductwork used in the installation of this device.~~

~~(8) "Solvent recovery dryer" means a class of drycleaning dryers that employs a condenser to condense and recover solvent vapors evaporated in a closed loop stream of heated air, together with the piping and ductwork used in the installation of this device.~~

~~(9) "Still" means a device used to volatilize, separate, and recover petroleum solvent from contaminants solvent, together with the piping and ductwork used in the installation of this device.~~

~~(10) "Washer" means a machine which agitates fabric articles in a petroleum solvent bath and spins the articles to remove the solvent, together with the piping and ductwork used in the installation of this device.~~

~~c. Standards for volatile organic compounds.~~

~~(1) Each affected petroleum solvent drycleaning dryer that is installed at a petroleum drycleaning plant shall be a solvent recovery dryer. The solvent recovery dryers must be properly installed, operated, and maintained.~~

~~(2) Each affected petroleum solvent filter that is installed at a petroleum drycleaning plant must be a cartridge filter. Cartridge filters shall be drained in their sealed housing for at least eight hours prior to their removal.~~

~~(3) Each manufacturer of an affected petroleum solvent dryer shall include leak inspection and leak repair cycle information in the operating manual and on a clearly visible label posted on each affected facility. Such information should state:~~

~~To protect against fire hazards, loss of valuable solvents, and emissions of solvent to the atmosphere, periodic inspection of this equipment for evidence of leaks and prompt repair of any leaks is recommended. The department recommends that the equipment be inspected every fifteen days and all vapor or liquid leaks be repaired within the subsequent fifteen day period.~~

~~d. Equivalent equipment and procedures.~~

~~(1) Upon written application from any person, the department and administrator may approve the use of equipment or procedures that have been demonstrated to its satisfaction to be equivalent, in terms of reducing volatile organic compounds emissions to the atmosphere, to those prescribed for compliance within a specified paragraph of this subsection. The application must contain a complete description of the equipment or procedure, the testing method, the date, time, and location of the test, and a description of the test results.~~

~~(2) The department and administrator will make a preliminary determination of whether or not the application for equivalency is approvable and will publish a notice of these findings. After notice and opportunity for public hearing, the department and administrator will publish the final determination.~~

~~e. Test methods and procedures. Each owner or operator of an affected facility subject to the provisions of paragraph 1 of subdivision c shall perform an initial test to verify that the flow rate of recovered solvent from the solvent recovery dryer at the termination of the recovery cycle is no greater than 0.05 liters per minute. This test must be conducted for a duration of no less than two weeks during which no less than fifty percent of the dryer loads must be monitored for their final recovered solvent flow rate. The suggested point for measuring the flow rate of recovered solvent is from the outlet of the solvent-water separator.~~

~~Near the end of the recovery cycle, the entire flow of recovered solvent should be diverted to a graduated cylinder. As the recovered solvent collects in the graduated cylinder, the elapsed time is monitored and recorded in periods of greater than or equal to one minute. At the same time, the volume of solvent in the graduated cylinder is monitored and recorded to determine the volume of recovered solvent that is collected during each time period. The recovered solvent flow rate is calculated by dividing the volume of solvent collected per~~

~~period by the length of time elapsed during the period and converting the result with appropriate factors into units of liters per minute. The recovery cycle and the monitoring procedure should continue until the flow rate of solvent is less than or equal to 0.05 liter per minute. The type of articles cleaned and the total length of the cycle should then be recorded.~~

~~f. Each owner or operator of an affected facility subject to the provisions of this subsection shall maintain a record of the performance test required under subdivision e.~~

~~30. Standards of performance for volatile organic compounds (VOC) emissions from petroleum refinery wastewater systems.~~

~~a. Applicability and designation of affected facility.~~

~~(1) The provisions of this subsection apply to affected facilities located in petroleum refineries for which construction, modification, or reconstruction is commenced after May 4, 1987.~~

~~(a) An individual drain system is a separate affected facility.~~

~~(b) An oil-water separator is a separate affected facility.~~

~~(c) An aggregate facility is a separate affected facility.~~

~~(2) Notwithstanding the provisions of paragraph 2 of subdivision e of subsection 12 of section 33-15-12-01, the construction or installation of a new individual drain system shall constitute a modification to an affected facility described in subparagraph e of paragraph 1 of this subdivision. For purposes of this paragraph, a new individual drain system must be limited to all process drains and the first common junction box.~~

~~b. Definitions. As used in this subsection, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 and in subsection 2 of section 33-15-12-01.~~

~~(1) "Active service" means that a drain is receiving refinery wastewater from a process unit that will continuously maintain a water seal.~~

~~(2) "Aggregate facility" means an individual drain system together with ancillary downstream sewerlines and~~

~~oil water separators, down to and including the secondary oil water separator, as applicable.~~

~~(3) "Catch basin" means an open basin which serves as a single collection point for stormwater runoff received directly from refinery surfaces and for refinery wastewater from process drains.~~

~~(4) "Closed vent system" means a system that is not open to the atmosphere and is composed of piping, connections, and, if necessary, flow inducing devices that transport gas or vapor from an emission source to a control device.~~

~~(5) "Completely closed drain system" means an individual drain system that is not open to the atmosphere and is equipped and operated with a closed vent system and control devices complying with the requirements of subdivision g.~~

~~(6) "Control device" means an enclosed combustion device, vapor recovery system, or flare.~~

~~(7) "Fixed roof" means a cover that is mounted to a tank or chamber in a stationary manner and which does not move with fluctuations in wastewater levels.~~

~~(8) "Floating roof" means a pontoon type or double deck type cover that rests on the liquid surface.~~

~~(9) "Gastight" means operated with no detectable emissions.~~

~~(10) "Individual drain system" means all process drains connected to the first common downstream junction box. The term includes all such drains and common junction box, together with their associated sewerlines and other junction boxes, down to the receiving oil water separator.~~

~~(11) "Junction box" means a manhole or access point to a wastewater sewer system line.~~

~~(12) "No detectable emissions" means less than five hundred parts per million above background levels, as measured by a detection instrument in accordance with method 21 in appendix A of this chapter.~~

~~(13) "Noncontact cooling water system" means a once through drain, collection and treatment system designed and operated for collecting cooling water which does not come into contact with hydrocarbons or~~

~~oily wastewater and which is not recirculated through a cooling tower.~~

~~(14) "Oil water separator" means wastewater treatment equipment used to separate oil from water consisting of a separation tank, which also includes the forebay and other separator basins, skimmers, weirs, grit chambers, and sludge hoppers. Slop oil facilities, including tanks, are included in this term along with storage vessels and auxiliary equipment located between individual drain systems and the oil water separator. This term does not include storage vessels or auxiliary equipment which do not come in contact with or store oil wastewater.~~

~~(15) "Oily wastewater" means wastewater generated during the refinery process which contains oil, emulsified oil, or other hydrocarbons. Oily wastewater originates from a variety of refinery processes including cooling water, condensed stripping steam, tank draw off, and contact process water.~~

~~(16) "Petroleum" means the crude oil removed from the earth and the oils derived from tar sands, shale, and coal.~~

~~(17) "Petroleum refinery" means any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through the distillation of petroleum, or through the redistillation of petroleum, cracking, or reforming unfinished petroleum derivatives.~~

~~(18) "Sewerline" means a lateral, truckline, branch line, ditch, channel, or other conduit used to convey refinery wastewater to downstream components of a refinery wastewater treatment system. This term does not include buried, below grade sewerlines.~~

~~(19) "Slop oil" means the floating oil and solids that accumulate on the surface of an oil water separator.~~

~~(20) "Storage vessel" means any tank, reservoir, or container used for the storage of petroleum liquids, including oily wastewater.~~

~~(21) "Stormwater sewer system" means a drain and collection system designed and operated for the sole purpose of collecting stormwater and which is segregated from the process wastewater collection system.~~

~~(22) "Wastewater system" means any component, piece of equipment, or installation that receives, treats, or processes oily wastewater from petroleum refinery process units.~~

~~(23) "Water seal controls" means a seal pot, p-leg trap, or other type of trap filled with water that has a designed capacity to create a waste barrier between the sewer and the atmosphere.~~

~~c. Standards - General.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall comply with the requirements of subdivisions c, d, e, f, g, and with j and k, except during periods of startup, shutdown, or malfunction.~~

~~(2) Compliance with subdivisions c, d, e, f, g, and with j and k, will be determined by review of records and reports, review of performance test results, and inspection using the methods and procedures specified in subdivision n.~~

~~(3) Permission to use alternative means of emission limitation to meet the requirements of subdivisions d, e, and f may be granted as provided in subdivision l.~~

~~(4) (a) Stormwater sewer systems are not subject to the requirements of this subsection.~~

~~(b) Ancillary equipment, which is physically separate from the wastewater system and does not come in contact with or store oily wastewater, is not subject to the requirements of this subsection.~~

~~(c) Noncontact cooling water systems are not subject to the requirements of this subsection.~~

~~(d) An owner or operator shall demonstrate compliance with the exclusions in subparagraphs a, b, and c of paragraph 4 of this subdivision as provided in paragraphs 8, 9, and 10 of subdivision o.~~

~~d. Standards - Individual drain systems.~~

~~(1) (a) Each drain must be equipped with water seal controls.~~

~~(b) Each drain in active service must be checked by visual or physical inspection initially and~~

~~monthly thereafter for indications of low water levels or other conditions that would reduce the effectiveness of the water seal controls.~~

~~(c) Except as provided in subparagraph d of paragraph 1 of this subdivision, each drain out of active service must be checked by visual or physical inspection initially and weekly thereafter for indications of low water levels or other problems that could result in volatile organic compound (VOC) emissions.~~

~~(d) As an alternative to the requirements in subparagraph c of paragraph 1 of this subdivision, if an owner or operator elects to install a tightly sealed cap or plug over a drain that is out of service, inspections must be conducted initially and semiannually to ensure caps or plugs are in place and properly installed.~~

~~(e) Whenever low water levels or missing or improperly installed caps or plugs are identified, water must be added or first efforts at repair must be made as soon as practicable, but no later than twenty-four hours after detection, except as provided in subdivision h.~~

~~(2) (a) Junction boxes must be equipped with a cover and may have an open vent pipe. The vent pipe must be at least ninety centimeters [3 feet] in length and may not exceed 10.2 centimeters [4 inches] in diameter.~~

~~(b) Junction box covers must have a tight seal around the edge and must be kept in place at all times, except during inspection and maintenance.~~

~~(c) Junction boxes must be visually inspected initially and semiannually thereafter to ensure that the cover is in place and to ensure that the cover has a tight seal around the edge.~~

~~(d) If a broken seal or gap is identified, first effort at repair must be made as soon as practicable, but not later than fifteen calendar days after the broken seal or gap is identified, except as provided in subdivision h.~~

~~(e) [1] Sewerlines may not be open to the atmosphere and must be covered or enclosed in a manner so as to have no visual gaps or~~

~~cracks in joints, seals, or other emission interfaces.~~

~~[2] The portion of each unburied sewerline must be visually inspected initially and semiannually thereafter for indication of cracks, gaps, or other problems that could result in volatile organic compound (VOC) emissions.~~

~~[3] Whenever cracks, gaps, or other problems are detected, repairs must be made as soon as practicable, but not later than fifteen calendar days after identification, except as provided in subdivision h.~~

~~(f) Except as provided in paragraph 5 of this subdivision, each modified or reconstructed individual drain system that has a catch basin in the existing configuration prior to May 4, 1987, must be exempt from the provisions of this subsection.~~

~~(g) Refinery wastewater routed through new process drains and a new first common downstream junction box, either as part of a new individual drain system or an existing individual drain system, may not be routed through a downstream catch basin.~~

~~e. Standards - Oil-water separators.~~

~~(1) Each oil-water separator tank, slop oil tank, storage vessel, or other auxiliary equipment subject to the requirements of this subsection must be equipped and operated with a fixed roof, which meets the following specifications, except as provided in paragraph 4 of this subdivision or in subdivision k.~~

~~(a) The fixed roof must be installed to completely cover the separator tank, slop oil tank, storage vessel, or other auxiliary equipment with no separation between the roof and the wall.~~

~~(b) The vapor space under a fixed roof may not be purged unless the vapor is directed to a control device.~~

~~(c) If the roof has access doors or openings, such doors or openings must be gasketed, latched, and kept closed at all times during operation of the separator system, except during inspection and maintenance.~~

~~(d)~~ ~~Roof seals, access doors, and other openings must be checked by visual inspection initially and semiannually thereafter to ensure that no cracks or gaps occur between the roof and wall and that access doors and other openings are closed and gasketed properly.~~

~~(e)~~ ~~When a broken seal or gasket or other problem is identified, first efforts at repair must be made as soon as practicable, but not later than fifteen calendar days after it is identified, except as provided in subdivision h.~~

~~(2)~~ ~~Each oil-water separator tank or auxiliary equipment with a design capacity to treat more than sixteen liters per second [250 gallons per minute] of refinery wastewater must, in addition to the requirements in paragraph 1 of this subdivision be equipped and operated with a closed vent system and control device, which meets the requirements of subdivision g, except as provided in paragraph 3 of this subdivision or in subdivision k.~~

~~(3)~~ ~~(a)~~ ~~Each modified or reconstructed oil-water separator tank with a maximum design capacity to treat less than thirty-eight liters per second [600 gallons per minute] of refinery wastewater which was equipped and operated with a fixed roof covering the entire separator tank or a portion of the separator tank prior to May 4, 1987, is exempt from the requirements of paragraph 2 of this subdivision, but shall meet the requirements of paragraph 1 of this subdivision, or may elect to comply with subparagraph b.~~

~~(b)~~ ~~The owner or operator may elect to comply with the requirements of paragraph 1 of this subdivision for the existing fixed roof covering a portion of the separator tank and comply with the requirements for floating roofs in subdivision k for the remainder of the separator tank.~~

~~(4)~~ ~~Storage vessels, including slop oil tanks and other auxiliary tanks that are subject to the requirements of subsections 9, 10, and 11 of section 33-15-12-04, are not subject to the requirements of this subdivision.~~

~~(5)~~ ~~Slop oil from an oil-water separator tank and oily wastewater from slop oil handling equipment must be collected, stored, transported, recycled, reused, or~~

~~disposed of in an enclosed system. Once slop oil is returned to the process unit or is disposed of, it is no longer within the scope of this subsection. Equipment used in handling slop oil must be equipped with a fixed roof meeting the requirements of paragraph 1 of this subdivision.~~

~~(6) Each oil-water separator tank, slop oil tank, storage vessel, or other auxiliary equipment that is required to comply with paragraph 1 of this subdivision may be equipped with a pressure control valve as necessary for proper system operation. The pressure control valve must be set at the maximum pressure necessary for proper system operation, but such that the valve will not vent continuously.~~

~~f. Standards - Aggregate facility. A new, modified, or reconstructed aggregate facility shall comply with the requirements of subdivisions d and e.~~

~~g. Standards - Closed vent systems and control devices.~~

~~(1) Enclosed combustion devices must be designed and operated to reduce the volatile organic compound (VOC) emissions vented to them with an efficiency of ninety-five percent or greater or to provide a minimum residence time of 0.75 seconds at a minimum temperature of eight hundred sixteen degrees Celsius [1500 degrees Fahrenheit].~~

~~(2) Vapor recovery systems (for example, condensers and absorbers) must be designed and operated to recover the volatile organic compound (VOC) emissions vented to them with an efficiency of ninety-five percent or greater.~~

~~(3) Flares used to comply with this subsection must comply with the requirements of subsection 14 of section 33-15-12-01.~~

~~(4) Closed vent systems and control devices used to comply with provisions of this subsection must be operated at all times when emissions may be vented to them.~~

~~(5) (a) Closed vent systems must be designed and operated with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as determined during the initial and semiannual inspections by the methods specified in subdivision n.~~

~~(b) Closed vent systems must be purged to direct vapor to the control device.~~

~~(c) A flow indicator must be installed on a vent stream to a control device to ensure that the vapors are being routed to the device.~~

~~(d) All gauging and sampling devices must be gastight except when gauging or sampling is taking place.~~

~~(e) When emissions from a closed system are detected, first efforts at repair to eliminate the emissions must be made as soon as practicable, but not later than thirty calendar days from the date the emissions are detected, except as provided in subdivision h.~~

~~h. Standards - Delay of repair.~~

~~(1) Delay of repair of facilities that are subject to the provisions of this subsection will be allowed if the repair is technically impossible without a complete or partial refinery or process unit shutdown.~~

~~(2) Repair of such equipment must occur before the end of the next refinery or process unit shutdown.~~

~~i. Standards - Delay of compliance.~~

~~(1) Delay of compliance of modified individual drain systems with ancillary downstream treatment components will be allowed if compliance with the provisions of this subsection cannot be achieved without a refinery or process unit shutdown.~~

~~(2) Installation of equipment necessary to comply with the provisions of this subsection must occur no later than the next scheduled refinery or process unit shutdown.~~

~~j. Alternative standards for individual drain systems.~~

~~(1) An owner or operator may elect to construct and operate a completely closed drain system.~~

~~(2) Each completely closed drain system must be equipped and operated with a closed vent system and control device complying with the requirements of subdivision g.~~

~~(3) An owner or operator must notify the department in the report required in subsection 6 of section~~

~~33-15-12-01 that the owner or operator has elected to construct and operate a completely closed drain system.~~

~~(4) If an owner or operator elects to comply with the provision of this subdivision, then the owner or operator does not need to comply with the provisions of subdivision d or l.~~

~~(5) (a) Sewerlines may not be open to the atmosphere and must be covered or enclosed in a manner so as to have no visual gaps or cracks in joints, seals, or other emission interfaces.~~

~~(b) The portion of each unburied sewerline must be visually inspected initially and semiannually thereafter for indication of cracks, gaps, or other problems that could result in volatile organic compound (VOC) emissions.~~

~~(c) Whenever cracks, gaps, or other problems are detected, repairs must be made as soon as practicable, but not later than fifteen calendar days after identification, except as provided in subdivision h.~~

~~k. Alternative standards for oil-water separators.~~

~~(1) An owner or operator may elect to construct and operate a floating roof on an oil-water separator tank, slop oil tank, storage vessel, or other auxiliary equipment subject to the requirements of this subsection which meets the following specifications:~~

~~(a) Each floating roof must be equipped with a closure device between the wall of the separator and the roof edge. The closure device is to consist of a primary seal and a secondary seal.~~

~~[1] The primary seal must be liquid-mounted seal.~~

~~[a] A liquid-mounted seal means a foam-filled or liquid-filled seal mounted in contact with the liquid between the wall of the separator and the floating roof.~~

~~[b] The gap width between the primary seal and the separator wall may not exceed 3.8 centimeters [1.5 inches] at any point.~~

~~[c] The total gap area between the primary seal and the separator wall may not exceed sixty seven centimeters squared per meter [3.2 inches squared per feet] of separator wall perimeter.~~

~~[2] The secondary seal must be above the primary seal and cover the annular space between the floating roof and the wall of the separator.~~

~~[a] The gap width between the secondary seal and the separator wall may not exceed 1.3 centimeters [0.5 inches] at any point.~~

~~[b] The total gap area between the secondary seal and the separator wall may not exceed 6.7 centimeters squared per meter [0.32 inch squared per feet] of separator wall perimeter.~~

~~[3] The maximum gap width and total gap area must be determined by the methods and procedures specified in paragraph 4 of subdivision n.~~

~~[a] Measurement of primary seal gaps must be performed within sixty calendar days after initial installation of the floating roof and introduction of refinery wastewater and once every five years thereafter.~~

~~[b] Measurement of secondary seal gaps must be performed within sixty calendar days of initial introduction of refinery wastewater and once every year thereafter.~~

~~[4] The owner or operator shall make necessary repairs within thirty calendar days of identification of seals not meeting the requirements listed in items 1 and 2 of subparagraph a of paragraph 1 of this subdivision.~~

~~(b) Except as provided in subparagraph d of paragraph 1 of this subdivision, each opening in the roof must be equipped with a gasketed cover, seal, or lid, which shall be maintained in a closed position at all times, except during inspection and maintenance.~~

~~(c) The roof must be floating on the liquid (i.e., off the roof supports) at all times except during abnormal conditions (i.e., low flow rate).~~

~~(d) The floating roof may be equipped with one or more emergency roof drains for removal of stormwater. Each emergency roof drain must be fitted with a slotted membrane fabric cover that covers at least ninety percent of the drain opening area or a flexible fabric sleeve seal.~~

~~(e) [1] Access doors and other openings must be visually inspected initially and semiannually thereafter to ensure that there is a tight fit around the edges and to identify other problems that could result in volatile organic compound (VOC) emissions.~~

~~[2] When a broken seal or gasket on an access door or other opening is identified, it must be repaired as soon as practicable, but not later than thirty calendar days after it is identified, except as provided in subdivision h.~~

~~(2) An owner or operator shall notify the department in the report required by subsection 6 of section 33-15-12-01 that the owner or operator has elected to construct and operate a floating roof under paragraph 1 of this subdivision.~~

~~(3) For portions of the oil-water separator tank where it is infeasible to construct and operate a floating roof, such as the skimmer mechanism and weirs, a fixed roof meeting the requirements of paragraph 1 of subdivision e must be installed.~~

~~(4) Except as provided in paragraph 3 of this subdivision, if an owner or operator elects to comply with the provisions of this subsection, then the owner or operator does not need to comply with the provisions of subdivision e or subdivision i applicable to the same facilities.~~

~~i. Permission to use alternative means of emission limitation.~~

~~(1) If, in the department's and administrator's judgment, an alternative means of emission limitation will achieve a reduction in volatile organic compound (VOC) emissions at least equivalent to the reduction~~

~~in volatile organic compound (VOC) emissions achieved by the applicable requirement in subdivisions c, d, e, f, g, h, and i, the department and administrator will publish a notice permitting the use of the alternative means for purposes of compliance with that requirement. The notice may condition the permission on requirements related to the operation and maintenance of the alternative means.~~

~~(2) Any notice under paragraph 1 of this subdivision must be published only after notice and an opportunity for a hearing.~~

~~(3) Any person seeking permission under this subdivision shall collect, verify, and submit to the department information showing that the alternative means achieves equivalent emission reductions.~~

~~m. Monitoring of operations.~~

~~(1) Each owner or operator subject to the provisions of this subsection shall install, calibrate, maintain, and operate according to manufacturer's specifications the following equipment unless alternative monitoring procedures or requirements are approved for that facility by the department.~~

~~(a) Where a thermal incinerator is used for volatile organic compound (VOC) emission reduction, a temperature monitoring device equipped with a continuous recorder must be used to measure the temperature of the gas stream in the combustion zone of the incinerator. The temperature monitoring device must have an accuracy of one percent of the temperature being measured in degrees Celsius or plus or minus 0.5 degrees Celsius [plus or minus 1.0 degrees Fahrenheit], whichever is greater.~~

~~(b) Where a catalytic incinerator is used for volatile organic compound (VOC) emission reduction, temperature monitoring devices, each equipped with a continuous recorder, must be used to measure the temperature in the gas stream immediately before and after the catalyst bed of the incinerator. The temperature monitoring devices must have an accuracy of one percent of the temperature being measured in degrees Celsius or plus or minus 0.5 degrees Celsius [plus or minus 1.0 degrees Fahrenheit], whichever is greater.~~

~~(c) Where a carbon adsorber is used for volatile organic compound (VOC) emissions reduction, a monitoring device that continuously indicates and records the volatile organic compound (VOC) concentration level or reading of organics in the exhaust gases of the control device outlet gas stream or inlet and outlet gas stream must be used.~~

~~(d) Where a flare is used for volatile organic compound (VOC) emission reduction, the owner or operator shall comply with the monitoring requirements of paragraph 2 of subdivision f of subsection 14 of section 33-15-12-01.~~

~~(2) Where a volatile organic compound (VOC) recovery device other than a carbon adsorber is used to meet the requirements specified in paragraph 1 of subdivision g, the owner or operator shall provide to the department information describing the operation of the control device and the process parameters that would indicate proper operation and maintenance of the device. The department may request further information and will specify appropriate monitoring procedures or requirements.~~

~~(3) An alternative operational or process parameter may be monitored if it can be demonstrated that another parameter will ensure that the control device is operated in conformance with these standards and the control devices design specifications.~~

~~n. Performance test methods and procedures and compliance provisions.~~

~~(1) Before using any equipment installed in compliance with the requirements of subdivisions d, e, f, g, or j, and k, the owner or operator shall inspect such equipment for indications of potential emissions, defects, or other problems that may cause the requirements of this subsection not to be met. Points of inspection must include, but are not limited to, seals, flanges, joints, gaskets, hatches, caps, and plugs.~~

~~(2) The owner or operator of each source that is equipped with a closed vent system and control device as required in subdivision g (other than a flare) is exempt from subsection 7 of section 33-15-12-01 and shall use method 21 to measure the emission concentrations, using five hundred parts per million as the no detectable emission limit. The instrument~~

~~must be calculated each day before using. The calibration gases must be:~~

~~(a) Zero air (less than ten parts per million of hydrocarbon in air); and~~

~~(b) A mixture of either methane or n-hexane and air at a concentration of approximately, but less than, ten thousand parts per million methane or n-hexane.~~

~~(3) The owner or operator shall conduct a performance test initially, and at other times as required by the department, using the test methods and procedures in paragraph 2 of subdivision g of subsection 14 of section 33-15-12-01 to determine compliance of flares.~~

~~(4) After installing the control equipment required to meet paragraph 1 of subdivision k or whenever sources that have ceased to treat refinery wastewater for a period of one year or more are placed back into service, the owner or operator shall determine compliance with the standards in paragraph 1 of subdivision k as follows:~~

~~(a) The maximum gap widths and maximum gap areas between the primary seal and the separator wall and between the secondary seal and the separator wall must be determined individually within sixty calendar days of the initial installation of the floating roof and introduction of refinery wastewater or sixty calendar days after the equipment is placed back into service using the following procedure when the separator is filled to the design operating level and when the roof is floating off the roof supports.~~

~~[1] Measure seal gaps around the entire perimeter of the separator in each place where a 0.32 centimeter [0.125 inch] diameter uniform probe passes freely (without forcing or binding against seal) between the seal and the wall of the separator and measure the gap width and perimetrical distance of each such location.~~

~~[2] The total surface area of each gap described in item 1 of subparagraph a of paragraph 4 of this subdivision must be determined by using probes of various widths to measure accurately the actual~~

~~distance from the wall to the seal and multiplying each such width by its respective perimetrical distance.~~

~~[3] Add the gap surface area of each gap location for the primary seal and the secondary seal individually, divide the sum for each seal by the nominal perimeter of the separator basin and compare each to the maximum gap area as specified in subdivision k.~~

~~(b) The gap widths and total gap area must be determined using the procedure in subparagraph a of paragraph 4 of this subdivision.~~

~~[1] For primary seals, once every five years.~~

~~[2] For secondary seals, once every year.~~

~~o. Recordkeeping requirements.~~

~~(1) Each owner or operator of a facility subject to the provisions of this subsection shall comply with the recordkeeping requirements of this section. All records must be retained for a period of two years after being recorded unless otherwise noted.~~

~~(2) (a) For individual drain systems subject to subdivision d, the location, date, and corrective action must be recorded for each drain when the water seal is dry or otherwise breached, when a drain cap or plug is missing or improperly installed, or other problem is identified that could result in volatile organic compound (VOC) emissions, as determined during the initial and periodic visual or physical inspection.~~

~~(b) For junction boxes subject to subdivision d, the location, date, and corrective action must be recorded for inspections required by paragraph 2 of subdivision d when a broken seal, gap, or other problem is identified that could result in volatile organic compound (VOC) emissions.~~

~~(c) For sewerlines subjects to subdivision d and paragraph 5 of subdivision j, the location, date, and corrective action must be recorded for inspections required by paragraph 3 of subdivision d and paragraph 5 of subdivision j when a problem is identified that could result in volatile organic compound (VOC) emissions.~~

~~(3)~~ ~~For oil-water separators subject to subdivision e, the location, date, and corrective action must be recorded for inspections required by paragraph 1 of subdivision e when a problem is identified that could result in volatile organic compound (VOC) emissions.~~

~~(4)~~ ~~For closed vent systems subject to subdivision g and completely closed drain systems subject to subdivision j, the location, date, and corrective action must be recorded for inspections required by paragraph 5 of subdivision g, during which detectable emissions are measured or a problem is identified that could result in volatile organic compounds (VOC) emissions.~~

~~(5)~~ ~~(a)~~ ~~If an emission point cannot be repaired or corrected without a process unit shutdown, the expected date of a successful repair must be recorded.~~

~~(b)~~ ~~The reason for the delay as specified in subdivision h must be recorded if an emission point or equipment problem is not repaired or connected in the specified amount of time.~~

~~(c)~~ ~~The signature of the owner or operator (or designee) whose decision it was that repair could not be affected without refinery or process shutdown must be recorded.~~

~~(d)~~ ~~The date of successful repair or corrective action must be recorded.~~

~~(6)~~ ~~(a)~~ ~~A copy of all design specifications for all equipment used to comply with the provisions of this subsection must be kept for the life of the source in a readily accessible location.~~

~~(b)~~ ~~The following information pertaining to the design specifications must be kept.~~

~~[1]~~ ~~Detailed schematics, and piping and instrumentation diagrams.~~

~~[2]~~ ~~The dates and descriptions of any changes in the design specifications.~~

~~(c)~~ ~~The following information pertaining to the operation and maintenance of closed drain systems and closed vent systems must be kept in a readily accessible location.~~

~~[1] Documentation demonstrating that the control device will achieve the required control efficiency during maximum loading conditions must be kept for the life of the facility. This documentation is to include a general description of the gas streams that enter the control device, including flow and volatile organic compound (VOC) content under varying liquid level conditions (dynamic and static) and manufacturer's design specifications for the control device. If an enclosed combustion device with a minimum residence time of 0.75 seconds and a minimum temperature of eight hundred sixteen degrees Celsius [1500 degrees Fahrenheit] is used to meet the ninety-five percent requirement, documentation that those conditions exist is sufficient to meet the requirements of this paragraph.~~

~~[2] A description of the operating parameter (or parameters) to be monitored to ensure that the control device will be operated in conformance with these standards and the control device's design specifications and an explanation of the criteria used for selection of that parameter (or parameters) must be kept for the life of the facility.~~

~~[3] Periods when the closed vent systems and control devices required in subdivisions c, d, e, f, g, h, and i are not operated as designed, including periods when a flare pilot does not have a flame must be recorded and kept for two years after the information is recorded.~~

~~[4] Dates of startup and shutdown of the closed vent system and control devices required in subdivisions c, d, e, f, g, h, and i must be recorded and kept for two years after the information is recorded.~~

~~[5] The dates of each measurement of detectable emission required in subdivisions c through k must be recorded and kept for two years after the information is recorded.~~

~~[6] The background level measured during each detectable emissions measurement must be recorded and kept for two years after the information is recorded.~~

~~[7]~~ ~~The maximum instrument reading measured during each detectable emission measurement must be recorded and kept for two years after the information is recorded.~~

~~[8]~~ ~~Each owner or operator of an affected facility that uses a thermal incinerator shall maintain continuous records of the temperature of the gas stream in the combustion zone of the incinerator and records of all three-hour periods of operation during which the average temperature of the gas stream in the combustion zone is more than twenty-eight degrees Celsius [50 degrees Fahrenheit] below the design combustion zone temperature, and shall keep such records for two years after the information is recorded.~~

~~[9]~~ ~~Each owner or operator of an affected facility that uses a catalytic incinerator shall maintain continuous records of the temperature of the gas stream both upstream and downstream of the catalyst bed of the incinerator, records of all three-hour periods of operation during which the average temperature measured before the catalyst bed is more than twenty-eight degrees Celsius [50 degrees Fahrenheit] below the design gas stream temperature, and records of all three-hour periods during which the average temperature difference across the catalyst bed is less than eighty percent of the design temperature difference, and shall keep such records for two years after the information is recorded.~~

~~[10]~~ ~~Each owner or operator of an affected facility that uses a carbon adsorber shall maintain continuous records of the volatile organic compound (VOC) concentration level or reading of organics of the control device outlet gas stream or inlet and outlet gas stream and records of all three-hour periods of operation during which the average volatile organic compound (VOC) concentration level or reading of organics in the exhaust gases, or inlet and outlet gas stream, is more than twenty percent greater than the design exhaust gas concentration level, and shall keep such~~

~~records for two years after the information is recorded.~~

~~(7)~~ ~~If an owner or operator elects to install a tightly sealed cap or plug over a drain that is out of active service, the owner or operator shall keep for the life of a facility in a readily accessible location, plans or specifications which indicate the location of such drains.~~

~~(8)~~ ~~For stormwater sewer systems subject to the exclusion in subparagraph a of paragraph 4 of subdivision c, an owner or operator shall keep for the life of the facility in a readily accessible location, plans or specifications which demonstrate that no wastewater from any process units or equipment is directly discharged to the stormwater sewer system.~~

~~(9)~~ ~~For ancillary equipment subject to the exclusion in subparagraph b of paragraph 4 of subdivision c, an owner or operator shall keep for the life of a facility in a readily accessible location, plans or specifications which demonstrate that the ancillary equipment does not come in contact with or store oil wastewater.~~

~~(10)~~ ~~For noncontact cooling water systems subject to the exclusion in subparagraph c of paragraph 4 of subdivision c, an owner or operator shall keep for the life of the facility in a readily accessible location, plans or specifications which demonstrate that the cooling water does not contact hydrocarbons or oily wastewater and is not recirculated through a cooling tower.~~

~~p. Reporting requirements.~~

~~(1)~~ ~~An owner or operator electing to comply with the provisions of subdivisions j and k shall notify the department of the alternative standard selected in the report required in subsection 6 of section 33-15-12-01.~~

~~(2)~~ ~~(a)~~ ~~Each owner or operator of a facility subject to this subsection shall submit to the department within sixty days after initial startup a certification that the equipment necessary to comply with these standards has been installed and that the required initial inspections or tests of process drains, sewerlines, junction boxes, oil-water separators, and closed vent systems and control devices have been carried out in accordance with these standards.~~

~~Thereafter, the owner or operator shall submit to the department semiannually a certification that all of the required inspections have been carried out in accordance with these standards.~~

~~(b) Each owner or operator of an affected facility that uses a flare shall submit to the department within sixty days after the initial startup, as required under subdivision a of subsection 7 of section 33-15-12-01, a report of the results of the performance test required in paragraph 3 of subdivision n.~~

~~(3) A report that summarizes all inspections when a water seal was dry or otherwise breached, when a drain cap or plug was missing or improperly installed, or when cracks, gaps, or other problems were identified that could result in volatile organic compound (VOC) emissions, including information about the repairs or corrective action taken, must be submitted initially and semiannually thereafter to the department.~~

~~(4) As applicable, a report must be submitted semiannually to the department that indicates:~~

~~(a) Each three-hour period of operation during which the average temperature of the gas stream in the combustion zone of a thermal incinerator, as measured by the temperature monitoring device, is more than twenty-eight degrees Celsius [50 degrees Fahrenheit] below the design combustion zone temperature;~~

~~(b) Each three-hour period of operation during which the average temperature of the gas stream immediately before the catalyst bed of a catalytic incinerator, as measured by the temperature monitoring device, is more than twenty-eight degrees Celsius [50 degrees Fahrenheit] below the design gas stream temperature, and any three-hour period during which the average temperature difference across the catalyst bed (i.e., the difference between the temperatures of the gas stream immediately before and after the catalyst bed), as measured by the temperature monitoring device, is less than eight percent of the design temperature difference; or~~

~~(c) Each three-hour period of operation during which the average volatile organic compound (VOC) concentration level or reading of organics in the exhaust gases from a carbon adsorber is more~~

~~than twenty percent greater than the design exhaust gas concentration level or reading.~~

~~(5) If compliance with the provisions of this subsection is delayed pursuant to subdivision i, the notification required under paragraph 4 of subdivision a of subsection 6 of section 33-15-12-01 must include the estimated date of the next scheduled refinery or process unit shutdown after the date of notification and the reason why compliance with the standards is technically impossible without a refinery or process unit shutdown.~~

History: ~~Amended effective February 1, 1982; October 1, 1987; January 1, 1989; June 1, 1990.~~
General Authority: NDCC 23-25-03, 28-32-01
Law Implemented: NDCC 23-25-03

~~APPENDIX A - REFERENCE METHODS~~

~~The reference methods specified within chapter 33-15-12 are identical to those specified in appendix A, as amended, of Title 40 Code of Federal Regulations, part 60 (40 CFR 60).~~

~~APPENDIX B - PERFORMANCE SPECIFICATIONS~~

~~The performance specifications specified within chapter 33-15-12 are identical to those specified in appendix B, part 60 and appendix E, part 52, as amended, of Title 40 of the Code of Federal Regulations.~~

~~APPENDIX C – DETERMINATION OF EMISSION RATE CHANGE~~

~~The determination of emission rate change method is identical to that specified in appendix C, part 60, as amended, of Title 40 of the Code of Federal Regulations.~~

~~APPENDIX D – [RESERVED]~~

~~APPENDIX E – [RESERVED]~~

~~APPENDIX F – QUALITY ASSURANCE PROCEDURES~~

~~The quality assurance procedures are identical to that specified in appendix F, part 60, as amended, of Title 40 of the Code of Federal Regulations.~~

CHAPTER 33-15-13

33-15-13-01. General provisions. Repealed effective June 1, 1992.

~~1. Applicability. The provisions of this chapter apply to the owner or operator of any stationary source for which a standard is prescribed under this chapter.~~

~~2. Definitions. As used in this chapter, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 or in section 33-15-01-04. Terms defined, both in this subsection and in section 33-15-01-04, shall have the meaning given them in this subsection:~~

~~a. "Alternative method" means any method of sampling and analyzing for an air pollutant which is not a reference method or an equivalent method but which has been demonstrated to the department's and administrator's satisfaction to produce results adequate for the department's and administrator's determination of compliance.~~

~~b. "Capital expenditure" means an expenditure for a physical or operational change to a stationary source which exceeds the product of the applicable "annual asset guideline repair allowance percentage" specified in the latest edition of internal revenue service publication 534 and the stationary source's basis, as defined by section 1012 of the Internal Revenue Code. However, the total expenditure for a physical or operational change to a stationary source must not be reduced by any "excluded additions" as defined for stationary sources constructed after December 31, 1981, in internal revenue service publication 534, as would be done for tax purposes. In addition, "annual asset guideline repair allowance" may be used even though it is excluded for tax purposes in internal revenue service publication 534.~~

~~c. "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.~~

~~d. "Compliance schedule" means the date or dates by which a source or category of sources is required to comply with the standards of this chapter and with any steps toward such compliance which are set forth under subsection 9.~~

~~e. "Construction" means fabrication, erection, or installation of an affected facility.~~

~~f. "Effective date" is the date of promulgation in this article of an applicable standard or other limitation under this chapter.~~

~~g. "Existing source" means any stationary source which is not a new source.~~

~~h. "Monitoring system" means any system, required under the monitoring sections in applicable sections, used to sample and condition (if applicable), to analyze, and to provide a record of emissions or process parameters.~~

~~i. "New source" means any stationary source, the construction or modification of which is commenced after February 9, 1976.~~

~~j. "Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.~~

~~k. "Reference method" means any method of sampling and analyzing for an air pollutant, as described in appendix B to this chapter.~~

~~l. "Run" means the net period of time during which an emission sample is collected. Unless otherwise specified, a run may be either intermittent or continuous within the limits of good engineering practice.~~

~~m. "Standard" means an emission standard including a design, equipment, work practice, or operational standard for a hazardous air pollutant promulgated under this chapter.~~

~~n. "Startup" means the setting in operation of a stationary source for any purpose.~~

~~o. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant which has been designated as hazardous by the department or the United States environmental protection agency.~~

~~3. Abbreviations. The abbreviations used in this chapter have the same meanings as found in subsection 3 of section 33-15-12-01.~~

~~4. Prohibited activities.~~

~~a. After the effective date of any standard prescribed under this chapter, no owner or operator may construct or modify any stationary source subject to such standard without~~

~~first obtaining a permit to construct from the department, except under an exemption granted by the president under section 112(c)(2) of the Federal Clean Air Act.~~

~~b. After the effective date of any standard prescribed under this chapter, no owner or operator may operate any new source in violation of such standard except under an exemption granted by the president under section 112(c)(2) of the Federal Clean Air Act.~~

~~c. Ninety days after the effective date of any standard prescribed under this chapter, no owner or operator may operate any existing stationary source in violation of such standard, except under a permit to operate with an attached compliance schedule granted by the department pursuant to subdivision b of subsection 8 or under an exemption granted by the president under section 112(c)(2) of the Federal Clean Air Act.~~

~~d. No owner or operator subject to the provisions of this chapter may fail to report, revise reports, or report source test results as required under this chapter.~~

~~5. Determination of construction or modification. An owner or operator may submit to the department and administrator a written application for a determination of whether actions intended to be taken by such owner or operator constitute construction or modification or the commencement thereof of a source subject to a standard. The department and administrator will, within thirty days of receipt of sufficient information to evaluate an application, notify the owner or operator of its determination.~~

~~6. Application for permit to construct. The owner or operator of any new source to which a standard prescribed under this chapter is applicable, prior to the date on which construction or modification is planned to commence, shall apply for and receive a permit to construct as provided in section 33-15-14-02.~~

~~7. Notification of startup. Any owner or operator of a source which has an initial startup date after the effective date of a standard prescribed under this chapter shall furnish the department written notification as follows:~~

~~a. A notification of the anticipated date of initial startup of the source not more than sixty days nor less than thirty days prior to such date.~~

~~b. A notification of the actual date of initial startup of the source within fifteen days after such date.~~

~~8. Source reporting and application for permit to operate.~~

~~a. The owner or operator of any existing source, or any new source which had an initial startup date before the effective date of a standard shall provide, within ninety days after the effective date, the following information in writing to the department:~~

~~(1) Name and address of the owner or operator.~~

~~(2) The location of the source.~~

~~(3) The type of hazardous pollutants emitted by the stationary source.~~

~~(4) A brief description of the nature, size, design, and method of operation of the stationary source including the operating design capacity of such source and identifying each point of emission for each hazardous pollutant.~~

~~(5) The average weight per month of the hazardous materials being processed by the source, over the last twelve months preceding the date of the report.~~

~~(6) A description of the existing control equipment for each emission point, including:~~

~~(a) Each control device for each hazardous pollutant.~~

~~(b) Estimated control efficiency (percent) for each control device.~~

~~(7) A statement by the owner or operator of the source as to whether the source can comply with the standards within ninety days of the effective date.~~

~~b. The owner or operator of an existing source unable to operate in compliance with any standard prescribed under this chapter may request the department to grant a permit to operate with an attached compliance schedule requiring compliance with the standard within two years of the effective date of such standard. Any request must be in writing and must include the following information:~~

~~(1) A description of the controls to be installed to comply with the standard.~~

~~(2) A compliance schedule, listing the date each step toward compliance will be reached. The list must include as a minimum the following dates:~~

~~(a) Date by which contracts for emission control systems or process modifications will be~~

~~awarded; or date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification.~~

~~(b) Date of initiation of onsite construction or installation of emission control equipment or process change.~~

~~(c) Date by which onsite construction or installation of emission control equipment or process modification is to be completed.~~

~~(d) Date by which final compliance is to be achieved.~~

~~(3) A description of interim emission control steps which will be taken during the compliance schedule period.~~

~~c. Changes in the information provided under subdivision a or subsection 6 must be provided to the department within thirty days after such change, except that if changes will result in modification of the source, the provisions of subsection 6 are applicable.~~

~~d. The format for reporting under this subsection is included as appendix A to this chapter. Advice on reporting the status of compliance may be obtained from the department.~~

~~9. Permit and compliance schedule.~~

~~a. Based on the information provided in any request under subsection 8, or other information, the department may grant a permit to operate with an attached compliance schedule not exceeding two years from the effective date of such standard.~~

~~b. Such permit will be in writing and will, as a minimum:~~

~~(1) Identify the stationary source covered.~~

~~(2) Specify the date upon which the standard is to be met. The permit may be revoked or suspended if the standard is not met by the date specified or if the conditions specified under paragraph 3 are not met.~~

~~(3) Specify dates by which steps toward compliance are to be taken, and impose such additional conditions as the department determines to be necessary to assure installation of the necessary controls within the compliance schedule period and to assure protection of the health of persons during such period.~~

~~c. Prior to denying any request for a permit pursuant to this subsection, the department will notify the owner or operator making such request of the department's intention to issue such denial, together with:~~

~~(1) Notice of the information and findings on which such intended denial is based.~~

~~(2) Notice of opportunity for such owner or operator to present, within such time limit as the department specifies, additional information or arguments to the department prior to final action on such request.~~

~~d. A final determination to deny any request for a permit under this subsection will be in writing and will set forth the specific grounds on which such denial is based. Such final determination will be made within sixty days after presentation of additional information or arguments, or within sixty days after the final date specified for such presentation, if no presentation is made.~~

~~e. The granting of a permit under this subsection does not abrogate the department's authority under section 33-15-01-05, subsection 9 of section 33-15-14-02, and subsection 6 of section 33-15-14-03.~~

~~10. Compliance with standards and maintenance requirements.~~

~~a. Compliance with numerical emission limits must be determined by emission tests established in subsection 11 unless otherwise specified in an individual section.~~

~~b. Compliance with design, equipment, work practice, or operational standards must be determined as specified in an individual section.~~

~~c. The owner or operator of each stationary source shall maintain and operate the source, including associated equipment for air pollution control, in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the department which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the source.~~

~~d. (1) If, in the administrator and department's judgment, an alternative means of emission limitation will achieve a reduction in emissions of a pollutant from a source at least equivalent to the reduction in emissions of that pollutant from that source achieved under any design, equipment, work practice, or~~

~~operational standard, the department will publish a notice permitting the use of the alternative means for purposes of compliance with the standard. The notice will restrict the permission to the sources or categories of sources on which the alternative means will achieve equivalent emission reductions. The notice may condition permission on requirements related to the operation and maintenance of the alternative means.~~

~~(2) Any notice under paragraph 1 shall be published only after notice and an opportunity for a hearing.~~

~~(3) Any person seeking permission under this subsection shall submit, unless otherwise specified in the applicable section, a proposed test plan or the results of testing and monitoring, a description of the procedures followed in testing or monitoring, and a description of pertinent conditions during testing or monitoring.~~

~~11. Emission tests and waiver of emission tests.~~

~~a. If required to do emission testing by an applicable section and unless a waiver of emission testing is obtained under this subsection, the owner or operator shall test emissions from the source:~~

~~(1) Within ninety days after the effective date, for an existing source or a new source which has an initial startup date before the effective date; or~~

~~(2) Within ninety days after initial startup, for a new source which has an initial startup date after the effective date.~~

~~b. The department may require an owner or operator to test emissions from the source at any other time.~~

~~c. The owner or operator shall notify the department of the emission test at least thirty days before the emission tests to allow the department the opportunity to have an observer present during the test.~~

~~d. If required to do emission testing, the owner or operator of each new source and, at the request of the department, the owner or operator of each existing source shall provide emission testing facilities as follows:~~

~~(1) Sampling ports adequate for test methods applicable to each source.~~

~~(2) Safe sampling platforms.~~

~~(3) Safe access to sampling platforms.~~

~~(4) Utilities for sampling and testing equipment.~~

~~(5) Any other facilities that the department needs to safely and properly test a source.~~

~~e. Each emission test must be conducted under such conditions as the department shall specify based on design and operational characteristics of the source.~~

~~f. Unless otherwise specified in an applicable section, samples must be analyzed and emissions determined within thirty days after each emission test has been completed. The owner or operator shall report the determinations of the emission test to the department by registered letter sent before the close of business on the thirty-first day following the completion of the emission test.~~

~~g. The owner or operator shall retain at the source and make available, upon request, for inspection by the department, for a minimum of two years, records of emission test results and other data needed to determine emissions.~~

~~h. (1) Emission tests must be conducted as set forth in this subsection, the applicable section and appendix B unless the department specifies or approves the use of a reference method with minor changes in methodology, or the department and administrator:~~

~~(a) Approves the use of an alternative method; or~~

~~(b) Waives the requirement for emission testing because the owner or operator of a source has demonstrated by other means to the department's satisfaction that the source is in compliance with the standard.~~

~~(2) If the department finds reasonable grounds to dispute the results obtained by an alternative method, the department may require the use of a reference method. If the results of the reference and alternative methods do not agree, the results obtained by the reference method prevail.~~

~~(3) The owner or operator may request approval for the use of an alternative method at any time, except:~~

~~(a) For an existing source or a new source that had an initial startup before the effective date, any request for use of an alternative method during the initial emission test must be submitted to the department within thirty days~~

~~after the effective date, or with the request for a permit with compliance schedule if one is submitted under subsection 8.~~

~~(b) For a new source that has an initial startup after the effective date, any request for use of an alternative method during the initial emission test must be submitted to the department no later than with the notification of anticipated startup required under subsection 7.~~

~~i. (1) Emission tests may be waived upon written application to the department if, in its judgment, the source is meeting the standard, or if the source is operating under a permit granted under subsection 9 or has requested such permit.~~

~~(2) If application for waiver of the emission test is made, such application must accompany the information required by subsection 8. The appropriate form is contained in appendix A to this chapter.~~

~~(3) Approval of any waiver granted pursuant to this subsection does not abrogate the department's authority under North Dakota Century Code chapter 23-25 or in any way prohibit the department from later canceling such waiver. Such cancellation will be made only after notice is given to the owner or operator of the source.~~

~~12. Monitoring requirements.~~

~~a. Unless otherwise specified, this subsection applies to each monitoring system required under each section which requires monitoring.~~

~~b. Each owner or operator shall maintain and operate each monitoring system as specified in the applicable section and in a manner consistent with good air pollution control practice for minimizing emissions. Any unavoidable breakdown or malfunction of the monitoring system should be repaired or adjusted as soon as practicable after its occurrence. The department's determination of whether acceptable operating and maintenance procedures are being used will be based on information which may include, but not be limited to, review of operating and maintenance procedures, manufacturer recommendations and specifications, and inspection of the monitoring system.~~

~~c. When required by the applicable section, and at any other time the department may require, the owner or operator of a source being monitored shall conduct a performance~~

~~evaluation of the monitoring system and furnish the department with a copy of a written report of the results within sixty days of the evaluation. Such a performance evaluation must be conducted according to the applicable specifications and procedures described in the applicable section. The owner or operator of the source shall furnish the department with written notification of the date of the performance evaluation at least thirty days before the evaluation is to begin.~~

~~d. When the effluents from a single source, or from two or more sources subject to the same emission standards, are combined before being released to the atmosphere, the owner or operator shall install a monitoring system on each effluent or on the combined effluent. If two or more sources are not subject to the same emission standards, the owner or operator shall install a separate monitoring system on each effluent, unless otherwise specified. If the applicable standard is a mass emission standard and the effluent from one source is released to the atmosphere through more than one point, the owner or operator shall install a monitoring system at each emission point unless the installation of fewer systems is approved by the department.~~

~~e. The owner or operator of each monitoring system shall reduce the monitoring data as specified in each applicable section. Monitoring data recorded during periods of unavoidable monitoring system breakdowns, repairs, calibration checks, and zero and span adjustments shall not be included in any data average.~~

~~f. The owner or operator shall maintain records of monitoring data, monitoring system calibration checks, and the occurrence and duration of any period during which the monitoring system is malfunctioning or inoperative. These records must be maintained at the source for a minimum of two years and made available, upon request, for inspection by the department.~~

~~g. (1) Monitoring must be conducted as set forth in this subsection and applicable section unless the department:~~

~~(a) Specifies or approves the use of the specified monitoring requirements and procedures with minor changes in methodology; or~~

~~(b) Approves the use of alternatives to any monitoring requirements or procedures.~~

~~(2) If the department finds reasonable grounds to dispute the results obtained by an alternative monitoring~~

~~method, the department may require the monitoring requirements and procedures specified in this subsection.~~

~~13. Modification.~~

~~a. Except as provided under subdivision d, any physical or operational change to a stationary source which results in an increase in the rate of emission to the atmosphere of a hazardous pollutant to which a standard applies must be considered a modification.~~

~~b. Upon modification, an existing source shall become a new source for each hazardous pollutant for which the rate of emission to the atmosphere increases and to which a standard applies.~~

~~c. Emission rate must be expressed as kilograms per hour or any hazardous pollutant discharged into the atmosphere for which a standard is applicable. The department shall use the following to determine the emission rate:~~

~~(1) Emission factors as specified in the background information document (BID) for the applicable standard, or in the latest issue of "Compilation of Air Pollutant Emission Factors", environmental protection agency publication number AP-42, or other emission factors determined by the department to be superior to AP-42 emission factors, in cases where use of emission factors demonstrates that the emission rate will clearly increase or clearly not increase as a result of the physical or operational change.~~

~~(2) Material balances, monitoring data, or manual emission tests in cases where use of emission factors, as referenced in paragraph 1, does not demonstrate to the department's satisfaction that the emission rate will clearly increase or clearly not increase as a result of the physical or operational change, or where an interested person demonstrates to the department's satisfaction that there are reasonable grounds to dispute the result obtained by the department using emission factors. When the emission rate is based on results from manual emission tests or monitoring data, the procedures specified in appendix 6 of chapter 33-15-12 must be used to determine whether an increase in emission rate has occurred. Tests must be conducted under such conditions as the department shall specify to the owner or operator. At least three test runs must be conducted before and at least three after the physical or operational change. If the department~~

~~approves, the results of the emission tests required in subsection 11 may be used for the test runs to be conducted before the physical or operational change. All operating parameters which may affect emissions must be held constant to the maximum degree feasible for all test runs.~~

~~d. The following may not, by themselves, be considered modifications under this part:~~

~~(1) Maintenance, repair, and replacement which the department determines to be routine for a source category.~~

~~(2) An increase in production rate of a stationary source, if that increase can be accomplished without a capital expenditure on the stationary source.~~

~~(3) An increase in the hours of operation.~~

~~(4) Any conversion to coal that meets the requirements specified in section 111(a)(8) of the Clean Air Act.~~

~~(5) The relocation or change in ownership of a stationary source. However, such activities must be reported in accordance with subdivision c of subsection 8.~~

~~14. Availability of information.~~

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

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

~~15. Circumvention. No owner or operator subject to the provisions of this chapter may build, erect, install, or use any article, machine, equipment, process, or method, the use of which conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous diluents to achieve compliance with a visible emissions standard, and the piecemeal carrying out of an operation to avoid coverage by a standard that applies only to operations larger than a specified size.~~

History: ~~Amended effective February 1, 1982; October 1, 1987; January 1, 1989.~~
General Authority: ~~NDCC 23-25-03~~
Law Implemented: ~~NDCC 23-25-03~~

33-15-13-01.1. Scope. The subparts and appendices of 40 Code of Federal Regulations, part 61 [40 CFR 61] as they exist on May 1, 1991, which are listed in section 33-15-13-01.2 are incorporated into this chapter by reference. Any changes to the emission standard are listed below the title of the standard.

History: Effective June 1, 1992.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-13-01.2. Emission standards.

Subpart A - General provisions.

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

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

The following definition is added:

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

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

Application for permit to construct. The owner or operator of any new source to which a standard prescribed under these subparts is applicable, prior to the date on which construction or modification is planned to commence, shall

apply for and receive a permit to construct as provided in section 33-15-14-02. For those sources on which construction or modification has commenced and initial startup has not occurred prior to the effective date of a standard of this chapter, the owner or operator shall apply for a permit to construct within thirty days after the effective date of the standard.

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

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

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

*61.09(b) is deleted in its entirety.

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

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

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

Availability of information.

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

b. Any records, reports, or information, other than emission data, provided to, or otherwise obtained by, the department in accordance with the provisions of this chapter must be available to the public, except that upon a showing satisfactory to the department by any person that such records, reports, or information, or particular part thereof (other than emission data), if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the department will consider such records, reports, or information, or particular part thereof, confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such records, reports, or

information, or particular part thereof, may be disclosed to other officers, employees, or authorized representatives of the state and federal government concerned with carrying out the provisions of North Dakota Century Code chapter 23-25 or when relevant in any proceeding under North Dakota Century Code chapter 23-25.

*61.17 is deleted in its entirety.

Subpart C - National emission standard for beryllium.

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

Subpart E - National emission standard for mercury.

Subpart F - National emission standard for vinyl chloride.

Subpart G - [Reserved]

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

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

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

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

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

Subpart S - [Reserved]

Subpart U - [Reserved]

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

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

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

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

Appendix B - Test methods.

Appendix C - Quality assurance procedures.

History: Effective June 1, 1992.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-13-02. Emission standard for asbestos.

1. **Applicability.** The provisions of this section are applicable to those sources specified in subsections 3 through ~~16~~ 17.

2. **Definitions.** All terms that are used in this section and are not defined below are given the same meaning as in North Dakota Century Code chapter 23-25 and in section 33-15-13-01.

   a. "Active waste disposal site" means any disposal site other than an inactive site.

   b. "Adequately ~~wetted~~ wet" means to sufficiently ~~mixed~~ mix or ~~coated with amended water, or an aqueous solution to prevent dust emissions~~ penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted; however, the absence of visible emissions is not sufficient evidence of being adequately wet.

   c. "Asbestos" means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite (amosite), anthophyllite, and actinolite-tremolite.

   d. "Asbestos abatement" means any demolition, renovation, salvage, repair, or construction activity which involves the repair, enclosure, encapsulation, removal, handling, or disposal of more than three square feet [0.28 square meters] or three linear feet [0.91 meters] of friable asbestos material. Asbestos abatement also means any inspections, preparation of management plans, and abatement project design for both friable and nonfriable asbestos material.

   e. "Asbestos abatement project designer" means any person who develops the plans, specifications, and designs for an asbestos abatement project.

   f. "Asbestos abatement project monitor" means any person, employed to monitor an asbestos removal project to ensure any of the following:

      (1) The removal is conducted in accordance with state and federal regulations.

(2) State-of-the-art work practices are employed.

(3) The abatement is conducted as designed.

(4) Personal and ambient air samples are collected properly.

Persons acting as the project designer who do not ensure personal and ambient air samples are collected properly and employees of the asbestos removal contractor are excluded from this definition.

g. "Asbestos abatement supervisor" means any person employed by the asbestos contractor who ~~provides supervision and direction to~~ supervises workers engaged in asbestos removal, encapsulation, enclosure, and repair. Supervisors may include those individuals with the position title of foreman, working foreman, or leadman pursuant to collective bargaining agreements.

~~g.~~ h. "Asbestos-containing waste material" means asbestos mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of this section. This term includes ~~asbestos mill tailings, asbestos waste~~ filters from control devices, friable asbestos waste material, and bags or ~~containers that previously contained~~ other similar packaging contaminated with commercial asbestos. As applied to demolition and renovation operations, this term includes ~~only friable asbestos~~ regulated asbestos-containing material waste and materials contaminated with asbestos ~~waste from control devices~~ including disposable equipment and clothing.

~~h.~~ i. "Asbestos contractor" means any partnership, firm, association, operation, or sole proprietorship that contracts to perform asbestos abatement for another.

~~i.~~ j. "Asbestos inspector" means any person who inspects facilities for asbestos-containing materials.

~~j.~~ k. "Asbestos management planner" means any person who develops facility plans for the management of asbestos-containing materials.

~~k. "Asbestos material" means asbestos or any material containing greater than one percent asbestos.~~

l. "Asbestos mill" means any facility engaged in converting, or in any intermediate step in converting, asbestos ore into commercial asbestos. Outside storage of asbestos materials is not considered a part of the asbestos mill.

m. "Asbestos tailings" means any solid waste that contains asbestos and is a product of asbestos mining or milling operations.

n. "Asbestos waste from control devices" means any waste material that contains asbestos and is collected by a pollution control device.

o. "Asbestos worker" means an employee or agent of an asbestos contractor, or a public employee engaged in the abatement of more than three square feet [0.28 square meters] or three linear feet [0.91 meters] of friable asbestos material, except for individuals engaged in abatement at their private residence.

p. "Category I nonfriable asbestos-containing material" means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than one percent asbestos as determined using the methods specified in appendix A, subpart F, 40 CFR part 763, section 1, polarized light microscopy.

q. "Category II nonfriable asbestos-containing material" means any material, excluding category I nonfriable asbestos-containing material, containing more than one percent asbestos as determined using the methods specified in appendix A, subpart F, 40 CFR part 763, section 1, polarized light microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure or by mechanical forces expected to act on the material.

r. "Commercial asbestos" means any material containing asbestos that is extracted from ~~asbestos~~ ore and has value because of its asbestos content.

s. "Cutting" means to penetrate with a sharp-edged instrument and includes sawing, but does not include shearing, slicing, or punching.

~~q.~~ t. "Demolition" means the wrecking or taking out of any load-supporting structural member of a facility, together with any related handling operations or the intentional burning of any facility.

~~r.~~ u. "Emergency renovation operation" means a renovation operation that was not planned but results from a sudden, unexpected event that, if not immediately attended to, presents a safety or public health hazard, is necessary to protect equipment from damage, or is necessary to avoid imposing an unreasonable financial burden. This term includes operations necessitated by nonroutine failures of equipment.

~~s.~~ v. "Encapsulation" means a method of asbestos abatement that includes the treatment of asbestos-containing materials with a sealant material that completely surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers. A bridging encapsulant creates a membrane over the surface while a penetrating encapsulant penetrates the material and binds the material's components together.

~~t.~~ w. "Enclosure" means a method of asbestos abatement that includes the construction of a permanent, airtight, impermeable barrier around asbestos-containing material to prevent the release of asbestos fibers into the air.

~~u.~~ x. "Fabricating" means any processing (e.g., cutting, sawing, drilling) of a manufactured product that contains commercial asbestos, with the exception of processing at temporary sites (field fabricating) for the construction or restoration of facilities. In the case of friction products, fabricating includes bonding, debonding, grinding, sawing, drilling, or other similar operations performed as part of fabricating.

~~v.~~ y. "Facility" means any institutional, commercial, ~~or~~ public, industrial, or residential structure, installation, or building ~~(excluding apartment buildings having no more than four dwelling units)~~ (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation, or building that was previously subject to this section is not excluded, regardless of its current use or function.

~~w.~~ z. "Facility component" means any ~~pipe, duct, boiler, tank, reactor, turbine, or furnace at or in a facility; or any structural member~~ part of a facility including equipment.

~~x.~~ aa. "Friable asbestos material" means any material containing more than one percent asbestos that hand pressure or mechanical forces expected to act on the material can crumble, pulverize, or reduce to powder when dry. The percentage of asbestos is determined using the method specified in appendix A, subpart F, 40 CFR part 763, section 1, polarized light microscopy. If the asbestos content is greater than zero percent, assume the material contains greater than one percent asbestos or verify the asbestos content by point counting using polarized light

microscopy. If a result obtained by point count is different from a result obtained by visual estimation, the point count result will be used.

bb. "Fugitive source" means any source of emissions not controlled by an air pollution control device.

cc. "Glove-bag" means a sealed compartment with attached inner gloves used for the handling of asbestos-containing materials. Properly installed and used, glove-bags provide a small work area enclosure typically used for small-scale asbestos stripping operations. Information on glove-bag installation, equipment and supplies, and work practices is contained in the occupational safety and health administration's (OSHA's) final rule on occupational exposure to asbestos, appendix G, 29 CFR 1926.58.

dd. "Grinding" means to reduce to powder or small fragments and includes mechanical chipping or drilling.

ee. "In poor condition" means the binding of the material is losing its integrity as indicated by peeling, cracking, or crumbling of the material.

~~y.~~ ff. "Inactive waste disposal site" means any disposal site or portion of it where additional asbestos-containing waste material ~~will~~ has not ~~be~~ been deposited ~~and where the surface is not disturbed by vehicular traffic~~ within the past year.

gg. "Installation" means any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operator under common control).

hh. "Leaktight" means that solids or liquids cannot escape or spill out. It also means dusttight.

ii. "Malfunction" means any sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner so that emissions of asbestos are increased. Failures of equipment shall not be considered malfunctions if they are caused in any way by poor maintenance, careless operations, or any other preventable upset conditions, equipment breakdown, or process failure.

~~z.~~ jj. "Manufacturing" means the combining of commercial asbestos, or in the case of woven friction products, the combining of textiles containing commercial asbestos, with any other materials, including commercial asbestos, and

the processing of this combination into a product. Chlorine production is considered a part of manufacturing.

kk. "Natural barrier" means a natural object that effectively precludes or deters access. Natural barriers include physical obstacles such as cliffs, lakes, or other large bodies of water, deep and wide ravines, and mountains. Remoteness by itself is not a natural barrier.

ll. "Nonfriable asbestos-containing material" means any material containing more than one percent asbestos as determined using the method specified in appendix A, subpart F, 40 CFR part 763, section 1, polarized light microscopy, that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure or mechanical forces expected to act on the material.

mm. "Nonscheduled renovation operation" means a renovation operation necessitated by the routine failure of equipment, which is expected to occur within a given period based on past operating experience, but for which an exact date cannot be predicted.

~~aa.~~ nn. "Outside air" means the air outside buildings and structures, including, but not limited to, the air under a bridge or in an open ferry dock.

oo. "Owner or operator of a demolition or renovation activity" means any person who owns, leases, operates, controls, or supervises a facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operations, or both.

~~bb.~~ pp. "Particulate asbestos material" means finely divided particles of asbestos or material containing asbestos.

~~cc.~~ qq. "Planned renovation operations" means a renovation operation, or a number of such operations, in which ~~the amount of friable asbestos material that~~ some regulated asbestos-containing material will be removed or stripped within a given period of time and that can be predicted. Individual nonscheduled operations are included if a number of such operations can be predicted to occur during a given period of time based on operating experience.

~~dd.~~ rr. "Public employee" for the purpose of this chapter means any person employed by the United States government or the state of North Dakota or any of its political subdivisions who provides service for which compensation is paid. This includes employment by appointment or election.

ss. "Regulated asbestos-containing material (RACM)" means:

(1) Friable asbestos material.

(2) Category I nonfriable asbestos-containing material that has become friable.

(3) Category I nonfriable asbestos-containing material that will be or has been subjected to sanding, grinding, cutting, or abrading.

(4) Category II nonfriable asbestos-containing material that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces acting on or expected to act on the material in the course of demolition or renovation operations regulated by this section.

~~ee.~~ tt. "Remove" means ~~friable asbestos materials~~ to take out regulated asbestos-containing material or facility components that contain or are covered with regulated asbestos-containing material from any facility.

~~gg.~~ uu. "Renovation" means altering in any way ~~one~~ a facility or ~~more~~ facility components, including the stripping or removal of regulated asbestos-containing material from a facility component. Operations in which load-supporting structural members are wrecked or taken out are ~~excluded~~ demolitions.

~~ff.~~ vv. "Repair" means returning damaged asbestos-containing materials to an undamaged condition or to an intact state so as to prevent asbestos fiber release.

ww. "Resilient floor covering" means asbestos-containing floor tile, including asphalt and vinyl floor tiles and sheet vinyl floor covering containing more than one percent asbestos as determined using polarized light microscopy according to the methods specified in appendix A, subpart F, 40 CFR part 763, section 1, polarized light microscopy.

~~hh.~~ xx. "Roadways" means surfaces on which motor vehicles travel. This term includes public and private highways, roads, streets, parking areas, and driveways.

~~ii.~~ yy. "Strip" means to take off ~~friable asbestos materials~~ regulated asbestos-containing material from any part of any facility or facility components.

~~jj.~~ zz. "Structural member" means any ~~load supporting~~ member of a facility, such as beams ~~and load supporting~~, walls~~; or any non load supporting member, such as~~, ceilings ~~and non load supporting walls~~, floors, etc.

~~kk.~~ aaa. "Visible emissions" means any emissions ~~containing asbestos material that~~ which are visually detectable without the aid of instruments, coming from regulated asbestos-containing material or asbestos-containing waste material, or from any asbestos milling, manufacturing, or fabricating operations. This does not include condensed uncombined water vapor.

bbb. "Waste generator" means any owner or operator of a source covered by this section whose act or process produces asbestos-containing waste material.

ccc. "Waste shipment record" means the shipping document, required to be originated and signed by the waste generator and is used to track and substantiate the disposition of asbestos-containing waste material.

ddd. "Working day" means any day Monday through Friday and includes holidays that fall on any day Monday through Friday.

3. Standard for abestos mills.

a. Each owner or operator of an asbestos mill shall either discharge no visible emissions to the outside air from that asbestos mill ~~and~~, including fugitive sources, or use the methods specified by subsection 13 to clean emissions containing asbestos material before they escape to, or are vented to, the outside air.

b. Each owner or operator of an asbestos mill shall meet the following requirements:

(1) Monitor each potential source of asbestos emissions from any part of the mill facility, including air-cleaning devices, process equipment, and buildings that house equipment for material processing and handling, at least once each day during daylight hours for visible emissions to the outside air during periods of operation. The monitoring must be by visual observation of at least fifteen seconds duration per source of emissions.

(2) Inspect each air-cleaning device at least once each week for proper operation and for changes that signal the potential for malfunction, including, to the maximum extent possible without dismantling other than opening the device, the presence of tears, holes, and abrasions in filter bags and for dust deposits on the clean side of bags. For air-cleaning devices that cannot be inspected on a weekly basis according to this paragraph, submit to the department, and revise as necessary, a written

maintenance plan to include, at a minimum, the following:

(a) Maintenance schedule.

(b) Recordkeeping plan.

(3) Maintain records of the results of visible emissions monitoring and air-cleaning device inspections using a suitable form which includes the following information:

(a) Date and time of each inspection.

(b) Presence or absence of visible emissions.

(c) Condition of fabric filters including presence of any tears, holes, and abrasions.

(d) Presence of dust deposits on clean side of fabric filters.

(e) Brief description of corrective actions taken including date and time.

(f) Daily hours of operation for each air-cleaning device.

(4) Furnish upon request and make available at the affected facility during normal business hours for inspection by the department all records required under this subdivision.

(5) Retain a copy of all monitoring inspection records for at least two years.

(6) Submit quarterly a copy of visible emissions monitoring records to the department if visible emissions occurred during the report period. Quarterly reports must be postmarked by the thirtieth day following the end of the calendar quarter.

4. Standard for roadways. No person may surface a roadway with asbestos tailings or asbesto-containing waste material.

5. Standard for manufacturing.

a. Applicability. This section applies to the following manufacturing operations using commercial asbestos.

(1) The manufacture of cloth, cord, wicks, tubing, tape, twine, rope, thread, yarn, roving, lap, or other textile materials.

(2) The manufacture of cement products.

(3) The manufacture of fireproofing and insulating materials.

(4) The manufacture of friction products.

(5) The manufacture of paper, millboard, and felt.

(6) The manufacture of ~~floor tile~~ resilient floor covering.

(7) The manufacture of paints, coatings, caulks, adhesives, and sealants.

(8) The manufacture of plastics and rubber materials.

(9) The manufacture of chlorine utilizing asbestos diaphragm technology.

(10) The manufacture of shotgun shell wads.

(11) The manufacture of asphalt concrete.

b. Standard. Each owner or operator of any of the manufacturing operations to which this section applies shall either:

(1) Discharge no visible emissions to the outside air from these operations or from any building or structure in which they are conducted or from any other fugitive sources; or

(2) Use the methods specified by subsection 13 to clean emissions containing asbestos material from these operations before they escape to, or are vented to, the outside air.

(3) Monitor each potential source of asbestos emissions from any part of the manufacturing facility, including air-cleaning devices, process equipment, and buildings housing material processing and handling equipment, at least once each day during daylight hours for visible emission to the outside air during periods of operation. The monitoring must be by visual observation of at least fifteen seconds duration per source of emissions.

(4) Inspect each air-cleaning device at least once each week for proper operation and for changes that signal the potential for malfunctions, including, to the maximum extent possible without dismantling other than opening the device, the presence of tears,

holes, and abrasions in filter bags and for dust deposits on the clean side of bags. For air-cleaning devices that cannot be inspected on a weekly basis according to this paragraph, submit to the department, and revise as necessary, a written maintenance plan to include, at a minimum, the following:

(a) Maintenance schedule.

(b) Recordkeeping plans.

(5) Maintain records of the results of visible emission monitoring and air-cleaning device inspections using a suitable form which includes the following information:

(a) Date and time of each inspection.

(b) Presence or absence of visible emissions.

(c) Condition of fabric filters including presence of any tears, holes, and abrasions.

(d) Presence of dust deposits on clean side of fabric filters.

(e) Brief description of corrective action taken, including date and time.

(f) Daily hours of operation for each air-cleaning device.

(6) Furnish upon request and make available at the affected facility during normal business hours for inspection by the department all records required under this subdivision.

(7) Retain a copy of all monitoring and inspection records for at least two years.

(8) Submit quarterly a copy of the visible emissions monitoring records to the department if visible emissions occurred during the report period. Quarterly reports must be postmarked by the thirtieth day following the end of the calendar quarter.

6. Standard for demolition and renovation.

a. Applicability. To determine which requirements of subdivisions a, b, and c of this subsection apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or

renovation, thoroughly inspect the affected facility, or part of the facility where the demolition or renovation operation will occur, for the presence of asbestos, including category I and category II nonfriable asbestos-containing material. The requirements of subdivisions b and c of this subsection apply to each owner or operator of an asbestos demolition or renovation operation including the removal of regulated asbestos-containing material, as follows:

(1) For ~~any~~ a demolition or renovation project involving the stripping or removal of ~~friable asbestos materials~~ more than three square feet [0.28 square meters] or three linear feet [0.91 meters] of regulated asbestos-containing material, all the ~~procedure~~ procedural requirements of subdivision c apply, except for ordered demolitions as provided in paragraph 4.

(2) ~~If there are any friable asbestos materials present in a demolition project~~ For any facility being demolished, all the notification requirements of subdivision b apply.

(3) ~~If~~ For a renovation project where at least one hundred sixty square feet [14.9 square meters] of ~~friable asbestoes~~ regulated asbestos-containing material on facility components or at least two hundred sixty linear feet [79.3 meters] of ~~friable asbestos~~ regulated asbestos-containing material on pipes or a total of ~~at least~~ thirty-five cubic feet [1 cubic meter] of ~~friable~~ regulated asbestos-containing material on or off ~~all~~ facility components are to be stripped ~~or~~, removed, dislodged, cut, drilled, or similarly disturbed at a facility ~~being renovated,~~ all the notification requirements of subdivision b apply.

(a) To determine whether this paragraph applies to planned renovation operations involving individual nonscheduled operations, predict the additive amount of ~~friable asbestos material~~ regulated asbestos-containing material to be removed or stripped over the maximum period of time a prediction can be made, not to exceed one calendar year of January first through December thirty-first.

(b) To determine whether this paragraph applies to emergency renovation operations, estimate the amount of ~~friable asbestos materials~~ regulated asbestos-containing material to be removed or

stripped as a result of the sudden unexpected event that necessitated the renovation.

(4) If the facility is being demolished under an order of a state or local government agency, issued because the facility is structurally unsound and in danger of imminent collapse, only the requirements of subdivision b and paragraphs 4, 5, 6, ~~and~~ 7, and 8 of subdivision c apply.

(5) Owners or operators of demolition or renovation operations are exempt from the requirements of ~~subdivision a of subsection 4, subsection 6, and subsection 7 of section 33-15-13-01~~ 61.05(a), 61.07, and 61.09 of the general provisions of this chapter.

b. Notification requirements. Each owner or operator to which this section applies shall:

(1) Provide the department with written notice of the intention to demolish or renovate.

(2) Indicate whether the notice is an original or a revised notification and update the notice as necessary including when the amount of asbestos affected changes by at least twenty percent.

(3) Postmark or deliver the notice as follows:

(a) At least ten working days before demolition begins, except as provided in subparagraph b.

(b) As early as possible before, but not later than the following working day after, demolition begins if the operation is described in paragraph 4 of subdivision a or for an emergency renovation as described in subparagraph b of paragraph 3 of subdivision a of this subsection.

(c) At least ten working days before the end of the calendar year preceding the year for which notice is being given for renovations described in subparagraph a of paragraph 3 of subdivision a of this subsection.

~~(c)~~ (d) At least ten working days before renovation begins. When necessary, the department may accept a telephone notification followed by the written ~~notice~~ notification.

~~(d) Within forty-eight hours after the beginning of an emergency renovation operation.~~

(e) In no event may an operation covered by this subsection begin on a date other than the date contained in the written notice unless the department has been supplied a properly amended notification following the timetables outlined above.

~~(3)~~ (4) Include the following information on a notification form provided by the department:

(a) Name ~~and~~, address, and telephone number of both the owner ~~or~~ and operator and the asbestos removal contractor.

(b) Description of the facility or affected part of the facility being demolished or renovated, including the size, age, and prior and present use of the facility.

(c) An estimate of the amount of ~~friable asbestos material present in~~ regulated asbestos-containing material to be removed from the facility in terms of square feet, linear feet or cubic feet, as appropriate. Also estimate the approximate amount of category I and category II nonfriable asbestos-containing material in the affected part of the facility that will not be removed before demolition. Also provide the procedures and analytical methods used to detect the presence and determine the quantity of regulated asbestos-containing material and category I and category II nonfriable asbestos-containing material.

(d) Location of the facility being demolished or renovated to include the street address, city, county, and state.

(e) Scheduled starting and completion dates of ~~demolition or renovation~~ the asbestos abatement work or any other activity that would break up, dislodge, or similarly disturb asbestos material.

(f) Scheduled starting and completion dates of the demolition or renovation.

(g) Type of operation: demolition or renovation.

(h) ~~Nature~~ A description of ~~planned~~ the demolition or renovation ~~and~~ work to be performed including the demolition or renovation techniques and

methods to be ~~used~~ employed during the activity and a description of the affected facility components.

~~(g)~~ (i) ~~Procedures~~ Description of work practices and engineering controls to be used to comply with the requirements of this section, including asbestos removal and waste handling emission control procedures.

~~(h)~~ (j) The name and location of the waste disposal site where the ~~friable asbestos~~ asbestos-containing waste material will be deposited.

(k) The name, address, and telephone number of the waste transporter.

(l) For emergency renovations, provide the date and hour that the emergency occurred, a description of the sudden unexpected event, and an explanation of how the event caused an unsafe condition or would cause equipment damage or an unreasonable financial burden.

(m) Description of procedures to be followed in the event that unexpected regulated asbestos-containing material is found or category II nonfriable asbestos-containing material becomes crumbled, pulverized, or reduced to powder during the operation.

~~(i)~~ (n) For facilities described in paragraph 4 of subdivision a, the name, title, and authority of the state or local governmental representative who has ordered the demolition, the date that the order was issued, and the date on which the demolition was ordered to begin. A copy of the order must be attached to the notification.

~~(j)~~ (o) A signed statement by the contractor that all asbestos abatement supervisors and asbestos workers assigned to this project are certified by the department, in accordance with subsection 16.

c. Procedures for asbestos emission control. Each owner or asbestos contractor to whom this subsection applies shall comply with the following procedures ~~to prevent visible emissions of asbestos material outside the work area~~:

(1) Remove ~~friable asbestos materials~~ all regulated asbestos-containing material from a facility being demolished or renovated before any ~~wrecking or~~

~~dismantling~~ activity begins that would break up, dislodge, or similarly disturb the materials or preclude access to the materials for subsequent removal. ~~However, friable asbestos materials~~ Asbestos-containing material need not be removed before demolition if:

(a) It is category I nonfriable asbestos-containing material that is not in poor condition and is not friable.

(b) ~~They are~~ It is on a facility component that is encased in concrete or other ~~similar~~ similarly hard material~~,~~ and adequately wetted whenever exposed during demolition and maintained wet until it is disposed of in accordance with subsection 11.

~~(b)~~ (c) ~~These~~ It was not accessible for testing and therefore was not discovered before demolition began and the material cannot be safely removed. If not removed for safety reasons, these materials ~~are~~ must be adequately wetted ~~whenever~~ when exposed during demolition ~~to ensure that they remain~~ and maintained wet until they are ~~collected for disposal~~ disposed of in accordance with subsection 11.

(d) They are category II nonfriable asbestos-containing material and the probability is low that the materials will become crumbled, pulverized, or reduced to powder during demolition.

(2) When a facility component that contains, is covered with, or is coated with ~~friable asbestos materials~~ regulated asbestos-containing material is being taken out of the facility as ~~units~~ a unit or in sections:

(a) Adequately wet ~~any friable asbestos materials~~ all regulated asbestos-containing material exposed during cutting or disjointing operations; and

(b) Carefully wrap or otherwise contain the facility member with an impermeable covering prior to the disjoining operation; and

(c) Carefully lower the units or sections to the floor and to ground level, not dropping ~~them or~~, throwing ~~them~~, sliding, or otherwise damaging or disturbing the regulated asbestos-containing material.

(3) ~~Adequately wet friable asbestos materials when they are~~ When regulated asbestos-containing material is being stripped from a facility ~~components before the members are removed from the facility~~ component while it remains in place in a facility, adequately wet the material during the stripping operation.

(a) In renovation operations, wetting that would unavoidably damage equipment or present a safety hazard is not required if ~~the owner or operator~~:

~~(a) Asks the department to determine whether wetting to comply with this paragraph would unavoidably damage equipment, and, before beginning to strip, supplies the department with adequate information to make this determination; and~~

~~(b) When the department does determine that equipment damage would be unavoidable, uses a~~

[1] The owner or operator has obtained prior written approval from the department based on a written application that wetting to comply with this paragraph would unavoidably damage equipment or present a safety hazard; and

[2] The owner or operator uses one of the following emission control methods:

[a] A local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping and removal of the ~~friable~~ asbestos materials. The system must exhibit no visible emissions to the outside air and be equipped with high efficiency particulate air filtration or be designed and operated in accordance with the requirements in subsection 13.

[b] A glove-bag system designed and operated to contain the particulate asbestos material produced by the stripping of the asbestos materials.

[c] Leaktight wrapping to contain all regulated asbestos-containing material prior to dismantlement.

(b) In renovation operations where wetting would result in equipment damage or a safety hazard and the methods allowed in subparagraph a of paragraph 3 of this subdivision cannot be used, another method may be used after obtaining written approval from the department based upon a determination that it is equivalent to wetting in controlling emissions or to the methods allowed in paragraph 3 of this subdivision.

(c) A copy of the department's written approval must be kept at the worksite and made available for inspection.

(4) After a facility component covered with, coated with, or containing regulated asbestos-containing material has been taken out of the facility as units or in sections~~, either~~ pursuant to paragraph 2 of this subdivision it must be kept contained in leaktight wrapping or:

(a) Adequately wet ~~friable asbestos materials~~ the regulated asbestos-containing material during stripping; or

(b) Use a local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping. The system must exhibit no visible emissions to the outside air and be equipped with high efficiency particulate air filtration or be designed and operated in accordance with the requirements in subsection 13.

(5) For large facility components such as reactor vessels, large tanks, and steam generators, but not beams (which must be handled in accordance with paragraphs 2, 3, and 4 of this subdivision) the regulated asbestos-containing material is not required to be stripped if the following requirements are met:

(a) The component is removed, transported, stored, disposed of, or reused without disturbing or damaging the regulated asbestos-containing material;

(b) The component is encased in a leaktight wrapping; and

(c) The leaktight wrapping is labeled according to subsection 11 during all loading and unloading operations and during storage.

(6) For ~~friable asbestos materials~~ all regulated asbestos-containing material, including material that ~~have~~ has been removed or stripped:

(a) Adequately wet the ~~materials to~~ material and ensure that ~~they remain~~ it remains wet until ~~they are~~ collected for disposal in accordance with subsection 11;

(b) Carefully lower the materials to the ground or a lower floor, not dropping ~~or~~, throwing ~~them~~, sliding, or otherwise damaging or disturbing the material; and

(c) Transport the materials to the ground via ~~dusttight~~ leaktight chutes or containers if they have been removed or stripped more than fifty feet [15.24 meters] above ground level and were not removed as units or in sections.

Regulated asbestos-containing material contained in leaktight wrapping that has been removed in accordance with paragraph 4 of this subdivision and subitem 2 of subparagraph a of paragraph 3 of this subdivision need not be wetted.

~~(6)~~ (7) When the temperature at the point of wetting is below zero degrees Celsius [32 degrees Fahrenheit], the owner or operator:

(a) ~~Comply~~ Need not comply with the wetting requirements of ~~paragraphs 4 and 5~~ subparagraph a of paragraph 2 of subdivision c of subsection 4 and paragraph 3 of this subdivision. The owner or operator ~~need not~~ shall comply with the other ~~wetting~~ requirements in this ~~section~~ subdivision; and

(b) Remove facility components containing, coated with or covered with friable asbestos materials as units or in sections to the maximum extent possible~~.~~; and

(c) During periods when wetting operations are suspended due to freezing temperatures, the owner or operator must record the temperature in the area containing the facility components at the beginning, middle, and end of each workday and keep daily temperature records. These records must be available for inspection by the department during normal business hours at the demolition or renovation site. The owner or

operator shall retain the temperature records for at least two years.

(8) No regulated asbestos-containing material may be stripped, removed, or otherwise handled or disturbed at a facility regulated by this subsection unless at least one onsite representative such as a supervisor, foreman or management level person, or other authorized representative who has completed the supervisor training requirements of subparagraph a of paragraph 2 and paragraph 4 of subdivision b of subsection 16 is present. Evidence that the required training has been completed shall be posted and made available for inspection by the department at the demolition or renovation site.

~~(7)~~ (9) For facilities described in paragraph 4 of subdivision a, adequately wet the portion of the facility that contains friable asbestos materials during the wrecking operation.

(10) If a facility is demolished by intentional burning, all regulated asbestos-containing material including category I and category II nonfriable asbestos-containing material must be removed in accordance with this subsection before burning.

~~(8)~~ (11) When a ~~friable asbestos~~ demolition or renovation project that involves the disturbance of regulated asbestos-containing material is conducted in the ambient air, the owner or operator shall designate the boundaries of the work area by appropriate means.

7. Standard for spraying. The owner or operator of an operation in which asbestos-containing materials are spray applied shall use only those materials that contain one percent asbestos or less for spray-on application ~~on buildings, structures, pipes, and conduits~~.

8. Standard for fabricating.

a. Applicability. This subsection applies to the following fabricating operations using commercial asbestos:

(1) The fabrication of cement building products.

(2) The fabrication of friction products, except those operations that primarily install asbestos friction materials on motor vehicles.

(3) The fabrication of cement or silicate board for ventilation hoods; ovens; electrical panels; laboratory furniture; bulkheads, partitions, and

ceilings for marine construction; and flow control devices for the molten metal industry.

b. Standard. Each owner or operator of any of the fabricating operations to which this subsection applies shall ~~either~~:

(1) Discharge no visible emissions to the outside air from any of the operations or from any building or structure in which they are conducted or from any other fugitive sources; or

(2) Use the methods specified by subsection 13 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air.

(3) Monitor each potential source of asbestos emissions from any part of the fabricating facility, including air-cleaning devices, process equipment, and buildings that house equipment for material processing and handling, at least once each day during daylight hours, for visible emissions to the outside air during periods of operation. The monitoring must be by visual observation of at least fifteen seconds duration per source of emissions.

(4) Inspect each air-cleaning device at least once each week for proper operation and for changes that signal the potential for malfunction, including, to the maximum extent possible without dismantling other than opening the device, the presence of tears, holes, and abrasions in filter bags and for dust deposits on the clean side of bags. For air-cleaning devices that cannot be inspected on a weekly basis according to this paragraph, submit to the department, and revise as necessary, a written maintenance plan to include at a minimum, the following:

(a) Maintenance schedule.

(b) Recordkeeping plan.

(5) Maintain records of the results of visible emission monitoring and air-cleaning device inspections using a suitable form which includes the following information:

(a) Date and time of each inspection.

(b) Presence or absence of visible emissions.

(c) Condition of fabric filters, including the presence of any tears, holes, and abrasions.

(d) Presence of dust deposits on clean side of fabric filters.

(e) Brief description of corrective actions taken including date and time.

(f) Daily hours of operation for each air-cleaning device.

(6) Furnish upon request and make available at the affected facility during normal business hours, for inspection by the department, all records required under this section.

(7) Retain a copy of all monitoring and inspection records for at least two years.

(8) Submit quarterly a copy of the visible emission monitoring record to the department if visible emissions occurred during the report period. Quarterly reports must be postmarked by the thirtieth day following the end of the calendar quarter.

9. **Standard for insulating materials.** ~~After October 1, 1987, no~~ No owner or operator of a facility may install or reinstall on a facility component any insulating materials that contain commercial asbestos if the materials are either molded and friable or wet applied and friable after drying. The provisions of this subsection do not apply to spray-applied insulating materials regulated under subsection 7.

10. **Standard for waste disposal for asbestos mills.** Each owner or operator of any source covered under the provisions of subsection 3 shall:

a. Deposit all asbestos-containing waste material at department approved waste disposal sites operated in accordance with the provisions of subsection 15.

b. Discharge no visible emissions to the outside air from the transfer of asbestos waste from control devices to the tailings conveyor, or use the methods specified by subsection 13 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air. Dispose of the asbestos waste from control devices in accordance with subdivision b of subsection 11 or subdivision c of this subsection.

c. Discharge no visible emissions to the outside air during the collection, processing, packaging, transporting, or

deposition of any asbestos-containing waste material, or use one of the disposal methods as follows:

(1) Use a wetting agent as follows:

(a) Adequately mix all asbestos-containing waste material with a wetting agent recommended by the manufacturer of the agent to effectively wet dust and tailings, before depositing the material at a waste disposal site. Use the agent as recommended for the particular dust by the manufacturer of the agent.

(b) Discharge no visible emissions to the outside air from the wetting operation or use the methods specified by subsection 13 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air.

(c) Wetting may be suspended when the ambient temperature at the waste disposal site is less than fifteen degrees Fahrenheit [-9.44 degrees Celsius] as determined by an appropriate measurement method with an accuracy of plus or minus two degrees Fahrenheit [-16.66 degrees Celsius]. During periods when wetting operations are suspended, the temperature must be recorded at least at hourly intervals, and records must be retained for at least two years in a form suitable for inspection.

(2) Use an alternative ~~disposal~~ emission control and treatment method that has received prior written approval by the department and administrator. To obtain approval for an alternative method, a written application must be submitted to the department and the administrator of the United States environmental protection agency demonstrating that the following criteria are met:

(a) The alternative method will control asbestos emissions equivalent to currently required methods.

(b) That the alternative method is suitable for the intended application.

(c) The alternative method will not violate other regulations.

(d) The alternative method will not result in increased water pollution, land pollution, or occupational hazards.

(3) When waste is transported by vehicle to a disposal site, all of the requirements of subdivision d of subsection 11 must be complied with.

11. **Standard for waste disposal for manufacturing, demolition, renovation, and fabricating operations.** Each owner or operator of any source covered under any of the provisions of subsection 5, 6, or 8 shall~~.~~ comply with all the provisions of this subsection. Each owner or operator of any source covered by subsection 10 shall comply with subdivision d of this subsection.

a. ~~Deposit all asbesto-containing waste material at department approved waste disposal sites operated in accordance with the provisions of subsection 15.~~

~~b.~~ Discharge no visible emissions to the outside air during the collection processing (including incineration), packaging, transporting, or deposition of any asbestos-containing waste material generated by the source, or use one of the ~~disposal methods~~ emmission control and waste treatment methods as follows:

(1) ~~Treat~~ Adequately wet asbestos-containing waste material ~~with water~~ as follows:

(a) Mix asbestos waste from control devices with water to form a slurry; adequately wet other asbestos-containing waste material~~.~~;

(b) Discharge no visible emissions to the outside air from collection, mixing, and wetting operations, or use the methods specified by subsection 13 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air~~.~~;

(c) After wetting, seal all asbestos-containing waste material in leaktight containers while wet. For materials that will not fit into containers without additional breaking, put materials into leaktight wrapping;

(d) Label the containers or wrapped materials specified ~~in subparagraph c~~ above as follows:

DANGER

CONTAINS ASBESTOS FIBERS

AVOID CREATING DUST
CANCER AND LUNG DISEASE HAZARD

Alternatively, use warning labels currently specified by occupational safety and health standards of the department of labor, occupational safety and health administration (OSHA) under 29 CFR 1910.1001 or 29 CFR 1926.58~~.~~; and

(e) For asbestos-containing waste material to be transported off the facility site, label containers or wrapped materials with the name of the waste generator and the location at which the waste was generated.

(2) Process asbestos-containing waste material into nonfriable forms as follows:

(a) Form all asbestos-containing waste material into nonfriable pellets or other shapes.

(b) Discharge no visible emissions to the outside air from the collection and processing operations including incineration, or use the methods specified by subsection 13 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air.

(3) For facilities demolished where the regulated asbestos-containing material is not removed prior to demolition according to paragraph 4 of subdivision a and subparagraphs a, b, c, and d of paragraph 1 of subdivision c of subsection 6 adequately wet asbestos-containing waste material at all times during and after demolition and keep wet during handling and loading for transport to a disposal site. Asbestos-containing waste materials covered by this paragraph do not have to be sealed in leaktight containers or wrapping but may be transported by covered hauling and disposed of in bulk.

(4) Use an alternative disposal method that has received prior approval by the department and administrator of the United States environmental protection agency.

(5) As applied to demolition and renovation the requirements of subdivision a of this subsection do not apply to category I or category II nonfriable asbestos-containing material waste that is not or will not become crumbled, pulverized, or reduced to powder.

b. Deposit all asbestos-containing waste material as soon as practical at:

(1) Department-approved waste disposal sites operated in accordance with the provisions of subsection 15.

(2) A United States environmental protection agency approved site that converts regulated asbestos-containing material and asbestos-containing waste material into nonasbestos (asbestos free) material according to the provisions of subsection 17.

(3) The requirements of this subdivision do not apply to category I nonfriable asbestos-containing material that is not or will not become regulated asbestos-containing material.

c. All facilities used for the temporary storage of asbestos-containing waste material ~~in leaktight containers~~ must be controlled~~.~~ and the material must be stored in leaktight containers.

(1) Post a warning sign at the entrances to the temporary storage facility with a label as follows:

DANGER

ASBESTOS
CANCER AND LUNG DISEASE HAZARD
AUTHORIZED PERSONNEL ONLY

Alternatively, use warning labels currently specified by occupational safety and health standards of the department of labor, occupational safety and health administration (OSHA) under 29 CFR 1910.1001 or 29 CFR 1926.58.

(2) Take necessary precautions to prevent or restrict access to ~~that~~ the temporary storage facility.

(3) The temporary storage facility must be inspected at least once per week to ensure that good structural integrity of the storage facility is maintained and that the facility remains secure.

(4) The maximum length of time allowed for temporary storage of an asbestos-containing waste material may not exceed one hundred eighty days.

d. ~~Recordkeeping of all asbestos-containing waste material must be maintained~~ Mark vehicles used to transport asbestos-containing waste material during the loading and

unloading of waste so that the signs are visible. The markings must:

(1) Be displayed in such a manner and location that a person can easily read the legend.

(2) Conform to the requirements for twenty-inch by fourteen-inch [50.8-centimeter by 35.56-centimeter] upright format signs specified in 29 CFR 1910.145(d)(4) and this paragraph; and

(3) Display the following legend in the lower panel with letter sizes and styles of a visibility at least equal to those specified in this paragraph.

Legend	Notation
DANGER	2.5 cm [1 in.] Sans Serif, Gothic, or Block.
ASBESTOS DUST HAZARD	2.5 cm [1 in.] Sans Serif, Gothic, or Block.
CANCER AND LUNG DISEASE HAZARD	1.9 cm [3/4 in.] Sans Serif, Gothic, or Block.
Authorized Personnel Only	14 Point Gothic

Spacing between any two lines must be at least equal to the height of the upper of the two lines.

~~(1)~~ e. Prior to transportation of more than three square feet [0.28 square meters] or three linear feet [0.91 meters] of asbestos-containing waste material~~,~~ off the facility site:

(1) The owner or operator and the transporter shall ensure that a ~~manifest form~~ waste shipment record has been appropriately completed and signed by the generator, ~~except as provided in paragraph 4 of this subdivision~~ and accompanies the waste to the disposal site. The waste shipment record must include the following information:

~~(2) The manifest form must include the following information:~~

(a) Name ~~and~~, address, and telephone number of the facility owner or operator where the ~~source of~~ asbestos-containing waste materials were generated.

(b) Location of the facility where asbestos-containing waste material was generated.

(c) The name and address of this department as being the responsible agency for administering the asbestos NESHAP program.

(d) Estimated quantity of asbestos-containing waste material ~~which may include the total number of containers or the total weight~~ in cubic yards.

~~(d)~~ (e) Name and physical site location of the waste disposal site where the asbestos-containing waste will be deposited.

(f) The name and telephone number of the disposal site operator.

(g) The date transported.

(h) The name, address, and telephone number of the transporters.

(i) A certification that the contents of this consignment are fully and accurately described by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and government regulations.

(2) Provide a copy of the waste shipment record to the disposal site owner or operator at the same time as the asbestos-containing waste material is delivered to the disposal site.

~~(e) Information including, but not limited to, the name of the supervisor and employer of the persons loading the asbestos containing waste material into leaktight containers, the name and employer of the transporter, and the name and employer of the landfill site operator, including the signatures of these persons and the dates of transaction.~~

(3) For waste shipments where a copy of the waste shipment record signed by the owner or operator of the designated disposal site is not received by the waste generator within thirty-five days of the date the waste was accepted by the initial transporter, contact the transporter or the owner or operator, or

both, of the designated disposal site to determine the status of the waste shipment.

(4) Report in writing to this department if a copy of the waste shipment record signed by the owner or operator of the designated waste disposal site is not received by the waste generator within forty-five days of the date the waste was accepted by the initial transporter. Include in the report the following information:

(a) A copy of the waste shipment record for which a confirmation of delivery was not received; and

(b) A cover letter signed by the waste generator explaining the efforts taken to locate the asbestos waste shipment and the result of those efforts.

(5) Retain a copy of all waste shipment records including a copy of the waste shipment record signed by the owner or operator of the designated waste disposal site for at least two years.

(6) A copy of the completed ~~manifest form~~ waste shipment record must be submitted to the department by the owner or operator of the facility no later than ten days after ~~the asbestos containing waste material has been received by a~~ the owner or operator of the facility receives the completed waste shipment record from the landfill operator.

f. Furnish upon request, and make available for inspection by the department, all records required under this section.

~~(4)~~ g. If an acceptable disposal site, as determined by subsection 15, is located on the same property as the facility where asbestos-containing waste materials were generated, then the recordkeeping requirements of subdivision ~~d~~ e of this subsection do not apply. The owner shall maintain records which include information on the quantity, location, and date of asbestos-containing waste disposal activities.

12. **Standard for inactive waste disposal sites for asbestos mills and manufacturing and fabricating operations.** Each owner or operator of any inactive waste disposal site that ~~was operated by sources covered under subsection 3, 5, or 8 and~~ received deposits of asbestos-containing waste material generated by ~~the~~ sources covered under subsection 3, 5, 8, or 10, shall:

a. Comply with one of the following:

(1) ~~Either discharge~~ Discharge no visible emissions to the outside air from an inactive waste disposal site subject to this subsection;

(2) Cover the asbestos-containing waste material with at least fifteen centimeters [6 inches] of compacted non-asbestos-containing material, and grow and maintain a cover of vegetation on the area adequate to prevent exposure of the asbestos-containing waste material;

(3) ~~Cover~~ In areas where vegetation would be difficult to maintain, cover the asbestos-containing waste material with at least sixty centimeters [2 feet] of compacted non-asbestos-containing material, and maintain it to prevent exposure of the asbestos-containing waste~~;~~ or cover with at least six inches [15.24 centimeters] of compacted non-asbestos-containing material and at least an additional three inches [7.62 centimeters] of a nonasbestos crushed rock cover in place of the vegetation; or

(4) For inactive waste disposal sites for asbestos tailings, apply a resinous-based or petroleum-based dust suppression agent that effectively binds dust ~~and controls wind erosion~~ to control surface air emissions. Use the agent ~~as~~ in the manner and frequency recommended for the particular asbestos tailings by the manufacturer of the dust suppression agent. Obtain prior approval of the department to use other equally effective dust suppression agents. For purposes of this paragraph, used, spent, or other waste ~~crankcase~~ oil is not considered a dust suppression agent.

b. Unless a natural barrier adequately deters access by the general public, install and maintain warning signs and fencing as follows, or comply with paragraph 2 or 3 of subdivision a of this subsection.

(1) Display warning signs at all entrances and at intervals of three hundred twenty-eight feet [100 meters] or less along the property line of the site or along the perimeter of the sections of the site where asbestos-containing waste material was deposited. The warning signs must:

(a) Be posted in such a manner and location that a person can easily read the legend.

(b) Conform to the requirements for fifty-one-~~centimeters~~ centimeter by

thirty-six-~~centimeters~~ centimeter [20-~~inches~~ inch by 14-~~inches~~ inch] upright format signs specified in 29 CFR 1910.145(d)(4) and this subdivision.

(c) Display the following legend in the lower panel with letter sizes and styles of a visibility at least equal to those specified in this paragraph.

~~Legend~~	~~Notation~~
~~Asbestos Waste Disposal Site~~	~~2.5 cm [1 inch] Sans Serif, Gothic, or Block~~
~~Avoid Creating Dust Breathing Asbestos Dust May Cause Lung Disease and Cancer~~	~~1.9 cm [3/4 inch] Sans Serif, Gothic, or Block 14 Point Gothic~~

Legend	Notation
DANGER	2.5 cm [1 in.] Sans Serif, Gothic, or Block.
ASBESTOS DUST HAZARD	2.5 cm [1 in.] Sans Serif, Gothic, or Block.
CANCER AND LUNG DISEASE HAZARD	1.9 cm [3/4 in.] Sans Serif, Gothic, or Block.
Authorized Personnel Only	14 Point Gothic

Spacing between any two lines must be at least equal to the height of the upper two lines.

(2) Fence the perimeter of the site in a manner adequate to deter access by the general public.

(3) Upon request and supply of appropriate information, the department will determine whether a fence or a natural barrier adequately deters access by the general public.

c. The owner or operator may use an alternative control method that has received prior approval of the department and administrator of the United States environmental protection agency rather than comply with the requirements of subdivision a or b of this subsection.

d. Notify the department, in writing, at least forty-five days prior to excavating or otherwise disturbing any

asbestos-containing waste material that has been deposited at a waste disposal site under this section and follow the procedures specified in the notification. If the excavation will begin on a date other than the one contained in the original notice, notice of a new start date must be provided to the department at least ten days before excavation begins and in no event shall excavation begin earlier than the date specified in the original notification. Include the following information in the notice:

(1) Scheduled starting and completion dates.

(2) Reason for disturbing the waste.

(3) Procedures to be used to control emissions during the excavation, storage, transport, and ultimate disposal of the excavated asbestos-containing waste material. If deemed necessary, the department may require changes in the emission control procedures to be used.

(4) Location of any temporary storage site and the final disposal site.

e. Within sixty days of a site becoming inactive, record in accordance with state law a notation on the deed to the facility property and on any instrument that would normally be examined during a title search. This notation will in perpetuity notify any potential purchaser of the property that:

(1) The land has been used for the disposal of asbestos-containing waste material;

(2) The survey plot and record of the location and quantity of asbestos-containing waste disposed of within the disposal site required in subdivision f of subsection 15 have been filed with the department; and

(3) The site is subject to this section.

13. Air-cleaning.

a. The owner or operator who elects to use air-cleaning, as permitted in subsections 3, 5, 6, 7, 8, 10, and 11 shall:

(1) Use fabric filter collection devices except as noted in subdivision b of this subsection, doing all of the following:

(a) ~~Operating the fabric filter collection devices at a pressure drop of no more than .995 kilopascal [4 inches water gauge], as measured across the filter fabric.~~

~~(b)~~ Ensuring that the airflow permeability, as determined by A.S.T.M. method D737-75, does not exceed nine $m^3/min/m^2$ [30 $ft^3/min/ft^2$] for woven fabrics or eleven $m^3/min/m^2$ [35 $ft^3/min/ft^2$] for felted fabrics, except that twelve $m^3/min/m^2$ [40 $ft^3/min/ft^2$] for woven and fourteen $m^3/min/m^2$ [45 $ft^3/min/ft^2$] for felted fabrics is allowed for filtering air from asbestos ore dryers.

~~(c)~~ (b) Ensuring that felted fabric weighs at least four hundred seventy-five grams per square meter [14 ounces per square yard] and is at least one and six-tenths millimeters [1/16 inch] thick throughout.

~~(d)~~ (c) Avoiding the use of synthetic fabrics that contain fill yarn other than that which is spun.

(2) Properly install, use, operate, and maintain all air-cleaning equipment authorized by this subsection. Bypass devices may be used only during upset or emergency conditions and then only for so long as it takes to shut down the operation generating the asbestos material.

(3) For fabric filters installed after January 10, 1989, provide for easy inspection for faulty bags.

b. There are the following exceptions to paragraph 1 of subdivision a:

(1) If the use of fabric creates a fire or explosion hazard or the department determines that a fabric filter is not feasible, the department may authorize as a substitute the use of wet collectors designed to operate with a unit contacting energy of at least 9.95 kilopascals [40 inches water gauge pressure].

(2) Use a high efficiency particulate air filter that is certified to be at least ninety-nine and ninety-seven hundredths percent efficient for particles with a diameter size of three-tenths microns and greater.

(3) The department and administrator of the United States environmental protection agency may authorize the use of filtering equipment other than that described in ~~paragraph 1 of subdivision~~ subdivisions a and ~~paragraph 1 of subdivision~~ b of this subsection if

the owner or operator demonstrates to the administrator and the department's satisfaction that it is equivalent to the described equipment in filtering asbestos material.

14. Reporting.

a. ~~Within ninety days after February 9, 1976, each owner or operator of any existing source to which this section applies~~ Any existing source to which this section applies (with the exception of sources subject to subsections 4, 7, and 9) which has not previously supplied a notice to this department or the administrator, shall provide such notice within ninety days of the effective date of this regulation. Any new source to which this section applies shall provide notice to this department within ninety days of the effective startup date of the source. Changes to the information provided in a notice must be submitted to this department within thirty days of the change taking place. The notice shall provide the following information to the department:

(1) A description of the emission control equipment used for each process~~.~~; and

(2) If a fabric filter device is used to control emissions~~, the pressure drop across the fabric filter in inches water gauge.~~;

(a) ~~If the fabric filter device uses a woven fabric, the~~ The airflow permeability in $m^3/min/m^2$ if the fabric filter device uses a woven fabric and; if the fabric is synthetic, whether the fill yarn is spun or not spun.

(b) If the fabric filter device uses a felted fabric, the density in g/m^2, the minimum thickness in ~~inches~~ millimeters, and the airflow permeability in $m^3/min/m^2$.

(3) If a high efficiency particulate air filter is used to control emissions, the certified efficiency.

(4) For sources subject to subsections 10 and 11:

(a) A brief description of each process that generates asbestos-containing waste material~~.~~;

(b) The average ~~weight~~ volume of asbestos-containing waste material disposed of~~, measured in kilograms~~ in cubic yards per day~~.~~;

(c) The emission control methods used in all stages of waste disposal~~.~~; and

(d) The type of disposal site ~~or incineration site~~ used for ultimate disposal, the name of the site operator, and the name and location of the disposal site.

~~(4)~~ (5) For sources subject to ~~subsection~~ subsections 12 and 15:

(a) A brief description of the site~~.~~; and

(b) The method or methods used to comply with the standard, or alternative procedures to be used.

b. The information required by subdivision a of this subsection must accompany the information required by subsection 8 of section 33-15-13-01. ~~The information described in this section must be reported using the format of appendix A.~~ Active waste disposal sites subject to subsection 15 shall also comply with this provision. Roadways, demolition and renovations, spraying, and insulating materials are exempted from the requirements of section 33-15-13-01.1.

15. ~~Active~~ Standard for active waste disposal sites. To be an acceptable site for disposal of asbestos-containing waste material under subsections 10 ~~and~~, 11, and 17, an active waste disposal site must meet the requirements of this subsection. ~~Until the requirements of this subsection have been met, care shall be exercised by the disposal site owner or operator, or both, to avoid rupturing leaktight containers containing asbestos waste, and to avoid crumbling or pulverizing nonfriable asbestos-containing waste material.~~

a. Either there shall be no visible emissions to the outside air from any active waste disposal site where asbestos-containing waste material has been deposited, or the requirements of subdivisions c and d of this subsection must be met.

b. Unless a natural barrier adequately deters access by the general public, either warning signs and fencing must be installed and maintained as follows, or the requirements of paragraph 1 of subdivision c of this subsection must be met.

(1) Warning signs must be displayed at all entrances and at intervals of three hundred twenty-eight feet [100 meters] or less along the property line of the site or along the perimeter of the sections of the site

where asbestos-containing waste material is deposited. The warning signs must:

(a) Be posted in such a manner and location that a person may easily read the legend.

(b) Conform to the requirements of fifty-one centimeters by thirty-six centimeters [20 inches by 14 inches] upright format signs specified in 29 CFR 1910.145(d)(4) and this subsection.

(c) Display the following legend in the lower panel, with letter sizes and styles of a visibility at least equal to those specified in this paragraph.

Legend	Notation
Asbestos Waste Disposal Site	2.5 cm [1 in.] Sans Serif, Gothic, or Block
Avoid Creating Dust Breathing Asbestos Dust May Cause Lung Disease and Cancer	1.9 cm [3/4 in.] Sans Serif, Gothic, or Block 14 Point Gothic

Spacing between lines must be at least equal to the height of the upper two lines.

(2) The perimeter of the disposal site must be fenced in order to adequately deter access to the general public.

(3) Upon request and supply of appropriate information, the department will determine whether a fence or a natural barrier adequately deters access by the general public.

c. Rather than meet the <u>no visible emission</u> requirements of subdivision a <u>of this subsection</u>, an active waste disposal site would be an acceptable site if at the end of each operating day, or at least once every twenty-four-hour period while the site is in continuous operation, the asbestos-containing waste material which was deposited at the site during the operating day or previous twenty-four-hour period is covered with either:

(1) At least fifteen centimeters [6 inches] of compacted non-asbestos-containing material; or

(2) A resinous-based or petroleum-based dust suppression agent that effectively binds dust and controls wind erosion. This agent must be used ~~as~~ in the manner and frequency recommended for the particular dust by the manufacturer of the dust suppression agent. Other equally effective dust suppression agents may be used upon prior approval by the department. For purposes of this paragraph, used, spent, or other waste ~~crankcase~~ oil is not considered a dust suppression agent.

d. Rather than meet the ~~requirements~~ no visible emission requirement of subdivision a~~,~~ ~~an active waste disposal site would be an acceptable site if~~ of this subsection, use an alternative emission control method ~~for emissions~~ that has received prior approval by the department and administrator ~~is used~~ of the United States environmental protection agency.

e. For all asbestos-containing waste material received, the owner or operator of the active waste disposal site shall:

(1) Maintain waste shipment records which include the following information:

(a) The name, address, and telephone number of the waste generator.

(b) The name, address, and telephone number of the transporters.

(c) The quantity of the asbestos-containing material in cubic yards.

(d) The presence of improperly enclosed or uncovered wastes or any asbestos-containing waste material not sealed in leaktight containers. Report in writing to this department by the following working day, the presence of a significant amount of improperly enclosed or uncovered waste. Submit a copy of the waste shipment record along with the report.

(e) The date of the receipt.

(2) As soon as possible and no longer than thirty days after receipt of the waste send a copy of the signed waste shipment record to the waste generator.

(3) Upon discovering a discrepancy between the quantity of waste designated on the waste shipment records and the quantity actually received, attempt to reconcile the discrepancy with the waste generator. If the

discrepancy is not resolved within fifteen days after receiving the waste, immediately report in writing to this department. Describe the discrepancy and attempts to reconcile it, and submit a copy of the waste shipment record along with the report.

(4) Retain a copy of all records and reports required by this paragraph for at least two years.

f. Maintain until closure, records of the location, depth and area and quantity in cubic yards of asbestos-containing waste material within the disposal site on a map or diagram of the disposal area.

g. Upon closure, comply with all the provisions of subsection 12.

h. Submit to this department, upon closure of the facility, a copy of records of asbestos waste disposal locations and quantities.

i. Furnish upon request and make available during normal business for inspection by this department, all records required under this section.

j. Comply with subdivision d of subsection 12 if it becomes necessary to excavate or otherwise disturb asbestos-containing waste material that has been previously covered.

16. **Asbestos abatement licensing and certification.** No public employees or employees of asbestos contractors shall engage in any asbestos abatement activity or provide asbestos abatement project monitoring unless they are certified with the department as provided in this subsection. Certification will be for a period of one year from the completion date of the initial training course or the last refresher source in the appropriate discipline. All asbestos contractors and firms who provide asbestos abatement project monitoring services, must be licensed with this department, as provided in this subsection, prior to beginning asbestos abatement or asbestos abatement project monitoring activities. At least one person having completed the requirements for supervisor certification of subdivision b of this subsection is required to be at the worksite at all times while work is in progress, if the work involves repair, removal, encapsulation, enclosure, or handling of ~~friable asbestos~~ regulated asbestos-containing material~~.~~ ~~Certification of individuals must be for a period of one year from the completion date of the initial training course or the last refresher course in the appropriate discipline~~ if the work is being conducted by an asbestos contractor or public employees. At least one onsite individual having completed the supervisor training

requirement of subdivision b of this subsection is required to be present if the activity is regulated by subsection 6 and the work is being conducted by employees of the owner.

a. Asbestos workers. All asbestos workers employed by asbestos abatement contractors and all public employees engaged in the repair, removal, enclosure, encapsulation, or handling of ~~friable asbestos~~ regulated asbestos-containing material, must obtain certification as outlined in all paragraphs of this subdivision except as provided in subdivision h.

(1) Application. Any applicant desiring certification as an asbestos worker shall make an application to the department on forms supplied by the department. Each application shall be accompanied by a nonrefundable fee of twenty-five dollars except as provided in subdivision g. This fee includes the processing of the initial examination specified in paragraph 3 of this subdivision.

(2) Initial training. Any applicant desiring certification as an asbestos worker shall ~~have completed~~ complete the initial training requirements for asbestos worker accreditation under 40 CFR part 763, appendix C to subpart E - environmental protection agency model contractor accreditation plan, by attending and successfully completing a training course designed for asbestos workers. The training course must have received approval from the environmental protection agency or the department.

(3) Examination. Any applicant for certification shall pass a written examination administered by the department. The department may accept proof of successful completion of an examination administered by an environmental protection agency or department approved training course provider. The examination and the results of the examination must be available to the department upon request. Any applicant who fails to obtain a minimum seventy percent passing score on the examination shall be eligible to take a subsequent examination no earlier than one week following the previous examination. A twenty-five dollar fee is required for each examination. No more than three examinations may be given before requiring attendance of another initial training course. Information concerning the testing arrangements can be obtained from the department.

(4) Refresher training. Any asbestos worker who has received initial training and has established full certification with the department, and who wishes to

maintain continuous certification, shall complete a refresher training course as required by the model contractor accreditation plan within one year of completing the initial training course. The course content shall include, but not be limited to, a review of the changes in federal and state regulations, a discussion of the developments in state-of-the-art procedures and equipment as well as an overview of key aspects of the initial training course. Thereafter, the asbestos worker shall complete a refresher course within one year of the last refresher course.

(5) Certification renewal. Any asbestos worker who desires to renew their certification must have attended a refresher training course within twelve months prior to submittal of the renewal application. The renewal application shall include proof of attendance at such course and a recertification fee of twenty-five dollars. If an asbestos worker does not satisfy the refresher training requirements of this subdivision within two years of the date of the initial training course or of the last refresher training course, then the individual shall complete the initial training requirements provided in paragraph 2 of this subdivision to reestablish full certification.

(6) The certification card issued by the department must be available at the worksite for each asbestos worker.

b. Other asbestos disciplines. Any individual, except asbestos workers, acting as or acting on behalf of an asbestos contractor who performs an asbestos abatement service <u>or any individual who performs asbestos abatement project monitoring on behalf of a contracting firm or as a public employee</u> must obtain certification as outlined in all paragraphs of this subdivision. This certification requirement applies to asbestos abatement supervisors, asbestos inspectors, asbestos management planners, asbestos abatement project designers, <u>asbestos abatement project monitors,</u> and to public employees performing these duties except as provided in subdivision h.

(1) Application. Any person desiring certification in the disciplines of asbestos inspector, asbestos management planner, asbestos abatement project designer, <u>asbestos abatement project monitor,</u> and asbestos abatement supervisor shall make an application to the department on forms supplied by the department. Each application shall be accompanied by a nonrefundable fee of twenty-five

dollars for each discipline within which the applicant is seeking certification except as provided in subdivision g. This fee includes the processing of the initial examination specified in paragraph 3 of this subdivision.

(2) ~~Initial~~ The initial training~~.~~ requirements are as follows:

(a) Any applicant desiring certification as an asbestos inspector, asbestos management planner, asbestos abatement project designer, or asbestos abatement supervisor or any individual required to meet the training requirements of paragraph 8 of subdivision c of subsection 6 shall ~~have completed~~ complete the initial training requirements set forth in 40 CFR part 763, appendix C to subpart E - environmental protection agency model contractor accreditation plan, by attending and successfully completing a training course in the appropriate discipline. The training course must have received approval in the respective discipline from the environmental protection agency or the department. For the purpose of certification, the four-day asbestos abatement supervisor training course will fulfill the initial training requirements for asbestos abatement project designer.

(b) Asbestos abatement project monitors must have a valid state certification as asbestos abatement supervisor or asbestos abatement project designer and shall have completed a NIOSH 582 or equivalent air sampling course of not less than four days in length.

~~An applicant may be certified for more than one discipline provided such certification meets the initial training requirements referenced in this paragraph.~~

(3) Examination. Any applicant for certification in a specific discipline except asbestos abatement project monitor shall pass a written examination administered by the department for that discipline ~~which will be administered by the department~~. The department may accept proof of successful completion of an examination administered by an environmental protection agency or department approved training course provider. The examination and the results of the examination must be available to the department upon request. Any applicant who fails to obtain a

minimum seventy percent passing score on the examination shall be eligible to take a subsequent examination no earlier than one week following the previous examination. A twenty-five dollar fee is required for each examination. No more than three examinations shall be given before requiring attendance of another initial training course.

(4) Refresher training. Any asbestos abatement supervisor, asbestos inspector, asbestos management planner, or asbestos abatement project designer who has received initial training and has established full certification with the department, and who wishes to maintain continuous certification, or any individual who must meet the training requirements of paragraph 8 of subdivision c of subsection 6 shall complete a refresher training course as required by the model contractor accreditation plan within one year of completing the initial training course. The course content shall include, but not be limited to, a review of the changes in the federal and state regulations, a discussion of the developments in state-of-the-art procedures and equipment as well as an overview of key aspects of the initial training course. Thereafter, these persons shall complete a refresher course designed for the respective disciplines within one year of the last refresher course.

(5) Certification renewal. Any asbestos abatement supervisor, asbestos inspector, asbestos management planner, ~~or~~ asbestos abatement project designer, or asbestos abatement project monitor who desires to renew his or her certification must have attended a refresher training course in the appropriate discipline within twelve months prior to submittal of the renewal application. The renewal application shall include proof of attendance at such a course and a recertification fee of twenty-five dollars per discipline. If an individual does not satisfy the refresher training requirements of this subdivision in their respective discipline within two years of the date of the initial training or of the last refresher training, then that individual shall complete the initial training requirements provided in paragraph 2 of this subdivision to reestablish full certification. Refresher training of the air sampling course for project monitors is not required.

(6) The certification card issued by the department must be available at the worksite.

c. Asbestos contractor license. Each ~~asbestos~~ contractor who performs asbestos abatement services or performs asbestos abatement project monitoring services in the state shall obtain an asbestos contractor license except as provided in subdivision h.

(1) Submit an application to the department on forms supplied by the department. An application shall be accompanied by a nonrefundable fee of one hundred dollars.

(2) The license fee will cover the period from January first through December thirty-first of each year unless the license is suspended, revoked, or denied as specified in subdivision f. The fee shall be one hundred dollars regardless of the application date. Following the initial submittal, the renewal fee shall be due and payable by January thirtieth of the following year.

(3) ~~An asbestos~~ A contractor seeking ~~a~~ an asbestos contractor license must have completed the appropriate training and certification requirements in subdivision b of this subsection. The contractor may designate an employee who has completed this requirement to serve as the contractor's agent for the purposes of obtaining ~~a~~ an asbestos contractor license.

(4) Asbestos contractors who provide multiple services are not required to pay additional license fees.

(5) All certifiable services offered by an asbestos contractor must be performed by persons certified in accordance with subdivisions a and b of this subsection.

(6) A copy of the asbestos contractor license shall be made available at the worksite.

(7) This license does not exempt, supersede, or replace any other state or local licensing or permitting requirements.

d. Approved initial and refresher training courses. The department will maintain and provide a listing of approved initial and refresher training courses. Applicants seeking approval of courses, other than those present on the department list, must submit information on the course content on application forms supplied by the department. The course content must satisfy the minimum requirements of the model contractor accreditation plan. The department will advise the applicant whether the course is

approved within thirty days of receipt of the necessary information.

e. Reciprocity. Each applicant for asbestos worker or asbestos contractor certification who is licensed or certified for asbestos abatement in another state may petition the department for certification without written examination. The department shall evaluate the requirements in such other states and shall issue the certification without examination if the department determines that the requirements in such other states are at least as stringent as the requirements for certification in North Dakota. Each application for certification pursuant to this subdivision shall submit an application accompanied by a nonrefundable fee of twenty-five dollars.

f. Suspension, revocation, or denial. An asbestos certification or license may be suspended, revoked, or denied if:

(1) Violations of the requirements of this section are noted;

(2) Another state has revoked, suspended, or denied a license or certification for violations of applicable standards;

(3) An incomplete application is filed; or

(4) The required fee is not submitted.

g. Public employees will not be required to pay the twenty-five dollar certification or recertification fees.

h. Any individual or asbestos contractor engaged in repair, removal, enclosure, or encapsulation activities involving less than or equal to three square feet [0.28 square meters] or three linear feet [0.91 meters] of asbestos-containing materials, are exempt from the certification and licensing requirements of this subsection.

i. Upon written request, the department, at its discretion, may review training course material and conduct an audit of a training course to determine if the course and examination meet the training requirements of 40 CFR part 763, appendix C to subpart E - environmental protection agency model contractor accreditation plan. Under the authority granted to this department by the environmental protection agency on April 21, 1989, courses that this department determine to meet the model

contractor accreditation plan ~~must~~ shall be listed in the federal register list of approved courses.

(1) Training courses seeking department approval shall submit the material necessary for the department to conduct the review including the submittal requirements listed in 40 CFR part 763, appendix C, subpart III.

(2) The department must be provided access, without cost, to any asbestos course conducted in this state to determine if the course meets the requirement of the environmental protection agency model contractor accreditation plan. Following such an audit, the department may rescind approval or refuse to accept as adequate any course determined not to meet the training requirements of the environmental protection agency model contractor accreditation plan.

(3) Any training provider requesting a review of the provider's course for approval by this department shall submit a filing fee of one hundred fifty dollars plus an application processing fee. The application processing fee will be based on the actual processing costs, including time spent by this department to conduct the course review and course audit, and any travel and lodging expenses the department incurs conducting these items. Following the course review and audit, and after making a determination on the accreditation status of the course, a statement will be sent to the applicant listing the remaining application processing costs. The statement must be sent within fifteen months of the submittal of the initial filing fee.

17. Standard for operations that convert asbestos-containing waste material into nonasbestos (asbestos-free) material. Each owner or operator of an operation that converts regulated asbestos-containing material and asbestos-containing waste material into nonasbestos (asbestos-free) material shall:

a. Obtain the prior written approval of this department and the administrator of the United States environmental protection agency to construct the facility. To obtain approval, the owner or operator shall provide the department and the administrator of the United States environmental protection agency with the following information:

(1) Application to construct pursuant to chapter 33-15-14.

(2) In addition to the information requirements of chapter 33-15-14, provide a:

(a) Description of the waste feed handling and temporary storage.

(b) Description of process operating conditions.

(c) Description of the handling and temporary storage of the end products.

(d) Description of the protocol to be followed when analyzing output materials by transmission electron microscopy.

(3) Performance test protocol including provisions for obtaining information required under subdivision b of this subsection.

(4) The department may require that a demonstration of the process be performed prior to approval of the application to construct.

b. Conduct a startup performance test. Test results must include:

(1) A detailed description of the types and quantities of nonasbestos material, regulated asbestos containing material, and asbestos-containing waste material processed (e.g., asbestos cement products, friable asbestos insulation, plaster, wood, plastic, wire, etc.). Test feed is to include the full range of materials that will be encountered in actual operation of the process.

(2) Results of analyses, using polarized light microscopy, that document the asbestos content of the wastes processed.

(3) Results of analyses using transmission electron microscopy, that document that the output materials are free of asbestos. Samples for analysis are to be collected as eight-hour composite samples (one 200 gram [seven ounce] sample per hour), beginning with the initial introduction of regulated asbestos-containing material or asbestos-containing waste material and continuing until the end of the performance test.

(4) A description of operating parameters, such as temperature and residence times, defining the full range over which the process is expected to operate to produce nonasbestos (asbestos-free) materials.

Specify the limits for each operating parameter within which the process will produce nonasbestos (asbestos-free) materials.

(5) The length of the test.

c. During the initial ninety days of operation;

(1) Continuously monitor and log the operating parameters identified during startup performance tests that are intended to ensure the production of nonasbestos (asbestos-free) output material.

(2) Monitor input materials to ensure that they are consistent with the test feed materials described during startup performance tests in paragraph 1 of this subdivision.

(3) Collect and analyze samples taken as ten-day composite samples (one 200 gram [seven ounce] sample collected every eight hours of operation) of all output materials for the presence of asbestos. Composite samples may be for fewer than ten days. Transmission electron microscopy must be used to analyze the output materials for the presence of asbestos. During the initial ninety-day period, all output materials must be stored onsite until analysis shows the material to be asbestos-free or be disposed of as asbestos-containing waste material according to subsection 11.

d. After the initial ninety days of operation:

(1) Continuously monitor and record the operating parameters identified during startup performance testing and any subsequent performance testing. Any output produced during a period of deviation from the range of operating conditions established to ensure the production of nonasbestos (asbestos-free) output material shall be:

(a) Disposed of as asbestos-containing waste material according to subsection 11;

(b) Recycled as waste feed during process operations within the established range of operating conditions; or

(c) Stored temporarily onsite in a leaktight container until analyzed for asbestos content. Any product material that is not asbestos-free shall either be disposed of as

asbestos-containing waste material or recycled as waste feed to the process.

(2) Collect and analyze monthly composite samples (one 200 gram [seven ounce] sample collected every eight hours of operation) of the output material. Transmission electron microscopy must be used to analyze the output material for the presence of asbestos.

e. Discharge no visible emissions to the outside air from any part of the operation or use the methods specified by subsection 13 to clean emissions containing particulate asbestos material before they escape to or are vented to the outside air.

f. Maintain records onsite and include the following information:

(1) Results of startup performance testing and all subsequent performance testing, including operating parameters, feed characteristics, and analyses of output materials.

(2) Results of the composite analysis required during the initial ninety days of operation under subdivision c of this subsection.

(3) Results of the monthly composite analysis required under subdivision d of this subsection.

(4) Results of continuous monitoring and logs of process operating parameters required under subdivisions c and d of this subsection.

(5) Information on waste shipments received as required in subdivision e of subsection 15.

(6) For output materials where no analyses were performed to determine the presence of asbestos, record the name and location of the purchaser or disposal site to which output materials were sold or deposited and the date of sale or disposal.

(7) Retain records required by this subdivision for at least two years.

g. Submit the following reports to the department:

(1) A report for each analysis of product composite samples performed during the initial ninety days of operation.

(2) A quarterly report, including the following information concerning activities during each consecutive three-month period:

(a) Results of analyses of monthly product composite samples.

(b) A description of any deviation from the operating parameters established during performance testing, the duration of the deviation, and steps taken to correct the deviation.

(c) Disposition of any product produced during a period of deviation, including whether it was recycled, disposed of as asbestos-containing waste material, or stored temporarily onsite until analyzed for asbestos content.

(d) The information on waste disposal activities as required in subdivision f of subsection 15.

h. Nonasbestos (asbestos-free) output material is not subject to any of the provisions of this section. Output material in which asbestos is detected, or output materials produced when the operating parameters deviated from those established during the startup performance testing, unless shown by transmission electron microscopy analysis to be asbestos-free shall be considered to be asbestos-containing waste and must be handled and disposed of in accordance with subsections 11 and 15 or reprocessed while all of the established operating parameters are being met.

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

33-15-13-03. Emission standard for beryllium. Repealed effective June 1, 1992.

~~1. Applicability. The provisions of this section are applicable to the following stationary sources:~~

~~a. Extraction plants, ceramic plants, foundries, incinerators, and propellant plants which process beryllium ore, beryllium, beryllium oxide, beryllium alloys, or beryllium containing waste.~~

~~b. Machine shops which process beryllium, beryllium oxides, or any alloy when such alloy contains more than five percent beryllium by weight.~~

~~2. Definitions. As used in this section, all terms not defined in this subsection shall have the meaning given to them in North Dakota Century Code chapter 23-25 or in subsection 2 of section 33-15-13-01.~~

~~a. "Beryllium" means the element beryllium. Where weights or concentrations are specified, such weights or concentrations apply to beryllium only, excluding the weight or concentration of any associated elements.~~

~~b. "Beryllium alloy" means any metal to which beryllium has been added in order to increase its beryllium content and which contains more than one-tenth of one percent beryllium by weight.~~

~~c. "Beryllium-containing waste" means material contaminated with beryllium or beryllium compounds, or both, used or generated during any process or operation performed by a source subject to this section.~~

~~d. "Beryllium ore" means any naturally occurring material mined or gathered for its beryllium content.~~

~~e. "Ceramic plant" means a manufacturing plant producing ceramic items.~~

~~f. "Extraction plant" means a facility chemically processing beryllium ore to beryllium metal, alloy, or oxide, or performing any of the intermediate steps in these processes.~~

~~g. "Foundry" means a facility engaged in the melting or casting of beryllium metal or alloy.~~

~~h. "Incinerator" means any furnace used in the process of burning waste for the primary purpose of reducing the volume of the waste by removing combustible matter.~~

~~i. "Machine shop" means a facility performing cutting, grinding, turning, honing, milling, deburring, lapping, electrochemical machining, etching, or other similar operations.~~

~~j. "Propellant" means a fuel and oxidizer physically or chemically combined which undergoes combustion to provide rocket propulsion.~~

~~k. "Propellant plant" means any facility engaged in the mixing, casting, or machining of propellant.~~

~~3. Emission standard.~~

~~a. Emissions to the atmosphere from stationary sources subject to the provisions of this section may not exceed ten grams of beryllium over a twenty-four hour period, except as provided in subdivision b.~~

~~b. Rather than meet the requirement of subdivision a, an owner or operator may request approval from the department to meet an ambient concentration limit on beryllium in the vicinity of the stationary source of one-hundredths microgram per cubic meter, averaged over a thirty-day period.~~

~~(1) Approval of such requests may be granted by the department provided that:~~

~~(a) At least three years of data is available which in the judgment of the department demonstrates that the future ambient concentrations of beryllium in the vicinity of the stationary source will not exceed one-hundredths microgram per cubic meter, averaged over a thirty-day period. Such three-year period shall be the three years ending thirty days before February 9, 1976.~~

~~(b) The owner or operator requests such approval in writing within thirty days after February 9, 1976.~~

~~(c) The owner or operator submits a report to the department within forty-five days after February 9, 1976, which report includes the following information:~~

~~[1] Description of sampling method including the method and frequency of calibration.~~

~~[2] Method of sample analysis.~~

~~[3] Averaging techniques for determining thirty-day average concentrations.~~

~~[4] Number, identity, and location (address, coordinates, or distance and heading from plant) of sampling sites.~~

~~[5] Ground elevations and height above ground of sampling inlets.~~

~~[6] Plant and sampling area plots showing emission points and sampling sites.~~

~~Topographic features significantly affecting dispersion including plant building heights and locations must be included.~~

~~(7)~~ ~~Information necessary for estimating dispersion including stack height, inside diameter, exit gas temperature, exit velocity or flow rate, and beryllium concentration.~~

~~(8)~~ ~~A description of data and procedures (methods or models) used to design the air sampling network, i.e., number and location of sampling sites.~~

~~(9)~~ ~~Air sampling data indicating beryllium concentrations in the vicinity of the stationary source for the three-year period specified in this paragraph. This data must be presented chronologically and include the beryllium concentration and location of each individual sample taken by the network and the corresponding thirty-day average beryllium concentrations.~~

~~(2)~~ ~~Within sixty days after receiving such report, the department will notify the owner or operator in writing whether approval is granted or denied. Prior to denying approval to comply with the provisions of this subdivision, the department will consult with representatives of the stationary source for which the demonstration report was submitted.~~

~~c.~~ ~~The burning of beryllium or beryllium-containing waste, except propellants, is prohibited except in incinerators, emissions from which must comply with the standard.~~

~~4.~~ ~~Stack sampling.~~

~~a.~~ ~~Unless a waiver of emission testing is obtained under subsection 11 of section 33-15-13-01, each owner or operator required to comply with subdivision a of subsection 3 shall test emissions from the owner's or operator's source.~~

~~(1)~~ ~~Within ninety days of February 9, 1976, in the case of an existing source or a new source which has an initial startup date preceding February 9, 1976, or~~

~~(2)~~ ~~Within ninety days of startup in the case of a new source which did not have an initial startup date preceding February 9, 1976.~~

~~b. The department must be notified at least thirty days prior to an emission test so that the department may observe the test.~~

~~c. Samples must be taken over such a period or periods as are necessary to accurately determine the maximum emissions which will occur in any twenty-four hour period. Where emissions depend upon the relative frequency of operation of different types of processes, operating hours, operating capacities, or other factors, the calculation of maximum twenty-four hour period emissions will be based on that combination of factors which is likely to occur during the subject period and which result in the maximum emissions. No changes in the operation may be made, which would potentially increase emissions above that determined by the most recent source test, until a new emission level has been estimated by calculation and the results reported to the department.~~

~~d. All samples must be analyzed and beryllium emissions must be determined within thirty days after the source test. All determinations must be reported to the department by a registered letter dispatched before the close of the next business day following such determination.~~

~~e. Records of emission test results and other data needed to determine total emissions must be retained at the source and made available, for inspection by the department, for a minimum of two years.~~

~~5. Air sampling.~~

~~a. Stationary sources subject to subdivision b of subsection 3 shall locate air sampling sites in accordance with a plan approved by the department. Such sites must be located in such a manner as is calculated to detect maximum concentrations of beryllium in the ambient air.~~

~~b. All monitoring sites must be operated continuously except for a reasonable time allowance for instrument maintenance and calibration, for changing filters, or for replacement of equipment needing major repair.~~

~~c. Filters must be analyzed and concentrations calculated within thirty days after filters are collected. Records of concentrations at all sampling sites and other data needed to determine such concentrations must be retained at the source and made available, for inspection by the department, for a minimum of two years.~~

~~d. Concentrations measured at all sampling sites must be reported to the department every thirty days by a registered letter.~~

~~e. The department may at any time require changes in, or expansion of, the sampling network.~~

General Authority: ~~NDCC 23-25-03~~
Law Implemented: ~~NDCC 23-25-03~~

33-15-13-04. Emission standard for beryllium rocket motor firing. Repealed effective June 1, 1992.

~~1. Applicability. The provisions of this section are applicable to rocket motor testsites.~~

~~2. Definitions. As used in this section, all terms not defined in this subsection shall have the meaning given to them in North Dakota Century Code chapter 23-25 or in subsection 2 of section 33-15-13-01.~~

~~a. "Beryllium propellant" means any propellant incorporating beryllium.~~

~~b. "Rocket motor testsite" means any building, structure, facility, or installation where the static test firing of a beryllium rocket motor or the disposal of beryllium propellant, or both, is conducted.~~

~~3. Emission standard.~~

~~a. Emissions to the atmosphere from rocket motor testsites may not cause time-weighted atmospheric concentrations of beryllium to exceed seventy-five microgram minutes per cubic meter of air within the limits of ten to sixty minutes, accumulated during any two consecutive weeks, in any area in which an effect adverse to public health could occur.~~

~~b. If combustion products from the firing of beryllium propellant are collected in a closed tank, emissions from such tank may not exceed two grams per hour and a maximum of ten grams per day.~~

~~4. Emission testing - Rocket firing or propellant disposal.~~

~~a. Ambient air concentrations must be measured during and after firing of a rocket motor or propellant disposal and in such a manner that the effect of these emissions can be compared with the standard. Such sampling techniques must be approved by the department.~~

~~b. All samples must be analyzed and results must be calculated within thirty days after samples are taken and before any subsequent rocket motor firing or propellant disposal at the given site. All results must be reported~~

~~to the department by a registered letter dispatched before the close of the next business day following determination of such results.~~

~~c. Records of air sampling test results and other data needed to determine integrated intermittent concentrations must be retained at the source and made available for inspection by the department, for a minimum of two years.~~

~~d. The department must be notified at least thirty days prior to an air sampling test, so that it may at its option observe the test.~~

~~5. Stack sampling.~~

~~a. Sources subject to subdivision b of subsection 3 must be continuously sampled, during release of combustion products from the tank, in such a manner that compliance with the standard can be determined. The provisions of subsection 12 of section 33-15-13-01 shall apply.~~

~~b. All samples must be analyzed, and beryllium emissions must be determined within thirty days after samples are taken and before any subsequent rocket motor firing or propellant disposal at the given site. All determinations must be reported to the department by a registered letter dispatched before the close of the next business day following such determinations.~~

~~c. Records of emission test results and other data needed to determine total emissions must be retained at the source and made available, for inspection by the department, for a minimum of two years.~~

~~d. The department must be notified at least thirty days prior to an emission test so that it may, at its option, observe the test.~~

General Authority: ~~NDCC 23-25-03~~
Law Implemented: ~~NDCC 23-25-03~~

33-15-13-05. Emission standard for mercury. Repealed effective June 1, 1992.

~~1. Applicability. The provisions of this section are applicable to those stationary sources which process mercury ore to recover mercury, use mercury chlor-alkali cells to produce chlorine gas and alkali metal hydroxide, and incinerate or dry wastewater treatment plant sludge.~~

~~2. Definitions. As used in this section, all terms not defined in this subsection shall have the meaning given to them in~~

~~North Dakota Century Code chapter 23-25 or in subsection 2 of section 33-15-13-01.~~

~~a. "Cell room" means a structure or structures housing one or more mercury electrolytic chlor-alkali cells.~~

~~b. "Condenser stack gases" mean the gaseous effluent evolved from the stack of processes utilizing heat to extract mercury metal from mercury ore.~~

~~c. "Denuder" means a horizontal or vertical container which is part of a mercury chlor-alkali cell and in which water and alkali metal amalgam are converted to alkali metal hydroxide, mercury, and hydrogen gas in a short-circuited, electrolytic reaction.~~

~~d. "End box" means a container or containers located on one or both ends of a mercury chlor-alkali electrolyzer which serves as a connection between the electrolyzer and denuder for rich and stripped amalgam.~~

~~e. "End box ventilation system" means a ventilation system which collects mercury emissions from the end boxes, the mercury pump sumps, and their water collection systems.~~

~~f. "Hydrogen gas stream" means a hydrogen stream formed in the chlor-alkali cell denuder.~~

~~g. "Mercury" means the element mercury, excluding any associated elements, and includes mercury in particulates, vapors, aerosols, and compounds.~~

~~h. "Mercury chlor-alkali cell" means a device which is basically composed of an electrolyzer section and a denuder (decomposer) section and utilizes mercury to produce chlorine gas, hydrogen gas, and alkali metal hydroxide.~~

~~i. "Mercury chlor-alkali electrolyzer" means an electrolytic device which is part of a mercury chlor-alkali cell and utilizes a flowing mercury cathode to produce chlorine gas and alkali metal amalgam.~~

~~j. "Mercury ore" means a mineral mined specifically for its mercury content.~~

~~k. "Mercury ore processing facility" means a facility processing mercury ore to obtain mercury.~~

~~l. "Sludge" means sludge produced by a treatment plant that processes municipal or industrial wastewaters.~~

m. "Sludge dryer" means a device used to reduce the moisture content of sludge by heating to temperatures above sixty-five degrees Celsius [circa 150 degrees Fahrenheit] directly with combustion gases.

3. Emission standard.

a. Emission to the atmosphere from mercury ore processing facilities and mercury cell chlor-alkali plants may not exceed two thousand three hundred grams of mercury per twenty-four hour period.

b. Emissions to the atmosphere from sludge incineration plants, sludge drying plants, or a combination of these that process wastewater treatment plant sludges may not exceed three thousand two hundred grams of mercury per twenty-four hour period.

4. Stack sampling.

a. Mercury ore processing facility.

(1) Unless a waiver of emission testing is obtained under subsection 11 of section 33-15-13-01, each owner or operator processing mercury ore shall test emissions from the owner's or operator's source.

(a) Within ninety days of February 9, 1976, in the case of an existing source or a new source which has an initial startup date preceding February 9, 1976, or

(b) Within ninety days of startup in the case of a new source which did not have an initial startup date preceding February 9, 1976.

(2) The department must be notified at least thirty days prior to an emission test so that it may, at its option, observe the test.

(3) Samples must be taken over such a period or periods as are necessary to accurately determine the maximum emissions which will occur in a twenty-four hour period. No changes in the operation may be made, which would potentially increase emissions above that determined by the most recent source test, until the new emission level has been estimated by calculation and the results reported to the department.

(4) All samples must be analyzed, and mercury emissions must be determined within thirty days after the source test. Each determination will be reported to the department by a registered letter dispatched

~~before the close of the next business day following such determination.~~

~~(5)~~ ~~Records of emission test results and other data needed to determine total emissions must be retained at the source and made available, for inspection by the department, for a minimum of two years.~~

~~b.~~ ~~Mercury chlor-alkali plant hydrogen and end box ventilation gas streams.~~

~~(1)~~ ~~Unless a waiver of emission testing is obtained under subsection 11 of section 33-15-13-01, each owner or operator employing mercury chlor-alkali cell or cells shall test emissions from the owner's or operator's source.~~

~~(a)~~ ~~Within ninety days of February 9, 1976, in the case of an existing source or a new source which has an initial startup date preceding February 9, 1976, or~~

~~(b)~~ ~~Within ninety days of startup in the case of a new source which did not have an initial startup date preceding February 9, 1976.~~

~~(2)~~ ~~The department must be notified at least thirty days prior to an emission test so that it may, at its option, observe the test.~~

~~(3)~~ ~~Samples must be taken over such a period or periods as are necessary to accurately determine the maximum emissions which will occur in a twenty-four hour period. No changes in the operation may be made, which would potentially increase emissions above that determined by the most recent source test, until the new emission has been estimated by calculation and the results reported to the department.~~

~~(4)~~ ~~All samples must be analyzed and mercury emissions must be determined within thirty days after the source test. All the determinations will be reported to the department by a registered letter dispatched before the close of the next business day following such determination.~~

~~(5)~~ ~~Records of emission test results and other data needed to determine total emissions must be retained at the source and made available, for inspection by the department, for a minimum of two years.~~

~~c.~~ ~~Mercury chlor-alkali plants - cell room ventilation system.~~

~~(1) Stationary sources using mercury chlor-alkali cells may test cell room emissions in accordance with paragraph 2 or demonstrate compliance with paragraph 4 and assume ventilation emissions of one thousand three hundred grams per day of mercury.~~

~~(2) Unless a waiver of emission testing is obtained under subsection 11 of section 33-15-13-01, each owner or operator shall pass all cell room air in forced gas streams through stacks suitable for testing.~~

~~(a) Within ninety days of the effective date in the case of an existing source or a new source which has an initial startup date preceding February 9, 1976, or~~

~~(b) Within ninety days of startup in the case of a new source which did not have an initial startup date preceding February 9, 1976.~~

~~(3) The department must be notified at least thirty days prior to an emission test so that it may, at its option, observe the test.~~

~~(4) An owner or operator may carry out approved design, maintenance, and housekeeping practices. A list of approved design, maintenance, and housekeeping practices may be obtained from the department.~~

~~d. Sludge incineration and drying plants.~~

~~(1) Unless a waiver of emission testing is obtained under subsection 11 of section 33-15-13-01, each owner or operator of a source subject to the standard in subdivision b of subsection 3 shall test emissions from that source. Such tests must be conducted in accordance with the procedures set forth either in this subdivision or in subsection 5.~~

~~(2) Method 101 in appendix B to this chapter shall be used to test emissions as follows:~~

~~(a) The test must be performed within ninety days of February 9, 1976, in the case of an existing source or a new source which has an initial startup date preceding February 9, 1976.~~

~~(b) The test must be performed within ninety days of startup in the case of a new source which did not have an initial startup date preceding February 9, 1976.~~

~~(3) The department must be notified at least thirty days prior to an emission test so that it may, at its option, observe the test.~~

~~(4) Samples must be taken over such a period or periods as are necessary to determine accurately the maximum emissions which will occur in a twenty-four hour period. No changes may be made in the operation which would potentially increase emissions above the level determined by the most recent stack test, until the new emission level has been estimated by calculation and the results reported to the department.~~

~~(5) All samples must be analyzed, and mercury emissions must be determined within thirty days after the stack test. Each determination must be reported to the department by a registered letter dispatched before the close of the next business day following such determination.~~

~~(6) Records of emission test results and other data needed to determine total emissions must be retained at the source and must be made available, for inspection by the department, for a minimum of two years.~~

~~5. Sludge sampling.~~

~~a. As an alternative means for demonstrating compliance with subdivision b of subsection 3, an owner or operator may use method 105 of appendix B and the procedures specified in this subsection.~~

~~(1) A sludge test must be conducted within ninety days of February 9, 1976, in the case of an existing source or a new source which has an initial startup date preceding February 9, 1976.~~

~~(2) A sludge test must be conducted within ninety days of startup in the case of a new source which did not have an initial startup date preceding February 9, 1976.~~

~~b. The department must be notified at least thirty days prior to a sludge sampling test so that it may, at its option, observe the test.~~

~~c. Sludge must be sampled according to paragraph 1, sludge charging rate for the plant must be determined according to paragraph 2, and the sludge analysis must be performed according to paragraph 3.~~

~~(1)~~ ~~The sludge must be sampled after dewatering and before incineration or drying, at a location that provides a representative sample of the sludge that is charged to the incinerator or dryer. Eight consecutive grab samples must be obtained at intervals of between forty-five and sixty minutes and thoroughly mixed into one sample. Each of the eight grab samples shall have a volume of at least two hundred milliliters but not more than four hundred milliliters. A total of three composite samples must be obtained within an operating period of twenty-four hours. When the twenty-four hour operating period is not continuous, the total sampling period may not exceed seventy-two hours after the first grab sample is obtained. Samples may not be exposed to any condition that may result in mercury contamination or loss.~~

~~(2)~~ ~~The maximum twenty-four hour period sludge incineration or drying rate must be determined by use of a flow rate measurement device that can measure the mass rate of sludge charged to the incinerator or dryer with an accuracy of plus or minus five percent over its operating range. Other methods of measuring sludge mass charging rates may be used if they have received prior approval by the department.~~

~~(3)~~ ~~The handling, preparation, and analysis of sludge samples must be accomplished according to method 105 in appendix B of this chapter.~~

~~d.~~ ~~The mercury emissions must be determined by use of the following equation:~~

$$E_{Hg} = 1 \times 10^{-3} cQ$$

~~where:~~

E_{Hg} = ~~mercury emissions, grams per day.~~

c = ~~mercury concentration of sludge on a dry solids basis, micrograms per gram (parts per million).~~

Q = ~~sludge charging rate, kilograms per day.~~

~~e.~~ ~~No changes in the operation of a plant may be made after a sludge test has been conducted which would potentially increase emissions above the level determined by the most recent sludge test, until the new emission level has been estimated by calculation and the results reported to the department.~~

~~f. All sludge samples must be analyzed for mercury content within thirty days after the sludge sample is collected. Each determination must be reported to the department by a registered letter dispatched before the close of the next business day following such determination.~~

~~g. Records of sludge sampling, charging rate determination, and other data needed to determine mercury content of wastewater treatment plant sludges must be retained at the source and made available, for inspection by the department, for a minimum of two years.~~

~~6. Emission monitoring - Wastewater treatment plant sludge incineration and drying plants. All such sources for which mercury emissions exceed one thousand six hundred grams per day, demonstrated either by stack sampling according to subsection 4 or sludge sampling according to subsection 5, shall monitor mercury emissions at intervals of at least once per year by use of method 105 of appendix B, or the procedures specified in subdivisions c and d of subsection 5. The results of monitoring must be reported and retained according to paragraphs 5 and 6 of subdivision d of subsection 4 or subdivisions f and g of subsection 5.~~

General Authority: ~~NDCC 23-25-03~~
Law Implemented: ~~NDCC 23-25-03~~

33-15-13-06. Emission standard for vinyl chloride. Repealed effective June 1, 1992.

~~1. Applicability.~~

~~a. This section applies to plants which produce:~~

~~(1) Ethylene dichloride by reaction of oxygen and hydrogen chloride with ethylene.~~

~~(2) Vinyl chloride by any process.~~

~~(3) One or more polymers containing any fraction of polymerized vinyl chloride.~~

~~b. This section does not apply to equipment used in research and development if the reactor used to polymerize the vinyl chloride processed in the equipment has a capacity of no more than nineteen hundredths of a cubic meter [50 gallons].~~

~~c. Provisions of this section other than paragraph 1 of subdivision a, subdivision b, subdivision c, and subdivision d of subsection 5 do not apply to equipment used in research and development if the reactor used to~~

~~polymerize the vinyl chloride processed in the equipment has a capacity of greater than nineteen hundredths of a cubic meter [50 gallons] and no more than four and seven-hundredths cubic meters [1,100 gallons].~~

~~2. Definitions. Terms used in this section are defined in North Dakota Century Code chapter 23-25, in subsection 2 of section 33-15-12-01, or in this subsection as follows:~~

~~a. "Bulk resin" means a resin which is produced by a polymerization process in which no water is used.~~

~~b. "Dispersion resin" means a resin manufactured in such a way as to form fluid dispersions when dispersed in a plasticizer or plasticizer/diluent mixtures.~~

~~c. "Ethylene dichloride plant" includes any plant which produces ethylene dichloride by reaction of oxygen and hydrogen chloride with ethylene.~~

~~d. "Ethylene dichloride purification" includes any part of the process of ethylene dichloride production which follows ethylene dichloride formation and in which finished ethylene dichloride is produced.~~

~~e. "Grade of resin" means the subdivision of resin classification which describes it as a unique resin, i.e., the most exact description of a resin with no further subdivision.~~

~~f. "In vinyl chloride service" means that a piece of equipment contains or contacts either a liquid that is at least ten percent by weight vinyl chloride or a gas that is at least ten percent by volume vinyl chloride.~~

~~g. "Inprocess wastewater" means any water which, during manufacturing or processing, comes into direct contact with vinyl chloride or polyvinyl chloride or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product containing vinyl chloride or polyvinyl chloride but which has not been discharged to a wastewater treatment process or discharged untreated as wastewater.~~

~~h. "Latex resin" means a resin which is produced by a polymerization process which initiates from free radical catalyst sites and is sold undried.~~

~~i. "Polyvinyl chloride plant" includes any plant where vinyl chloride alone or in combination with other materials is polymerized.~~

~~j. "Reactor" includes any vessel in which vinyl chloride is partially or totally polymerized into polyvinyl chloride.~~

~~k. "Reactor opening loss" means the emissions of vinyl chloride occurring when a reactor is vented to the atmosphere for any purpose other than an emergency relief discharge, as defined in subdivision a of subsection 6.~~

~~l. "Run" means the net period of time during which an emission sample is collected.~~

~~m. "Slip gauge" means a gauge which has a probe that moves through the gas/liquid interface in a storage or transfer vessel and indicates the level of vinyl chloride in the vessel by the physical state of the material the gauge discharges.~~

~~n. "Standard operating procedure" means a formal written procedure officially adopted by the plant owner or operator and available on a routine basis to those persons responsible for carrying out the procedure.~~

~~o. "Standard pressure" means a pressure of seven hundred sixty millimeters of mercury [29.92 inches of mercury].~~

~~p. "Standard temperature" means a temperature of twenty degrees Celsius [68 degrees Fahrenheit].~~

~~q. "Stripper" includes any vessel in which residual vinyl chloride is removed from polyvinyl chloride resin, except bulk resin, in the slurry form by the use of heat or vacuum. In the case of bulk resin, stripper includes any vessel which is used to remove residual vinyl chloride from polyvinyl chloride resin immediately following the polymerization step in the plant process flow.~~

~~r. "Type of resin" means the broad classification of resin referring to the basic manufacturing process for producing that resin, including, but not limited to, the suspension, dispersion, latex, bulk, and solution processes.~~

~~s. "Vinyl chloride plant" includes any plant which produces vinyl chloride by any process.~~

~~t. "Vinyl chloride purification" includes any part of the process of vinyl chloride production which follows vinyl chloride formation and in which vinyl chloride is produced.~~

~~u. "Wastewater treatment process" includes any process which modifies characteristics such as BOD, COD, TSS, and pH, usually for the purpose of meeting effluent guidelines and standards; it does not include any process the purpose of~~

~~which is to remove vinyl chloride from water to meet requirements of this subsection.~~

~~3. Emission standard for ethylene dichloride plants. Any owner or operator of any ethylene dichloride plant shall comply with the requirements of this subsection and subsection 6.~~

~~a. Ethylene dichloride purification. The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from any equipment used in ethylene dichloride purification is not to exceed ten parts per million, except as provided in subdivision a of subsection 6. This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in subparagraph a of paragraph 6 of subdivision b of subsection 6 before being opened.~~

~~b. Oxychlorination reactor. Except as provided in subdivision a of subsection 6, emissions of vinyl chloride to the atmosphere from each oxychlorination reactor are not to exceed two tenths of a gram per kilogram [0.0002 pound per pound] of the one hundred percent ethylene dichloride product from the oxychlorination process.~~

~~4. Emission standard for vinyl chloride plants. An owner or operator of a vinyl chloride plant shall comply with the requirements of this subsection and subsection 6.~~

~~a. Vinyl chloride formation and purification. The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from any equipment used in vinyl chloride formation or purification is not to exceed ten parts per million, except as provided in subdivision a of subsection 6. This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in subparagraph a of paragraph 6 of subdivision b of subsection 6 before being opened.~~

~~5. Emission standard for polyvinyl chloride plants. An owner or operator of a polyvinyl chloride plant shall comply with the requirements of this subsection and subsection 6.~~

~~a. Reactor. The following requirements apply to reactors:~~

~~(1) The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each reactor is not to exceed ten parts per million, except as provided in paragraph 2 and subsection 6.~~

~~(2) The reactor opening loss from each reactor is not to exceed two hundredths gram vinyl chloride per kilogram [0.00002 pound vinyl chloride per pound] of polyvinyl chloride product, with the product~~

~~determined on a dry solids basis. This requirement applies to any vessel which is used as a reactor or as both a reactor and a stripper. In the bulk process, the product means the gross product of prepolymerization and postpolymerization.~~

~~(3) Manual vent valve discharge. Except for an emergency manual vent valve discharge, there is to be no discharge to the atmosphere from any manual vent valve on a polyvinyl chloride reactor in vinyl chloride service. An emergency manual vent valve discharge means a discharge to the atmosphere which could not have been avoided by taking measures to prevent the discharge. Within ten days of any discharge to the atmosphere from any manual vent valve, the owner or operator of the source from which the discharge occurs shall submit to the department a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.~~

~~b. Stripper. The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each stripper is not to exceed ten parts per million, except as provided in subdivision a of subsection 6. This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in subparagraph a of paragraph 6 of subdivision b of subsection 6 before being opened.~~

~~c. Mixing, weighing, and holding containers. The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each mixing, weighing, or holding container in vinyl chloride service which precedes the stripper (or the reactor if the plant has no stripper) in the plant process flow is not to exceed ten parts per million, except as provided in subdivision a of subsection 6. This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in subparagraph a of paragraph 6 of subdivision b of subsection 6 before being opened.~~

~~d. Monomer recovery system. The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each monomer recovery system is not to exceed ten parts per million, except as provided in subdivision a of subsection 6. This requirement does not apply to equipment that has been opened, is out of operation, and~~

~~met the requirement in subparagraph a of paragraph 6 of subdivision b of subsection 6 before being opened.~~

~~e. Sources following the stripper. The following requirements apply to emissions of vinyl chloride to the atmosphere from the combination of all sources following the stripper (or the reactor if the plant has no stripper) in the plant process flow including, but not limited to, centrifuges, concentrators, blend tanks, filters, dryers, conveyor air discharges, baggers, storage containers, and inprocess wastewater:~~

~~(1) In polyvinyl chloride plants using stripping technology to control vinyl chloride emissions, the weighted average residual vinyl chloride concentration in all grades of polyvinyl chloride resin processed through the stripping operation on each calendar day, measured immediately after the stripping operation is completed, may not exceed:~~

~~(a) Two thousand parts per million for polyvinyl chloride dispersion resins, excluding latex resins.~~

~~(b) Four hundred parts per million for all other polyvinyl chloride resins, including latex resins, averaged separately for each type of resin.~~

~~(2) In polyvinyl chloride plants controlling vinyl chloride emissions with technology other than stripping or in addition to stripping, emissions of vinyl chloride to the atmosphere may not exceed:~~

~~(a) Two grams per kilogram [0.002 pound per pound] product from the stripper (or reactor if the plant has no stripper) for dispersion polyvinyl chloride resins, excluding latex resins, with the product determined on a dry solids basis.~~

~~(b) Four tenths gram per kilogram [0.0004 pound per pound] product from the stripper (or reactor if the plant has no stripper) for all other polyvinyl chloride resins, including latex resins, with the product determined on a dry solids basis.~~

~~6. Emission standard for ethylene dichloride, vinyl chloride, and polyvinyl chloride plants. An owner or operator of an ethylene dichloride, vinyl chloride, or polyvinyl chloride plant shall comply with the requirements of this subsection:~~

~~a. Relief valve discharge. Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge. Within ten days of any relief valve discharge, the owner or operator of the source from which the relief valve discharge occurs shall submit to the department a report in writing containing information on the source, nature, and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.~~

~~b. Fugitive emission sources.~~

~~(1) Loading and unloading lines. Vinyl chloride emissions from loading and unloading lines in vinyl chloride service which are opened to the atmosphere after each loading or unloading operation are to be minimized as follows:~~

~~(a) After each loading or unloading operation and before opening a loading or unloading line to the atmosphere, the quantity of vinyl chloride in all parts of each loading or unloading line that are to be opened to the atmosphere is to be reduced so that the parts combined contain no greater than thirty-eight ten-thousandths cubic meter [0.13 cubic feet] of vinyl chloride, at standard temperature and pressure.~~

~~(b) Any vinyl chloride removed from a loading or unloading line in accordance with subparagraph a is to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million, or equivalent as provided in subsection 7.~~

~~(2) Slip gauges. During loading or unloading operations, the vinyl chloride emissions from each slip gauge in vinyl chloride service are to be minimized by ducting any vinyl chloride discharged from the slip gauge through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million, or equivalent as provided in subsection 7.~~

~~(3) Leakage from pump, compressor, and agitator seals.~~

~~(a)~~ ~~Rotating pumps.~~ ~~Vinyl chloride emissions from seals on all rotating pumps in vinyl chloride service are to be minimized by installing sealless pumps, pumps with double mechanical seals, or equivalent as provided in subsection 7. If double mechanical seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the pump; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million; or equivalent as provided in subsection 7.~~

~~(b)~~ ~~Reciprocating pumps.~~ ~~Vinyl chloride emissions from seals on all reciprocating pumps in vinyl chloride service are to be minimized by installing double outboard seals, or equivalent as provided in subsection 7. If double outboard seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the pump; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million; or equivalent as provided in subsection 7.~~

~~(c)~~ ~~Rotating compressors.~~ ~~Vinyl chloride emissions from seals on all rotating compressors in vinyl chloride service are to be minimized by installing compressors with double mechanical seals, or equivalent as provided in subsection 7. If double mechanical seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the compressor; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million; or equivalent as provided in subsection 7.~~

~~(d)~~ ~~Reciprocating compressors.~~ ~~Vinyl chloride emissions from seals on all reciprocating compressors in vinyl chloride service are to be minimized by installing double outboard seals, or equivalent as provided in subsection 7. If double outboard seals are used, vinyl chloride~~

~~emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the compressor; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million; or equivalent as provided in subsection 7.~~

~~(e) Agitator. Vinyl chloride emissions from seals on all agitators in vinyl chloride service are to be minimized by installing agitators with double mechanical seals; or equivalent as provided in subsection 7. If double mechanical seals are used; vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the agitated vessel; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million; or equivalent as provided in subsection 7.~~

~~(4) Leakage from relief valves. Vinyl chloride emissions due to leakage from each relief valve on equipment in vinyl chloride service are to be minimized by installing a rupture disk between the equipment and the relief valve; by connecting the relief valve discharge to a process line or recovery system; or equivalent as provided in subsection 7.~~

~~(5) Manual venting of gases. Except as provided in paragraph 3 of subdivision a of subsection 5, all gases which are manually vented from equipment in vinyl chloride service are to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million; or equivalent as provided in this section.~~

~~(6) Opening of equipment. Vinyl chloride emissions from opening of equipment (including loading or unloading lines that are not opened to the atmosphere after each loading or unloading operation) are to be minimized as follows:~~

~~(a) Before opening any equipment for any reason, the quantity of vinyl chloride is to be reduced so that the equipment contains no more than two percent by volume vinyl chloride or ninety-five thousandths cubic meter [25 gallons] of vinyl~~

~~chloride, whichever is larger, at standard temperature and pressure.~~

~~(b) Any vinyl chloride removed from the equipment in accordance with subparagraph a is to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million, or equivalent as provided in subsection 7.~~

~~(7) Samples. Unused portions of samples containing at least ten percent of weight vinyl chloride are to be returned to the process, and sampling techniques are to be such that sample containers in vinyl chloride service are purged into a closed process system.~~

~~(8) Leak detection and elimination. Vinyl chloride emissions due to leaks from equipment in vinyl chloride service are to be minimized by instituting and implementing a formal leak detection and elimination program. The owner or operator shall submit a description of the program to the department for approval. The program is to be submitted within forty-five days of the effective date of this chapter.~~

~~(a) It includes a reliable and accurate vinyl chloride monitoring system for detection of major leaks and identification of the general area of the plant where a leak is located. A vinyl chloride monitoring system means a device which obtains air samples from one or more points on a continuous sequential basis and analyzes the samples with gas chromatography or, if the owner or operator assumes that all hydrocarbons measured are vinyl chloride, with infrared spectrophotometry flame ion detection, or an equivalent or alternative method.~~

~~(b) It includes a reliable and accurate portable hydrocarbon detector to be used routinely to find small leaks and to pinpoint the major leaks indicated by the vinyl chloride monitoring system. A portable hydrocarbon detector means a device which measures hydrocarbons with a sensitivity of at least ten parts per million and is of such design and size that it can be used to measure emissions from localized points.~~

~~(c) It provides for an acceptable calibration and maintenance schedule for the vinyl chloride monitoring system and portable hydrocarbon detector. For the vinyl chloride monitoring~~

~~system, a daily span check is to be conducted with a concentration of vinyl chloride equal to the concentration defined as a leak according to subparagraph f. The calibration is to be done with either:~~

~~[1] A calibration gas mixture prepared from the gases specified in sections 5.2.1 and 5.2.2 of test method 106 and in accordance with section 7.1 of test method 106; or~~

~~[2] A calibration gas cylinder standard containing the appropriate concentration of vinyl chloride. The gas composition of the calibration gas cylinder standard is to have been certified by the manufacturer. The manufacturer must have recommended a maximum shelf life for each cylinder so that the concentration does not change greater than plus or minus five percent from the certified value. The date of gas cylinder preparation, certified vinyl chloride concentration, and recommended maximum shelf life must have been affixed to the cylinder before shipment from the manufacturer to the buyer. If a gas chromatograph is used as the vinyl chloride monitoring system, these gas mixtures may be directly used to prepare a chromatograph calibration curve as described in section 7.3 of test method 106. The requirements in sections 5.2.3.1 and 5.2.3.2 of test method 106 for certification of cylinder standards and for establishment and verification of calibration standards are to be followed.~~

~~(d) The location and number of points to be monitored and the frequency of monitoring provided for in the program are acceptable when they are compared with the number of pieces of equipment in vinyl chloride service and the size and physical layout of the plant.~~

~~(e) It contains an acceptable plan of action to be taken when a leak is detected.~~

~~(f) It contains a definition of leak which is acceptable when compared with the background concentrations of vinyl chloride in the areas of the plant to be monitored by the vinyl chloride monitoring system. Measurements of background concentrations of vinyl chloride in the areas of~~

~~the plant to be monitored by the vinyl chloride monitoring system are to be included with the description of the program. The definition of leak for a given plant may vary among the different areas within the plant and is also to change over time as background concentrations in the plant are reduced.~~

~~(9) Inprocess wastewater. Vinyl chloride emissions to the atmosphere from inprocess wastewater are to be reduced as follows:~~

~~(a) The concentration of vinyl chloride in each inprocess wastewater stream containing greater than ten parts per million vinyl chloride measured immediately as it leaves a piece of equipment and before being mixed with any other inprocess wastewater stream is to be reduced to no more than ten parts per million by weight before being mixed with any other inprocess wastewater stream which contains less than ten parts per million vinyl chloride, before being exposed to the atmosphere, before being discharged to a wastewater treatment process, or before being discharged untreated as a wastewater. This subparagraph does apply to water which is used to displace vinyl chloride from equipment before it is opened to the atmosphere in accordance with paragraph 2 of subdivision a of subsection 5 or paragraph 6 of this subdivision, but does not apply to water which is used to wash out equipment after the equipment has already been opened to the atmosphere in accordance with paragraph 2 of subdivision a of subsection 5 or paragraph 6.~~

~~(b) Any vinyl chloride removed from the inprocess wastewater in accordance with paragraph 3 of this subdivision is to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed ten parts per million, or equivalent as provided in subsection 7.~~

~~c. The requirements of paragraphs 1, 2, 5, 6, 7, and 8 of subdivision b are to be incorporated into a standard operating procedure, and made available upon request for inspection by the department. The standard operating procedure is to include provisions for measuring the vinyl chloride in equipment four and seventy-five hundredths cubic meters [1,250 gallons] in volume for which an emission limit is prescribed in subparagraph a of paragraph 6 of subdivision b prior to opening the~~

~~equipment and using test method 106, a portable hydrocarbon detector, or an equivalent or alternative method. The method of measurement is to meet the requirements in items 1 and 2 of subparagraph a of paragraph 5 of subdivision g of subsection 8.~~

~~7. Equivalent equipment and procedures. Upon written application from an owner or operator, the department and administrator may approve use of equipment or procedures which have been demonstrated to its satisfaction to be equivalent in terms of reducing vinyl chloride emissions to the atmosphere to those prescribed for compliance with a specific provision of this section. For an existing source, any request for using an equivalent method as the initial measure of control is to be submitted to the department and administrator within thirty days of the effective date. For a new source, any request for using an equivalent method is to be submitted to the department and administrator with the application for approval of construction or modification by subsection 6 of section 33-15-13-01.~~

~~8. Emission tests.~~

~~a. Unless a waiver of emission testing is obtained under subsection 11 of section 33-15-13-01, the owner or operator of a source to which this section applies shall test emissions from the source within ninety days of startup in the case of a new source, initial startup of which occurs after the effective date.~~

~~b. The owner or operator shall provide the department at least thirty days' prior notice of an emission test to afford the department the opportunity to have an observer present during the test.~~

~~c. Any emission test is to be conducted while the equipment being tested is operating at the maximum production rate at which the equipment will be operated and under other relevant conditions as may be specified by the department based on representative performance of the source.~~

~~d. [Reserved]~~

~~e. When at all possible, each sample is to be analyzed within twenty-four hours, but in no case in excess of seventy-two hours of sample collection. Vinyl chloride emissions are to be determined within thirty days after the emission test. The owner or operator shall report the determinations to the department by a registered letter dispatched before the close of the next business day following the determination.~~

~~f. The owner or operator shall retain at the plant and make available, upon request, for inspection by the department, for a minimum of two years, records of emission test results and other data needed to determine emissions.~~

~~g. Unless otherwise specified, the owner or operator shall use test methods in appendix B to this chapter for each test as required by paragraphs 1, 2, 3, 4, and 5 unless an equivalent method or an alternative method has been approved by the department. If the department finds reasonable grounds to dispute the results obtained by an equivalent or alternative method, the department may require the use of a reference method. If the results of the reference and equivalent or alternative methods do not agree, the results obtained by the reference method prevail, and the department may notify the owner or operator that approval of the method previously considered to be equivalent or alternative is withdrawn.~~

~~(1) Test method 106 is to be used to determine the vinyl chloride emissions from any source for which an emission limit is prescribed in subdivision a or b of subsection 3, subdivision a of subsection 4, paragraph 1 of subdivision a, subdivision b, subdivision c, or subdivision d of subsection 5, or from any control system to which reactor emissions are required to be ducted in paragraph 2 of subdivision a of subsection 5 or to which fugitive emissions are required to be ducted in subparagraph b of paragraph 1, paragraph 2, paragraph 5, subparagraph b of paragraph 6, subparagraph b of paragraph 9 of subdivision b of subsection 6.~~

~~(a) For each run, one sample is to be collected. The sampling site is to be at least two stack or duct diameters downstream and one-half diameter upstream from any flow disturbance such as a bend, expansion, contraction, or visible flame. For a rectangular cross section an equivalent diameter is to be determined from the following equation:~~

$$\text{equivalent diameter} = 2\,\frac{(\text{length})\,(\text{width})}{\text{length} + \text{width}}$$

~~The sampling point in the duct is to be at the centroid of the cross section. The sample is to be extracted at a rate proportional to the gas velocity at the sampling point. The sample is to be taken over a minimum of one hour, and is to contain a minimum volume of fifty liters corrected to standard conditions.~~

~~(b)~~ ~~Each emission test is to consist of three runs. For the purpose of determining emissions, the average of results of all runs is to apply. The average is to be computed on a time weighted basis.~~

~~(c)~~ ~~For gas streams containing more than ten percent oxygen, the concentration of vinyl chloride as determined by test method 106 is to be corrected to ten percent oxygen (dry basis) for determination of emissions by using the following equation:~~

$$C_b \text{(corrected)} = C_b \frac{10.9}{20.9 - \text{percent } O_2}$$

~~where:~~

C_b ~~(corrected)~~ = ~~concentration of vinyl chloride in the exhaust gases, corrected to ten percent oxygen.~~

C_b = ~~concentration of vinyl chloride as measured by test method 106.~~

~~20.9~~ = ~~percent oxygen in the ambient air at standard conditions.~~

~~10.9~~ = ~~percent oxygen in the ambient air at standard conditions, minus the ten percent oxygen to which the correction is being made.~~

percent O_2 = ~~percent oxygen in the exhaust gas as measured by reference method 3 in appendix A of chapter 33-15-12.~~

~~(d)~~ ~~For those emission sources where the emission limit is prescribed in terms of mass rather than concentration, mass emissions in kilograms per one hundred kilograms product are to be determined by using the following equation:~~

$$C_{BX} = \frac{[C_b (2.60) Q \; 10^{-6}][100]}{P}$$

~~where:~~

C_{BX} = ~~kilogram vinyl chloride per one hundred kilogram product.~~

C_b = ~~concentration of vinyl chloride~~

~~as measured by test method 106.~~

~~2.60 = density of vinyl chloride at one atmosphere and twenty degrees Celsius in kilograms per cubic meter.~~

~~10^{-6} = conversion factor for parts per million.~~

~~— = production rate [kilograms per hour].~~

~~(2) Test method 107 is to be used to determine the concentration of vinyl chloride in each inprocess wastewater stream for which an emission limit is prescribed in subparagraph a of paragraph 9 of subdivision b of subsection 6.~~

~~(3) Where a stripping operation is used to attain the emission limit in subdivision e of subsection 5, emissions are to be determined using test method 107 as follows:~~

~~(a) The number of strippers and samples and the types and grades of resin to be sampled are to be determined by the department for each individual plant at the time of the test based on the plant's operation.~~

~~(b) Each sample is to be taken immediately following the stripping operation.~~

~~(c) The corresponding quantity of material processed by each stripper is to be determined on a dry solids basis and by a method submitted to and approved by the department.~~

~~(d) At the prior request of the department the owner or operator shall provide duplicates of the samples required in subparagraph a.~~

~~(4) Where control technology other than or in addition to a stripping operation is used to attain the emission limit in subdivision e of subsection 5, emissions are to be determined as follows:~~

~~(a) Test method 106 is to be used to determine atmospheric emissions from all of the process equipment simultaneously. The requirements of subparagraph a of paragraph 3 are to be met.~~

~~(b) Test method 107 is to be used to determine the concentration of vinyl chloride in each inprocess wastewater stream subject to the~~

~~emission limit prescribed in subdivision e of subsection 5. The mass of vinyl chloride in kilograms per one hundred kilograms product in each inprocess wastewater stream is to be determined by using the following equation:~~

$$\cancel{C_{BX} = \frac{[C_d R\ 10^{-6}][100]}{Z}}$$

~~where:~~

$\cancel{C_{BX}}$ = ~~kilogram vinyl chloride per one hundred kilograms product.~~

$\cancel{C_d}$ = ~~concentration of vinyl chloride as measured by test method 107.~~

R = ~~water flow rate in liters per hour, determined in accordance with a method which has been submitted to and approved by the department.~~

$\cancel{10^{-6}}$ = ~~conversion factor for parts per million.~~

~~Z~~ = ~~production rate [kilograms per hour], determined in accordance with a method which has been submitted and approved by the department.~~

~~(5) The reactor opening loss for which an emission limit is prescribed in paragraph 2 of subdivision a of subsection 5 is to be determined. The number of reactors for which the determination is to be made is to be specified by the department for each individual plant at the time of the determination based on the plant's operation. For a reactor that is also used as a stripper, the determination may be made immediately following the stripping operation.~~

~~(a) Except as provided in subparagraph b, the reactor opening loss is to be determined using the following equation:~~

$$\cancel{C = \frac{W(2.60)(10^{-6})(Cb)}{Y}}$$

~~where:~~

C = ~~kilogram vinyl chloride emissions per kilogram product.~~

W = ~~capacity of the reactor in cubic meters.~~

~~2.60~~ = ~~density of vinyl chloride at one atmosphere and twenty degrees Celsius in kilogram per cubic meter.~~

~~10^{-6}~~ = ~~conversion factor for parts per million.~~

~~Cb~~ = ~~parts per million by volume vinyl chloride as determined by test method 106 or a portable hydrocarbon detector which measures hydrocarbons with a sensitivity of at least ten parts per million.~~

~~Y~~ = ~~number of batches since the reactor was last opened to the atmosphere.~~

~~—~~ = ~~average kilograms of polyvinyl chloride produced per batch in the number of batches since the reactor was last opened to the atmosphere.~~

~~[1]~~ ~~If method 106 is used to determine the concentration of vinyl chloride (Cb), the sample is to be withdrawn at a constant rate with a probe of sufficient length to reach the vessel bottom from the manhole. Samples are to be taken for five minutes within six inches [15.24 centimeters] of the vessel bottom, five minutes near the vessel center, and five minutes near the vessel top.~~

~~[2]~~ ~~If a portable hydrocarbon detector is used to determine the concentration of vinyl chloride (Cb), a probe of sufficient length to reach the vessel bottom from the manhole is to be used to make the measurements. One measurement will be made within six inches [15.24 centimeters] of the vessel bottom, one near the vessel center, and one near the vessel top. Measurements are to be made at each location until the reading is stabilized. All hydrocarbons measured are to be assumed to be vinyl chloride.~~

~~[3]~~ ~~The production rate of polyvinyl chloride (Z) is to be determined by a method submitted to and approved by the department.~~

~~(b)~~ ~~A calculation based on the number of evacuations, the vacuum involved, and the volume of gas in the reactor is hereby approved by the department or as an alternative method for~~

~~determining reactor opening loss for postpolymerization reactors in the manufacture of bulk resins.~~

~~9. Emission monitoring.~~

~~a. A vinyl chloride monitoring system is to be used to monitor on a continuous basis the emissions from the sources for which emission limits are prescribed in subdivisions a and b of subsection 3, subdivision a of subsection 4, and paragraph 1 of subdivision a, subdivision c, and subdivision d of subsection 5, and for any control system to which reactor emissions are required to be ducted in paragraph 2 of subdivision a of subsection 5 or to which fugitive emissions are required to be ducted in subparagraph a of paragraph 1, paragraph 2, paragraph 5, subparagraph b of paragraph 6, and subparagraph b of paragraph 9 of subdivision b of subsection 6.~~

~~b. The vinyl chloride monitoring system used to meet the requirement in subdivision a is to be a device which obtains air samples from one or more points on a continuous sequential basis and analyzes the samples with gas chromatography or, if the owner or operator assumes that all hydrocarbons measured are vinyl chloride, with infrared spectrophotometry, flame ion detection, or an equivalent or alternative method. The vinyl chloride monitoring system used to meet the requirements in subparagraph a of paragraph 8 of subdivision b of subsection 6 may be used to meet the requirements of this subsection.~~

~~c. A daily span check is to be conducted for each vinyl chloride monitoring system used. For all of the emission sources listed in subdivision a, except the one for which an emission limit is prescribed in subdivision b of subsection 3, the daily span check is to be conducted with a concentration of vinyl chloride equal to ten parts per million. For the emission source for which an emission limit is prescribed in subdivision b of subsection 3, the daily span check is to be conducted with a concentration of vinyl chloride which is determined to be equivalent to the emission limit for that source based on the emission test required by subsection 8. The calibration is to be done with either:~~

~~(1) A calibration gas mixture prepared from the gases specified in sections 5.2.1 and 5.2.2 of test method 106 and in accordance with section 7.1 of test method 106, or~~

~~(2) A calibration gas cylinder standard containing the appropriate concentration of vinyl chloride. The gas~~

~~composition of the calibration gas cylinder standard is to have been certified by the manufacturer. The manufacturer must have recommended a maximum shelf life for each cylinder so that the concentration does not change greater than plus or minus five percent from the certified value. The date of gas cylinder preparation, certified vinyl chloride concentration, and recommended maximum shelf life must have been affixed to the cylinder before shipment from the manufacturer to the buyer. If a gas chromatograph is used as the vinyl chloride monitoring system, these gas mixtures may be directly used to prepare a chromatograph calibration curve as described in section 7.3 of test method 106. The requirements in sections 5.2.3.1 and 5.2.3.2 of test method 6 for certification of cylinder standards and for establishment and verification of calibration standards are to be followed.~~

~~10. Initial report.~~

~~a. An owner or operator of any source to which this section applies shall submit a statement in writing notifying the department that the equipment and procedural specifications in paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of subdivision b of subsection 6 are being implemented. In the case of a new source which did not have an initial startup date preceding the effective date, the statement is to be submitted within thirty days of the initial startup date.~~

~~b. The statement is to contain the following information:~~

~~(1) A list of the equipment installed for compliance.~~

~~(2) A description of the physical and functional characteristics of each piece of equipment.~~

~~(3) A description of the methods which have been incorporated into the standard operating procedures for measuring or calculating the emissions for which emission limits are prescribed in subparagraph a of paragraphs 1 and 6 of subdivision b of subsection 6.~~

~~(4) A statement that each piece of equipment is installed and that each piece of equipment and each procedure is being used.~~

~~11. Semiannual report.~~

~~a. The owner or operator of any source to which this section applies shall submit to the department on September fifteenth and March fifteenth of each year a report in~~

~~writing containing the information required by this subsection. The first semiannual report is to be submitted following the first full six-month reporting period after the initial report is submitted.~~

~~b. In the case of a new source which did not have an initial startup date preceding the effective date, the first report is to be submitted within one hundred eighty days of the initial startup date.~~

~~c. Unless otherwise specified, the owner or operator shall use the test methods in appendix B to this chapter to conduct emission tests as required by paragraphs 2 and 3, unless an equivalent or an alternative method has been approved by the department. If the department finds reasonable grounds to dispute the results obtained by an equivalent or alternative method, it may require the use of a reference method. If the results of the reference and equivalent or alternative methods do not agree, the results obtained by the reference method prevail, and the department may notify the owner or operator that approval of the method previously considered to be equivalent or alternative is withdrawn.~~

~~(1) The owner or operator shall include in the report a record of any emissions which averaged over any hour period (commencing on the hour) are in excess of the emission limits prescribed in subdivision a or b of subsection 3, subdivision a of subsection 4, or paragraph 1 of subdivision a, subdivision b, subdivision c, or subdivision d of subsection 5, or for any control system to which reactor emissions are required to be ducted in paragraph 2 of subdivision a of subsection 5 or to which fugitive emissions are required to be ducted in subparagraph b of paragraph 1, paragraph 2, paragraph 5, subparagraph b of paragraph 6, or subparagraph b of paragraph 9 of subdivision b of subsection 6. The emissions are to be measured in accordance with subsection 9.~~

~~(2) In polyvinyl chloride plants for which a stripping operation is used to attain the emission level prescribed in subdivision e of subsection 5, the owner or operator shall include in the report a record of the vinyl chloride content in the polyvinyl chloride resin. Test method 107 is to be used to determine vinyl chloride content as follows:~~

~~(a) If batch stripping is used, one representative sample of polyvinyl chloride resin is to be taken from each batch of each grade of resin immediately following the completion of the stripping operation, and identified by resin~~

~~type and grade and the date and time the batch is completed. The corresponding quantity of material processed in each stripper batch is to be recorded and identified by resin type and grade and the date and time the batch is completed.~~

~~(b) If continuous stripping is used, one representative sample of polyvinyl chloride resin is to be taken for each grade of resin processed or at intervals of eight hours for each grade of resin which is being processed, whichever is more frequent. The sample is to be taken as the resin flows out of the stripper and identified by resin type and grade and the date and time the sample was taken. The corresponding quantity of material processed by each stripper over the time period represented by the sample during the eight hour period is to be recorded and identified by resin type and grade and the date and time it represents.~~

~~(c) The quantity of material processed by the stripper is to be determined on a dry solids basis and by a method submitted to and approved by the department.~~

~~(d) At the prior request of the department, the owner or operator shall provide duplicates of the samples required in subparagraphs a and b.~~

~~(e) The report to the department by the owner or operator is to include the vinyl chloride content found in each sample required by subparagraphs a and b, averaged separately for each type of resin, over each calendar day and weighted according to the quantity of each grade of resin processed by the stripper that calendar day, according to the following equation:~~

$$A_{T_i} = \frac{\sum_{i=1}^{n} P_{G_i} M_{G_i}}{Q_{T_i}} = \frac{P_{G1} M_{G1} + P_{G2} M_{G2} + \ldots P_{Gn} + M_{Gn}}{Q_{T_i}}$$

~~where:~~

~~A = twenty four hour average concentration of type T_i resin in ppm (dry weight basis).~~

~~Q = total production of T_s resin over the twenty four hour period, in kg.~~

T_i = type of resin; i = 1,2.... m where m is total number of resin types produced during the twenty-four hour period.

M = concentration of vinyl chloride in one sample of grade G_i resin, in ppm.

P = production of grade G_i resin represented by the sample, in kg.

G_i = grade of resin, e.g., G_1, G_2, and G_3.

N = total number of grades of resin produced during the twenty-four hour period.

(f) The owner or operator shall retain at the source and make available for inspection by the department, for a minimum of two years, records of all data needed to furnish the information required by subparagraph e. The records are to contain the following information:

(1) The vinyl chloride content found in all the samples required in subparagraphs a and b identified by the resin type and grade and the time and date of the sample.

(2) The corresponding quantity of polyvinyl chloride resin processed by the strippers, identified by the resin type and grade and the time and date it represents.

(3) The owner or operator shall include in the report a record of the emissions from each reactor opening for which an emission limit is prescribed in paragraph 2 of subdivision a of subsection 5. Emissions are to be determined in accordance with paragraph 5 of subdivision g of subsection 8, except that emissions for each reactor are to be determined. For a reactor that is also used as a stripper, the determination may be made immediately following the stripping operation.

12. Recordkeeping. The owner or operator of any source to which this section applies shall retain the following information at the source and make it available for inspection by the department for a minimum of two years:

a. A record of the leaks detected by the vinyl chloride monitoring system, as required by paragraph 8 of subdivision b of subsection 6, including the

~~concentrations of vinyl chloride as measured, analyzed, and recorded by the vinyl chloride detector, the location of each measurement, and the date and approximate time of each measurement.~~

~~b. A record of the leaks detected during routine monitoring with the portable hydrocarbon detector and the action taken to repair the leaks, as required by paragraph 8 of subdivision b of subsection 6, including a brief statement explaining the location and cause of each leak detected with the portable hydrocarbon detector, the date and time of the leak, and any action taken to eliminate that leak.~~

~~c. A record of emissions measured in accordance with subsection 9.~~

~~d. A daily operating record for each polyvinyl chloride reactor, including pressures and temperatures.~~

History: ~~Amended effective January 1, 1989.~~
General Authority: ~~NDCC 23-25-03~~
Law Implemented: ~~NDCC 23-25-03~~

33-15-13-07. Emission standard for equipment leaks (fugitive emissions sources) of benzene. Repealed effective June 1, 1992.

~~1. Applicability and designation of sources.~~

~~a. The provisions of this section apply to each of the following sources that are intended to operate in benzene service: pumps, compressors, pressure relief devices, sampling connection systems, open ended valves or lines, valves, flanges and other connectors, product accumulator vessels, and control devices or systems required by this section.~~

~~b. The provisions of this section do not apply to sources located in coke byproduct plants.~~

~~c. (1) If an owner or operator applies for one of the exemptions in this subdivision, then the owner or operator shall maintain records, as required in subdivision i of subsection 7 of section 33-15-13-08.~~

~~(2) Any equipment in benzene service that is located at a plant site designed to produce or use less than one thousand megagrams of benzene per year is exempt from the requirements of subsection 3.~~

~~(3) Any process unit (defined in subsection 2 of section 33-15-13-08) that has no equipment in benzene service is exempt from the requirements of subsection 3.~~

~~d. While the provisions of this section are effective, a source to which this section applies that is also subject to the provisions of chapter 33-15-12 only will be required to comply with the provisions of this section.~~

~~2. Definitions. As used in this section, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 or in this chapter, and the following terms shall have the specific meanings given them:~~

~~a. "In benzene service" means that a piece of equipment either contains or contacts a fluid (liquid or gas) that is at least ten percent benzene by weight as determined according to the provisions of subdivision d of subsection 6 of section 33-15-13-08. The provisions of subdivision d of subsection 6 of section 33-15-13-08 also specify how to determine that a piece of equipment is not in benzene service.~~

~~b. "Semiannual" means a six-month period; the first semiannual period concludes on the last day of the last month during the one hundred eighty days following initial startup for new sources; and the first semiannual period concludes on the last day of the last full month during the one hundred eighty days after June 6, 1984, for existing sources.~~

~~3. Standards.~~

~~a. Each owner or operator subject to the provisions of this section shall comply with the requirements of section 33-15-13-08.~~

~~b. An owner or operator may elect to comply with the requirements of subsection 4 of section 33-15-13-08.~~

~~c. An owner or operator may apply to the department and administrator for a determination of an alternative means of emission limitation that achieves a reduction in emissions of benzene at least equivalent to the reduction in emissions of benzene achieved by the controls required in this section. In doing so, the owner or operator shall comply with requirements of subsection 5 of section 33-15-13-08.~~

History: ~~Effective October 1, 1987.~~
General Authority: ~~NDCC 23-25-03~~
Law Implemented: ~~NDCC 23-25-03~~

33-15-13-08. Emission standard for equipment leaks (fugitive emission sources). Repealed effective June 1, 1992.

~~1. Applicability and designation of sources.~~

~~a. The provisions of this section apply to each of the following sources that are intended to operate in volatile hazardous air pollutant (VHAP) service: pumps, compressors, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, flanges and other connectors, product accumulator vessels, and control devices or systems required by this section.~~

~~b. The provisions of this section apply to the sources listed in subdivision a after the date of promulgation of a specific section.~~

~~c. While the provisions of this section are effective, a source to which this section applies that is also subject to the provisions of chapter 33-15-12 only will be required to comply with the provisions of this section.~~

~~2. Definitions. As used in this section, all terms not defined herein shall have the meaning given them in North Dakota Century Code chapter 23-25 or in this chapter, and the following terms shall have specific meaning given them:~~

~~a. "Closed-vent system" means a system that is not open to atmosphere and that is composed of piping, connections, and, if necessary, flow-inducing devices that transport gas or vapor from a piece or pieces of equipment to a control device.~~

~~b. "Connector" means flanged, screwed, welded, or other joined fittings used to connect two pipelines or a pipeline and a piece of equipment.~~

~~c. "Control device" means an enclosed combustion device, vapor recovery system, or flare.~~

~~d. "Double block and bleed system" means two block valves connected in series with a bleed valve or line that can vent the line between the two block valves.~~

~~e. "Equipment" means each pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, valve, flange or other connector, product accumulator vessel in volatile hazardous air pollutant service, and any control devices or systems required by this section.~~

~~f. "First attempt at repair" means to take rapid action for the purpose of stopping or reducing leakage of organic material to atmosphere using best practices.~~

~~g. "In gas/vapor service" means that a piece of equipment contains process fluid that is in the gaseous state at operating conditions.~~

~~h. "In liquid service" means that a piece of equipment is not in gas/vapor service.~~

~~i. "In situ sampling systems" means nonextractive samplers or in-line samplers.~~

~~j. "In vacuum service" means that equipment is operating at an internal pressure which is at least five kilopascals (kPa) below ambient pressure.~~

~~k. "In volatile hazardous air pollutant service" means that a piece of equipment either contains or contacts a fluid (liquid or gas) that is at least ten percent by weight a volatile hazardous air pollutant (VHAP) as determined according to the provisions of subdivision d of subsection 6. The same provisions also specify how to determine that a piece of equipment is not in volatile hazardous air pollutant service.~~

~~l. "In volatile organic compounds (VOC) service" means, for the purposes of this section, that (1) the piece of equipment contains or contacts a process fluid that is at least ten percent volatile organic compounds by weight (see subsection 2 of section 33-15-12-04 for the definition of volatile organic compounds (VOC) and paragraph 4 of subdivision p of subsection 23 of section 33-15-12-04 to determine whether a piece of equipment is not in volatile organic compounds service); and (2) the piece of equipment is not in heavy liquid service as defined in subdivision b of subsection 23 of section 33-15-12-04.~~

~~m. "Open-ended valve or line" means any valve, except pressure relief valves, having one side of the valve seat in contact with process fluid and one side open to atmosphere, either directly or through open piping.~~

~~n. "Pressure release" means the emission of materials resulting from the system pressure being greater than the set pressure of the pressure relief device.~~

~~o. "Process unit" means equipment assembled to produce a volatile hazardous air pollutant or its derivatives as intermediates or final products, or equipment assembled to use a volatile hazardous air pollutant in the production of a product. A process unit can operate independently if supplied with sufficient feed or raw materials and sufficient product storage facilities.~~

p. "Process unit shutdown" means a work practice or operational procedure that stops production from a process unit or part of a process unit. An unscheduled work practice or operational procedure that stops production from a process unit or part of a process unit for less than twenty-four hours is not a process unit shutdown. The use of spare equipment and technically feasible bypassing of equipment without stopping production is not a process unit shutdown.

q. "Product accumulator vessel" means any distillate receiver, bottoms receiver, surge control vessel, or product separator in volatile hazardous air pollutant service that is vented to atmosphere either directly or through a vacuum-producing system. A product accumulator vessel is in volatile hazardous air pollutant service if the liquid or the vapor in the vessel is at least ten percent by weight volatile hazardous air pollutant.

r. "Repaired" means that equipment is adjusted, or otherwise altered, to eliminate a leak as indicated by one of the following: an instrument reading of ten thousand parts per million or greater, indication of liquids dripping, or indication by a sensor that a seal or barrier fluid system has failed.

s. "Semiannual" means a six-month period; the first semiannual period concludes on the last day of the last month during the one hundred eighty days following initial startup for new sources, and the first semiannual period concludes on the last day of the last full month during the one hundred eighty days after the effective date of a specific section that references this section for existing sources.

t. "Sensor" means a device that measures a physical quantity or the change in a physical quantity, such as temperature, pressure, flow rate, pH, or liquid level.

u. "Volatile hazardous air pollutant" means a substance regulated under this section for which a standard for equipment leaks of the substance has been proposed and promulgated. Benzene is a volatile hazardous air pollutant.

3. Standards.

a. General.

(1) Each owner or operator subject to the provisions of this section shall demonstrate compliance with the requirements of subsection 3 for each new and existing source as required in subsection 4 of

~~section 33-15-13-01, except as provided in subsections 4 and 5.~~

~~(2) Compliance with this section will be determined by review of records, review of performance test results, and inspection using the methods and procedures specified in subsection 6.~~

~~(3) (a) An owner or operator may request a determination of alternative means of emission limitation to the requirements of subdivisions b, c, e, f, g, h, i, and k as provided in subsection 5.~~

~~(b) If the department and administrator make a determination that a means of emission limitation is at least a permissible alternative to the requirements of subdivisions b, c, e, f, g, h, i, and k, an owner or operator shall comply with the requirements of that determination.~~

~~(4) Each piece of equipment to which this section applies shall be marked in such a manner that it can be distinguished readily from other pieces of equipment.~~

~~(5) Equipment that is in vacuum service is excluded from the requirements of subsection 3 if it is identified as required in subdivision e of subsection 7.~~

~~b. Pumps.~~

~~(1) (a) Each pump must be monitored monthly to detect leaks by the methods specified in subdivision b of subsection 6, except as provided in paragraph 3 of subdivision a and paragraphs 4, 5, and 6 of this subdivision.~~

~~(b) Each pump must be checked by visual inspection each calendar week for indications of liquids dripping from the pump seal.~~

~~(2) (a) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(b) If there are indications of liquids dripping from the pump seal, a leak is detected.~~

~~(3) (a) When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision j.~~

~~(b)~~ ~~A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(4)~~ ~~Each pump equipped with a dual mechanical seal system that includes a barrier fluid system is exempt from the requirements of paragraph 1, provided the following requirements are met:~~

~~(a)~~ ~~Each dual mechanical seal system is:~~

~~[1]~~ ~~Operated with the barrier fluid at a pressure that is at all times greater than the pump stuffing box pressure; or~~

~~[2]~~ ~~Equipped with a barrier fluid degassing reservoir that is connected by a closed vent system to a control device that complies with the requirements of subdivision k.~~

~~[3]~~ ~~Equipped with a system that purges the barrier fluid into a process stream with zero volatile hazardous air pollutant emissions to atmosphere.~~

~~(b)~~ ~~The barrier fluid is not in volatile hazardous air pollutant service and, if the pump is covered by standards under chapter 33 15 12, is not in volatile organic compounds service.~~

~~(c)~~ ~~Each barrier fluid system is equipped with a sensor that will detect failure of the seal system, the barrier fluid system, or both.~~

~~(d)~~ ~~Each pump is checked by visual inspection each calendar week for indications of liquids dripping from the pump seal.~~

~~(e)~~ ~~[1]~~ ~~Each sensor as described in subparagraph c of paragraph 4 is checked daily or is equipped with an audible alarm.~~

~~[2]~~ ~~The owner or operator determines, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.~~

~~(f)~~ ~~[1]~~ ~~If there are indications of liquids dripping from the pump seal or the sensor indicates failure of the seal system, the barrier fluid system, or both, based on the~~

~~criterion determined in item 2 of subparagraph e of paragraph 4, a leak is detected.~~

~~(2) When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision j.~~

~~(3) A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(5) Any pump that is designated, as described in paragraph 2 of subdivision e of subsection 7, for no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, is exempt from the requirements of paragraphs 1, 3, and 4 if the pump:~~

~~(a) Has no externally actuated shaft penetrating the pump housing;~~

~~(b) Is demonstrated to be operating with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as measured by the method specified in subdivision c of subsection 6; and~~

~~(c) Is tested for compliance with subparagraph b initially upon designation, annually, and at other times requested by the department.~~

~~(6) If any pump is equipped with a closed vent system capable of capturing and transporting any leakage from the seal or seals to a control device that complies with the requirements of subdivision k, it is exempt from the requirements of paragraphs 1 through 5.~~

~~(7) Any pump that is located within the boundary of an unmanned plantsite is exempt from the weekly visual inspection requirements of subparagraph b of paragraph 1 and subparagraph d of paragraph 4, and the daily requirements of item 1 of subparagraph e of paragraph 4, provided that each pump is visually inspected as often as practicable and at least monthly.~~

~~c. Compressors.~~

~~(1)~~ ~~Each compressor must be equipped with a seal system that includes a barrier fluid system and that prevents leakage of process fluid to atmosphere, except as provided in paragraph 3 of subdivision a and paragraphs 8 and 9.~~

~~(2)~~ ~~Each compressor seal system as required in paragraph 1 must be:~~

~~(a)~~ ~~Operated with the barrier fluid at a pressure that is greater than the compressor stuffing box pressure;~~

~~(b)~~ ~~Equipped with a barrier fluid system that is connected by a closed-vent system to a control device that complies with the requirements of subdivision k; or~~

~~(c)~~ ~~Equipped with a system that purges the barrier fluid into a process stream with zero volatile hazardous air pollutant emissions to atmosphere.~~

~~(3)~~ ~~The barrier fluid may not be in volatile hazardous air pollutant service and, if the compressor is covered by standards under chapter 33-15-12, may not be in volatile organic compounds service.~~

~~(4)~~ ~~Each barrier fluid system as described in paragraphs 1 through 3 must be equipped with a sensor that will detect failure of the seal system, barrier fluid system, or both.~~

~~(5)~~ ~~Each sensor as required in paragraph 4 must be checked daily or must be equipped with an audible alarm unless the compressor is located within the boundary of an unmanned plantsite.~~

~~(6)~~ ~~The owner or operator shall determine, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.~~

~~(7)~~ ~~If the sensor indicates failure of the seal system, the barrier fluid system, or both, based on the criterion determined under paragraph 6, a leak is detected.~~

~~(8)~~ ~~(a)~~ ~~When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision j.~~

~~(b)~~ ~~A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(9)~~ ~~A compressor is exempt from the requirements of paragraphs 1 through 8 if it is equipped with a closed vent system capable of capturing and transporting any leakage from the seal to a control device that complies with the requirements of subdivision k, except as provided in paragraph 9.~~

~~(10)~~ ~~Any compressor that is designated, as described in paragraph 2 of subdivision e of subsection 7, for no detectable emission as indicated by an instrument reading of less than five hundred parts per million above background is exempt from the requirements of paragraphs 1 through 9 if the compressor:~~

~~(a)~~ ~~Is demonstrated to be operating with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as measured by the method specified in subdivision c of subsection 6; and~~

~~(b)~~ ~~Is tested for compliance with subparagraph a initially upon designation, annually, and at other times requested by the department.~~

~~d.~~ ~~Pressure relief devices in gas/vapor service.~~

~~(1)~~ ~~Except during pressure releases, each pressure relief device in gas/vapor service must be operated with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as measured by the method specified in subdivision c of subsection 6.~~

~~(2)~~ ~~(a)~~ ~~After each pressure release, the pressure relief device must be returned to a condition of no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as soon as practicable, but no later than five calendar days after each pressure release, except as provided in subdivision j.~~

~~(b)~~ ~~No later than five calendar days after the pressure release, the pressure relief device shall be monitored to confirm the condition of no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, as measured~~

~~by the method specified in subdivision c of subsection 6.~~

~~(3) Any pressure relief device that is equipped with a closed vent system capable of capturing and transporting leakage from the pressure relief device to a control device as described in subdivision k is exempt from the requirements of paragraphs 1 and 2.~~

~~e. Sampling connecting systems.~~

~~(1) Each sampling connection system must be equipped with a closed purge system or closed vent system, except as provided in paragraph 3 of subdivision a.~~

~~(2) Each closed purge system or closed vent system as required in paragraph 1 shall:~~

~~(a) Return the purged process fluid directly to the process line with zero volatile hazardous air pollutant emissions to atmosphere;~~

~~(b) Collect and recycle the purged process fluid with zero volatile hazardous air pollutant emissions to atmosphere; or~~

~~(c) Be designed and operated to capture and transport all the purged process fluid to a control device that complies with the requirements of subdivision k.~~

~~(3) In situ sampling systems are exempt from the requirements of paragraphs 1 and 2.~~

~~f. Open ended valves or lines.~~

~~(1) (a) Each open ended valve or line must be equipped with a cap, blind flange, plug, or a second valve, except as provided in paragraph 3 of subdivision a.~~

~~(b) The cap, blind flange, plug, or second valve will seal the open end at all times except during operations requiring process fluid flow through the open ended valve or line.~~

~~(2) Each open ended valve or line equipped with a second valve shall be operated in a manner such that the valve on the process fluid end is closed before the second valve is closed.~~

~~(3) When a double block and bleed system is being used, the bleed valve or line may remain open during~~

~~operations that require venting the line between the block valves but shall comply with paragraph 1 at all other times.~~

~~g. Valves.~~

~~(1) Each valve must be monitored monthly to detect leaks by the method specified in subdivision b of subsection 6 and shall comply with paragraphs 2 through 5, except as provided in paragraphs 6, 7, and 8, subsection 4, and paragraph 3 of subdivision a.~~

~~(2) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(3) (a) Any valve for which a leak is not detected for two successive months may be monitored the first month of every quarter, beginning with the next quarter, until a leak is detected.~~

~~(b) If a leak is detected, the valve must be monitored monthly until a leak is not detected for two successive months.~~

~~(4) (a) When a leak is detected, it must be repaired as soon as practicable, but no later than fifteen calendar days after the leak is detected, except as provided in subdivision j.~~

~~(b) A first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(5) First attempts at repair include, but are not limited to, the following best practices where practicable:~~

~~(a) Tightening of bonnet bolts.~~

~~(b) Replacement of bonnet bolts.~~

~~(c) Tightening of packing gland nuts.~~

~~(d) Injection of lubricant into lubricated packing.~~

~~(6) Any valve that is designated, as described in paragraph 2 of subdivision e of subsection 7, for no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, is exempt from the requirements of paragraph 1 if the valve:~~

~~(a) Has no external actuating mechanism in contact with the process fluid,~~

~~(b) Is operated with emissions less than five hundred parts per million above background, as measured by the method specified in subdivision c of subsection 6; and~~

~~(c) Is tested for compliance with subparagraph b initially upon designation, annually, and at other times required by the department.~~

~~(7) Any valve that is designated, as described in paragraph 1 of subdivision f of subsection 7, as an unsafe to monitor valve is exempt from the requirements of paragraph 1 if:~~

~~(a) The owner or operator of the valve demonstrates that the valve is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of complying with paragraph 1; and~~

~~(b) The owner or operator of the valve has a written plan that requires monitoring of the valve as frequently as practicable during safe to monitor times.~~

~~(8) Any valve that is designated, as described in paragraph 2 of subdivision f of subsection 7, as a difficult to monitor valve is exempt from the requirements of paragraph 1 if:~~

~~(a) The owner or operator of the valve demonstrates that the valve cannot be monitored without elevating the monitoring personnel more than two meters above a support surface;~~

~~(b) The process unit within which the valve is located is an existing process unit; and~~

~~(c) The owner or operator of the valve follows a written plan that requires monitoring of the valve at least once per calendar year.~~

~~h. Pressure relief devices in liquid service and flanges and other connectors.~~

~~(1) Pressure relief devices in liquid service and flanges and other connectors must be monitored within five days by the method specified in subdivision b of subsection 6 if evidence of a potential leak is found by visual, audible, olfactory, or any other detection method, except as provided in paragraph 3 of subdivision a.~~

~~(2) If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(3) (a) When a leak is detected, it must be repaired as soon as practicable, but not later than fifteen calendar days after it is detected, except as provided in subdivision j.~~

~~(b) The first attempt at repair must be made no later than five calendar days after each leak is detected.~~

~~(4) First attempts at repair include, but are not limited to, the best practices described under paragraph 5 of subdivision g.~~

~~i. Product accumulator vessels. Each product accumulator vessel must be equipped with a closed vent system capable of capturing and transporting any leakage from the vessel to a control device as described in subdivision k, except as provided in paragraph 3 of subdivision a.~~

~~j. Delay of repair.~~

~~(1) Delay of repair of equipment for which leaks have been detected will be allowed if the repair is technically infeasible without a process unit shutdown. Repair of this equipment shall occur before the end of the next process unit shutdown.~~

~~(2) Delay of repair of equipment for which leaks have been detected will be allowed for equipment that is isolated from the process and that does not remain in volatile hazardous air pollutant service.~~

~~(3) Delay of repair for valves will be allowed if:~~

~~(a) The owner or operator demonstrates that emissions of purged material resulting from immediate repair are greater than the fugitive emissions likely to result from the delay of repair; and~~

~~(b) When repair procedures are effected, the purged material is collected and destroyed or recovered in a control device complying with subdivision k.~~

~~(4) Delay of repair for pumps will be allowed if:~~

~~(a) Repair requires the use of a dual mechanical seal system that includes a barrier fluid system; and~~

~~(b)~~ ~~Repair is completed as soon as practicable, but not later than six months after the leak was detected.~~

~~(5)~~ ~~Delay of repair beyond a process unit shutdown will be allowed for a valve if valve assembly replacement is necessary during the process unit shutdown, valve assembly supplies have been depleted, and valve assembly supplies had been sufficiently stocked before the supplies were depleted. Delay of repair beyond the next process unit shutdown will not be allowed unless the next process unit shutdown occurs sooner than six months after the first process unit shutdown.~~

~~k. Closed vent system and control devices.~~

~~(1)~~ ~~Owners or operators of closed vent systems and control devices used to comply with provisions of this section shall comply with the provisions of this section, except as provided in paragraph 3 of subdivision a.~~

~~(2)~~ ~~Vapor recovery systems (for example, condensers and absorbers) must be designed and operated to recover the organic vapors vented to them with an efficiency of ninety-five percent or greater.~~

~~(3)~~ ~~Enclosed combustion devices must be designated and operated to reduce the volatile hazardous air pollutant emissions vented to them with an efficiency of ninety-five percent or greater or to provide a minimum residence time of 0.50 seconds at a minimum temperature of seven hundred sixty degrees Celsius [1400 degrees Fahrenheit].~~

~~(4)~~ ~~Flares used to comply with this section shall comply with the requirements of subsection 14 of section 33-15-12-01.~~

~~(5)~~ ~~Owners or operators of control devices that are used to comply with the provisions of this section shall monitor these control devices to ensure that they are operated and maintained in conformance with their design.~~

~~(6)~~ ~~(a)~~ ~~Closed vent systems must be designed for and operated with no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background and by visual inspections, as determined by the methods specified in subdivision c of subsection 6.~~

~~(b) Closed vent systems must be monitored to determine compliance with this subsection initially in accordance with subsection 4 of section 33-15-13-01, annually, and at other times requested by the department.~~

~~(c) Leaks, as indicated by an instrument reading greater than five hundred parts per million and visual inspections, must be repaired as soon as practicable, but not later than fifteen calendar days after the leak is detected.~~

~~(d) A first attempt at repair must be made no later than five calendar days after the leak is detected.~~

~~(7) Closed vent systems and control devices used to comply with provisions of this section shall be operated at all times when emissions may be vented to them.~~

~~4. Alternative standards for valves in volatile hazardous air pollutant service.~~

~~a. Allowable percentage of valves leaking.~~

~~(1) An owner or operator may elect to have all valves within a process unit to comply with an allowable percentage of valves leaking of equal to or less than two percent.~~

~~(2) The following requirements must be met if an owner or operator decides to comply with an allowable percentage of valves leaking:~~

~~(a) An owner or operator must notify the department that the owner or operator has elected to have all valves within a process unit comply with the allowable percentage of valves leaking before implementing this alternative standard, as specified in subdivision d of subsection 8.~~

~~(b) A performance test as specified in paragraph 3 of this subsection must be conducted initially upon designation, annually, and at other times requested by the department.~~

~~(c) If a valve leak is detected, it must be repaired in accordance with paragraphs 4 and 5 of subdivision g of subsection 3.~~

~~(3) Performance tests must be conducted in the following manner:~~

~~(a)~~ ~~All valves in volatile hazardous air pollutant service within the process unit must be monitored within one week by the methods specified in subdivision b of subsection 6.~~

~~(b)~~ ~~If an instrument reading of ten thousand parts per million or greater is measured, a leak is detected.~~

~~(c)~~ ~~The leak percentage must be determined by dividing the number of valves in volatile hazardous air pollutant service for which leaks are detected by the number of valves in volatile hazardous air pollutant service within the process unit.~~

~~(4)~~ ~~Owners or operators who elect to have all valves comply with this alternative standard may not have a process unit with a leak percentage greater than two percent.~~

~~(5)~~ ~~If an owner or operator decides no longer to comply with this subdivision, the owner or operator must notify the department in writing that the work practice standard described in paragraphs 1 through 5 of subdivision g of subsection 3 will be followed.~~

~~b.~~ ~~Skip period leak detection and repair.~~

~~(1)~~ ~~(a)~~ ~~An owner or operator may elect for all valves within a process unit to comply with one of the alternative work practices specified in subparagraphs b and c of paragraph 2.~~

~~(b)~~ ~~An owner or operator must notify the department before implementing one of the alternative work practices, as specified in subdivision d of subsection 8.~~

~~(2)~~ ~~(a)~~ ~~An owner or operator shall comply initially with the requirements for valves, as described in subdivision g of subsection 3.~~

~~(b)~~ ~~After two consecutive quarterly leak detection periods with the percentage of valves leaking equal to or less than two, an owner or operator may begin to skip one of the quarterly leak detection periods for the valves in volatile hazardous air pollutant service.~~

~~(c)~~ ~~After five consecutive quarterly leak detection periods with the percentage of valves leaking equal to or less than two, an owner or operator~~

may begin to skip three of the quarterly leak detection periods for the valves in volatile hazardous air pollutant service.

(d) If the percentage of valves leaking is greater than two, the owner or operator shall comply with the requirements, as described in subdivision g of subsection 3, but may again elect to use this subdivision.

5. Alternative means of emission limitation.

a. Permission to use an alternative means of emission limitation under section 112(e)(3) of the Clean Air Act shall be governed by the following procedures:

b. Where the standard is an equipment, design, or operational requirement:

(1) Each owner or operator applying for permission is responsible for collecting and verifying test data for an alternative means of emission limitation, test data for the equipment, design, and operational requirements.

(2) The department and administrator may condition the permission on requirements that may be necessary to assure operation and maintenance to achieve the same emission reduction as the equipment, design, and operational requirements.

c. Where the standard is a work practice:

(1) Each owner or operator applying for permission is responsible for collecting and verifying test data for an alternative means of emission limitation.

(2) For each source for which permission is required, the emission reduction achieved by the required work practices must be demonstrated for a minimum period of twelve months.

(3) For each source for which permission is requested, the emission reduction achieved by the alternative means of emission limitation must be demonstrated.

(4) Each owner or operator applying for permission shall commit, in writing, each source to work practices that provide for emission reductions equal to or greater than the emission reductions achieved by the required work practices.

~~(5) The department and administrator will compare the demonstrated emission reduction for the alternative means of emission limitation to the demonstrated emission reduction for the required work practices and will consider the commitment in paragraph 4.~~

~~(6) The department and administrator may condition the permission on requirements that may be necessary to assure operation and maintenance to achieve the same emission reduction as the required work practices of this subsection.~~

~~d. An owner or operator may offer a unique approach to demonstrate the alternative means of emission limitation.~~

~~e. (1) Manufacturers of equipment used to control equipment leaks of a volatile hazardous air pollutant may apply to the department for permission for an alternative means of emission limitation that achieves a reduction in emissions of the volatile hazardous air pollutant achieved by the equipment, design, and operational requirements of this section.~~

~~(2) The department and administrator will grant permission according to the provisions of subdivisions b, c, and d.~~

~~6. Test methods and procedures.~~

~~a. Each owner or operator subject to the provisions of this section shall comply with the test methods and procedures requirements provided in this section.~~

~~b. Monitoring, as required in subsections 3, 4, and 5, shall comply with the following requirements:~~

~~(1) Monitoring shall comply with reference method 21.~~

~~(2) The detection instrument shall meet the performance criteria of reference method 21.~~

~~(3) The instrument shall be calibrated before use on each day of its use by the procedures specified in reference method 21.~~

~~(4) Calibration gases shall be:~~

~~(a) Zero air (less than ten parts per million of hydrocarbon in air); and~~

~~(b) A mixture of methane or n-hexane and air at a concentration of approximately, but less than~~

~~ten thousand parts per million methane or n-hexane.~~

~~(5) The instrument probe must be traversed around all potential leak interfaces as close to the interface as possible as described in reference method 21.~~

~~c. When equipment is tested for compliance with no visible emissions, as required in paragraph 5 of subdivision b, paragraph 9 of subdivision c, subdivision d, paragraph 6 of subdivision g, and paragraph 6 of subdivision k of subsection 3, the test shall comply with the following requirements:~~

~~(1) The requirements of paragraphs 1 through 4 of subdivision b shall apply.~~

~~(2) The background level must be determined, as set forth in reference method 21.~~

~~(3) The instrument probe must be traversed around all potential leak interfaces as close to the interface as possible as described in reference method 21.~~

~~(4) The arithmetic difference between the maximum concentration indicated by the instrument and the background level is compared with five hundred parts per million for determining compliance.~~

~~d. (1) Each piece of equipment within a process unit that can conceivably contain equipment in volatile hazardous air pollutant service is presumed to be in volatile hazardous air pollutant service unless an owner or operator demonstrates that the piece of equipment is not in volatile hazardous air pollutant service. For a piece of equipment to be considered not in volatile hazardous air pollutant service, it must be determined that the percent volatile hazardous air pollutant content can be reasonably expected never to exceed ten percent by weight. For purposes of determining the percent volatile hazardous air pollutant content of the process fluid that is contained in or contacts equipment, procedures that conform to the methods described in A.S.T.M. method D 2267 must be used.~~

~~(2) (a) An owner or operator may use engineering judgment rather than the procedures in paragraph 1 to demonstrate that the percent volatile hazardous air pollutant content does not exceed ten percent by weight, provided that the engineering judgment demonstrates that the volatile hazardous air pollutant content clearly~~

~~does not exceed ten percent by weight. When an owner or operator and the department do not agree on whether a piece of equipment is not in volatile hazardous air pollutant service, however, the procedures in paragraph 1 of this subdivision must be used to resolve the disagreement.~~

~~(b) If an owner or operator determines that a piece of equipment is in volatile hazardous air pollutant service, the determination can be revised only after following the procedures in paragraph 1.~~

~~(3) Samples used in determining the percent volatile hazardous air pollutant content must be representative of the process fluid that is contained in or contacts the equipment or the gas being combusted in the flare.~~

~~e. (1) Reference method 22 must be used to determine compliance of flares with the visible emission provisions of this section.~~

~~(2) The presence of a flare pilot flame must be monitored using a thermocouple or any other equivalent device to detect the presence of a flame.~~

~~(3) The net heating value of the gas being combusted in a flare must be calculated using the following equation:~~

$$H_T = K \sum_{i=1}^{N} C_i H_i$$

~~where:~~

H_T = ~~Net heating value of the sample MJ/scm;~~

~~where the net enthalpy per mole of off-gas is based on combustion at twenty-five degrees Celsius and seven hundred sixty mm Hg, but the standard temperature for determining the volume corresponding to one mole is twenty degrees Celsius.~~

K = ~~Constant, 1.74×10^{-7} (1/ppm) (g mole/scm) (MJ/kcal) where standard temperature for (g mole/scm) is twenty degrees Celsius.~~

C_i = ~~Concentration of sample component i in ppm, as measured by reference method 18 of appendix A of chapter 33-15-12 and A.S.T.M. D2504-67 (reapproved 1977).~~

H_i = Net heat of combustion of sample component i, kcal/g mole. The heats of combustion may be determined using A.S.T.M. D2382-76 if published values are not available or cannot be calculated.

(4) The actual exit velocity of a flare must be determined by dividing the volumetric flow rate (in units of standard temperature and pressure), as determined by reference method 2, 2A, 2C, or 2D, as appropriate, by the unobstructed (free) cross-section area of the flare tip.

(5) The maximum permitted velocity, V_{max} for air-assisted flares must be determined by the following equation:

$$V_{max} = 8.76 + 0.7084 (H_T)$$

where:

V_{max} = Maximum permitted velocity, m/sec

8.706 = Constant.

0.7084 = Constant.

H_T = The net heating value as determined in paragraph 3.

7. Recordkeeping requirements.

a. (1) Each owner or operator subject to the provisions of this section shall comply with the recordkeeping requirements of this subsection.

(2) An owner or operator of more than one process unit subject to the provisions of this section may comply with the recordkeeping requirements for these process units in one recordkeeping system if the system identifies each record by each process unit.

b. When each leak is detected as specified in subdivisions b, c, g, and h of subsection 3, the following requirements apply:

(1) A weatherproof and readily visible identification, marked with the equipment identification number, must be attached to the leaking equipment.

(2) The identification on a valve may be removed after it has been monitored for two successive months as specified in paragraph 3 of subdivision g of

~~subsection 3 and no leak has been detected during those two months.~~

~~(3) The identification on equipment, except on a valve, may be removed after it has been repaired.~~

~~c. When each leak is detected, as specified in subdivisions b, c, g, and h of subsection 3, the following information must be recorded in a log and shall be kept for two years in a readily accessible location:~~

~~(1) The instrument and operator identification numbers and the equipment identification number.~~

~~(2) The date the leak was detected and the dates of each attempt to repair the leak.~~

~~(3) Repair methods applied in each attempt to repair the leak.~~

~~(4) "Above ten thousand" if the maximum instrument reading measured by the methods specified in subdivision a of subsection 6 after each repair attempt is equal to or greater than ten thousand parts per million.~~

~~(5) "Repair delayed" and the reason for the delay if a leak is not repaired within fifteen calendar days after discovery of the leak.~~

~~(6) The signature of the owner or operator (or designate) whose decision it was that repair could not be effected without a process shutdown.~~

~~(7) The expected date of successful repair of the leak if a leak is not repaired within fifteen calendar days.~~

~~(8) Dates of process unit shutdowns that occur while the equipment is unrepaired.~~

~~(9) The date of successful repair of the leak.~~

~~d. The following information pertaining to the design requirements for closed vent systems and control devices described in subdivision k of subsection 3 must be recorded and kept in a readily accessible location:~~

~~(1) Detailed schematics, design specifications, and piping and instrumentation diagrams.~~

~~(2) The dates and descriptions of any changes in the design specifications.~~

~~(3)~~ ~~A description of the parameter or parameters monitored, as required in paragraph 5 of subdivision k of subsection 3, to ensure that control devices are operated and maintained in conformance with their design and an explanation of why that parameter (or parameters) was selected for the monitoring.~~

~~(4)~~ ~~Periods when the closed vent systems and control devices required in subdivisions b, c, d, e, and i of subsection 3 are not operated as designed, including periods when a flare pilot light does not have a flame.~~

~~(5)~~ ~~Dates of startups and shutdowns of the closed vent systems and control devices required in subdivisions b, c, d, e, and i of subsection 3.~~

~~e.~~ ~~The following information pertaining to all equipment subject to the requirements in subsection 3 must be recorded in a log that is kept in a readily accessible location:~~

~~(1)~~ ~~A list of identification numbers for equipment subject to the requirements of this section.~~

~~(2)~~ ~~(a)~~ ~~A list of identification numbers for equipment that the owner or operator elects to designate for no detectable emissions, as indicated by an instrument reading of less than five hundred parts per million above background, under the provisions of paragraph 5 of subdivision b, paragraph 9 of subdivision c, and paragraph 6 of subdivision g of subsection 3.~~

~~(b)~~ ~~The designation of this equipment as subject to the requirements of paragraph 5 of subdivision b, paragraph 9 of subdivision c, and paragraph 6 of subdivision g of subsection 3 must be signed by the owner or operator.~~

~~(3)~~ ~~A list of equipment identification numbers for pressure relief devices required to comply with paragraph 1 of subdivision d of subsection 3.~~

~~(4)~~ ~~(a)~~ ~~The dates of each compliance test required in paragraph 5 of subdivision b, paragraph 9 of subdivision c, and paragraph 6 of subdivision g of subsection 3.~~

~~(b)~~ ~~The background level measured during each compliance test.~~

~~(c)~~ ~~The maximum instrument reading measured at the equipment during each compliance test.~~

~~(5)~~ ~~A list of identification numbers for equipment in vacuum service.~~

~~f.~~ ~~The following information pertaining to all valves subject to the requirements of paragraphs 7 and 8 of subdivision g of subsection 3 must be recorded in a log that is kept in a readily accessible location:~~

~~(1)~~ ~~A list of identification numbers for valves that are designated as unsafe to monitor, an explanation for each valve stating why the valve is unsafe to monitor, and the plan for monitoring each valve.~~

~~(2)~~ ~~A list of identification numbers for valves that are designated as difficult to monitor, an explanation for each valve stating why the valve is difficult to monitor, and the planned schedule for monitoring each valve.~~

~~g.~~ ~~The following information must be recorded for valves complying with subdivision b of subsection 4:~~

~~(1)~~ ~~A schedule for monitoring.~~

~~(2)~~ ~~The percent of valves found leaking during each monitoring period.~~

~~h.~~ ~~The following information must be recorded in a log that is kept in a readily accessible location:~~

~~(1)~~ ~~Design criterion required in subparagraph e of paragraph 4 of subdivision b and paragraph 6 of subdivision c of subsection 3 and an explanation of the design criterion; and~~

~~(2)~~ ~~Any changes to this criterion and the reasons for the changes.~~

~~i.~~ ~~The following information must be recorded in a log that is kept in a readily accessible location for use in determining exemptions as provided in the applicability subsection and other specific sections:~~

~~(1)~~ ~~An analysis demonstrating the design capacity of the process unit.~~

~~(2)~~ ~~An analysis demonstrating that equipment is not in volatile hazardous air pollutant service.~~

~~j. Information and data used to demonstrate that a piece of equipment is not in volatile hazardous air pollutant service must be recorded in a log that is kept in a readily accessible location.~~

~~8. Reporting requirements.~~

~~a. (1) An owner or operator of any piece of equipment to which this section applies shall submit a statement in writing notifying the department that the requirements of subsections 3, 6, 7, and 8 are being implemented.~~

~~(2) In the case of an existing source or a new source which has an initial startup date preceding the effective date, the statement is to be submitted within ninety days of the effective date, unless a compliance schedule is granted under subsection 9 of section 33-15-13-01, along with the information required under subsection 8 of section 33-15-13-01. If a compliance schedule is granted, the statement is to be submitted on a date scheduled by the department.~~

~~(3) In the case of new sources which did not have an initial startup date preceding the effective date, the statement must be submitted with the application for approval of construction, as described in subsection 6 of section 33-15-13-01.~~

~~(4) The statement is to contain the following information for each source:~~

~~(a) Equipment identification number and process unit identification.~~

~~(b) Type of equipment (for example, a pump or pipeline valve).~~

~~(c) Percent by weight volatile hazardous air pollutant in the fluid at the equipment.~~

~~(d) Process fluid state at the equipment (gas/vapor or liquid).~~

~~(e) Method of compliance with the standard (for example, "monthly leak detection and repair" or "equipped with dual mechanical seals").~~

~~b. A report must be submitted to the department semiannually starting six months after the initial report required in subdivision a that includes the following information:~~

~~(1) Process unit identification.~~

~~(2) For each month during the semiannual reporting period.~~

~~(a) Number of valves for which leaks were detected as described in paragraph 2 of subdivision g of subsection 3 and subdivision b of subsection 4.~~

~~(b) Number of valves for which leaks were not repaired as required in paragraph 4 of subdivision g of subsection 3.~~

~~(c) Number of pumps for which leaks were detected as described in paragraph 2 and subparagraph f of paragraph 4 of subdivision b of subsection 3.~~

~~(d) Number of pumps for which leaks were not repaired as required in paragraph 3 and subparagraph f of paragraph 4 of subdivision b of subsection 3.~~

~~(e) Number of compressors for which leaks were detected as described in paragraph 6 of subdivision c of subsection 3.~~

~~(f) Number of compressors for which leaks were not repaired as required in paragraph 7 of subdivision c of subsection 3.~~

~~(g) The facts that explain any delay of repairs and, where appropriate, why a process unit shutdown was technically infeasible.~~

~~(3) Dates of process unit shutdowns which occurred within the semiannual reporting period.~~

~~(4) Revisions to items reported according to subdivision a if changes have occurred since the initial report or subsequent revisions to the initial report.~~

~~(5) The results of all performance testing to determine compliance with paragraph 5 of subdivision b, paragraph 9 of subdivision c, paragraph 1 of subdivision d, paragraph 6 of subdivision g, paragraph 6 of subdivision k of subsection 3, and subsection 4 conducted within the semiannual reporting period.~~

~~c. In the first report submitted as required in subdivision a, the report must include a reporting schedule stating the months that semiannual reports shall~~

~~be submitted. Subsequent reports must be submitted according to that schedule, unless a revised schedule has been submitted in a previous semiannual report.~~

~~d. An owner or operator electing to comply with the provisions of subsection 4 shall notify the department of the alternative standard selected ninety days before implementing either of the provisions.~~

~~e. An application for approval of construction or modification, subdivision a of subsection 4 and subsection 6 of section 33-15-13-01, will not be required if:~~

~~(1) The new source complies with the standard in subsection 3;~~

~~(2) The new source is not part of the construction of a process unit; and~~

~~(3) In the next semiannual report required by subdivision b, the information in paragraph 4 of subdivision a is reported.~~

History: ~~Effective October 1, 1987; amended effective January 1, 1989.~~
General Authority: ~~NDCC 23-25-03~~
Law Implemented: ~~NDCC 23-25-03~~

~~APPENDIX~~

~~The appendix references, as specified within chapter 33-15-13, are identical to those specified in appendix A and appendix B, as amended, of title 40, Code of Federal Regulations, part 61 [40 CFR 61].~~

~~Appendix A - Compliance Status Information~~

~~Appendix B - Test Methods~~

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 3.

(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 which has not begun normal operations on the particular date, actual emissions must equal the potential to emit of the unit on that date.

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. 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) 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, but are not limited to, 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. "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.

i. "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.

j. "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.

k. "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.

l. "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.

m. "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).

n. "Federal land manager" means, with respect to any lands in the United States, the secretary of the department with authority over such lands.

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

p. "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.

q. "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.

r. "Indian reservation" means any federally recognized reservation established by treaty, agreement, executive order, or Act of Congress.

s. "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.

t. "Low terrain" means any area other than high terrain.

u. "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.

[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.

v. "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.

w. "Necessary preconstruction permits" means those permits required under this article.

x. "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.

(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.

y. "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 enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

z. "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.

aa. "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

(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 $\mu g/m^3$ (twenty-four-hour average).

bb. "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.

cc. "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:			
TSP, Annual geometric mean	5	19	37
TSP, 24-hour maximum	10	37	75
Sulfur dioxide:			
Annual arithmetic mean	2	15	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 <u>but may be redesignated as provided in this subsection</u>.

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 $\mu g/m^3$, TSP, 24-hour average; 10 $\mu g/m^3$, 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

(b) The concentrations of the air contaminant in the area that the source or modification would effect 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, but not be limited to, 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 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:	
TSP, Annual geometric mean	19
TSP, 24-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	15
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) 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 class I area; or~~

~~(c)~~ 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.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

CHAPTER 33-15-20

33-15-20-01. General provisions.

1. **Applicability.** The provisions of this chapter apply to any oil or gas well production facility which emits sulfur or sulfur compounds to the atmosphere.

2. **Definitions.** As used in this chapter, all terms not defined herein shall have the meaning given them in section 33-15-01-04 or in North Dakota Century Code chapter 23-25.

   a. "Casinghead gas" means any gas or vapor, or both gas and vapor, indigenous to and produced from a pool classified as an oil pool by the North Dakota state industrial commission.

   b. "Completion" means an oil well must be considered completed when the first oil is produced through wellhead equipment into lease tanks from the ultimate producing interval after casing has been run. A gas well must be considered complete when the well is capable of producing gas through wellhead equipment from the ultimate producing zone after casing has been run. A dry hole must be considered complete when all North Dakota state industrial commission provisions of plugging are complied with.

   c. "Condensate" means the liquid hydrocarbons recovered at the surface that result from condensation due to reduced pressure or temperature of petroleum hydrocarbons existing in a gaseous phase in the reservoir.

   d. "Continuous burning pilot" means a stable auxiliary flame supported by a reliable fuel source which is independent of wellhead production.

   e. "Cubic foot of gas" means that volume of gas contained in one cubic foot [28.32 liters] of space and computed at a pressure of fourteen and seven-tenths pounds per square inch [1034 grams per square centimeter] absolute at a base temperature of sixty degrees Fahrenheit [15.5 degrees Celsius].

   ~~e.~~ f. "Gas well" means a well producing gas or natural gas from a common source of gas supply as determined by the North Dakota state industrial commission.

   ~~f.~~ g. "Natural gas or gas" means and includes all natural gas and all other fluid hydrocarbons not herein defined as oil.

~~g.~~ h. "Oil" means and includes crude petroleum oil and other hydrocarbons regardless of specific gravity which are produced at the wellhead in liquid form and the liquid hydrocarbons known as distillate or condensate recovered or extracted from gas, other than gas produced in association with oil and commonly known as casinghead gas.

~~h.~~ i. "Oil well" means any well capable of producing oil or oil and casinghead gas from a common source of supply as determined by the North Dakota state industrial commission.

~~i.~~ j. "Operator" means any person or persons who, duly authorized, is in charge of the development of a lease or the operation of a producing property.

~~j.~~ k. "Owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil or gas he produces.

~~k.~~ l. "Pool" means an underground reservoir containing a common accumulation of oil or gas or both; each zone of a structure which is completely separated from any other zone in the same structure is a pool.

~~l.~~ m. "Production facility" means all equipment, wells, flow lines, separators, treaters, tanks, flares, gathering lines, and auxiliary nontransportation-related equipment used in the exploration, development, or subsequent production or handling of oil and gas from an oil or gas well or wells which are located on one or more contiguous or adjacent surface properties, and are under the control of the same person (or persons under common control).

~~m.~~ n. "Recomplete" or "recompletion" means the subsequent completion of a well in a different pool from the pool in which it was originally completed.

~~n.~~ o. "Reservoir" means pool or common source of supply.

History: Effective October 1, 1987; amended effective June 1, 1990; June 1, 1992.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-20-02. Registration and reporting requirements.

1. The owner or operator of any oil or gas well that is completed or recompleted on or after July 1, 1987, shall submit an oil and gas well registration form available from the department, and an analysis of any gas produced from the well. The registration form and gas analysis must be submitted to the

department within ninety days of the completion or recompletion of the well. The registration form must contain sufficient information to allow the department to determine if the oil or gas well and associated production facility is in compliance with all applicable sections of this chapter.

2. The owner or operator of any oil or gas well that has been completed or recompleted prior to July 1, 1987, and emits ten tons per year or more of sulfur (all sulfur compounds expressed as S) from any associated production facility shall submit an oil and gas well registration form available from the department, and an analysis of any gas produced from the well. The registration form must contain sufficient information to allow the department to determine if the oil or gas well and associated production facility is in compliance with all applicable sections of this chapter. The registration form and gas analysis must be submitted to the department by January 1, 1988, unless the emissions are the result of a modification or change that occurs after July 1, 1987. For wells that are subject to this subsection due to a modification or change which occurred after July 1, 1987, the registration form and gas analysis must be submitted within ninety days of the modification or change.

3. The owner or operator of any oil or gas well subject to this section shall inform the department of any change to the information contained on the registration form for a particular well and shall submit a new gas analysis if the composition or the volume of the gas produced from the well has changed from the previous analysis to cause an increase of ten tons per year or more of sulfur (all sulfur compounds expressed as S).

History: Effective October 1, 1987; amended effective June 1, 1990; June 1, 1992.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

33-15-20-03. Prevention of significant deterioration applicability and source information requirements.

1. Any oil or gas well production facility that emits or has the potential to emit two hundred fifty tons per year or more of any air contaminant regulated under North Dakota Century Code chapter 23-25, as determined by the department, shall comply with the permitting requirements of chapter 33-15-15.

2. To determine prevention of significant deterioration of air quality (PSD) applicability for sulfur dioxide, the following formula must be used:

$$E = 0.00084\ R\ T\ (\%\ H_2S)$$

Where: E = sulfur dioxide emission rate (tons/yr).

R = the average daily amount of gas burned, incinerated and/or flared (thousand cubic feet per day-MCFD) based upon a thirty-day period. The thirty-day period must be the last thirty operating days of a one hundred eighty-day period following the completion or recompletion of a well. In cases where the well is shut in for extended periods during the one hundred eighty-day period following completion or recompletion, a case-by-case determination of PSD can be requested of the department.

T = days of operation per year (day/yr). This number must be three hundred sixty-five unless there are verifiable physical limitations or a federally enforceable permit that limits the number of operating days.

% H_2S = mole percent hydrogen sulfide content as determined by the most recent gas analysis.

The formula is derived as follows:

$$E = \left(\frac{Mcf}{day}\right)\left(\frac{1000\ cf}{Mcf}\right)\left(\frac{\%\ H_2S}{100}\right)\left(\frac{lb\text{-}mole}{379.5\ cf}\right)\left(\frac{64.06\ lb\ SO_2}{lb\text{-}mole}\right)\left(\frac{days}{year}\right)\left(\frac{ton}{2000\ lb}\right)$$

$$E = 0.00084\ \left(\frac{Mcf}{day}\right)\left(\frac{days\ of\ operation}{year}\right)(\%\ H_2S)$$

~~Alternative methods of calculation may be used when approved by the department.~~ Emissions from all onsite equipment at the production facility must be included in the total annual emission determination.

3. The owner or operator of any oil or gas well production facility subject to subsection 1 of this section shall provide information to demonstrate that emissions from the facility do not significantly contribute to exceeding the ambient air quality standards, as defined in chapter 33-15-02, or class I or class II increments, as defined in chapter 33-15-15; and shall address other requirements as specified in chapter 33-15-15.

History: Effective October 1, 1987; amended effective June 1, 1990; June 1, 1992.
General Authority: NDCC 23-25-03
Law Implemented: NDCC 23-25-03

SEPTEMBER 1992

ARTICLE (CHAPTER 33-22-01)

33-22-01-01. Scope. The provisions of this article shall apply to all hearings held by the department for the purposes of adjudicating the rights of parties under North Dakota Century Code chapters 23-20.1, 23-25, 23-29, and 61-28 ~~and Section 23-01-17~~. This article shall provide procedures in addition to or in explanation of those procedures provided by such chapters ~~or section~~, and North Dakota Century Code chapter 28-32.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-02

OCTOBER 1992

CHAPTER 33-03-23

33-03-23-01. Definitions. As used in this article, except as otherwise specifically provided or where the context indicates otherwise:

1. ~~"Board" means the North Dakota board of medical examiners.~~

~~2.~~ "Committee" means the health care data committee established in accordance with North Dakota Century Code chapter 23-01.1.

~~3.~~ 2. "Comprehensive health association of North Dakota members" means those insurance companies who are participating members in the North Dakota comprehensive health association as determined by the insurance commissioner under North Dakota Century Code section 26.1-08-03.

~~4.~~ 3. "Council" means the state health council as established under North Dakota Century Code section 23-01-02.

~~5.~~ 4. "Data supplier" means any insurer, nonprofit health service corporation, health maintenance organization, self-funded employer health insurance plan regulated by the North Dakota insurance department, or state agency which the committee requires to provide data.

~~6.~~ 5. "Department" means the North Dakota state department of health and consolidated laboratories.

~~7.~~ 6. "Diagnosis-related group" (DRG) means the categorizations established by the health care financing administration for

the purposes of hospital payment and any subsequent similar set of categorizations so established.

7. "HCFA-1500" means the health care financing administration form 1500 or successor forms.

8. "Health maintenance organization" means any health maintenance organization certified by the North Dakota insurance department.

9. "Health professional data" means any claims for inpatient, outpatient, or ambulatory medical or surgical services or other services normally submitted to the third party payer on HCFA-1500 or successor forms or other forms specified by the committee.

10. "Hospital data" means any claims for inpatient, outpatient, or ambulatory surgical services or other services normally submitted to the third-party payer on form UB-82 or a revised form.

~~10.~~ 11. "Insurers" means any insurance company licensed to do business in North Dakota by the insurance department.

~~11.~~ 12. "Provider" means a person, agency, or organization which is engaged in the provision of health care or nursing home care services to the public.

~~12.~~ 13. "UB-82" means the health care financing administration form UB-82 or successor forms.

History: Effective April 1, 1988; amended effective October 1, 1992.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-04

33-03-23-02. **Requests for data.** The committee may require data suppliers and agencies of state government to provide certain data and information.

1. The committee shall establish uniform formats for the different types of data for use by data suppliers in providing hospitalization data, health professional data, nursing home data, health maintenance organization data, and other types of data as the committee finds necessary.

2. Data required to be submitted must be provided to the committee in the format established or, if the data supplier requests in writing, in a format which is technically equivalent and which supplies all of the necessary information. Third-party payers who cannot meet these reporting specifications and third-party payers who determine that it is not economically feasible to report in accordance

with these specifications shall request in writing approval to report the data in a specific, alternative form. These requests must be submitted to and approved by the department.

3. Data requests must be specific regarding the time period covered, data elements to be provided, and the form and format in which the data is to be provided.

4. Hospital data required to be provided must be limited to those data elements provided for on the health care financing administration form UB-82 (or replacement form) using the current definitions developed by the North Dakota uniform billing committee.

5. Health professional data required to be provided must be limited to those data elements provided for on the health care financing administration form 1500 or successor form or other forms specified by the committee.

6. Data must be provided within forty-five days of the committee's request for data. A fifteen-day extension of time for providing data may be granted if the data source adequately justifies the delay.

~~6.~~ 7. Prior to collecting hospital data or health professional data from any data supplier, the data supplier must be provided an exact format for reporting data and an explicit description of each data item to be reported. Descriptions of data elements shall include specifications in terms of form location, definitions and alternate specifications, and definitions for those data suppliers that do not maintain the exact UB-82 data as described in the North Dakota uniform billing procedures manual, ~~UB-82~~ or for data elements not provided for in the HCFA-1500 medicare carriers manual (as revised). Those data suppliers that maintain similar elements shall report the comparable data elements that they maintain and a detailed code structure for each element to the department.

~~7.~~ 8. Data must be collected at least annually but not more often than quarterly from the following data suppliers:

a. Those comprehensive health association of North Dakota members, including health maintenance organizations, found by the North Dakota insurance commissioner to be subject to an assessment of one percent or more as a participating member of the comprehensive health association of North Dakota.

b. The committee may request, but may not require, that self-funded employer health plans submit claims data.

c. State agencies that have paid any ~~inpatient~~ claims for hospital or health professional services during the

calendar year, including medicare and medicaid data in the possession of the agency.

~~8.~~ 9. The committee shall require that the data suppliers include a contract identifier number for contracts or plans paid for or subsidized by the North Dakota public employees retirement system or the comprehensive health insurance association of North Dakota and for those employer groups who have requested in writing that the department retain a contract identifier number.

10. The committee shall require that the data suppliers include identification codes for hospitals, health professionals, clinics, and patients.

~~9.~~ 11. Data must be collected at least annually, but not more often than quarterly, from the department of human services regarding basic care, intermediate care, and skilled nursing care provided in long-term care facilities located in this state. The data must include medicare and medicaid claims for these facilities as collected by the department of human services.

History: Effective April 1, 1988; amended effective October 1, 1992.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02, 23-01.1-04

33-03-23-03. **Prepublication review.** Prior to publication the committee shall allow data suppliers and providers an opportunity to review the data to be published and comment.

Data reports and analyses which are to be made available to the general public and which identify specific providers or which are solely derived from the records of a specific data supplier are subject to the following prepublication review procedures:

1. Data, information, analyses, or reports relating to individual providers must be submitted to or available to the provider prior to publication for verification of the accuracy of the information contained in the report. In the event that the provider finds a discrepancy between the data available to the provider and the information contained in the draft report, the provider may submit information substantiating or refuting the draft report. Hospital data and nursing home data will be submitted to each hospital or nursing home identified. Health professional data will be available onsite at the department, and onsite at the licensing or certifying authority of the health professional or available at locations determined by the committee.

2. If the committee has not received the provider's response in writing within thirty days of the mailing date of the draft

report, the committee shall assume that the data contained in the report has been verified and shall proceed with publication.

3. If the provider responds within thirty days of the mailing date of the draft report that the information is incorrect and provides documentation that an error has occurred, the committee may accept the documentation and revise the draft report correspondingly or it may reject the documentation as inadequate and proceed with publication.

   The committee shall notify the provider of its decision.

4. The provider may appeal the decision of the committee pursuant to North Dakota Century Code chapter 28-32.

5. Providers may have their data-specific comments published as an appendix to ~~the~~ final ~~report~~ reports.

History: Effective April 1, 1988; amended effective October 1, 1992.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02

33-03-23-04. Mutual responsibilities of the department and the board with regard to a physician directory. ~~The department and the board shall establish, in a memorandum of agreement approved by the committee, the procedures for sharing the cost of producing and distributing a directory of physicians licensed to practice in North Dakota. The memorandum of understanding must specify the relative responsibilities of the department and the board for the collection, maintenance, and analysis of the information contained in the directory as specified by law.~~

~~1. The department shall prepare and distribute a uniform survey form to all physicians currently practicing medicine in North Dakota from a current listing of licensed physicians supplied by the board.~~

~~2. Physicians who choose to provide fee information for publication must complete the required information items contained in the survey form and return it within forty-five days of the mailing date of the survey.~~

~~3. The department shall devise a format for the separate section of the physician directory containing physician fee information and for determining its method of publication. The extent of the distribution of the physician directory must be determined in conjunction with the board and set forth in the memorandum of understanding.~~

~~4. The board may charge a reasonable fee for providing copies of the directory.~~

~~5. The publication of the physician directory is not subject to the prepublication review procedures of section 33-03-23-03.~~ Repealed effective October 1, 1992.

History: ~~Effective April 1, 1988.~~
General Authority: ~~NDCC 23-01.1-04~~
Law Implemented: ~~NDCC 23-01.1-03~~

33-03-23-05. Confidentiality. Individual patient confidentiality shall be protected.

1. The committee shall adopt such procedures as it finds necessary for the protection of patient confidentiality provided that in no case shall data that specifically identify a patient by name or that could be used to identify a patient by name be released to the public, data researchers, or employers. Any provider that is identified in the claims data submitted to the committee may be identified by name and code number in the tabulations released by the committee.

2. The committee may enter into agreements with data users, researchers, and employers for the release of data in other than final published form. The committee shall establish within these agreements appropriate safeguards regarding the release of such data so that individual patients will not be identified. The agreements shall prohibit the public re-release of provider specific data by data users, researchers, and employers.

History: Effective April 1, 1988; amended effective October 1, 1992.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-05

33-03-23-06. Accessibility and cost of reports. The committee shall make certain information available to the public, providers, data suppliers, researchers, and state agencies.

1. The committee shall direct and the department shall produce an annual report comparing the cost of hospitalization by hospital and for those diagnosis-related groups selected by the committee by diagnosis-related group.

2. The committee shall direct and the department shall produce an annual report comparing the fees of health professionals providing services identified by the committee.

3. Any person, organization, governmental agency, or other entity may request special tabulations of the UB-82 data or HCFA-1500 data or data from other forms as specified by the committee that are reported to the department, or direct access to a machine-readable, final data set prepared and maintained by

the department. The final data set must include the exact list of data elements specified by the committee. All requests must be made in writing to the department. The written request must include the name, address, telephone number, employer, or organizational affiliation, and a detailed description of the data or tabulations being requested.

~~3.~~ 4. With the exception of those analyses, reports, and projects undertaken pursuant to section 33-03-23-08, no special tabulations may be produced by the department until all editing and updating of the data for the year to be included in the tabulations have been completed, and the data set is determined to be the final corrected data set.

~~4.~~ 5. When a request for special tabulations or computer tapes is received by the department that would include identification of a specific provider in the special tabulations or on the requested computer tapes, the provider must be notified by the department that data including the provider identification are being released. The notification must consist of a copy of the completed request form filed with the department and a cover letter indicating the anticipated date that the data shall be provided.

~~5.~~ 6. All direct and indirect costs associated with the fulfillment of special requests including staff time, computer time, copying costs, and supplies must be borne by the requester.

History: Effective April 1, 1988; amended effective October 1, 1992.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02, 23-01.1-06

33-03-23-07. Maintenance of data. All data reported to the committee in response to the committee's requests for necessary data must be maintained for five years. A diagnosis-specific subset of the hospitalization claims data set (UB-82) and health professional claims data set (HCFA-1500 or data set from other forms specified by the committee) must be maintained for a period of not less than ten years.

History: Effective April 1, 1988; amended effective October 1, 1992.
General Authority: NDCC 23-01.1-04
Law Implemented: NDCC 23-01.1-02

CHAPTER 33-36-01

33-36-01-02. Emergency medical services training programs. The department shall establish training, testing, and certification requirements for the following emergency medical services programs:

1. Primary certification programs:

   a. First responder;

   b. Emergency care technician;

   c. Emergency medical technician-basic;

   d. Emergency medical technician-intermediate; and

   e. Emergency medical technician-paramedic.

2. Certification scope enhancement programs:

   a. Emergency medical services instructor;

   b. Automatic defibrillation;

   c. Manual defibrillation;

   d. Intravenous maintenance;

   e. Flight medical crew;

   f. Automobile extrication;

   g. Automobile extrication instructor;

   h. First responder-refresher;

   i. Emergency medical technician-basic refresher;

   j. Emergency medical technician-intermediate refresher; and

   k. Emergency medical technician-paramedic refresher.

   l. Epinephrine administration.

History: Effective April 1, 1992; amended effective October 1, 1992.
General Authority: NDCC 23-27-04.3
Law Implemented: NDCC 23-27-04.3

33-36-01-04. Training, testing, and certification standards for certification scope enhancement programs. The department shall

authorize the conduct of courses, the testing of students, and the certification of personnel when application has been made on forms provided and in the manner specified by the department contingent on the following requirements:

1. Automatic defibrillation:

   a. Student prerequisite certification. Students must be certified as a first responder or its equivalent, with oxygen and suction training.

   b. Curriculum. The course curriculum must be that issued by the department entitled "Automatic Defibrillator: Coordinator Handbook".

   c. Textbooks. The textbook must be chapter twenty from the advanced cardiac life support textbook published by the American heart association.

   d. Course instructor. The course instructor must be a physician, registered nurse, or paramedic and must be currently certified by the American heart association in advanced cardiac life support.

   e. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination conducted by the department. The practical examination must consist of the automatic defibrillation of a simulated cardiac arrest patient.

   f. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. The certification must expire one year from the date the practical and written tests were passed.

   g. Recertification. The department shall recertify for a one-year period those persons who have met all of the following requirements:

      (1) Quarterly review of the automatic defibrillation process conducted by a person trained at least to the emergency care technician level and certified in automatic defibrillation.

      (2) Demonstration of skill competence to the squad's medical director five to seven months after becoming certified.

      (3) Successful completion of the department's written and practical examinations.

2. Manual defibrillation:

   a. Student prerequisite certification. A student must be certified as an emergency care technician or its equivalent.

   b. Curriculum. The course curriculum must be that issued by the department entitled "Manual Defibrillator/Monitor Curriculum".

   c. Course instructor. The course instructor must be a physician, registered nurse, or paramedic and must be currently certified by the American heart association in advanced cardiac life support.

   d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination conducted by the department. The practical examination must consist of the manual defibrillation of a simulated cardiac arrest patient and correctly identify eleven out of thirteen static cardiac strips.

   e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. The certification must expire one year from the date the practical and written tests were passed.

   f. Recertification. The department shall recertify for a one-year period those persons who have met all of the following requirements:

      (1) Quarterly review of the manual defibrillation process conducted by a person trained at least to the emergency care technician level and certified in manual defibrillation.

      (2) Demonstration of skill competence to the squad's medical director five to seven months after becoming certified.

      (3) Successful completion of the department's written and practical examinations.

3. Intravenous therapy maintenance:

   a. Student prerequisite certification. A student must be certified as an emergency care technician or its equivalent.

b. Curriculum. The course curriculum must be that issued by the department entitled "EMT/ECT IV Maintenance Module".

c. Course instructor. The course instructor must be an emergency medical technician-intermediate or its equivalent.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination provided by the department. The practical examination must consist of performing intravenous maintenance skills on a manikin.

e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of that year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the following year.

f. Recertification. The department shall recertify for a one-year period those persons who have completed the department's one hour refresher course, written examination, and practical examination.

4. Flight medical crew:

a. Student prerequisite certification. An individual must be enrolled as an emergency medical technician-paramedic student or certified as an emergency medical technician-paramedic or its equivalent.

b. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "Air Medical Crew National Standard Curriculum", in the edition specified by the department.

c. Course instructor. The department shall provide the course instructor.

d. Initial certification. The department shall issue initial certification to persons who have completed an authorized course. A person who has completed an authorized course between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the second year.

e. Recertification. The department shall recertify for a two-year period those persons who have completed the department's four hour refresher course or complete eight hours of air medical related education.

5. Automobile extrication:

a. Curriculum. The course curriculum must be that issued by transportation rescue consultants, inc. entitled "The Carbusters: Principles, Techniques and Handtools".

b. Course instructor. The course instructor must be certified by the department as an automobile extrication instructor.

c. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department.

d. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the second year.

e. Recertification. The department shall recertify for a two-year period those persons who complete the department's six hour refresher course or audit eight hours of an initial course and pass the department's written examination.

6. Automobile extrication instructor:

a. Curriculum. The course curriculum must be that issued by transportation rescue consultants, inc. entitled "The Carbusters: Principles, Techniques and Handtools".

b. Course instructor. The department shall provide the course instructor.

c. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department.

d. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process

between July first and December thirty-first must be certified until December thirty-first of the second year.

e. Recertification. The department shall recertify for a two-year period those persons who have satisfactorily conducted an automobile extrication course or have audited eight hours of an automobile extrication instructor course.

7. Emergency medical services instructor:

a. Student prerequisite. An individual must be at least eighteen years of age in order to be certified.

b. Curriculum. The course curriculum must consist of thirty-two hours of training based on the curriculum issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Services Instructor Training Program, A National Standard Curriculum", in the edition specified by the department. The department shall determine which training topics must be extracted from the curriculum to comprise the thirty-two hours of training.

c. Course instructor. The course instructor must be provided by the department.

d. Initial certification. The curriculum must be divided into two 16-hour blocks of instruction and the department shall issue initial certification to persons for each sixteen-hour block. Persons completing the first block of instruction between January first and June thirtieth must be certified until December thirty-first of that year. Persons completing the first block of instruction between July first and December thirty-first must be certified until December thirty-first of the following year. Persons completing the second block of instruction must be certified for an additional year beyond the expiration date of the first block. The department may determine equivalencies for either block of instruction.

e. Recertification. The department shall recertify for a two-year period those persons who have completed the department's eight hour refresher course or have audited eight hours of an initial emergency medical services instructor course.

8. First responder refresher:

a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "First

Responder Refresher Training Program National Standard Curriculum", in the edition specified by the department.

b. Textbooks. The department shall publish a list of approved textbooks.

c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as a first responder or its equivalent.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the course coordinator and pass all stations of a practical examination conducted by the course coordinator. The practical examination must consist of no less than one medical, one cardiopulmonary resuscitation, and one trauma station.

9. Emergency medical technician-basic refresher:

a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "EMT Ambulance Refresher Training Program National Standard Curriculum", in the edition specified by the department.

b. Textbooks. The department shall publish a list of approved textbooks.

c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency care technician or its equivalent.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all stations of a practical examination conducted by the course coordinator.

10. Emergency medical technician-intermediate refresher:

a. Curriculum. The course coordinator shall select topics consisting of twelve hours of training from the curriculum issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Technician-Intermediate National Standard Curriculum", in the edition specified by the department.

b. Textbooks. The department shall publish a list of approved textbooks.

c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency medical technician-intermediate or its equivalent.

11. Emergency medical technician-paramedic refresher:

a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "EMT Paramedic Refresher Training Program National Standard Curriculum", in the edition specified by the department.

b. Textbooks. The department shall publish a list of approved textbooks.

c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency medical technician-paramedic or its equivalent.

12. Epinephrine administration:

a. Student prerequisite certification. A student must be certified as an emergency care technician or its equivalent.

b. Curriculum. The course curriculum must be that issued by the department entitled "EMT/ECT Epinephrine Administration Module".

c. Course instructor. The course instructor must be a physician, registered nurse, or paramedic.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination provided by the department. The practical examination must consist of performing subcutaneous injection of epinephrine with the use of a preloaded, self-injecting device such as the epipen trainer.

e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of that year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the following year.

f. Recertification. The department shall recertify for a one-year period those persons who have completed the department's one hour refresher course, written examination, and practical examination.

History: Effective April 1, 1992; amended effective October 1, 1992.
General Authority: NDCC 23-27-04.3
Law Implemented: NDCC 23-27-04.3

NOVEMBER 1992

CHAPTER 33-03-24

33-03-24-01. Definitions.

1. "Abuse" ~~means verbal or nonverbal actions which constitute harassment or negligent treatment or maltreatment, an act of omission which evinces disregard of consequences of such a magnitude as to constitute a clear and present danger to a resident's health, well-being, or safety~~ includes mental, physical, sexual, and verbal abuse. Mental abuse includes, but is not limited to, 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, but is not limited to, 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 residents or their families, or within their hearing distance to describe residents, regardless of their age, ability to comprehend, or disability.

2. "Active treatment" includes the assessment of the developmental, behavioral, social, medical, and mental health status of a resident, the development of a plan to change those techniques of intervention across all environments in which the resident exists, all of which are intended to result in a desired developmental, behavioral, and social growth and change.

~~2.~~ 3. "Activities of daily living" means those personal functional activities required by an individual for continued well-being,

including eating, nutrition, dressing, personal hygiene, mobility, toileting, and behavior management.

a. "Assistance" means the resident is able to help with most of an activity, but cannot do it entirely alone. The resident may need prompting, encouragement, or the minimal hands-on assistance of the personal care aide.

b. "Independent" means the resident can perform the activities of daily living without help.

~~3.~~ 4. "Activity staff" means an employee who is qualified and responsible for providing an activity program.

~~4.~~ 5. "Administrator" means the individual person who is in general administrative charge of a facility.

~~5.~~ 6. "Ambulatory" means a person who is able to walk independently, without mechanical devices.

~~6.~~ 7. "Basic care facility" means a ~~social model~~ facility whose focus is to provide an atmosphere conducive to improving, maintaining, or overcoming an individual's physical, psychological, and emotional or mental incapacities in an effort to achieve the highest level of self-sufficiency and quality of life for which the resident is capable. Any facility, place, or building in which there is provided for a period exceeding twenty-four consecutive hours and whose primary purpose is to ~~furnish~~ provide, within the facility, either directly or through contract services, room, board, laundry, and personal care assistance when necessary with activities of daily living to five or more persons nonrelated to the manager or owner of the facility who by reason of age or disability are incapable of living independently or managing their own affairs but who are ambulatory or mobile nonambulatory is considered a basic care facility.

~~7.~~ 8. "Capable of self-preservation" means physically and mentally capable of making one's way from the facility within an acceptable period of time to a place of safety in case of fire or other emergency as documented in the basic care facility fire drill reports.

9. "Chemical restraints" include psychoactive drugs administered for the purposes of discipline or convenience and not required to treat the resident's medical symptoms.

~~8.~~ 10. "Department" means the North Dakota state department of health and consolidated laboratories.

~~9.~~ 11. "Dietary staff" means any employee who is responsible for the preparation and cooking of meals for residents.

~~10.~~ 12. "Environmental support staff" means employees whose services are directed towards the resident's surroundings and includes assistance with such instrumental activities of daily living as household cleaning, meal preparation, shopping, transportation, and laundry.

~~11.~~ 13. "Governing body" means the entity legally responsible for the operation of a basic care facility.

~~12.~~ 14. "Housekeeping staff" means any employee who is responsible for cleaning and doing laundry.

~~13.~~ 15. "Inspection" means an examination in order to evaluate compliance with this chapter.

~~14.~~ 16. "Instrumental activities of daily living" are considered more complex than activities of daily living. Performance of these tasks requires mental or cognitive (memory, judgment, intellectual ability) or physical ability, or both. Instrumental activities of daily living includes preparing meals, shopping, managing money, housework, laundry, taking medicine, transportation, use of telephone, and mobility outside the basic care facility.

~~15.~~ 17. "Investigation" means an inquiry into a basic care facility whenever the department has reason to believe a violation of the law or rules has occurred.

~~16. "Licensed nurse" means one who is licensed by the North Dakota board of nursing to practice nursing consistent with the North Dakota nurse practice act, North Dakota Century Code chapter 43-12.1.~~

~~17.~~ 18. "Licensee" means the person, institution, or organization to whom the license is issued.

~~18.~~ 19. "Medication administration" means an act in which a single dose of a prescribed drug or biological is given to a resident by an authorized person in accordance with laws and regulations governing such acts. The complete act of administration entails the removal of an individual dose from a previously dispensed, properly labeled container (including a unit dose container), verifying the drug and dosage with the practitioner's orders, administering dose to the proper resident, and immediately recording the time and amount given.

~~19.~~ 20. "Mobile nonambulatory" means unable to ambulate without another's assistance, but able to move from place to place, and self-exit the building, with the use of a device such as a walker, crutches, or a wheelchair, and capable of independent bed-to-chair transfer.

21. "Neglect" includes failure to carry out resident services as directed or ordered by the physician or other authorized personnel, failure to give proper attention to residents, and failure to carry out as through careless oversight.

~~20.~~ 22. "Nursing care" means the performance of services necessary in caring for the sick or injured and which require specialized knowledge, judgment, and skill, and meet the standards of nursing regimen as defined in the North Dakota nurse practice act, North Dakota Century Code chapter 43-12.1.

~~21.~~ 23. "Personal care" means assistance with meals, dressing, movement, bathing, grooming, medication, or other personal needs, or general supervision of physical or mental well-being.

~~22.~~ 24. "Personal care attendant" means an employee who has appropriate training and is responsible for provision of resident care.

~~23.~~ 25. "Plan of correction" means a specific, time-limited plan of action, approved by the department, which states how and when a violation will be corrected in a manner which assures continued compliance.

~~24.~~ 26. "Resident" means any individual who is admitted to a basic care facility in order to receive room, board, and personal care.

~~25.~~ 27. "Staff" means any individual other than a resident, who must be at least sixteen years old, and who is either the licensee or is an agent or employee of the licensee, and who performs any service or carries out any duties at the basic care facility which are subject to this chapter.

~~26.~~ 28. "Supervision and protective oversight" means to provide guidance and direction. Generally this care is provided to persons who are disoriented or ~~suffer from~~ have some form of dementia.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3

33-03-24-03. Application for license. Applications for a license to operate a basic care facility must be made to the department prior to opening a facility, making alterations which increase or decrease the resident bed capacity, or prior to a change in ownership and annually. Prior to opening a facility or making other architectural alterations including those which increase or decrease resident bed capacity, a facility must submit architectural floor plans to the department for

review and approval. Facilities meeting the definition of basic care facility as outlined in North Dakota Century Code chapter 23-09.3 must obtain a license by the department in order to operate in North Dakota.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-05

33-03-24-04. Inspection and issuance of license.

1. Upon receipt of an application for license, the department shall schedule an inspection of the basic care facility.

2. The department shall request the assistance of the state fire marshal in the inspection.

3. Upon completion of the inspection and consideration of the findings, the department may issue an unrestricted, restricted, or provisional license, or deny the application, as the facts and circumstances warrant.

4. Once issued, the facility shall display the license in a conspicuous place. A license is valid only in the hands of the person to whom it is issued and not subject to sale, assignment, or other transfer, voluntary or involuntary. A license is not valid for any premises other than those for which originally issued.

5. The department may inspect any facilities which the department determines meet the definition of a basic care facility as described in chapter 33-03-24 and North Dakota Century Code chapter 23-09.3.

6. The department will perform, ~~at least annually and~~ as deemed necessary by the department, unannounced onsite visits at all basic care facilities to determine compliance with chapter 33-03-24, or to investigate complaints.

7. The department shall send a quarterly list of all facilities currently licensed to county social service offices.

8. The facility must provide the department access to any material and information necessary, as determined by the department, for determining compliance with these requirements.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-05

33-03-24-05. Unrestricted license. An unrestricted license is valid for a period not to exceed one year from the date of issuance and must state the maximum number of persons who may reside in the basic care facility ~~as well as the classifications specified in sections 33-03-24-19 and 33-03-24-20. The license for each classification must be color coded~~.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-07

33-03-24-06. Provisional license.

1. A provisional license may be issued to a basic care facility which does not comply with this chapter if practices in the basic care facility do not pose a danger to the health and safety of the residents as determined by the department.

2. A provisional license must be prominently stamped and state that the basic care facility has failed to comply with applicable rules of the department and be accompanied by a written statement of the specific rule or statute violated and the factual basis of the alleged violation, or expire at a set date, not to exceed ~~ninety days~~ three months from the date of issuance.

3. A provisional license is revoked by the department at the end of ~~ninety days~~ three months if compliance is not achieved or an acceptable plan of correction is not approved, or the provisional license will be exchanged for an unrestricted license, which must bear the same date as the date on which the facility was found by the department to be in compliance with the licensure rules.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-05

33-03-24-11. Plan of correction.

1. A basic care facility shall submit a plan of correction within ten days of receipt of the deficiency list if a violation has been cited pursuant to this chapter.

2. The plan of correction must address all violations identified in the deficiency list and submit a date upon which the corrective action will be completed, not to exceed sixty days from the date the inspection was completed unless the department approves.

3. The department may accept, reject, or negotiate modifications to the plan of correction.

4. In appropriate circumstances the department may, upon acceptance of a plan of correction, issue a provisional license to a basic care facility which has had its application denied or license revoked.

5. The department shall notify the basic care facility in writing of a decision on a plan of correction or relicensure within ~~ten~~ thirty days of receipt of the plan.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-12. Personnel policies and procedures. The basic care facility shall have written personnel policies and procedures ~~for~~ which appropriately meet the needs of the basic care facility ~~which specify:~~.

~~1. Duty hours.~~

~~2. Sick leave.~~

~~3. Vacations.~~

~~4. Holidays.~~

~~5. Dress code.~~

~~6. Conduct.~~

~~7. Job description.~~

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-13. Operating policies and procedures.

1. The basic care facility shall have operating policies ~~which include policies~~ and procedures for ~~all~~ services provided by the basic care facility including admission, discharge, and transfer.

2. The basic care facility shall comply with all applicable federal, state, and local laws.

3. The operating policies must be ~~prepared~~ developed to meet the needs of the residents and updated as necessary.

4. The basic care facility shall develop policies and procedures for infection control prevention and management. The facility shall provide a sanitary environment to avoid sources and transmission of infections and communicable diseases. There must be an active program for the prevention, control, and investigation of infections and communicable diseases.

5. The basic care facility shall develop a policy specific to the handling of resident abuse and theft of resident property or funds. The basic care facility may not retain or employ individuals who have been convicted of resident abuse, neglect, or theft of resident property or funds in a court of law or have findings of resident abuse, neglect, or theft of resident property or funds listed on the state nurse aide registry.

~~3.~~ 6. Basic care facilities ~~that admit~~ admitting persons ~~who are~~ confined to a wheelchair or use a walker shall develop a policy and procedure that appropriately responds to the needs of residents with ambulatory deficits and implement a practice that provides:

a. ~~Provide hallways~~ Hallways, doorways, exits, and toilet and bathing facilities which will accommodate a wheelchair or walker.

b. ~~Provide a~~ A minimum of one exit ramp accessible to residents requiring wheelchairs or have an acceptable means ~~to provide~~ of providing regular access to the outdoors as approved in writing by the department.

~~c. Provide placement of those residents who require the use of a walker or who are blind on a floor which has direct exit at grade, a ramp or no more than two steps to grade with a handrail.~~

~~d. Provide placement of those residents who use a wheelchair near an exit and there must be a direct exit at grade or a ramp.~~

~~e.~~ c. ~~Be in compliance~~ That all structural changes related to egress comply with the fire code as certified in writing by the state fire marshal.

~~4. A typewritten or printed copy of any rules, routines, and regulations for the resident must be provided at the time of application for admission and be available upon request.~~

~~5. Copies of all rules, routines, regulations, policies, or procedures affecting the operation of the basic care facility must be available in the administrator's office.~~

~~6. It is the responsibility of the governing body and the administrator to see that these policies are carried out.~~

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-05

33-03-24-15. Administrator.

1. The administrator must be an employee of good mental and physical health, possessing knowledge and experience in administration and personnel management. The administrator is a person who:

   a. Has a bachelor's degree ~~in a health related or human services related field; or~~

   b. Is licensed as a nursing home administrator in North Dakota; or

   c. Has a minimum of a high school diploma or its equivalent and at least three years' experience in a health-related or human services-related field.

2. Whenever the administrator leaves the premises, a responsible employee must be designated, in writing, to act in the administrator's absence. ~~At no time may the home be left without~~ There shall always be the onsite presence of the administrator or ~~the~~ a designee.

3. The administrator shall attend at least twelve continuing education hours per year relating to care and services for the ~~elderly~~ residents.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-16. Staffing and training. The governing body or its designee shall employ sufficient staff to meet the residents' needs.

1. Sufficient, trained, personal care staff must be in the basic care facility awake and prepared to assist residents at all times, twenty-four hours per day. This staff may not have

simultaneous duties on other units in a basic care facility that is part of a nursing home or other health care facility.

2. There must be sufficient staff to ensure that each resident receives daily personal care as needed to keep skin, nails, hair, mouth, clothing, and body clean and healthy.

3. Sufficient activity staff must be provided to meet the needs of the residents.

   a. The basic care facility shall provide for a qualified activity person who will provide activities suited to the needs and interests of residents. Individual activity programs must encourage maintenance of self-care and continuity of normal activities.

   b. The basic care facility shall employ a qualified activity person who is responsible for the direction and supervision of the activities program. A qualified activity person:

      (1) Is 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; <u>or</u>

      (2) Is a qualified occupational therapist as defined in North Dakota Century Code chapter 43-40 or certified occupational therapist assistant; or

      (3) Has at least two years of full-time experience within the last five years as an employee in an activities program in a health care setting or other activity-related experience in another setting. Activity persons not having this experience will be required to attend a minimum of four activity-related inservices in the first year of employment.

4. The basic care facility shall provide for social services consistent with the needs of the residents.

5. The basic care facility shall provide a planned orientation program commensurate with job requirements for each new staff member.

6. An ongoing educational program must be planned and conducted for the development and improvement of staff skills for all basic care facility personnel including training related to the problems and needs of the aged, physically ill, mentally ill, and disabled. Inservice training must be conducted at least quarterly for all personnel. On an annual basis, all

employees shall receive inservice training in at least the following:

a. Fire and accident prevention and safety.

b. Mental and physical health needs of the residents.

c. Prevention and control of infections.

d. Resident ~~personal and property~~ rights.

e. Confidentiality of ~~resident~~ information.

~~f. Open admission policy.~~

7. A record must be maintained of all orientation and inservice training provided to employees ~~of the basic care facility~~. ~~This~~ The record must include a notation of type of training, length of training, ~~names~~ signatures of employees attending, date of training, and ~~signature~~ name of person providing the training.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-17. Employee records. The basic care facility shall provide and maintain employee records appropriate to facility needs including the following information:

~~1. An identification sheet containing:~~

~~a.~~ 1. An initial physical assessment by an appropriately licensed health care professional.

~~b.~~ 2. An initial mantoux, or in the case of a significant tuberculin reactor, a negative chest x-ray that was taken not more than six months prior to employment.

~~c. The basic care facility shall establish a policy identifying which diagnostic procedures, in addition to those for tuberculosis, will be included in preemployment medical evaluations. The policy must include the interval of employee medical evaluations and a clinical surveillance program for evidence of contagious diseases and infected skin lesions.~~

3. Ongoing monitoring of infection control issues according to facility policies and procedures.

~~2.~~ 4. ~~Work assignment~~ Staffing records which reflect the ~~employee's designation as personal care, dietary, activity, social~~

~~service, or environmental support staff, and notations of any changes in responsibilities~~ assignment of staff for resident care services.

5. Record of training and education credentials and job description of employees.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-18. Classification of basic care facilities. ~~A class I or class II license will be issued by the department based upon the qualifications and utilization of the staff (licensed personnel), and the functional abilities of the persons who reside at or are being admitted to the facility.~~ Repealed effective November 1, 1992.

History: ~~Effective December 1, 1990.~~
General Authority: ~~NDCC 23-09.3-09, 28-32-02(1)~~
Law Implemented: ~~NDCC 23-09.3-04~~

33-03-24-19. Class I license. ~~The facility shall comply with the following provisions to obtain a class I license:~~

~~1. The facility may not admit or retain persons whose needs cannot be met by class I licensed facilities.~~

~~a. All residents residing in a class I facility must be physically and mentally capable of negotiating a normal path to safety unassisted by staff but may use assistive devices such as canes or walkers and must be able to open doors, transfer from bed to chair, get out of a chair, follow directions, know where exits are, and respond to a fire alarm without staff assistance.~~

~~b. For purposes of a class I facility, a licensed professional is not required for the following diets: regular, soft, bland, low fat, low fiber, high fiber, high potassium, low sodium, low salt, no added salt, low carbohydrate, and diabetic diet if they are self-monitored by the resident.~~

~~c. Persons who require the ongoing or regularly scheduled intermittent services of a licensed nurse may not be admitted or retained in a class I facility.~~

~~d. Persons requiring use of physical or chemical restraints may not be admitted or retained.~~

~~e. Persons who are subject to attacks of epilepsy or other seizures which are not controllable by self-administered medications may not be admitted or retained.~~

~~f. Persons who require active treatment for mental illness, unless the illness is controlled by self-administered medication, may not be admitted or retained.~~

~~g. Persons who require active treatment for mental retardation or who have been receiving active treatment within the previous ninety days may not be admitted or retained.~~

~~h. Persons may be admitted who are in need of environmental support and supervision and protective oversight because of psychosocial factors.~~

~~i. Persons may be admitted who require assistance with application and removal of braces or other prosthetic devices except when the absence of assistance with such devices makes the resident incapable of self-preservation.~~

~~j. Blindness or total deafness does not disqualify persons for admission to a class I facility if the resident needs only personal care assistance in not more than two activities of daily living.~~

~~k. Persons who require the use of a wheelchair for mobility must be able to demonstrate the ability to transfer to and from the wheelchair unassisted.~~

~~2. A class I facility shall admit or retain only persons who are capable of self-administration of all medications as follows:~~

~~a. All medications taken by residents in a class I facility must be self-administered. Facility staff may not administer medications to residents.~~

~~b. No person may be admitted to this type of facility who is not capable of taking their own medications or biologicals (such as serums, vaccines, antigens, and antitoxins) as documented in writing by the resident's personal physician or the licensed nurse completing the resident assessments. Class I facility staff may remind a resident when to take medications.~~

~~3. Persons admitted to a class I facility must be at least mobile nonambulatory and require assistance in no more than two activities of daily living.~~

~~4. Each facility shall have a current signed written agreement with a licensed nurse to provide services consistent with North Dakota Century Code chapter 43-12.1. Nursing assessment~~

~~is required for each resident prior to or within seven days of admission and, at a minimum, semiannually thereafter. Included in the services, the licensed nurse or physician shall establish protocol for use by the facility in the event of a serious health threatening condition or in cases of temporary illness.~~ Repealed effective November 1, 1992.

History: ~~Effective December 1, 1990.~~
General Authority: ~~NDCC 23-09.3-09, 28-32-02(1)~~
Law Implemented: ~~NDCC 23-09.3-04~~

33-03-24-20. ~~Class II license~~ Admission criteria. The basic care facility shall comply with the following provisions to obtain or maintain a ~~class II~~ license:

1. The facility ~~may not~~ shall admit or retain only those persons whose needs ~~cannot be~~ are met ~~by a class II licensed facility~~ either directly or through facility coordination of a contract between the resident and the service provider.

   a. All residents residing in a ~~class II~~ facility must be physically and mentally capable of negotiating a normal path to safety with minimal staff assistance such as verbal prompting. Functional capability of residents must be demonstrated and documented during monthly fire drills.

   ~~b. A class II facility may admit and retain persons who require the ongoing intermittent services of a licensed nurse or physician.~~

   ~~c. Facility administration of as needed (prn) controlled prescription drugs, such as narcotics, tranquilizers, or psychotropic medications, requires nursing judgment and a fluctuating medication regimen and must therefore be administered by appropriate health care professionals consistent with applicable state practice acts.~~

   ~~d. A class II facility may not admit or retain persons requiring use of physical or chemical restraints.~~

   ~~e. A class II facility may admit and retain persons who are subject to attacks of epilepsy or other seizures which are controlled through administration of medication as delegated to staff persons by the licensed nurse consistent with the North Dakota Nurse Practices Act, North Dakota Century Code chapter 43-12.1.~~

   ~~f. A class II facility may not admit or retain persons who require active treatment as provided by qualified mental health professionals, unless the illness is controlled by medication.~~

~~g. A class II facility may not admit or retain persons who require active treatment for mental retardation.~~

~~h.~~ b. Persons who require universal precautions for communicable diseases may be admitted or retained if the facility provides the staff and expertise necessary.

~~i.~~ c. Persons who require the use of a wheelchair or walker for mobility must be able to demonstrate the ability to transfer to and from the wheelchair or walker unassisted.

~~j. The facility may admit or retain persons who require assistance with administration of medications, or require nursing assessment or oversight, or both. Based on the nursing assessment of residents, the licensed nurse may delegate, consistent with North Dakota Century Code chapter 43-12.1, to unlicensed caregivers, within the limitations of the unlicensed caregivers' knowledge and skills under the following conditions:~~

~~(1) There is a physician's order, if necessary.~~

~~(2) The licensed nurse has assessed the resident's condition to determine there is not a significant risk to the resident if an unlicensed caregiver performs the task.~~

~~(3) The licensed nurse has determined the unlicensed caregiver is capable of performing the task.~~

~~(4) The licensed nurse has taught the unlicensed caregiver how to do the task.~~

~~(5) The unlicensed caregiver has satisfactorily demonstrated to the licensed nurse the ability to perform the task safely.~~

~~(6) The licensed nurse provides written instructions for the unlicensed caregiver to use as a reference.~~

~~(7) The unlicensed caregiver has been instructed that the task is delegated for this specific person only and is not transferable to other residents or taught to other caregivers.~~

~~(8) The licensed nurse has determined the frequency for monitoring, based upon each resident's health status.~~

~~(9) The licensed nurse documents in the resident's record the delegation procedures, evaluation of the process, frequency of the licensed nurse followup visits, condition of the resident, date, and signature of the licensed nurse doing the delegating.~~

~~(10) The licensed nurse retains all responsibility and accountability for the delegation of nursing tasks to unlicensed caregivers.~~

d. Persons admitted or retained in a basic care facility may not be dependent in any activities of daily living, but may require assistance in activities of daily living.

2. ~~Persons admitted or retained in a class II facility may not be dependent in any activities of daily living, but may require assistance in activities of daily living.~~ The basic care facility may not admit or retain individuals whose needs cannot be met by the facility.

a. A facility may not admit or retain persons requiring use of physical or chemical restraints.

b. A facility may not admit or retain persons who require active treatment for mental illness as provided by qualified mental health professionals, unless the illness is controlled by medication.

c. A facility may not admit or retain persons who require active treatment for mental retardation. Active treatment is defined in subsection 2 of section 33-03-24-18.

3. ~~Nursing assessment is required for each resident within seven days of admission and as determined by the licensed nurse thereafter, but no less frequently than quarterly.~~

~~4. Each class II facility shall employ or have a contract for the provision of nursing services under the direction of a licensed nurse. As part of the services, the licensed nurse or physician~~ With the assistance of appropriately licensed professionals, the facility shall establish protocol for use ~~by the facility~~ in the event of a serious health threatening condition or in cases of temporary illness.

~~5. A class II facility may not admit or retain persons whose needs cannot be met by the nursing oversight as outlined under subdivision j of subsection 1.~~

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-21. Change of status for care requirements.

~~1. If a resident's care needs change, after continued residence in the facility, resulting in care requirements greater than the facility's license classification allows, the facility~~

~~shall assist the resident in transferring to an appropriate setting, or the facility shall notify the department in writing and request:~~

~~a. A reclassification of the facility's license; or~~

~~b. An exception consistent with department procedures which allows the resident to remain in the facility. An exception may be granted if:~~

~~(1) The best interests of the resident are served by remaining in the facility;~~

~~(2) The facility is able to provide appropriate staff and expertise to supply the services necessary to meet the resident's needs; and~~

~~(3) The facility is able to provide structural or equipment changes as necessary in meeting the health and safety needs of the resident.~~ Repealed effective November 1, 1992.

History: ~~Effective December 1, 1990.~~
General Authority: ~~NDCC 23-09.3-09, 28-32-02(1)~~
Law Implemented: ~~NDCC 23-09.3-04~~

33-03-24-22. ~~Medical~~ Health assessment and care planning for residents.

1. Each resident shall designate a physician to be called in case of emergency. The basic care facility shall make necessary arrangements to secure the services of a licensed physician if the resident's own physician is not available.

2. In the event of an illness or the injury of a resident, ~~the consulting licensed nurse or physician must be notified~~ an appropriately licensed professional must be notified by the facility.

3. ~~Within seven days of admission for all facilities and each year thereafter for a class II facility, or more frequently if there is a change in health status, each resident shall submit to the basic care facility the results of a physical examination by a physician, physician assistant, nurse practitioner, or other authorized health care professional. The examination must include an evaluation of ambulatory status and an examination for contagious and infectious diseases, as well as a medication review.~~ Assessment is required for each resident within seven days of admission and as determined by an appropriately licensed professional thereafter, but no less frequently than quarterly.

a. The assessment must be done by an appropriately licensed professional and include at a minimum, a review of health status, psychosocial and functional levels, activity, and nutritional status.

b. The facility with the assistance of an appropriately licensed professional shall develop written policies and procedures including when and how referral services will be implemented.

4. The resident's health status, functional, psychosocial, activity, and dietary needs must be assessed in writing within seven days of admission and at least quarterly thereafter by an appropriately licensed professional. The examination results must be placed in the resident's file.

5. A care plan, based on the assessment, including input from the resident or person with legal status to act on behalf of the resident, shall be developed and consistently implemented in response to individual resident needs.

~~4.~~ 6. ~~A~~ The facility shall provide a first-aid kit containing~~, but not limited to,~~ at least gauze, tape, adhesive, antiseptic, and bandages ~~must be provided~~ for emergencies ~~and~~. The first-aid kit must be kept in an accessible, well-identified place within the facility.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-23. Care plan.

~~1. An initial assessment by the licensed nurse and care plan based on the resident's functional, psychosocial, and activity levels must be developed for each resident within seven days of admission and updated at least quarterly thereafter for a class II facility and semiannually for a class I facility. The care plan must state the resident's problems or needs and how the basic care facility will address these needs.~~

~~2. A social history must be completed within seven days of admission which includes family involvement and previous social interactions.~~ Repealed effective November 1, 1992

History: ~~Effective December 1, 1990.~~
General Authority: ~~NDCC 23-09.3-09, 28-32-02(1)~~
Law Implemented: ~~NDCC 23-09.3-04~~

33-03-24-24. Resident records.

1. The basic care facility shall provide for secure maintenance and storage of all resident records.

2. All staff with access to resident records must be provided instruction in confidentiality in the use of sensitive and private records.

3. The basic care facility shall establish ~~guidelines for~~ a policy and procedure for release of information from resident records.

4. ~~All resident records must be made available for inspection by authorized representatives of the department.~~

~~5.~~ Resident records must include:

   a. Resident's name, social security number, marital status, age, sex, ~~last~~ previous address, and religion; personal physician, dentist, and designated representative or other responsible person and social history.

   b. Admission and discharge data and report of the physician's orders and admission physical examination of the resident.

   c. A copy of an initial assessment by the ~~licensed nurse or appropriate health care~~ appropriately licensed professional and care plan based on the resident's health status, functional, psychosocial, nutritional, and activity levels.

   d. Observations by personnel, licensed nurses, physician, or others authorized to care for the resident.

   e. A list of clothing and personal possessions of the resident for identification purposes.

   f. Documentation of death, including cause and disposition of the resident's personal effects and money or valuables deposited with the basic care facility.

   g. A written record of all accidents, injuries, and illnesses of the resident which occur while in the care of the basic care facility must be kept in the resident's file. A copy of this record must accompany the resident if transferred to another facility.

   h. A quarterly progress note for each resident documenting the resident's current health condition, level of functioning, activity involvement, ~~social~~ nutritional status, psychosocial interactions and ~~problems~~ needs, to be part of the care plan review.

i. Transfer forms to be completed, signed, and sent with the resident when going to a hospital or transferring to another health care facility.

j. A medication sheet for each resident who takes medications, documenting medications currently being used or ordered, the time and how often the resident takes them, or the time and how often the resident is supposed to take them, and the initials of the individual who assists the resident in taking medications, consistent with applicable state laws.

k. A written report of any funds kept at a resident's request which is available for inspection by the resident and the department's representative. Such record must show deposits to and withdrawals from the fund.

l. All agreements or contracts entered into between the operator or basic care facility and the resident.

5. Resident records must be maintained by the facility for a period of not less than seven years from the date of discharge.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-03, 23-09.3-04

33-03-24-25. Medications.

1. Every basic care facility shall adopt written policies and procedures, which are consistent with the purpose of this chapter, and which must be followed in the operation of the basic care facility, for assisting residents in obtaining individually prescribed medication and for disposing of outdated medications prescribed by the attending physicians or other health care professionals, consistent with applicable state ~~practice acts~~ laws.

   a. These policies and procedures must be developed in consultation with ~~a licensed nurse and~~ a registered pharmacist. These policies and procedures must be part of the written program of care and services for the basic care facility.

   b. All prescription medications taken by residents in a basic care facility must be ordered by the attending physician or other appropriate health care professional ~~consistent with applicable state practice acts~~.

c. The policies and procedures of the basic care facility shall permit residents upon request to be totally responsible for their own medication; the attending physician, the consulting licensed nurse, or other appropriate health care professional shall have assessed the resident's capabilities with respect to this function.

2. The attending physician, or other health care professional consistent with applicable state practice acts, or a consulting pharmacist shall review the medication regimen of each resident as needed, but at least annually. Documentation of this review must be entered in the resident's record.

3. All medications used by residents must be properly recorded by basic care facility staff at time of use. A medication record need not be kept for those residents for whom authorization has been given by the ~~attending physician or licensed nurse~~ appropriate licensed health care professional to keep their medication in their room and to be fully responsible for taking the medication in the correct dosage and at the proper times.

4. Facility administration of as needed (prn) controlled prescription drugs such as narcotics, tranquilizers, or psychotropic medications requiring a fluctuating medication regimen, require judgment capabilities beyond the expertise of unlicensed staff and therefore must be the responsibility of an appropriately licensed health care professional consistent with applicable state laws. Infractions of state laws specific to professional practice acts, as identified by the department, must be referred to appropriate agencies or licensing boards.

5. Bottled oxygen may not be administered in a basic care facility, except in an emergency. Not more than one four hundred fifteen liter (E-cylinder) portable size tank of oxygen for such emergency use may be kept in the facility. However, the use of an oxygen concentrator is permitted when prescribed by a physician for a resident if the resident can manage self-care. The basic care facility must be in compliance with directions for use and storage of such equipment as established by the manufacturer.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-26. Labeling and storage of medications.

1. The basic care facility shall provide residents with a secure area for medication storage. This area may be a drawer, cabinet, closet, or room.

   a. All controlled medication must be stored under lock and key.

   b. Noncontrolled medication must be stored in areas restricted from the public and residents and may be locked at the discretion of the facility.

   c. The facility shall have a specific system for the accountability of keys issued for locked drug storage areas.

2. Residents' medications must be properly labeled.

3. The facility shall provide each resident with a secure storage place for their medications.

4. The facility shall provide assistance to the resident in obtaining the necessary medications and medical supplies.

5. ~~The class I facility staff may not remove a medication from its original container. The responsibility for control for administration of medications must remain with the resident.~~

~~6.~~ Medications no longer in use must be disposed of or destroyed in accordance with federal and state laws and rules.

~~7.~~ 6. Medications having an expiration date must be removed from use and properly disposed of after the expiration date.

~~8.~~ 7. The medications of each resident must be kept and stored in the original containers. Medications may not be transferred between containers.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-27. Required services. The following services must be provided to residents:

1. Personal care services.

   a. Basic care facilities shall provide personal care including, but not limited to:

      (1) Assistance as needed with activities of daily living and instrumental activities of daily living and

observation and documentation of changes in physical, mental, and emotional functioning.

(2) Assistance with arrangements for appropriate transfer and transport as needed.

(3) Assisting each resident to maintain the highest level of functioning possible, compatible with individual safety and welfare and providing general supervision if required by the resident, including encouraging and assisting the resident:

(a) To self-administer medically prescribed drugs and treatment and to follow any planned diet, rest, or activity regimen.

(b) With arrangements to seek health care when the resident shows signs or describes symptoms of an illness or abnormality for which treatment may be indicated.

(c) With functional aids or equipment, such as glasses, hearing aids, canes, crutches, walkers, or wheelchairs.

(d) With clothing and other personal effects as well as personal living quarters in a manner conducive to safety and comfort.

2. Social services. Social services must be made available to the resident either by the basic care facility or by an appropriate agency offering social services.

3. Dietary services.

a. A minimum of three meals must be provided each day. Meals must be nutritious and well-balanced in accordance with the recommended dietary allowances of the food and nutrition board of the national research council, national academy of sciences.

b. There must be provision of therapeutic diets when required in a ~~class II~~ facility.

c. If the ~~class II~~ facility accepts or retains individuals in need of therapeutic diets, the diets must be medically prescribed diets. Menus for such diets must be planned and reviewed as needed by a professional consistent with North Dakota Century Code chapter 43-44. These reviews must be documented in the resident's record. The basic care facility shall provide the supervision for preparing and serving the special diets.

d. A record of the menu served must be kept for at least three months. These are subject to inspection by the department.

e. No more than a fourteen-hour span may exist between a substantial evening meal and breakfast and appropriate snacks must be made available between meals and in the evening and must be listed on the daily menu. Vending machines may not be the only source of snacks.

f. There must be a sufficient number of food service personnel employed and on duty to meet the dietary needs of all persons eating meals in the facility. Staff hours must be scheduled to meet the total dietary needs of the residents.

g. Dietary staff responsible for food preparation shall attend at a minimum two dietary workshops per year given by a licensed dietitian.

h. Food service personnel must be in good health, practice hygienic food-handling techniques and good personal grooming.

i. Food must be prepared by appropriate methods that will conserve nutritive value and enhance flavor and appearance and served at the proper temperatures and in a form to meet individual needs.

j. All residents must be served in a dining room except for residents with a temporary illness or a documented specific personal preference.

4. **Housekeeping services.** The basic care facility shall provide sufficient environmental support staff to maintain the interior and exterior of the facility in a safe, clean, orderly, and attractive manner and assist, as needed, with other instrumental activities of daily living.

5. **Laundry services.** The basic care facility shall provide laundry services to meet the needs of the residents.

6. **Activity services.** There must be a planned and meaningful activity program to meet the needs of the residents, which is coordinated by a qualified staff member. Volunteers may assist, but not replace salaried activity employees. This qualified staff person shall:

   a. Encourage, guide, or assist residents with arrangements to participate in social, recreational, diversional, vocational, religious, or other activities within the facility and the community in accordance with individual interests, tolerance, and abilities.

b. Basic care facilities shall post a monthly calendar which lists social and recreational activities and events for residents.

c. Appropriate activities must be provided to all residents during the day, in the evening, and on the weekend.

d. An initial assessment of the interests and social activities of each resident must be developed within seven days of admission and updated at least annually.

e. The activity service shall have a well-organized plan for using community resources.

f. Space must be provided for privacy during visits when the resident requests privacy.

g. The qualified activity person shall attend a minimum of two activity-related workshops per year.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-28. General building requirements. The basic care facility must be operated in conformance with all state and local laws, rules, and ordinances concerning fire safety and sanitation, including, but not limited to, the North Dakota sanitary requirements for food establishments effective October 1, 1979.

1. Lounge and activity area space must be provided with a minimum of fifteen square feet [1.39 square meters] per licensed bed of the facility for recreation, and visiting, and an activity program. The lounge and activity area must be separate areas and may be used to accommodate religious services and activities. Each lounge area for residents' use must be provided with an adequate number of reading lamps, tables, and chairs or couches. These furnishings must be well-constructed and of satisfactory design for the residents.

2. All corridors and stairways used by residents shall have sturdy handrails on one side of the corridor to provide for safety with ambulation.

3. Dining area.

   a. A minimum of fifteen square feet [1.39 square meters] per licensed bed must be provided for dining. Activity and dining areas must be separate.

b. Dining room furnishings which are well-constructed, comfortable, in good repair, and of satisfactory design for the residents must be provided for each resident. There must be a sufficient number of tables that can be used by wheelchair residents to accommodate all such residents in the basic care facility.

4. Resident bedrooms.

a. All bedrooms used for residents must be dry, well ventilated, naturally lighted, and otherwise suitable for occupancy. Each room must have direct access to a hall and have an outside wall. Resident bedrooms in new ~~(initial license after January 1, 1991)~~ basic care facilities must be at or above grade level.

b. The glazed area of the window may not be less than one-tenth of the floor area of the room. Windows must be easily opened and must be provided with screens.

c. Room size will vary depending on number of beds, but minimum floor dimension may not be less than ten feet [3.05 meters]. In computing floor area, only usable floor space may be included. Single rooms shall provide at least one hundred square feet [9.29 square meters] per bed. Double rooms ~~shall~~ must provide at least eighty square feet [7.43 square meters] per bed. Rooms for three or more persons must provide at least seventy square feet [6.50 square meters] per bed.

d. Each resident must be provided with a bed. Cots, rollaways, or folding beds may not be used. Double beds may be used if requested by the resident. Each bed must be provided with satisfactory springs in good repair and a clean, firm, comfortable mattress of appropriate size for the bed as well as a minimum of one clean, comfortable pillow.

e. Each bedroom must have window shades, or an equivalent, in good repair.

f. A lamp, or an equivalent, must be provided for each bed to assure adequate lighting levels to provide for reading and safety.

g. Each bedroom must be provided with a mirror unless there is a mirror in a bathroom opening into the bedroom. Each lavatory must be provided with a mirror.

h. For each bed there must be furnished a minimum of two adequately sized dresser drawers, a comfortable chair, a bedside table or stand, an individual towel rack, and

adequate closet, locker, or wardrobe space for hanging clothing within the room.

5. Toilet rooms and bathing facilities.

   a. An ample number of ~~lavatories and~~ toilets must be provided in accordance with the number of residents. At least one toilet for every four residents or fraction thereof must be provided. Toilets for public use must be provided.

   b. Facilities housing wheelchair residents shall provide at least one toilet room that is in compliance with the guidelines developed by the American national standards institute, inc., or the uniform federal accessibility standards for every four wheelchair residents.

   c. A bathtub or shower equipped with grab bars must be available in a ratio of one for each fifteen residents.

   d. Each bath and toilet room must be well lighted and have a light switch just inside the door.

6. The basic care facility shall provide for adequate ventilation throughout to assure an odor-free, comfortable environment.

7. Office spaces and other areas must be satisfactorily furnished with desks, chairs, lamps, cabinets, benches, worktables, and other furnishings essential to the proper use of the area.

8. Kitchen.

   a. If a conventional food preparation system is used, the following facilities must be provided:

      (1) Food preparation center and serving facilities.

      (2) Dishwashing room with potwashing and sanitizing facilities.

      (3) Refrigerated storage, medium temperature and freezer units as well as dry food storage areas.

      (4) Equipment storage areas.

      (5) Waste disposal and can washing facilities.

      (6) Dining facilities for visitors and staff.

      (7) Janitor's closet. Storage for housekeeping supplies and equipment.

   b. Effective procedures for cleaning all equipment and work areas must be developed and followed.

c. If a convenience food system is used, dietary areas and equipment must be designed to accommodate the requirements for sanitary storage, processing, and handling.

9. Laundry services.

a. The basic care facility shall supply an adequate amount of clean linen for operation, either through an in-house laundry or a contract with an outside service. An adequate supply of clean linen must include sheets, towels, pillowcases, etc. Additional changes of linen must be available to meet residents' and facility's needs. If an in-house laundry service is provided, the following conditions must exist:

(1) The laundry area must be maintained and operated in a clean, safe, and sanitary manner. Bed linens must be changed as needed, but at least weekly.

(2) Written operating procedures must be developed, posted, and implemented which provide for the handling, transporting, and storage of clean and soiled linens.

(3) Personnel doing laundry must be in good health and practice good personal grooming. Employees shall thoroughly wash hands and exposed portions of arms with soap and warm water before starting work; after smoking, eating, drinking, using the toilet, and handling soiled linens.

(4) Clean linen must be protected from contamination during handling, transporting, and storage.

(5) Soiled linen must be handled, transported, and stored in areas separate from other laundry spaces to protect residents and personnel from contamination.

(6) Soiled linen may not be sorted, laundered, rinsed, or stored in bathrooms, residents' rooms, kitchens, or food storage areas.

(7) The laundry and its accessory storage and handling areas may not be used as a storage area for supplies not directly connected with the operation of the laundry.

b. If an outside laundry service is used, it shall provide for protection of clean linens during transportation back to the basic care facility.

c. The basic care facility shall provide laundry service for residents' personal clothing. It must be handled,

transported, and stored in a manner that will prevent contamination of clean linen.

10. Fire safety.

a. The basic care facility shall comply with the national fire protection association life safety code, 1988 edition, chapter twenty-one, residential board and care occupancy or a greater level of fire safety.

b. Fire drills must be held monthly with a minimum of twelve per year, alternating with all of the different work shifts. Residents and staff as a group shall either evacuate the building or relocate from the point of occupancy to a point of safety.

c. Fire evacuation plans must be posted in a conspicuous place in the facility.

d. Written records of fire drills must be maintained. These records must include dates, times, and names of staff and residents participating and those absent and why, and a brief description of the drill.

e. Each resident shall receive an individual fire drill walk through documented in the resident's record within five days of admission.

f. Any variation to compliance with the fire code must be coordinated with the department and approved in writing by the state fire marshal.

g. Residents of facilities meeting a greater level of fire safety must meet the fire drill requirements of that occupancy classification.

History: Effective December 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-31. Waiver provision. The ~~health officer~~ department may waive ~~building~~ the licensure requirements for basic care facilities with respect to these rules for specified periods of time in specific instances, provided compliance with the requirement would result in an unreasonable hardship upon the facility and lack of compliance does not adversely affect the health or safety of the residents.

History: Effective December 1, 1990; amended effective August 1, 1991; November 1, 1992.
General Authority: NDCC 23-09.3-19
Law Implemented: NDCC 23-09.3-09

CHAPTER 33-07-03.1

33-07-03.1-01. General provisions.

1. **Institutions covered by the Medical Hospital Licensure Act.** The following types of institutions have been so designated 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 which 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. Hospitals, including general, medical, and specialized hospitals.

   b. Long-term care facilities.

      (1) Skilled nursing facilities.

      (2) Intermediate care facilities.

   c. Infirmaries.

   d. Maternity homes.

   e. Outpatient facilities, including ambulatory surgical centers (excluding physicians' clinics).

2. **Institutions not covered by the Medical Hospital Licensure Act.** The following types of institutions which provide some medical or nursing service are deemed not to come within the meaning of the Medical Hospital Licensure Act, North Dakota Century Code chapter 23-16.

   a. Any institution which is regularly licensed by the department of human services such as homes for unmarried mothers and homes providing custodial care for the aged.

   b. Federal and state institutions. (In the case of 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 made of institutions which 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. (These hospitals are licensed under the provisions of 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 except maternity homes which receive more than one patient in six months. Such maternity homes are deemed to come under North Dakota Century Code chapter 23-16 and are required to be licensed.

f. First-aid stations and emergency care facilities which do not provide accommodations for hospitalization as herein defined.

3. **Definitions.** The following terms are defined for purposes of North Dakota Century Code chapter 23-16.

a. "Abuse" includes mental, physical, sexual, and verbal abuse. Mental abuse includes, but is not limited to, 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, but is not limited to, 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 residents or their families, or within their hearing distance, to describe residents, regardless of their age, ability to comprehend, or disability.

b. "Ambulatory surgical center" means any distinct entity that operates exclusively for the purpose of providing surgical services to patients not requiring hospitalization.

c. "Bed capacity" means:

(1) All spaces designed for resident bedrooms even if currently closed or assigned to easily convertible nonresident uses such as storage or staff quarters.

(2) Space in areas originally designed as solaria, waiting rooms, offices, conference rooms, and classrooms which have necessary fixed equipment (nurses' call, lighting, etc.) and are accessible to a nurses' station exclusively staffed for resident care.

(3) Space under construction designed as resident bedrooms or designed to be readily convertible to resident bedrooms if planned for immediate completion (excludes unfinished shelled-in floors).

Bed capacity is determined by the floor area (square feet) in the following manner:

(4) In measuring the floor area of spaces usable as resident bedrooms 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 as part of the net usable space (square feet).

(5) Resident bedrooms must have adequate floor space to conveniently house necessary furniture and equipment, to provide for efficient resident care, and to provide for convenient movement of stretchers, and for the transfer of residents to and from beds. Adequate floor space is defined as:

(a) In single resident rooms the least dimension free of fixed obstructions must not be less than ten feet [3.05 meters], and the floor area must not be less than one hundred twenty-five square feet [11.61 square meters], nor more than one hundred forty-five square feet [13.47 square meters].

(b) Resident rooms having two or more beds must have as a minimum floor area eighty square feet [7.43 square meters] of space free of fixed obstructions per bed. The least dimension of a rectangular multiple resident room must not be less than eleven feet six inches [3.50 meters] free of fixed obstructions, except in especially arranged rectangular rooms such as, for example, in the toe-to-toe arrangement where the minimum clear width must not be less than ten feet [3.05 meters] and the minimum clear length must not be less than seventeen feet six inches [5.33 meters] free of fixed obstructions.

(c) In the case of other than rectangular shaped rooms, there must be adherence to the principles of specified minimum dimensions and areas per bed in rectangular rooms.

d. "Department" means the state department of health and consolidated laboratories.

e. "Discharge" means any dismissal from a nursing facility to a private, nonlicensed setting including a home or apartment, and the nursing facility ceases to be legally responsible for the care of the resident.

f. "Emanating services" means services which originate out of and are provided out of a licensed skilled nursing facility or intermediate care facility to facilities not subject to licensure by the department for which the governing body of a licensed skilled nursing facility or intermediate care facility has responsibility.

g. "General hospital" means an establishment with organized medical staffs; with permanent facilities that include inpatient beds; and with medical services including physician services and continuous nursing services to provide diagnosis and treatment for a variety of medical conditions, both surgical and nonsurgical, and services including rehabilitation services.

h. "Governing body" means the individual or group in whom the ultimate authority and legal responsibility is vested for the conduct of the long-term care facility.

i. "Hospital" means an institution, the principal activity or business of which is the reception of a person for diagnosis, care, and treatment of human illness through the maintenance and operation of organized facilities therefor.

j. "Hospitalization" means the reception and care of any person for a continuous period longer than twenty-four hours, for the purpose of consultations, diagnosis, or treatment including rehabilitation bearing on the physical and mental health of such person.

k. "Infirmary" means those special inpatient facilities which are established in connection with an educational or penal institution or an industrial or commercial establishment for persons who, during their attendance, confinement, or employment in such institution or establishment, require nursing service or physician treatment. Applicable requirements of North Dakota Administrative Code chapter 33-07-01 apply.

l. "Level of care" means the classification of a resident in accordance with the resident's medical and nursing needs generally expressed as a skilled, intermediate, or basic level of care dependent upon the degree of care necessitated to adequately care for the needs of the resident.

m. "Licensee" means the governing body of the hospital, related institution, skilled nursing facility, or intermediate care facility.

n. "Long-term care facilities" are the following:

(1) "Intermediate care facility" means an institution in which nursing care is rendered for compensation at any one time to two or more persons not related to the licensee by blood or marriage. An intermediate care facility shall serve persons suffering from prolonged physical or mental illness or defect or persons recovering from some injury or disease requiring less than twenty-four hours per day of nursing service provided by licensed personnel. Care given in an intermediate care facility must include procedures commonly employed in waiting on the sick, such as administration of medication, preparation of special diets, giving of bedside care, applications of dressings and bandages, and carrying out treatments prescribed by a licensed physician. An intermediate care facility may not provide for any higher level of care.

(2) "Skilled nursing facility" means an institution in which nursing care is rendered for compensation at any one time to two or more persons not related to the licensee by blood or marriage. A skilled nursing facility must serve persons suffering from a prolonged physical or mental illness or defect or persons recovering from some injury or disease and requiring twenty-four-hour nursing services provided by licensed personnel. Care given in a skilled nursing facility must provide all of the procedures commonly employed in waiting on the sick, such as administration of medicines, preparation of special diets, giving of bedside care, applications of dressings and bandages, and carrying out of treatments prescribed by a licensed physician. A skilled nursing facility may not provide for any higher level of care.

(3) If a facility is established for the provisions of custodial and personal care, but it develops that two or more persons usually served by such institutions require nursing care, such institutions are deemed to come within the meaning of North Dakota Century Code chapter 23-16 and such facility must conform to this chapter and chapter 33-07-04.1 or the institution shall transfer such patients to facilities properly staffed and equipped to care for such persons.

o. "Maternity home" means an institution of private dwelling type in which care for maternity patients is rendered. Any such home which receives more than one maternity patient (exclusive of those related to the licensee by blood or marriage) within a period of six months is deemed to be a maternity home. A maternity home which regularly provides accommodations for two or more patients at any one time must be classified as a maternity hospital and is required to meet the requirements for a specialized hospital. Applicable requirements of chapter 33-07-01 apply.

p. "Medical hospital" means an establishment with organized medical staff; with permanent facilities that include inpatient beds; and with medical services, including physician services and continuous nursing services, to provide diagnosis; and to provide nonsurgical treatment.

q. "Medical staff" means a formal organization of physicians (and dentists, where appropriate) with the delegated authority and responsibility to maintain proper standards of medical care and to plan for continued improvement of that care. This does not preclude the establishment of other medical staff sections.

r. "Mental health professional" means:

(1) A psychologist with at least a master's degree who has been either licensed or approved for exemption by the North Dakota board of psychology examiners.

(2) A social worker with a master's degree in social work from an accredited program.

(3) A registered nurse with a master's degree in psychiatric and mental health nursing from an accredited program.

(4) A registered nurse with a minimum of two years of psychiatric clinical experience under the supervision of a registered nurse as defined in subsection 3.

(5) A licensed addiction counselor.

s. "Neglect" includes failure to carry out resident services as directed or ordered by the physician or other authorized personnel, failure to give proper attention to residents, failure to carry out as through careless oversight.

t. "Nursing services" means those services pertaining to the curative, restorative, or preventive aspects of nursing

care that are performed or supervised by a registered professional nurse at the direction of a physician.

u. "Outpatient facility" (including ambulatory surgical centers - excluding physician's clinic) means a facility located in or apart from a hospital, providing community service for the diagnosis or diagnosis and treatment of ambulatory patients in need of physical or mental care:

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

(2) In which patient care is under the professional supervision of licensed physicians in various medical specialties in the state or, in the case of dental diagnosis or treatment, under the professional supervision of persons licensed to practice dentistry in the state; or

(3) Which offers to patients not requiring hospitalization the services of licensed physicians in various medical specialties, and which makes provision for its patients to receive a reasonably full range of diagnostic and treatment services.

v. "Transfer" means any move of the resident out of the nursing facility to another facility, hospital, any other health care facility or institutional care facility or residential facility, and the legal responsibility for the care of the resident changes from the nursing facility to the receiving facility.

4. Application for long-term care facility license general provisions.

a. No person or entity may establish, maintain, or operate a long-term care facility without first having obtained a license. Any person or entity who owns or leases a long-term care facility and desires to maintain or operate it shall apply to the department for a license in the form prescribed and shall obtain a license before accepting residents for care or treatment.

b. Each long-term care facility applying for a license must be designated by a distinctive name consistent with the services offered to avoid public confusion or misrepresentation. The name may not be changed without department approval.

c. In the case of a hospital, related institution, skilled nursing facility, or intermediate care facility, where two or more buildings are used in the care of residents, a separate license is required for each building. Separate

licenses are required even though the buildings are operated under the same management.

d. Every license application must be notarized and signed by an authorized corporate officer, general partner, or sole proprietor of the long-term care facility, as appropriate.

e. Upon receipt of a completed license application, the department shall review the long-term care facility to determine compliance with this chapter and chapter 33-07-04.1, including onsite inspections, as appropriate.

f. The license must be displayed in a conspicuous place. Each license is valid only in the hands of the person to whom it is issued and is not subject to sale, assignment or other transfer, voluntary or involuntary, nor is a license valid for any premises other than those for which originally issued.

g. The department may require submission of periodic reports including, but not limited to, staffing reports, census data, statistical information, and such business records as the department may reasonably require for the performance of its licensure functions.

h. The holder of each license issued by the department shall surrender the license immediately upon suspension, revocation, refusal to renew, or discontinuance of the operation of the long-term care facility.

i. The department may summarily suspend a license pending proceedings for revocation of or refusal to renew the license in cases of deliberate or willful violation, or where the public health, safety, or welfare imperatively requires emergency action.

j. The department and any duly authorized representative thereof have the right to enter upon and into the premises of any long-term care facility in order to determine the state of compliance with North Dakota Century Code chapter 23-16 and this chapter and chapter 33-07-04.1 and initially identify themselves to the person in charge of the long-term care facility at the time.

k. Any ~~long term care~~ nursing facility which advertises or holds itself out to the public as having ~~a special care~~ an alzheimer's unit for provision of care to people afflicted with alzheimer's disease or related ~~disorders~~ dementia shall request their ~~special care unit~~ alzheimer's unit or facility be licensed. Such ~~long term care~~ nursing facilities shall comply with the provisions of this chapter and chapter 33-07-04.1 as well as the requirements of section ~~33-07-03.1-21~~ 33-07-03.1-22. The ~~long term~~

~~care~~ nursing facility's license to operate shall identify provision of ~~a special care~~ an alzheimer's unit or facility and the number of beds.

1. ~~long term care~~ Nursing facilities wishing to install restricting devices on exterior doors that are not part of ~~a special care~~ an alzheimer's unit must have department approval and shall comply with subsection 2 of section 33-07-04.1-20 except that the main public access doors to a ~~long term care~~ nursing facility may not be equipped with restricting devices.

5. **Application for an initial long-term care facility license.** An application for an initial license must include the following information:

   a. Bylaws and articles of incorporation or partnership agreement, as appropriate, must accompany the initial application. Changes must be reported to the department within thirty days of occurrence.

   b. If a partnership, the name, address, and ownership share (expressed as a percentage), and legal status (general or limited) of each partner.

   c. If a corporation, the address, and ownership share of each shareholder who, directly or indirectly, owns or controls five percent or more of the shares of the corporation, and the name, address, and corporate title of each officer and director. In addition, copies of all documents of incorporation filed with the North Dakota secretary of state must be filed with the department.

   d. If a sole proprietorship or any form of business entity, the name and address, title, and ownership share (expressed as a percentage) of each person with a financial interest therein, and the name, address, and title of every person who controls, directs, or operates the business entity.

   e. If the applicant is the lessee of the long-term care facility, it shall furnish the information required for an initial license for itself and the lessor. A copy of the relevant lease must be submitted to the department.

   f. The applicant's legal name and other names under which it does business.

   g. Each applicant shall furnish to the department a signed and notarized statement at the time of initial application, describing and dating every proceeding in the United States within five years of the date of application, in which the applicant was involved, the

result of which was a limitation upon or a suspension, revocation, or refusal to grant or renew a long-term care facility license, certification for medicaid or medicare, or contract for participation in medicaid or medicare.

h. Each applicant shall furnish a signed and notarized statement to the department at the time of initial application, describing every criminal proceeding within five years of the date of the application in which the licensee or any of its shareholders owning an interest of five percent or more, officers, directors, partners, or other controlling or managing persons, has been convicted, or nolo contendere plea accepted, of a criminal offense related to the operation, management, or ownership of a long-term care facility.

i. Each applicant shall furnish to the department the information required for an initial license with respect to any management company with which it contracts for management services for the long-term care facility.

j. The department may not approve an application for an initial license unless:

(1) The application and all required attachments and statements submitted by the applicant meet the requirements of this chapter and chapter 33-07-04.1.

(2) The department has conducted an inspection or investigation of the long-term care facility to determine compliance with this chapter and chapter 33-07-04.1.

(3) The department has conducted an investigation of the fitness of the applicant. In the determination of this fitness, the department shall consider the following:

(a) Whether the applicant has legal capacity demonstrated by such documents as articles of incorporation to provide the services for which the license is sought.

(b) Whether financial resources and sources of revenue for the specific long-term care facility of the applicant appear adequate to provide staff, services, and the physical environment sufficient to comply with North Dakota Century Code chapter 23-16 and this chapter and chapter 33-07-04.1.

(c) Whether a substantially consistent and adequate level of care, as measured by compliance with

this chapter and chapter 33-07-04.1 and other pertinent evidence, is being or was rendered by the applicant during the five-year period prior to the date of application in each institution in which the applicant exercised ownership, management, or operational functions.

6. **Application for license renewal.** The licensee shall submit a completed application to the department. The department may require reports including, but not limited to, staffing reports, census data, statistical information, and such business records as the department may reasonably require for the performance of its licensure functions.

7. Provisional license.

   a. If the long-term care facility fails to conform to the requirements of North Dakota Century Code chapter 23-16 and this chapter and chapter 33-07-04.1, the department may refuse to issue a license, but may issue a provisional license to allow the long-term care facility to comply with licensing requirements, if the licensee makes a substantial good faith attempt to comply with such requirements and requires time to effect compliance.

   b. The provisional license is valid for ninety days.

   c. The provisional license may be renewed once, if the licensee demonstrates to the department that it has made further substantial progress towards compliance, and can effect compliance within the following ninety days.

   d. Before determining whether to issue a permanent license to a provisionally licensed long-term care facility, the department shall conduct a survey or such other investigation as it deems necessary to determine that the long-term care facility meets the requirements for licensure.

8. **Change or modification of license.** The holder of a license shall notify the department in writing thirty days in advance of any of the following changes:

   a. In the case of a partnership, transfer of ownership includes dissolution of the partnership and conversion thereof into any other entity or the removal, addition, or substitution of an individual or other entity for a general partner.

   b. Transfer of ownership of a sole proprietorship (any business owned by a single individual) includes transfer of title and property to another person.

c. Transfer of ownership of a corporation does not, in itself, include transfer of corporate stock or merger of one or more corporations with the licensee surviving. Transfer of ownership of a corporation includes consolidation of two or more corporations resulting in the creation of a new corporate entity and formation of a corporation from a partnership or a sole proprietorship.

d. Transfer of operating rights of the licensee includes a lease of the long-term care facility where the lessor retains no control of the operation or management of the long-term care facility and where the lessor is paid by a contract which specifies the amount of the payment.

e. Change in bed capacity.

f. Change in levels of long-term care services.

g. Change in name of long-term care facility.

h. Change of administrator.

History: Effective December 1, 1986; amended effective August 1, 1989; October 1, 1989; February 1, 1992; November 1, 1992.
General Authority: NDCC 23-01-03, ~~23-01-11, 28-32-03~~ 28-32-02
Law Implemented: NDCC ~~23-01-11,~~ 23-16-01, 28-32-02

33-07-03.1-22. ~~Special care~~ Alzheimer's units.

1. Description. ~~A special care~~ An alzheimer's unit is an ~~optional~~ inpatient facility or unit which may be established in ~~connection~~ conjunction with a ~~long term care~~ nursing facility and which is designed and operated to provide care for persons diagnosed with ~~dementia~~ alzheimer's disease and related ~~disorders~~ dementia. The ~~special care~~ alzheimer's unit should be designed as other nursing units, except that restricting devices may be placed on exit doors to prevent residents from wandering away from the unit and as otherwise provided in section 33-07-04.1-20.

2. Monitoring system. The facility shall provide an effective ongoing monitoring system to respond to the wandering behavior and related safety needs exhibited by residents with alzheimer's disease or related dementias.

3. Preadmission screening. Prior to admission or within seven days of admission, a multidisciplinary evaluation team shall evaluate the appropriateness of an individual's placement in the ~~special care~~ alzheimer's disease unit. For a facility or unit seeking licensure which is already housing alzheimer's disease or other related dementia diagnosed residents, this screening and evaluation needs to be completed on all

residents prior to final licensure. The evaluation team shall consist of, at a minimum, a registered nurse and a licensed social worker who will be providing services in ~~a special care~~ an alzheimer's unit, the prospective resident's attending physician, and the ~~prospective resident's guardian~~ resident or the person with legal status to act on behalf of the resident. The evaluation team ~~recommending~~ evaluating placement in ~~a special care~~ an alzheimer's unit shall make detailed written findings as appropriate, based on documented evidence, describing the factual basis for their determination. The team's findings must demonstrate that the individual ~~needs to be admitted to the special care unit~~ has a diagnosis of alzheimer's disease or related dementia that the individual's needs can be appropriately met by the facility or unit, and that the recommendation to admit to the alzheimer's unit was made for at least one of the following reasons:

a. The individual is independently mobile, either through ambulation or wheelchair, and habitually wanders or would wander out of the building and is unable to find the way back.

b. The individual exhibits a dementing illness, is still ambulatory, and would benefit from therapeutic programs specifically designed to meet their individual needs and capabilities of the person with alzheimer's disease or a related dementia.

c. The individual's behavior requires staff attention ~~and~~, redirection, and intervention because of repeated episodes of unpredictable combative or verbal abuse, disorientation, wandering, and removing or destroying property of others. It shall be determined and documented by the physician and reviewed by the pharmacist that such behavior is not drug or medication induced.

The evaluation team's findings must also demonstrate that other living alternatives allowing free and less restricted movement were or are unsuccessful or inappropriate, or both.

~~3.~~ 4. Admission records. The admission records of a resident in ~~a special care~~ an alzheimer's unit must, at a minimum, contain:

a. The written findings of the multidisciplinary evaluation team.

b. An informed, written consent for admission signed by the resident or ~~the resident's guardian~~ person with legal authority to act on behalf of the resident.

c. An order for admission signed by the resident's attending physician.

~~4.~~ 5. Prohibitions. ~~Special care~~ Alzheimer's units or facilities may not admit or retain residents whose needs cannot be met through the services, staff, or physical plant provided.

a. Alzheimer's units may not be used to care for individuals with acute mental illness or for individuals with a primary diagnosis of mental illness or mental retardation. ~~Furthermore, residents~~

b. Residents may not be placed in ~~special care~~ alzheimer's units as a means of punishment, as an alternative to maintaining proper staffing at the ~~long term care~~ nursing facility, or as a convenience to ~~long term care~~ nursing facility staff.

~~5.~~ 6. ~~Placement evaluation and transfer or discharge.~~ Continued reevaluation. Continued reevaluation of the resident must include the following considerations:

a. The evaluation team described in subsection 2 must reevaluate the placement of each resident every thirty days for the first ninety days after admission and no less than every one hundred eighty days thereafter.

b. If placement in the ~~special care~~ alzheimer's unit or facility is determined inappropriate at any time by the professional personnel responsible for development and review of the resident's overall plan of care (as identified in subsection 10 of section 33-07-03.1-05), it is the responsibility of the ~~long term care facility's social services department~~ professional designated by the nursing facility to notify the evaluation team and request ~~they evaluate~~ an evaluation of continued placement or possible discharge~~, or both,~~ from the unit or facility.

~~c. A resident's placement in, or restriction to, a special care unit shall terminate when:~~

~~(1) The condition or behavior justifying placement has diminished to the extent where the reasons for admission no longer exist or are no longer a factor in provision of care.~~

~~(2) Consent for placement is terminated or withdrawn by the resident or his guardian, or both.~~

~~(3) If the resident's attending physician determines continued placement would adversely affect the resident's health and safety.~~

~~(4) The resident's needs can be met in a less restrictive setting or because their physical condition has~~

~~deteriorated to the extent the therapeutic programming is no longer of benefit, or both.~~

~~6.~~ 7. Staffing. Alzheimer's unit staffing shall meet the needs of the residents and include the following:

a. ~~The unit must be separately staffed at all times.~~

~~b.~~ The unit shall have assigned a specially trained core staff in sufficient number to meet the needs of the residents. ~~This core staff may not have simultaneous duties on other units~~ At no time may the residents in the alzheimer's unit be left unattended.

~~c.~~ b. ~~Staff working in the unit~~ Professionals including licensed nurses, licensed social workers and activity staff shall have special training in the ~~particular~~ care ~~and~~ planning and interventions necessary for responding to the specific needs of ~~the types of~~ residents ~~admitted to the unit~~ with alzheimer's disease or related dementia.

~~d. For residents of the special care unit, the long-term care facility shall provide sufficient social work and activities staff to meet the social, emotional, and recreational needs of the residents.~~

c. Nurse aides staffing the unit must be certified and on the state registry with an additional thirty-two hours of formal training specific to care of residents with alzheimer's disease or a related dementia prior to assignment in an alzheimer's unit or facility. This thirty-two hours of additional training must include:

(1) At least sixteen hours of formal classroom training to include instruction specific to the physical, psychosocial, and behavioral problems of alzheimer's disease and related dementia.

(2) At least four hours of training provided by a licensed nurse that addresses the nursing needs of residents with alzheimer's disease and related dementia.

(3) A minimum of four hours must be provided to familiarize the nurse aide with common family concerns encountered in caring for the resident with alzheimer's disease or related dementia.

(4) A minimum of eight hours must consist of actual resident cares of individuals in the alzheimer's unit accompanied by a nurse aide qualified to work in the unit and monitored by a licensed nurse.

d. All staff working in the unit must attend at least twelve hours of continuing education per year. This continuing education is not necessarily in addition to other nursing home inservice requirements but must be training specific to the needs of persons with alzheimer's disease or related dementia.

~~7.~~ 8. Programs.

a. In addition to meeting the special medical and nursing needs of each resident in the ~~special care~~ alzheimer's unit, the ~~long term care~~ nursing facility shall provide social services and activity programs especially designed to avoid programmatic isolation and to meet each resident's individual needs.

b. The resident's individual program plan (plan of care) shall ~~include~~ provide for therapeutic programming which will assist the resident in attaining or maintaining, or both, their maximal level of functional independence ~~and provide for routine and ongoing out of facility activities~~ including tasks involved in accomplishing activities of daily living. The plan must address the provision of routine and ongoing access to the outdoors as appropriate based on resident's past history, personal preferences, and current condition.

c. Activities and social service programs shall provide the opportunity for interaction with nondementia residents of the ~~long term care~~ nursing facility and the community outside the ~~long term care~~ nursing facility to respond to individual resident needs and capabilities.

d. Residents of the unit may not be locked into or out of their rooms.

e. The ~~long term care~~ nursing facility shall have written policies and procedures regarding admission ~~(~~, including criteria for admission~~)~~, criteria for discharge ~~(including criteria for discharge)~~, and provision of services in the ~~special care~~ alzheimer's unit.

f. Facilities voluntarily or involuntarily terminating licensure as an alzheimer's unit or facility will be subject to a notice published by the department in the local newspaper to notify the public of the licensure termination. If the termination of licensure occurs and areas of noncompliance with these requirements as identified at the time of the termination still exist, the notice will include a listing of areas of noncompliance.

History: Effective October 1, 1989; amended effective November 1, 1992.
General Authority: NDCC 23-01-03

Law Implemented: NDCC 23-16-01

33-07-04.1-19.1. Alzheimer's care units or facilities. Alzheimer's units or facilities are to be developed and maintained as an alternative that more appropriately responds to the needs of residents with alzheimer's disease or other related dementias. The intent of these regulations is to establish and maintain a setting that minimizes or eliminates the need for physical or chemical restraints, provides a low stimulus setting where behaviors can be dealt with effectively through planned interventions, and staff is specially trained to plan for and implement care and activities beneficial in assisting residents with alzheimer's disease or related dementias attain or maintain their highest practicable level of functioning.

History: Effective November 1, 1992.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-16-01

33-07-04.1-20. Physical facilities - ~~Special care~~ Alzheimer's units or facilities.

1. In addition to the physical plant requirements of this chapter, a ~~long-term care~~ nursing facility with ~~a special care~~ an alzheimer's unit shall respond to the needs of each resident and provide the following:

   a. Dining area and recreational activities area ~~within~~ inside the unit which ~~may not be the same space~~ responds to the needs of the residents. The total area set aside for this purpose may not be less than twenty square feet [1.86 square meters] per bed for dining purposes, and fifteen square feet [1.40 square meters] per bed for recreational activities purposes. Special dining areas outside the unit specifically set aside for residents from the unit may be approved for acceptability upon written request and evaluation by the department.

   b. A visitation room, appropriately furnished where residents may meet privately with family members, visitors, clergy, etc. This area may be provided either inside or outside the unit.

   c. Toilet in or adjacent to recreation and dining areas.

   d. Bathing facilities within the unit which are functionally usable by residents of the unit.

   e. The unit shall provide a homelike, low stimulus, atmosphere~~,~~ that minimizes traffic through and noise in the unit and is furnished and decorated to respond to

individual resident needs. This includes spaces in the unit that respond to resident needs for individual or small group activities and quiet areas.

2. ~~Special care~~ Alzheimer's units utilizing restricting devices on doors shall comply with the following:

   a. Restricting devices may only be installed in buildings protected throughout by an approved supervised automatic fire detection system or approved supervised automatic sprinkler system.

   b. Restricting devices must unlock upon activation of an approved supervised automatic fire detection system or approved supervised automatic sprinkler system.

   c. Restricting devices must unlock upon loss of power controlling the lock or locking mechanism.

   d. The restricting devices must be designed and equipped so that a competent person may leave the unit at any time without the use of a key or requiring special instructions. ~~The system used to comply with this requirement is subject to approval by the licensing agency and the state fire marshal's office.~~

   e. The restricting device system used to comply with this requirement is subject to approval by the licensing agency and the state fire marshal's office.

3. ~~If a long term care facility has a special care unit and utilizes restricting devices, they shall provide their residents with immediate access to a secured outdoor area.~~

~~4.~~ ~~Review of plans.~~ A ~~long term care~~ nursing facility ~~wishing to open a special care~~ requesting licensure to operate an alzheimer's unit shall submit its plans for physical plant, staffing, and program to the department for prior ~~review~~ approval of conformity with these requirements. Continued approval is contingent upon onsite review.

History: Effective October 1, 1989; amended effective November 1, 1992.
General Authority: NDCC 23-01-03
Law Implemented: NDCC 23-16-01

TITLE 45

Insurance, Commissioner of

JUNE 1992

CHAPTER 45-03-05

45-03-05-13. ~~Annual registration~~ Registration of insurers - ~~Annual registration~~ Registration filing. An insurer required to file ~~an annual~~ a registration statement pursuant to North Dakota Century Code section 26.1-10-04 shall furnish the required information on Form B, hereby made a part of this chapter.

History: Effective January 1, 1982; amended effective January 1, 1992; February 28, 1992.
General Authority: NDCC 26.1-10-12
Law Implemented: NDCC 26.1-10-04

45-03-05-13.1. Summary of registration - Statement filing. An insurer required to file ~~an annual~~ a registration statement pursuant to North Dakota Century Code section 26.1-10-04 is also required to furnish information required on Form C. An insurer shall file a copy of Form C in each state in which the insurer is authorized to do business, if requested by the commissioner of that state.

History: Effective January 1, 1992; amended effective February 28, 1992.
General Authority: NDCC 28-32
Law Implemented: NDCC 26.1-10-04

45-03-05-14. Amendments to Form B.

1. An amendment to Form B shall be filed within fifteen days after the end of the month in which there is a material change

to the information provided in the ~~annual~~ registration statement.

2. Amendments must be filed in the Form B format with only those items which are being amended reported. Each such amendment must include at the top of the cover page: "Amendment No. (insert number) to Form B for (insert year)" and must indicate the date of the change and not the date of the original filings.

History: Effective January 1, 1982; amended effective January 1, 1992; February 28, 1992.
General Authority: NDCC 26.1-10-12
Law Implemented: NDCC 26.1-10-04

45-03-05-18. Extraordinary dividends and other distributions.

1. Requests for approval of extraordinary dividends or any other extraordinary distribution to shareholders shall include the following:

   a. The date established for payment of the dividend.

   b. A statement as to whether the dividend is to be in cash or other property and, if in property, a description of the property, its cost, and its fair market value together with an explanation of the basis for valuation.

   c. The amount of the proposed dividend.

   d. A copy of the calculations determining that the proposed dividend is extraordinary. The workpaper must include the following information:

      (1) The amounts, dates, and form of payment of all dividends or distributions (including regular dividends but excluding distributions of the insurer's own securities) paid within the period of twelve consecutive months ending on the date fixed for payment of the proposed dividend for which approval is sought and commencing on the day after the same day of the same month in the last preceding year;

      (2) Surplus as regards policyholders (total capital and surplus) as of the next preceding December thirty-first;

      (3) If the insurer is a life insurer, the net gain from operations for the twelve-month period ending the next preceding December thirty-first;

(4) If the insurer is not a life insurer, the net income less realized capital gains for the twelve-month period ending the next preceding December thirty-first and the two preceding twelve-month periods; and

(5) If the insurer is not a life insurer, the dividends paid to stockholders excluding distributions of the insurer's own securities in the preceding two calendar years.

e. A balance sheet and statement of income for the period intervening from the last annual statement filed with the commissioner and the end of the month preceding the month in which the request for dividend approval is submitted.

f. A brief statement as to the effect of the proposed dividend upon the insurer's surplus and the reasonableness of surplus in relation to the insurer's outstanding liabilities and the adequacy of surplus relative to the insurer's financial needs.

2. Subject to subsections 3, 4, and 5 of North Dakota Century Code section 26.1-10-05, each registered insurer shall report to the commissioner all dividends and other distributions to shareholders within ~~fifteen~~ ten business days following the declaration thereof, including the same information required by paragraphs 1 through 4 of subdivision d.

History: Effective January 1, 1982; amended effective January 1, 1992; February 28, 1992.
General Authority: NDCC 26.1-10-12
Law Implemented: NDCC 26.1-10-04

FORM B

INSURANCE HOLDING COMPANY SYSTEM ~~ANNUAL~~ REGISTRATION STATEMENT

Filed with the Insurance Department of the State of _____

By

_____

Name of Registrant

On Behalf of the Following Insurance Companies

Name Address

_____

_____

_____

_____

_____

Date: _____, 19 __

Name, title, address and telephone number of individual to whom notices and correspondence concerning this statement should be addressed:

_____

_____

_____

ITEM 1. IDENTITY AND CONTROL OF REGISTRANT

Furnish the exact name of each insurer registering or being registered (hereinafter called "the registrant"), the home office address and principal executive offices of each; the date on which each registrant became part of the insurance holding company system; and the methods by which control of each registrant was acquired and is maintained.

ITEM 2. ORGANIZATIONAL CHART

Furnish a chart or listing clearly presenting the identities of and interrelationships among all affiliated persons within the insurance holding company system. No affiliate need be shown if its total assets are equal to less than one-half of one percent of the total assets of the ultimate controlling person within the insurance holding company system unless it has assets valued at or exceeding (insert amount). The

chart or listing should show the percentage of each class of voting securities of each affiliate which is owned, directly or indirectly, by another affiliate. If control of any person within the system is maintained other than by the ownership or control of voting securities, indicate the basis of such control. As to each person specified in such chart or listing indicate the type of organization, e.g., corporation, trust, partnership, and the state or other jurisdiction of domicile.

ITEM 3. THE ULTIMATE CONTROLLING PERSON

As to the ultimate controlling person in the insurance holding company system furnish the following information:

1. Name.

2. Home office address.

3. Principal executive office address.

4. The organizational structure of the person, i.e., corporation, partnership, individual, trust, etc.

5. The principal business of the person.

6. The name and address of any person who holds or owns ten percent or more of any class of voting security, the class of such security, the number of shares held of record or known to be beneficially owned, and the percentage of class so held or owned.

7. If court proceedings involving a reorganization or liquidation are pending, indicate the title and location of the court, the nature of proceedings, and the date when commenced.

ITEM 4. BIOGRAPHICAL INFORMATION

Furnish the following information for the directors and executive officers of the ultimate controlling person; the individual's name and address, the individual's principal occupation and all offices and positions held during the past five years, and any conviction of crimes other than minor traffic violations during the past ten years.

ITEM 5. TRANSACTIONS AND AGREEMENTS

Briefly describe the following agreements in force and transactions currently outstanding or which have occurred during the last calendar year between the registrant and its affiliates:

1. Loans, other investments, or purchases, sales, or exchanges of securities of the affiliates by the registrant or of the registrant by its affiliates;

2. Purchases, sales, or exchanges of assets;

3. Transactions not in the ordinary course of business;

4. Guarantees or undertakings for the benefit of an affiliate which result in an actual contingent exposure of the registrant's assets to liability, other than insurance contracts entered into in the ordinary course of the registrant's business;

5. All management agreements, service contracts, and all cost-sharing arrangements;

6. Reinsurance agreements;

7. Dividends and other distributions to shareholders;

8. Consolidated tax allocation agreements; and

9. Any pledge of the registrant's stock or of the stock of any subsidiary or controlling affiliate, for a loan made to any member of the insurance holding company system.

No information need be disclosed if such information is not material for purposes of Section 26.1-10-04 of the North Dakota Century Code.

Sales, purchases, exchanges, loans, or extensions of credit, investments, or guarantees involving one-half of one percent or less of the registrant's admitted assets as of next preceding December thirty-first shall not be deemed material.

The description shall be in a manner as to permit the proper evaluation thereof by the commissioner, and shall include at least the following: the nature and purpose of the transaction, the nature and amounts of any payments or transfers of assets between the parties, the identity of all parties to such transaction, and relationship of the affiliated parties to the Registrant.

ITEM 6. LITIGATION OR ADMINISTRATIVE PROCEEDINGS

A brief description of any litigation or administrative proceedings of the following types, either then pending or concluded within the preceding fiscal year, to which the ultimate controlling person or any of its directors or executive officers was a party or of which the property of any such person is or was the subject; give the names of the parties and the court or agency in which such litigation or proceeding is or was pending:

1. Criminal prosecutions or administrative proceedings by any government agency or authority which may be relevant to the trustworthiness of any party thereto; and

2. Proceedings which may have a material effect upon the solvency or capital structure of the ultimate holding company

including, but not necessarily limited to, bankruptcy, receivership, or other corporate reorganizations.

ITEM 7. STATEMENT REGARDING PLAN OR SERIES OF TRANSACTIONS

The insurer shall furnish a statement that transactions entered into since the filing of the prior ~~year's annual~~ registration statement are not part of a plan or series of like transactions, the purpose of which is to avoid statutory threshold amounts and the review that might otherwise occur.

ITEM 8. FINANCIAL STATEMENTS AND EXHIBITS

1. Financial statements and exhibits should be attached to this statement as an appendix, but list under this item the financial statements and exhibits so attached.

2. The financial statements shall include the annual financial statements of the ultimate controlling person in the insurance holding company system as of the end of the person's latest fiscal year.

   If at the time of the initial registration, the annual financial statements for the latest fiscal year are not available, annual statements for the previous fiscal year may be filed and similar financial information shall be filed for any subsequent period to the extent such information is available. Such financial statements may be prepared on either an individual basis, or unless the commissioner otherwise requires, on a consolidated basis if such consolidated statements are prepared in the usual course of business.

   Unless the commissioner otherwise permits, the annual financial statements shall be accompanied by the certificate of an independent public accountant to the effect that such statements present fairly the financial position of the ultimate controlling person and the results of its operations for the year then ended, in conformity with generally accepted accounting principles or with requirements of insurance or other accounting principles prescribed or permitted under law. If the ultimate controlling person is an insurer which is actively engaged in the business of insurance, the annual financial statements need not be certified, provided they are based on the annual statement of such insurer filed with the insurance department of the insurer's domiciliary state and are in accordance with requirements of insurance or other accounting principles prescribed or permitted under the law and regulations of such state.

3. Exhibits shall include copies of the latest annual reports to shareholders of the ultimate controlling person and proxy material used by the ultimate controlling person; and any

additional documents or papers required by Form B or North Dakota Administrative Code sections 45-03-05-04 and 45-03-05-06.

ITEM 9. FORM C REQUIRED

A Form C, Summary of Registration Statement, must be prepared and filed with this Form B.

ITEM 10. SIGNATURE AND CERTIFICATION

Signature and certification required as follows:

SIGNATURE

Pursuant to the requirements of Section 26.1-10-04 of the North Dakota Century Code, the registrant has caused this ~~annual~~ registration statement to be duly signed on its behalf in the City of _____, and State of _____ on the _____ day of _____, 19 ___.

(SEAL)

_____
(Name of registrant)

By: _____
(Name) (Title)

Attest:

_____
(Signature of officer)

_____
(Title)

CERTIFICATION

The undersigned deposes and says that the undersigned has duly executed the attached annual registration statement dated _____, 19 ___,
for and on behalf of _____; that the
(Name of company)

undersigned is the _____ of such company, and that
(Title of officer)

the undersigned has authority to execute and file such instrument. The deponent further says that deponent is familiar with such instrument and that the facts therein set forth are true to the best of deponent's knowledge, information, and belief.

(Signature) _____

(Type or print name beneath) _____

_____

FORM C
SUMMARY OF REGISTRATION STATEMENT

Filed with the Insurance Department of the State of _____

BY

_____
Name of Registrant

On Behalf of the Following Insurance Companies

Name Address

_____

_____

_____

_____

Date: _____, 19____

Name, title, address, and telephone number of individual to whom notices and correspondence concerning this statement should be addressed:

_____

_____

_____

_____

Furnish a brief description of all items in the current ~~annual~~ registration statement which represent changes from the prior ~~year's annual~~ registration statement. The description shall be in a manner as to permit the proper evaluation thereof by the commissioner, and shall include specific references to item numbers in the ~~annual~~ registration statement and to the terms contained therein.

Changes occurring under Item 2 of Form B insofar as changes in the percentage of each class of voting securities held by each affiliate is concerned, need only be included where such changes are ones which result in ownership or holdings of ten percent or more of voting securities, loss or transfer of control, or acquisition or loss of partnership interest.

Changes occurring under Item 4 of Form B need only be included where: an individual is, for the first time, made a director or executive officer of the ultimate controlling person; a director or executive officer terminates his or her responsibilities with the

ultimate controlling person; or in the event an individual is named president of the ultimate controlling person.

If a transaction disclosed on the prior ~~year's annual~~ registration statement has been changed, the nature of such change shall be included. If a transaction disclosed on the prior ~~year's annual~~ registration statement has been effectuated, furnish the mode of completion and any flow of funds between affiliates resulting from the transaction.

The insurer shall furnish a statement that transactions entered into since the filing of the prior ~~year's annual~~ registration statement are not part of a plan or series of like transactions whose purpose it is to avoid statutory threshold amounts and the review that might otherwise occur.

SIGNATURE AND CERTIFICATION

Signature and certification required as follows:

SIGNATURE

Pursuant to the requirements of Section 26.1-10-04 of the North Dakota Century Code, the registrant has caused this summary of registration statement to be duly signed on its behalf in the City of _____ and State of _____ on the _____ day of _____, 19 ____.

(SEAL)

_____
(Name of Applicant)

By: _____
(Name) (Title)

Attest:

_____
(Signature of officer)

_____
(Title)

CERTIFICATION

The undersigned deposes and says that the deponent has duly executed the attached summary of registration statement dated _____, 19 ____, for and on behalf of _____ (Name of company); that the deponent is the _____ (Title of officer) of such company;

and that the deponent is authorized to execute and file such instrument. Deponent further says that deponent is familiar with such instrument and

the contents thereof, and that the facts therein set forth are true to the best of deponent's knowledge, information, and belief.

(Signature) _____

(Type or print name beneath) _____

CHAPTER 45-04-11

45-04-11-01. Financial statement prohibitions.

1. No licensed life insurer shall, for reinsurance ceded, reduce any liability or establish any asset in any financial statement filed with this department if, by the terms of the reinsurance agreement, in substance or effect, any of the following conditions exist:

   a. The primary effect of the reinsurance agreement is to transfer deficiency reserves or excess interest reserves to the books of the reinsurer for a "risk charge" and the agreement does not provide for ~~mortality, morbidity, or surrender benefit~~ significant participation by the reinsurer ~~consistent with its participation in the deficiency or excess interest portion of the policies reinsured~~ in one or more of the following risks: mortality, morbidity, investment, or surrender benefit;

   b. The reserve credit taken by the ceding insurer is in excess of the actuarial reserve necessary, under the North Dakota insurance law or rules, including actuarial interpretations or standards adopted by the department, to support the policy obligations transferred under the reinsurance agreement;

   c. The reserve credit taken by the ceding insurer is greater than the underlying reserve of the ceding company supporting the policy obligations transferred under the reinsurance agreement;

   d. The ceding insurer is required to reimburse the reinsurer for negative experience under the reinsurance agreement, except that neither offsetting experience refunds against prior years' losses nor payment by the ceding insurer of an amount equal to prior years' losses upon voluntary termination of inforce reinsurance by that ceding insurer shall be considered such a reimbursement to the insurer for negative experience;

   e. The ceding insurer can be deprived of surplus at the reinsurer's option or automatically upon the occurrence of some event, such as the insolvency of the ceding insurer, except that termination of the reinsurance agreement by the ~~insurer~~ reinsurer for nonpayment of reinsurance premiums shall not be considered to be such a deprivation of surplus;

f. The ceding insurer must, at specific points in time scheduled in the agreement, terminate or automatically recapture all or part of the reinsurance ceded;

g. No cash payment is due from the reinsurer, throughout the lifetime of the reinsurance agreement, with all settlements prior to the termination date of the agreement made only in a "reinsurance account", and no funds in such account are available for the payment of claims; or

h. The reinsurance agreement involves the possible payment by the ceding insurer to the reinsurer of amounts other than from income reasonably expected from the reinsured policies.

2. Notwithstanding subsection 1, a licensed life insurer may, with the prior approval of the commissioner, take such reserve credit as the commissioner may deem consistent with the insurance law or rules, including actuarial interpretations or standards adopted by the department.

History: Effective October 1, 1989; amended effective January 1, 1992; February 28, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 26.1-05-04, 26.1-05-19, 26.1-05-32

45-06-01.1-13. Permitted compensation arrangements.

1. An issuer or other entity must provide level commissions or other compensation to an agent or other representative for the sale of a medicare supplement policy or certificate for the year of issuance and no fewer than five renewal years.

2. No issuer or other entity may provide compensation to its agents or other producers and no agent or producer may receive compensation greater than the renewal compensation payable by the replacing issuer on renewal policies or certificates if an existing policy or certificate is replaced.

3. For purposes of this section, "compensation" includes pecuniary or nonpecuniary remuneration of any kind relating to the sale or renewal of the policy or certificate including, but not limited to, bonuses, gifts, prizes, awards, and finders fees.

4. This section does not apply to an issuer or other entity ~~which~~ that provides ~~annual~~ a one-time commission or other compensation provided the amount paid to an agent or other representative for the sale of a medicare supplement insurance policy or certificate ~~of twenty-five dollars or less~~ does not exceed twenty-five dollars. This payment is in lieu of level commissions.

History: Effective January 1, 1992; amended effective January 6, 1992.
General Authority: NDCC 26.1-36.1-02(1)(2)
Law Implemented: NDCC 26.1-36.1-03

AUGUST 1992

CHAPTER 45-06-01.1

45-06-01.1-14. Required disclosure provisions.

1. General rules.

   a. Medicare supplement policies and certificates must include a renewal or continuation provision. The language or specifications of such provision must be consistent with the type of contract issued. Such provision must be appropriately captioned and must appear on the first page of the policy, and must include any reservation by the issuer of the right to change premiums and any automatic renewal premium increases based on the policyholder's age.

   b. Except for riders or endorsements by which the issuer effectuates a request made in writing by the insured, exercises a specifically reserved right under a medicare supplement policy, or is required to reduce or eliminate benefits to avoid duplication of medicare benefits, all riders or endorsements added to a medicare supplement policy after date of issue or at reinstatement or renewal which reduce or eliminate benefits or coverage in the policy must require a signed acceptance by the insured. After the date of policy or certificate issue, any rider or endorsement which increases benefits or coverage with a concomitant increase in premium during the policy term must be agreed to in writing signed by the insured, unless the benefits are required by the minimum standards for medicare supplement policies, or if the increased benefits or coverage is required by law. Where a separate additional premium is charged for benefits provided in connection with riders or endorsements, such premium charge must be set forth in the policy.

c. Medicare supplement policies or certificates may not provide for the payment of benefits based on standards described as "usual and customary", "reasonable and customary", or words of similar import.

d. If a medicare supplement policy or certificate contains any limitations with respect to preexisting conditions, such limitations must appear as a separate paragraph of the policy and be labeled as "preexisting condition limitations".

e. Medicare supplement policies and certificates must have a notice prominently printed on the first page of the policy or certificate or attached thereto stating in substance that the policyholder or certificate holder has the right to return the policy or certificate within thirty days of its delivery and to have the premium refunded if, after examination of the policy or certificate, the insured person is not satisfied for any reason.

f. Issuers of accident and sickness policies or certificates which provide hospital or medical expense coverage on an expense incurred or indemnity basis, other than incidentally, to persons eligible for medicare by reason of age must provide to such applicants a medicare supplement buyer's guide in the form developed jointly by the national association of insurance commissioners and the health care financing administration and in a type size no smaller than twelve-point type. Delivery of the buyer's guide must be made whether or not such policies or certificates are advertised, solicited, or issued as medicare supplement policies or certificates as defined in this regulation. Except in the case of direct response issuers, delivery of the buyer's guide must be made to the applicant at the time of application and acknowledgement of receipt of the buyer's guide must be obtained by the insurer. Direct response issuers must deliver the buyer's guide to the applicant upon request but not later than at the time the policy is delivered.

2. Notice requirements.

a. As soon as practicable, but no later than thirty days prior to the annual effective date of any medicare benefit changes, an issuer must notify its policyholders and certificate holders of modifications it has made to medicare supplement insurance policies or certificates in a format acceptable to the commissioner. Such notice must:

(1) Include a description of revisions to the medicare program and a description of each modification made

to the coverage provided under the medicare supplement policy or certificate; and

(2) Inform each policyholder or certificate holder as to when any premium adjustment is to be made due to changes in medicare.

b. The notice of benefit modifications and any premium adjustments must be in outline form and in clear and simple terms so as to facilitate comprehension.

c. Such notices may not contain or be accompanied by any solicitation.

3. **Outline of coverage requirements for medicare supplement policies.**

a. Issuers must provide an outline of coverage to all applicants at the time application is presented to the prospective applicant and, except for direct response policies, must obtain an acknowledgement of receipt of such outline from the applicant; and

b. If an outline of coverage is provided at the time of application and the medicare supplement policy or certificate is issued on a basis which would require revision of the outline, a substitute outline of coverage properly describing the policy or certificate must accompany such policy or certificate when it is delivered and contain the following statement, in no less than twelve-point type, immediately above the company name:

"NOTICE: Read this outline of coverage carefully. It is not identical to the outline of coverage provided upon application and the coverage originally applied for has not been issued."

c. The outline of coverage provided to applicants pursuant to this section must consist of four parts: a cover page, premium information, disclosure pages, and charts displaying the features of each benefit plan offered by the issuer. The outline of coverage must be in the language and format prescribed below in no less than twelve-point type. All plans "A" through "J" must be shown on the cover page, and the plans that are offered by the issuer must be prominently identified. Premium information for plans that are offered must be shown on the cover page or immediately following the cover page and must be prominently displayed. The premium and mode must be stated for all plans that are offered to the prospective applicant. All possible premiums for the prospective applicant must be illustrated.

d. The following items must be included in the outline of coverage in the order prescribed below:

[COMPANY NAME]
Outline of Medicare Supplement Coverage-Cover Page:
Benefit Plan(s) _____[Insert letter(s) of plan(s) being offered]

Medicare supplement insurance can be sold in only ten standard plans. This chart shows the benefits included in each plan. Every company must make available Plan "A". Some plans may not be available in your state.

BASIC BENEFITS: Included in All Plans.
Hospitalization: Part A coinsurance plus coverage for 365 additional days after Medicare benefits end.
Medical Expenses: Part B coinsurance (20% of Medicare-approved expenses).
Blood: First three pints of blood each year.

A	B	C	D	E	F	G	H	I	J
Basic Benefits	Basic Benefits	Basic Benefits	Basic Benefits	Basic Benefits	Basic Benefits	Basic Benefits	Basic Benefits	Basic Benefits	Basic Benefits
		Skilled Nursing Co-Insurance	Skilled Nursing Co-Insurance	Skilled Nursing Co-Insurance	Skilled Nursing Co-Insurance	Skilled Nursing Co-Insurance	Skilled Nursing Co-Insurance	Skilled Nursing Co-Insurance	Skilled Nursing Co-Insurance
	Part A Deductible	Part A Deductible	Part A Deductible	Part A Deductible	Part A Deductible	Part A Deductible	Part A Deductible	Part A Deductible	Part A Deductible
		Part B Deductible			Part B Deductible				Part B Deductible
					Part B Excess (100%)	Part B Excess (80%)		Part B Excess (100%)	Part B Excess (100%)
		Foreign Travel Emergency	Foreign Travel Emergency	Foreign Travel Emergency	Foreign Travel Emergency	Foreign Travel Emergency	Foreign Travel Emergency	Foreign Travel Emergency	Foreign Travel Emergency
			At-Home Recovery			At-Home Recovery		At-Home Recovery	At-Home Recovery
							Basic Drugs ($1,250 Limit)	Basic Drugs ($1,250 Limit)	Extended Drugs ($3,000 Limit)
				Preventive Care					Preventive Care

PREMIUM INFORMATION

We [insert issuer's name] can only raise your premium if we raise the premium for all policies like yours in this state. [If the premium is based on the increasing age of the insured, include information specifying when premiums will change.]

DISCLOSURES

Use this outline to compare benefits and premiums among policies.

READ YOUR POLICY VERY CAREFULLY

This is only an outline describing your policy's most important features. The policy is your insurance contract. You must read the policy itself to understand all of the rights and duties of both you and your insurance company.

RIGHT TO RETURN POLICY

If you find that you are not satisfied with your policy, you may return it to [insert issuer's address]. If you send the policy back to us within 30 days after you receive it, we will treat the policy as if it had never been issued and return all of your payments.

POLICY REPLACEMENT

If you are replacing another health insurance policy, do NOT cancel it until you have actually received your new policy and are sure you want to keep it.

NOTICE

This policy may not fully cover all of your medical costs.

[for agents:]
Neither [insert company's name] nor its agents are connected with medicare.

[for direct response:]
[insert company's name] is not connected with medicare.

This outline of coverage does not give all the details of medicare coverage. Contact your local Social Security Office or consult "The medicare Handbook" for more details.

COMPLETE ANSWERS ARE VERY IMPORTANT

When you fill out the application for the new policy, be sure to answer truthfully and completely all questions about your medical and health history. The company may cancel your policy and refuse to pay any claims if you leave out or falsify important medical information. [If the policy or certificate is guaranteed issue, this paragraph need not appear.]

Review the application carefully before you sign it. Be certain that all information has been properly recorded.

[Include for each plan prominently identified in the cover page, a chart showing the services, medicare payments, plan payments and insured payments for each plan, using the same language, in the same order, using uniform layout and format as shown in the charts below. No more than four plans may be shown on one chart. For purposes of illustration, charts for each plan are included in this regulation. An issuer may use additional benefit plan designations on these charts pursuant to subsection 4 of section 45-06-01.1-07 of this chapter.]

[Include an explanation of any innovative benefits on the cover page and in the chart, in a manner approved by the commissioner.]

4. **Notice regarding policies or certificates which are not medicare supplement policies.** Any accident and sickness insurance policy or certificate, other than a medicare supplement policy; or a policy issued pursuant to a contract under section 1876 or section 1833 of the Social Security Act [42 U.S.C. 1395 et seq.], disability income policy; basic, catastrophic, or major medical expense policy; single premium nonrenewable policy or other policy identified in subsection 2 of section 45-06-01.1-01, issued for delivery in this state to persons eligible for medicare by reason of age must notify insureds under the policy that the policy is not a medicare supplement policy or certificate. Such notice must either be printed or attached to the first page of the outline of coverage delivered to insureds under the policy, or if no outline of coverage is delivered, to the first page of the policy, or certificate delivered to insureds. Such notice must be in no less than twelve-point type and must contain the following language:

   "THIS [POLICY OR CERTIFICATE] IS NOT A MEDICARE SUPPLEMENT [POLICY OR CONTRACT]. If you are eligible for Medicare, review the Medicare Supplement Buyer's Guide available from the company."

History: Effective January 1, 1992; amended effective August 1, 1992.
General Authority: NDCC 26.1-36.1-03, 26.1-36.1-05
Law Implemented: NDCC 26.1-36.1-05

TITLE 48

Board of Animal Health

NOVEMBER 1992

CHAPTER 48-02-01

48-02-01-03. Cattle.

1. Tuberculosis. ~~No test is required~~ A negative tuberculosis test, within thirty days prior to entry into North Dakota, is required for all cattle originating from any modified accredited state, or any other area, where in the estimation of the board, tuberculosis may exist.

   Nursing calves accompanying negative tested dams are exempted from the test requirement.

   Cattle of Mexican origin must have a negative tuberculosis test, administered by a licensed, accredited United States veterinarian, the test being administered at the proper interval following the Mexican test, which is required for entry into the United States. This last test must be administered within thirty days prior to entry into North Dakota.

2. Brucellosis. Tests for brucellosis must be conducted by a state or federal laboratory or by a veterinarian approved in the state of origin. "Brucellosis test" means the blood agglutination test conducted at the state-federal laboratory in Bismarck. Vaccination is required. No female cattle over twelve months (three hundred sixty-five days) of age may be imported unless officially calfhood vaccinated against brucellosis and properly identified. Exempted from this requirement are cattle entering licensed monitored feedlots or when, in the estimation of the board, the following conditions exist:

a. Drought conditions render pasture and feed supplies inadequate for North Dakota producers to maintain their breeding herds;

b. It is necessary that North Dakota cattle producers secure out-of-state grazing or feeding facilities for their breeding herds; and

c. The cattle are owned by legitimate North Dakota cattle producers with the intent to return the cattle to the North Dakota producers' premises upon completion of the grazing or feeding period.

3. **Permits.** Permits shall be required on all female cattle over twelve months (three hundred sixty-five days) of age. Permits shall be required on all cattle originating from any state where scabies may be introduced in shipments originating from such state at the discretion of the board.

4. **Dipping.** Dipping in a solution approved by the board shall be required on all cattle originating from states where scabies permits are required. Two dippings, ten to fourteen days apart, may be required on cattle originating from states determined by the board to have a large number of infested herds. In lieu of dipping, treatment with ivermectin administered by a licensed accredited veterinarian in accordance with the United States department of agriculture, guidelines for veterinary services, found in 9 CFR part 73, is acceptable.

5. **Calves.** Calf permits are required on all imported calves under four months of age. Imported calves are not to be resold in less than sixty days. Purchasers must pick up imported calves at the sellers' premises. Calves accompanying dams are excluded from the requirements of this section.

History: Amended effective April 1, 1980; June 1, 1983; September 1, 1984; September 1, 1988; May 16, 1990; November 1, 1992.
General Authority: NDCC 36-01-08
Law Implemented: NDCC 36-01-08

TITLE 50

Medical Examiners, Board of

JULY 1992

STAFF COMMENT: Chapter 50-02-10 contains all new material but is not underscored so as to improve readability.

CHAPTER 50-02-10
PATIENT RECORDS

Section
50-02-10-01 Patient Records Relating to Psychiatric Care

50-02-10-01. Patient records relating to psychiatric care. Psychiatric records may be transferred or released to the patient or the patient's representative upon request of the patient whenever the treating physician believes that such action is not contrary to the patient's best interests. In other instances, psychiatric records shall be transferred to another physician or released to a representative of the patient when requested on behalf of the patient by another physician.

History: Effective July 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-31

TITLE 51

Milk Stabilization Board

JULY 1992

CHAPTER 51-03-02

51-03-02-12.1. Authorized discounts on milk products - Market area 1. The following authorized maximum volume discounts are authorized on sales of milk products. Said discounts must be based upon the average total monthly purchases of milk products from all suppliers for the preceding year.

	Discount Rate	
Monthly Volume	Full Service	Limited Service
0 gal. to 799 gal.	0 %	3 %
800 gal. to 1600 gal.	2 %	5 %
1601 gal. to 2400 gal.	3 %	6 %
2401 gal. to 3200 gal.	4 %	7 %
3201 gal. to 8000 gal.	5 %	9 %
8001 gal. and over	7 %	11%

A limited service program should be authorized in market areas nos. 1, 2, 3, 4, 5, 6, 7, and 8 for grocery store retailers. This limited service program should consist of the following:

1. Maximum delivery of three times per week to store cooler.

2. All orders preordered prior to delivery.

3. No in-store service, i.e., cleaning cases, stamping products, etc.

4. Personnel for store resets will be limited to dairy case setting only.

5. No returns on merchandise, except when product is found to be damaged or defective at time of delivery check-in.

6. No callback on delivery days.

7. No volume discounts from processors or distributors will be allowed on charged sales not paid by a retailer within four weeks (twenty-eight days) of the statement date. All statements must be on a weekly basis, the weekly cutoff date must remain the same.

A full service program should be authorized in market areas nos. 1, 2, 3, 4, 5, 6, 7, and 8 for retailers whose total monthly purchases of milk products from all suppliers for the preceding year exceed eight hundred gallons [3028.33 liters] per month. This full service program should consist of the following:

1. Supplier will be responsible for maintaining adequate supply of product~~; product~~.

2. Product will be stocked and displayed on delivery days~~; product~~.

3. Product will be sold on a guaranteed sales basis~~; and personnel~~.

4. Personnel for store resets will be limited to dairy case resets only.

5. No volume discounts from processors or distributors will be allowed on charged sales not paid by a retailer within four weeks (twenty-eight days) of the statement date. All statements must be on a weekly basis, the weekly cutoff date must remain the same.

History: Effective June 1, 1990; amended effective February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-02-13. Price filings on frozen dairy products. On or before ~~June 1, 1990~~ February 1, 1992, all dealers in all market areas shall file the uniform wholesale price at which ice cream, frozen malt ice cream (frost malt ice cream), flavored ice cream, fruit ice cream, nut ice cream, french ice cream, ice milk, fruit sherbet, fruit sherbines, and the mix from which any such product is made, will be sold by each dealer to retailers within the market area. New prices and amended prices must be filed at the office of the North Dakota milk stabilization board at Bismarck, North Dakota, at least ten days in advance of the effective date of any new price or amended price together with the date on which such filing becomes effective. Placing a price schedule in the mail shall constitute a filing.

Any dealer may meet competition without delay in connection with the sale of any such frozen dairy product provided such dealer shall file an amended price specifically stating that such amended price is for the purpose of meeting lawful competition before actually meeting such competition. A dealer desiring to meet the lower prices of a competitor may do so in such portions of the marketing area as are specified in such dealer's amended price filing for the purpose of meeting competition. The wholesale prices filed by a processor for the marketing area shall automatically be applicable to sales by distributors of that processor's products within such area unless said distributors file their own schedule of prices.

All price filings must be available at the office of the milk board for inspection and copying and may be disclosed by the board upon the written request of any person.

History: Amended effective November 1, 1980; July 1, 1981; November 1, 1983; April 1, 1984; August 1, 1987; June 1, 1990; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-02-15. Formula to determine changes in the class I wholesale and retail prices. Based upon the class I formula as ordered in section 51-03-02-06, for each hundredweight price change to dairy farmers for raw milk ~~of sixty nine cents per hundredweight increase or decrease above or below the thirteen dollars and twenty eight cents base hundredweight price~~ or an increase or decrease of $.001 in the federal market order number 68 butterfat differential based on $~~.118~~ .100, the following factors will be used in determining adjustments in the class I wholesale and retail prices. ~~Respective price changes will take effect the first Monday of the month in which they occur. Minimum wholesale and retail prices in effect December shall remain in effect until March first.~~ If the first of the month falls on a Monday, Tuesday, or Wednesday, minimum wholesale and retail prices go in effect that Monday. If the first of the month falls on a Thursday, Friday, Saturday, or Sunday, minimum wholesale and retail prices go in effect the following Monday.

Item	Hundredweight Factor	B.F. Factor
Whole Milk 1/2 Gallon	$.0098900	$(.0001075)
2 % Milk	.0099130	(.0006465)
1 % Milk	.0099130	(.0010775)
Skim Milk	.0099245	(.0012945)
Buttermilk	.0099245	(.0012945)
Whole Chocolate	.0094645	(.0001029)
2 % Chocolate	.0094875	(.0006188)
1 % Chocolate	.0094875	(.0010313)
Skim Chocolate	.0094990	(.0012390)

All price adjustments at the retail level should be made to the nearest one cent per unit: wholesale to the nearest $.001 per unit. The

foregoing class I formula price changes shall be automatically adjusted without further amendment to this stabilization plan.

History: Amended effective November 1, 1983; June 26, 1989; June 1, 1990; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-03-13. Authorized discounts on milk products - Market areas 2, 5, 7 and 8. The following authorized maximum volume discounts are authorized on sales of milk products. Said discounts must be based upon the average total monthly purchases of milk products from all suppliers for the preceding year.

	Discount Rate	
Monthly Volume	Full Service	Limited Service
0 gal. to 799 gal.	0 %	3 %
800 gal. to 1600 gal.	2 %	5 %
1601 gal. to 2400 gal.	3 %	6 %
2401 gal. to 3200 gal.	4 %	7 %
3201 gal. to 8000 gal.	5 %	9 %
8001 gal. and over	7 %	11%

A limited service program should be authorized in market areas nos. 2, 3, 4, 5, 6, 7, and 8 for grocery store retailers. This limited service program should consist of the following:

1. Maximum delivery of three times per week to store cooler.

2. All orders preordered prior to delivery.

3. No in-store service, i.e., cleaning cases, stamping ~~product~~ products, etc.

4. Personnel for store resets will be limited to dairy case setting only.

5. No returns on merchandise, except when product is found to be damaged or defective at time of delivery checkin.

6. No callback on delivery days.

7. No volume discounts from processors or distributors will be allowed on charged sales not paid by a retailer within four weeks (twenty-eight days) of the statement date. All statements must be on a weekly basis, the weekly cutoff date must remain the same.

A full service program should be authorized in market areas nos. 2, 3, 4, 5, 6, 7, and 8 for retailers whose total monthly purchases of milk products from all suppliers for the preceding year exceed eight hundred gallons [3028.33 liters] per month. This full service program should consist of the following:

1. Supplier will be responsible for maintaining adequate supply of product.

2. Product will be stocked and displayed on delivery days.

3. Product will be sold on a guaranteed sales basis.

4. Personnel for store resets will be limited to dairy case resets only.

5. No volume discounts from processors or distributors will be allowed on charged sales not paid by a retailer within four weeks (twenty-eight days) of the statement date. All statements must be on a weekly basis, the weekly cutoff date must remain the same.

History: Amended effective April 14, 1980; November 1, 1980; July 1, 1981; June 26, 1989; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-03-14. Price filings on frozen dairy products. On or before ~~June 1, 1990~~ February 1, 1992, all dealers in all market areas shall file the uniform wholesale price at which ice cream, frozen malt ice cream (frost malt ice cream), flavored ice cream, fruit ice cream, nut ice cream, french ice cream, ice milk, fruit sherbet, fruit sherbines, and the mix from which any such product is made, will be sold by each dealer to retailers within the market area. New prices and amended prices must be filed at the office of the North Dakota milk stabilization board at Bismarck, North Dakota, at least ten days in advance of the effective date of any new price or amended price together with the date on which such filing becomes effective. Placing a price schedule in the mail shall constitute a filing.

Any dealer may meet competition without delay in connection with the sale of any such frozen dairy product provided such dealer shall file an amended price specifically stating that such amended price is for the purpose of meeting lawful competition before actually meeting such competition. A dealer desiring to meet the lower prices of a competitor may do so in such portions of the marketing area as are specified in such dealer's amended price filing for the purpose of meeting competition. The wholesale prices filed by a processor for the marketing area shall automatically be applicable to sales by distributors of that processor's products within such area unless said distributors file their own schedule of prices.

All price filings shall be available at the office of the milk board for inspection and copying and may be disclosed by the board upon the written request of any person.

History: Amended effective November 1, 1983; April 1, 1984; August 1, 1987; June 1, 1990; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-03-16. Formula to determine changes in the class I wholesale and retail prices. Based upon the class I formula as ordered in section 51-03-03-06, for each hundredweight price change to dairy farmers for raw milk ~~of sixty nine cents per hundredweight increase or decrease above or below the thirteen dollars and twenty eight cents base hundredweight price~~ or an increase or decrease of $.001 in the federal market order number 68 butterfat differential based on $~~.118~~.100, the following factors will be used in determining adjustments in the class I wholesale and retail prices. ~~Respective price changes will take effect the first Monday of the month in which they occur. Minimum wholesale and retail prices in effect December shall remain in effect until March first.~~ If the first of the month falls on a Monday, Tuesday, or Wednesday, minimum wholesale and retail prices go in effect that Monday. If the first of the month falls on a Thursday, Friday, Saturday, or Sunday, minimum wholesale and retail prices go in effect the following Monday.

Item	Hundredweight Factor	B.F. Factor
Whole Milk 1/2 Gallon	$.0098900	$(.0001075)
2 % Milk	.0099130	(.0006465)
1 % Milk	.0099130	(.0010775)
Skim Milk	.0099245	(.0012945)
Buttermilk	.0099245	(.0012945)
Whole Chocolate	.0094645	(.0001029)
2 % Chocolate	.0094875	(.0006188)
1 % Chocolate	.0094875	(.0010313)
Skim Chocolate	.0094990	(.0012390)

All price adjustments at the retail level should be made to the nearest one cent per unit: wholesale to the nearest $.001 per unit. The foregoing class I formula price changes shall be automatically adjusted without further amendment to this stabilization plan.

History: Amended effective November 1, 1983; June 26, 1989; June 1, 1990; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-04-13. Authorized discounts on milk products - Market areas 3, 4, and 6. The following authorized maximum volume discounts are authorized on sales of milk products. Said discounts must be based upon the average total monthly purchases of milk products from all suppliers for the preceding year.

Monthly Volume	Discount Rate Full Service	Limited Service
0 gal. to 799 gal.	0 %	3 %
800 gal. to 1600 gal.	2 %	5 %
1601 gal. to 2400 gal.	3 %	6 %
2401 gal. to 3200 gal.	4 %	7 %
3201 gal. to 8000 gal.	5 %	9 %
8001 gal. and over	7 %	11%

A limited service program should be authorized in market areas nos. 2, 3, 4, 5, 6, 7, and 8 for grocery store retailers. This limited service program should consist of the following:

1. Maximum delivery of three times per week to store cooler.

2. All orders preordered prior to delivery.

3. No in-store service, i.e., cleaning cases, stamping products, etc.

4. Personnel for store resets will be limited to dairy case setting only.

5. No returns on merchandise, except when product is found to be damaged or defective at time of delivery check-in.

6. No callback on delivery days.

7. No volume discounts from processors or distributors will be allowed on charged sales not paid by a retailer within four weeks (twenty-eight days) of the statement date. All statements must be on a weekly basis, the weekly cutoff date must remain the same.

A full service program should be authorized in market areas nos. 2, 3, 4, 5, 6, 7, and 8 for retailers whose total monthly purchases of milk products from all suppliers for the preceding year exceed eight hundred gallons [3028.33 liters] per month. This full service program should consist of the following:

1. Supplier will be responsible for maintaining adequate supply of product.

2. Product will be stocked and displayed on delivery days.

3. Product will be sold on a guaranteed sales basis.

4. Personnel for store resets will be limited to dairy case resets only.

5. No volume discounts from processors or distributors will be allowed on charged sales not paid by a retailer within four weeks (twenty-eight days) of the statement date. All statements must be on a weekly basis, the weekly cutoff date must remain the same.

History: Amended effective June 1, 1990; April 14, 1980; November 1, 1980; July 1, 1981; June 26, 1989; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-04-14. Price filings on frozen dairy products. On or before ~~June 1, 1990~~ February 1, 1992, all dealers in all market areas shall file the uniform wholesale price at which ice cream, frozen malt ice cream (frost malt ice cream), flavored ice cream, fruit ice cream, nut ice cream, french ice cream, ice milk, fruit sherbet, fruit sherbines, and the mix from which any such product is made, will be sold by each dealer to retailers within the market area. New prices and amended prices must be filed at the office of the North Dakota milk stabilization board at Bismarck, North Dakota, at least ten days in advance of the effective date of any new price or amended price together with the date on which such filing becomes effective. Placing a price schedule in the mail shall constitute a filing.

Any dealer may meet competition without delay in connection with the sale of any such frozen dairy product provided such dealer shall file an amended price specifically stating that such amended price is for the purpose of meeting lawful competition before actually meeting such competition. A dealer desiring to meet the lower prices of a competitor may do so in such portions of the marketing area as are specified in such dealer's amended price filing for the purpose of meeting competition. The wholesale prices filed by a processor for the marketing area shall automatically be applicable to sales by distributors of that processor's products within such area unless said distributors file their own schedule of prices.

All price filings must be available at the office of the milk board for inspection and copying and may be disclosed by the board upon the written request of any person.

History: Amended effective November 1, 1983; April 1, 1984; August 1, 1987; June 26, 1989; June 1, 1990; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-04-16. Formula to determine changes in the class I wholesale and retail prices. Based upon the class I formula as ordered in section 51-04-04-06, for each hundredweight price change to dairy farmers for raw milk ~~of sixty nine cents per hundredweight increase or decrease above or below the thirteen dollars and twenty eight cents base hundredweight price~~ or an increase or decrease of $.001 in the federal market order number 68 butterfat differential based on $~~.118~~.100, the following factors will be used in determining adjustments in the class I wholesale and retail prices. ~~Respective price changes will take effect the first Monday of the month in which they occur. Minimum wholesale and retail prices in effect December shall remain in effect until March first.~~ If the first of the month falls on a Monday, Tuesday, or Wednesday, minimum wholesale and retail prices go in effect that Monday. If the first of the month falls on a Thursday, Friday, Saturday, or Sunday, minimum wholesale and retail prices go in effect the following Monday.

Item	Hundredweight Factor	B.F. Factor
Whole Milk 1/2 Gallon	$.0098900	$(.0001075)
2 % Milk	.0099130	(.0006465)
1 % Milk	.0099130	(.0010775)
Skim Milk	.0099245	(.0012945)
Buttermilk	.0099245	(.0012945)
Whole Chocolate	.0094645	(.0001029)
2 % Chocolate	.0094875	(.0006188)
1 % Chocolate	.0094875	(.0010313)
Skim Chocolate	.0094990	(.0012390)

All price adjustments at the retail level should be made to the nearest one cent per unit: wholesale to the nearest $.001 per unit. The foregoing class I formula price changes shall be automatically adjusted without further amendment to this stabilization plan.

History: Amended effective November 1, 1983; June 26, 1989; June 1, 1990; February 1, 1992.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

TITLE 54

Nursing, Board of

JUNE 1992

CHAPTER 54-06-02

54-06-02-01. Registry eligibility. ~~The board shall enter individual names on the nurse aide registry upon receipt of information verifying completion of a board approved nurse assistant training program and a national standardized nurse assistant competency evaluation program. Information included on the registry must include name, address, social security number, birth date, program provider for both the training program and the competency evaluation program, and place of employment.~~ Repealed effective June 1, 1992.

History: ~~Effective March 1, 1990.~~
General Authority: ~~NDCC 43-12.1-08(18)~~
Law Implemented: ~~NDCC 43-12.1-08(17)~~

54-06-02-02. Registry renewal. ~~Current registry status is limited to twenty-four months. Within four months prior to the expiration date of the registry status, the board shall send an application for renewal to the certified nurse assistant. Upon receipt of a completed renewal application, verification of employment within the past twenty-four months, and the renewal fee, the certified nurse assistant must be issued a renewal certificate indicating current status. An individual who has not performed at least one hundred sixty hours of nursing or nursing related services for pay within a continuous twenty-four month period after completion of a training and competency evaluation program shall complete a board approved training and national standardized competency evaluation program in order to obtain current registry status.~~ Repealed effective June 1, 1992.

History: ~~Effective March 1, 1990.~~
General Authority: ~~NDCC 43-12.1-08(18)~~
Law Implemented: ~~NDCC 43-12.1-08(17)~~

CHAPTER 54-06-03

NURSE ASSISTANT TRAINING PROGRAM REQUIREMENTS

[Repealed effective June 1, 1992]

NOVEMBER 1992

STAFF COMMENT: Article 54-07 contains all new material but is not underscored so as to improve readability.

ARTICLE 54-07

ASSISTANTS TO THE NURSE

Chapter	
54-07-01	General Provisions
54-07-02	Nurse Assistant Registry
54-07-03	Nursing Tasks and Nursing Functions

CHAPTER 54-07-01
GENERAL PROVISIONS

Section	
54-07-01-01	Statement of Intent
54-07-01-02	Definitions
54-07-01-03	Recognition of Other State Registries

54-07-01-01. Statement of intent. The 1991 legislative assembly enacted legislation declaring that it is the policy of this state to regulate through the board of nursing the practice of nursing, those engaged in licensed nursing practice, and those persons who assist in the practice of nursing. Other governmental agencies, through implementation of federal standards and regulations, may also be charged with the regulation of those who assist in the practice of nursing in specific health care agencies, and it is the intent of the board to

recognize other state registries that may exist, rather than duplicating those services. When nursing care is delivered by a health care agency as a specific service to the North Dakota resident, the nursing care must be provided by licensed nurses, or by individuals that are trained, supervised, or directed by licensed nurses. In agencies where direct nursing care is not provided as a specific service, the provisions of this article do not apply.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-01

54-07-01-02. Definitions. The following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

1. "Assistant to the nurse" means an individual who works under the direction of a licensed nurse, provides nursing or nursing-related tasks, meets the requirements of article 54-07, and is listed on the board registry or other state registries acknowledged by the board as meeting or exceeding the requirements of this article.

2. "Consultative nursing" means that the licensed nurse provides guidance and information as a participant of the interdisciplinary team by is not individually responsible to direct the plan of care for the client.

3. "Delegation" means the assignment by a licensed nurse to an assistant to the nurse performance of nursing tasks in selected situations. Delegation can be either global or specific in nature.

   a. "Global" delegation means the assignment by a licensed nurse to an assistant to the nurse the performance of the nursing task for all clients or persons to whom the assistant to the nurse is assigned care responsibilities.

   b. "Specific" delegation means the assignment by a licensed nurse to an assistant to the nurse the performance of the selected nursing task for only the assigned client or person to whom the licensed nurse indicates.

4. "Direct nursing" means that the licensed nurse determines the nature or extent of the nursing care that will be provided for an individual or group of individuals and is responsible and accountable for the care provided that has been delegated to those providing assistance to the nurse.

5. "Nurse assistant registry" means a listing of all persons who are authorized by the board or included on another state registry which has been recognized by the board to perform

nursing functions or nursing tasks legally delegated and supervised by a licensed nurse.

6. "Nursing task" is a task or function that has been assigned to an assistant to the nurse following the determination of nursing needs by the licensed nurse.

7. "Supervision" means the provision of guidance or direction by the licensed nurse for the accomplishment of a nursing task or activity delegated to an assistant to the nurse. The licensed nurse is responsible for the determination of the level of supervision required to ensure the safety and well-being of the client.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-02

54-07-01-03. Recognition of other state registries. The board will acknowledge placement on other state registries in lieu of the nurse assistant registry. Criteria for recognition of other state registries is as follows:

1. The registry is open to the public during normal business hours.

2. The registry contains information about the individual that meets or exceeds the requirements for the nursing assistant registry.

3. The registry provides a mechanism for removal of the individual for cause, or marking of the registry of validated information regarding the individual's unsuitability to care for North Dakota residents.

4. The agency operating the registry has submitted sufficient documentation to the board of nursing to verify compliance with these requirements.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

CHAPTER 54-07-02
NURSE ASSISTANT REGISTRY

Section
54-07-02-01 Nurse Assistant Registry
54-07-02-02 Disciplinary Action of Registry Listing

54-07-02-01. Nurse assistant registry. The board shall establish and maintain a nurse assistant registry. The board shall enter individual names on the nurse assistant registry upon receipt of information required.

1. An applicant shall submit a completed application and fee that includes an affidavit of training and competency determination by the employer. The affidavit must include validation of training and competency determination for those tasks and functions listed in section 54-07-03-03. A national nursing assistant competency evaluation testing program may be used in lieu of the employer validation of competency.

2. Upon receipt of the required information, and a fee of five dollars, an initial registry listing card for a period of twenty-four months will be sent to the nurse assistant.

3. Registry listing is valid for twenty-four months and will be subject to renewal before the last day of the twenty-fourth month. Registry listing renewal requires verification of continued competency by the employer.

4. The renewal fee for the assistant to the nurse will be five dollars.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

54-07-02-02. Disciplinary action of registry listing. The board has the authority to revoke, suspend, or deny a nurse assistant registry listing following disciplinary action if the assistant to the nurse has been found to have completed any of the acts found in North Dakota Century Code section 43-12.1-14.1. The board shall use North Dakota Century Code chapter 28-32 as the process to determine the action to

revoke, suspend, or deny the listing. Disciplinary action must be communicated to all health care agencies or providers of personal care in North Dakota.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-14.1

CHAPTER 54-07-03
NURSING TASKS AND NURSING FUNCTIONS

Section	
54-07-03-01	Global Delegation of Nursing Tasks and Nursing Functions
54-07-03-02	Supervision of Nursing Tasks and Nursing Functions
54-07-03-03	Delegation of Global Nursing Tasks and Nursing Fuctions
54-07-03-04	Standards for Specific Delegation

54-07-03-01. Global delegation of nursing tasks and nursing functions. Global delegation of nursing tasks to an assistant to the nurse must comply with the following requirements:

1. The nursing task must be one that the assistant to the nurse has been trained to carry out safely and is within the listing included in section 54-07-03-03.

2. The nursing task must be one that, in the opinion of the delegating licensed nurse, can be properly and safely performed by the assistant to the nurse involved without jeopardizing the welfare of the recipient.

3. The licensed nurse must make an assessment of the patient's nursing care needs prior to delegating the nursing task.

4. The licensed nurse shall adequately supervise the performance of the delegated nursing task in accordance with the requirements of this chapter.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

54-07-03-02. Supervision of nursing tasks and nursing functions. The licensed nurse shall provide supervision of all nursing tasks delegated to the assistant to the nurse in accordance with the following conditions:

1. The degree of supervision required must be determined by the licensed nurse after an evaluation of appropriate factors involved including, but not limited to, the following:

   a. The stability of the condition of the patient;

   b. The training and capability of the assistant to the nurse to whom nursing task is delegated;

   c. The nature of the nursing task being delegated; and

d. The proximity and availability of the licensed nurse when the nursing task will be performed.

2. The licensed nurse providing the supervision is readily available to the assistant to the nurse.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

54-07-03-03. Delegation of global nursing tasks and nursing functions. The following nursing tasks and nursing functions are ones that are within the scope of sound nursing practice to be delegated to an assistant to the nurse.

1. The collecting, reporting, and documentation of data including, but not limited to:

   a. Vital signs, height, weight, intake, and output;

   b. Chances from baseline data established by the licensed nurse;

   c. Environmental situations;

   d. Patient and family comments relating to the patient's care; and

   e. Behaviors related to the plan of care.

2. Ambulation, positioning, and turning.

3. Transportation of the patient.

4. Personal hygiene and elimination, including cleansing enemas.

5. Feeding, cutting up food, placement of meal trays.

6. Socialization activities.

7. Activities of daily living.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

54-07-03-04. Standards for specific delegation. Nursing tasks other than those identified in section 54-07-03-03 may be specifically delegated to an assistant to the nurse caring for a specific client if the following criteria are met:

1. There are written agency policies identifying the process of specific delegation of nursing tasks, the training and supervision required, and the evaluation of the delegation of the specific nursing tasks.

2. The assistant to the nurse has received additional preparation pertinent to the specific nursing task and the additional preparation is documented in the individual's personnel folder.

3. The assistant to the nurse has completed a planned, supervised, onsite experience in the specific delegated nursing task.

History: Effective November 1, 1992.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

TITLE 55.5

Occupational Therapy Practice, Board of

NOVEMBER 1992

STAFF COMMENT: Article 55.5-03 contains all new material but is not underscored so as to improve readability.

ARTICLE 55.5-03

PRACTICE OF OCCUPATIONAL THERAPY

Chapter
55.5-03-01 Scope of Practice

CHAPTER 55.5-03-01
SCOPE OF PRACTICE

Section
55.5-03-01-01 Definitions
55.5-03-01-02 Educational Background and Scope of Practice
55.5-03-01-03 Specific Occupational Therapy Services
55.5-03-01-04 Occupational Therapy Assessment
55.5-03-01-05 Occupational Therapy Intervention

55.5-03-01-01. Definitions.

1. Unless otherwise specifically set out in this chapter, the terms used in this chapter, have the same meaning as in North Dakota Century Code chapter 43-40.

2. "Modality" means the employment of or the method of employment of a therapeutic agent.

3. "Physical agent modalities" means those modalities that produce a response in soft tissue through the use of light, water, temperature, sound, or electricity. Physical agent modalities include, but are not limited to, paraffin baths, hot packs, cold packs, fluidotherapy, contrast baths, ultrasound, whirlpool, and electrical stimulation units.

History: Effective November 1, 1992.
General Authority: NDCC 43-40-05
Law Implemented: NDCC 43-40-01, 43-40-05

55.5-03-01-02. Educational background and scope of practice.

1. The educational background of the occupational therapist includes anatomy, physiology, kinesiology, neuroanatomy, psychology, and other courses from the liberal arts and sciences, and enables the occupational therapist to assess and address an individual's deficits in occupational performance through the use of specific procedures, activities, modalities, and techniques, as taught in an accredited occupational therapy professional education program recognized by the board. The educational preparation and scope of practice of the occupational therapist to perform assessment and intervention may include, but is not limited to, the following:

   a. Neurological and physiological sciences:

      (1) Sensory integrative approaches;

      (2) Developmental approaches;

      (3) Sensory motor approaches;

      (4) Neurophysiological treatment approaches

      (5) Neuromuscular treatment approaches;

      (6) Sensory education and reeducation;

      (7) Visual and perceptual training;

      (8) Cognitive training;

      (9) Daily life tasks; and

      (10) Such other approaches in the neurological and physiological sciences as may be recognized by the board.

   b. Behavioral and social sciences:

(1) Behavioral approaches;

(2) Sensory integration;

(3) Interpersonal and intrapersonal skill development;

(4) Movement therapy;

(5) Vocational approaches;

(6) Entry into community living;

(7) Retirement planning;

(8) Self-management training;

(9) Leisure and play activities;

(10) Daily life tasks;

(11) Creative dramatics; and

(12) Such other approaches in the behavioral and social sciences as may be recognized by the board.

c. Biomechanical sciences:

(1) Work-related programs;

(2) Vocational programs and activities;

(3) Range of motion;

(4) Positioning and seating;

(5) Design, fabrication, and selection of orthotic devices;

(6) Design, fabrication, and selection of adaptive equipment;

(7) Prosthetic training;

(8) Therapeutic exercise and activity;

(9) Environmental accessibility;

(10) Application of assistive technology;

(11) Daily life tasks; and

(12) Such other approaches in the biomechanical sciences as may be recognized by the board.

d. Liberal arts and sciences.

2. The occupational therapist and occupational therapy assistant are responsible for proving competency in the use of specific procedures, activities, modalities, and techniques. Competency may be displayed through documented educational programs, including post-professional programs, specific certification, inservice training, or professional experience approved by the board.

   a. The board recognizes that the occupational therapist may be qualified and competent in the use of a variety of modalities, and that the occupational therapy assistant may utilize modalities under the supervision of the occupational therapist.

   b. When physical or therapeutic agents are selected, they may be used only in preparation for, or as an adjunct to, purposeful activity to enhance occupational performance.

   c. These qualifications and competencies may be obtained through programs recognized by the board, including accredited educational programs (including fieldwork education), specific certification, appropriate continuing education, inservice education, and postbaccalaureate higher education.

   d. The occupational therapist and occupational therapy assistant shall:

      (1) Document and demonstrate these qualifications and competencies on request;

      (2) Comply with federal and state laws which, in the opinion of the board, have a direct bearing upon the ability to serve as an occupational therapist and occupational therapy assistant;

      (3) Comply with the principles of ethics, the philosophical base, and the standards of practice of the American occupational therapy association; and

      (4) Provide services in the best interests of the client.

   e. Continuing education offerings specific to modalities and techniques must conform with:

      (1) Occupation as the common core of occupational therapy;

      (2) The applicable provisions of the rules of the board;

(3) Occupational therapy code of ethics as defined by the American occupational therapy association; and

(4) Standards of practice as defined by American occupational therapy association.

f. Occupational therapist, occupational therapy assistants, and students of occupational therapy use modalities and techniques only when the individual has received the theoretical and technical preparation necessary for safe and appropriate integration of the intervention in occupational therapy.

g. When an occupational therapist delegates the use of modalities to an occupational therapy assistant or student, both shall:

(1) Comply with appropriate supervision requirements; and

(2) Assure that their use is based on service competency.

History: Effective November 1, 1992.
General Authority: NDCC 43-40-05
Law Implemented: NDCC 43-40-01, 43-40-05

55.5-03-01-03. Specific occupational therapy services. The occupational therapist may apply those procedures, activities, modalities, or techniques that are preparatory to the individual's acquisition of functional skills or facilitative to the performance of purposeful activities, or both.

History: Effective November 1, 1992.
General Authority: NDCC 43-40-05
Law Implemented: NDCC 43-40-01, 43-40-05

55.5-03-01-04. Occupational therapy assessment. Assessment is the planned process of obtaining, interpreting, and documenting the functional status of the individual. The purpose of the assessment is to identify the individual's abilities and limitations, including deficits, delays, or maladaptive behavior that can be addressed in occupational therapy intervention. Data can be gathered through a review of records, observation, interview, and the administration of test procedures. Such procedures include, but are not limited to, the use of standardized tests, questionnaires, performance checklists, activities, and tasks designed to evaluate specific performance abilities.

History: Effective November 1, 1992.
General Authority: NDCC 43-40-05
Law Implemented: NDCC 43-40-01, 43-40-05

55.5-03-01-05. Occupational therapy intervention.

1. Occupational therapy addresses function and uses specific procedures, activities, modalities, and techniques to do any or all of the following:

   a. Develop, maintain, improve, or restore the performance of necessary functions.

   b. Compensate for dysfunction.

   c. Minimize or prevent debilitation.

   d. Promote health and wellness.

2. Categories of function are occupational performance areas and performance components. Occupational performance areas include activities of daily living, work activities, and play or leisure activities. Performance components refer to the functional abilities required for occupational performance, including sensory motor, motor, neuromuscular, cognitive, and psychological components, as well as cognitive integration and psychosocial skills. Deficits or delays in these occupational performance areas may be addressed by occupational therapy intervention.

History: Effective November 1, 1992.
General Authority: NDCC 43-40-05
Law Implemented: NDCC 43-40-01, 43-40-05

TITLE 58

Parks and Tourism Department

JULY 1992

CHAPTER 58-02-08

58-02-08-01. Authority. These state park use rules apply to all those areas which are under the control of or operated by the North Dakota parks and ~~recreation~~ tourism department. The authority to make and enforce these rules is granted pursuant to North Dakota Century Code sections ~~55-08-03~~ 55-08-01.3 and 55-08-05.

History: Effective September 1, 1987; amended effective July 1, 1992.
General Authority: NDCC 55-08-03, 55-08-05
Law Implemented: NDCC 55-08-03, 55-08-05

58-02-08-02. Definitions. In this chapter, unless the context or subject matter otherwise requires:

1. "All-terrain vehicle" means that term as defined by North Dakota Century Code section 39-29-01.

2. "Camping unit" means any vehicle or shelter specifically used for sleeping in or upon a portion of state land or water designated as a campsite.

3. "Campsite" means any area so designated by the department for the express purpose of camping. A campsite will normally include the following items: parking pad, picnic table, and fireplace.

4. "Department" means the North Dakota parks and ~~recreation~~ tourism department.

5. "Director" means the director of the parks and outdoor recreation sites division of the North Dakota parks and ~~recreation~~ tourism department.

6. "Occupied campsite" means a campsite where a valid camping permit is affixed to the campsite marker and a camping unit is onsite. If a camping unit is not onsite, a campsite is not occupied unless specific permission for leaving the campsite has been given by park personnel.

7. "Park manager" means the individual responsible for the administration of a state park.

8. "Snowmobile" means that term as defined in North Dakota Century Code section 39-24-01.

9. "State park" or "park" includes and embraces all land and water under the supervision of the North Dakota parks and ~~recreation~~ tourism department.

10. "Swimming area" means an area, marked by buoys, ropes, floats, or other United States coast guard-approved devices, in which swimming is allowed.

History: Effective September 1, 1987; amended effective July 1, 1992.
General Authority: NDCC 55-08-03
Law Implemented: NDCC 55-08-03

58-02-08-13. Fees and permits.

1. No person may evade or attempt to evade any fee or other charge that may be levied for admission to or use of any state park or facility contained therein.

2. When no park staff is on duty at the entrance station, park visitors must use the department's self-registration system.

3. While in the park, visitors must have their daily entrance permits, annual entrance permits, or senior citizen "passports" affixed to the lower left-hand corner of their vehicle or camping unit windshield to be considered validly registered for admission.

4. Camping permits must be placed on the campsite marker specifically provided for that purpose. If no campsite marker is provided, the permit must be conspicuously displayed on the camping unit or on a vehicle parked on the campsite.

5. The annual entrance permit may only be used on vehicles registered to the owner of the permit and listed on the department's annual vehicle permit log.

History: Effective September 1, 1987; amended effective July 1, 1992.
General Authority: NDCC 55-08-03, 55-08-05
Law Implemented: NDCC 55-08-03, 55-08-04, 55-08-05, 55-08-06

58-02-08-18. Swimming areas, boat ramps, and marinas.

1. No person may swim, bathe, or wade at a state park, except within designated swimming areas.

2. It is unlawful in a state park designated swimming area:

   a. To possess glass containers.

   b. To use the beach or designated swimming area between one-half hour after sunset and seven a.m.

   c. To enter with any boat, canoe, or raft.

   d. To fish.

   e. To engage in any hazardous activity which could cause injury to others.

   f. To use any soap, detergent, or shampoo.

   g. To change clothes except in structures that may be provided by the park for that purpose.

3. Swimming is not allowed in state parks by children under the age of twelve years, unless they are supervised by a swimmer eighteen years of age or older.

4. No person may give or transmit a false signal or alarm of drowning.

5. Any person swimming at ~~a~~ state park or recreation swimming areas under the control of or operated by the North Dakota parks and ~~recreation~~ tourism department shall do so at the person's own risk.

6. Any person using any designated beach, designated swimming area, boat ramp, or marina shall obey all posted rules and instructions given by lifeguards, rangers, or other state park employees.

7. All watercraft operating in state park marinas or near boat ramps must be restricted to idle speed.

History: Effective September 1, 1987; amended effective July 1, 1992.
General Authority: NDCC 55-08-03
Law Implemented: NDCC 55-08-03, 55-08-04

TITLE 60

Pesticide Control Board

JULY 1992

CHAPTER 60-03-01

60-03-01-02. Definitions. As used in this chapter, the following words shall have the meaning given to them below, unless otherwise made inappropriate by use and context. Words not defined in this section shall have the meaning given to them in North Dakota Century Code chapter 4-35.

1. "Board" means the North Dakota pesticide control board created pursuant to North Dakota Century Code section 4-35-02.

2. "Bulk pesticide" means any volume of pesticide which can be accurately metered and which is transported or held in an individual container capable of holding, in undivided quantities, ~~one hundred ten~~ fifty-five United States gallons [~~416.40~~ 208.2 liters] or greater, or two hundred pounds [90.72 kilograms] net dry weight.

3. "Bulk pesticide storage facility" means any area, location, tract of land, building, struture, or premises constructed for the storage of bulk pesticides.

4. "Certification" means certification of dealers, commercial applicators, and private applicators provided for by North Dakota Century Code sections 4-35-09, 4-35-12, and 4-35-14.

~~4.~~ 5. "Commissioner" means the North Dakota commissioner of agriculture.

~~5.~~ 6. "Compensation" means monetary payment for a specific service.

~~6.~~ 7. "Custom applicator" means any person who uses or supervises the use of a general use pesticide for compensation upon the land of another person.

~~7.~~ 8. "Custom ~~mix~~ blend" means any diluted mixture of pesticide prepared by a dealer to the specifications of the end-user and not held in inventory.

~~8.~~ 9. "End-use labeling" means the label application recommendations for a pesticide.

~~9.~~ 10. "End-user" means the person who applies the pesticide.

~~10.~~ 11. "General use pesticide" means any pesticide formulation which is not classified for restricted use by the board.

12. "Mix" means any diluted mixture of pesticide with fertilizer, seed, or other medium.

~~11.~~ 13. "Pesticide applicator" means any person who applies a pesticide.

~~12.~~ 14. "Repackaging" means the transfer of a pesticide in bulk quantities and in an unaltered state from a container into a designated refillable container.

History: Amended effective April 15, 1985; October 1, 1990; July 1, 1992.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06

60-03-01-03. Restricted use pesticides. The North Dakota restricted use pesticides shall be the same as those declared to be restricted use pesticides by the United States environmental protection agency and others declared at the discretion of the pesticide control board.

History: Effective August 1, 1978; amended effective February 1, 1982; October 1, 1990; July 1, 1992.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06

60-03-01-06. Application, storage, transportation, and disposal of pesticides.

1. Application.

a. All pesticides shall be used in accordance with the label.

b. Pesticide applicators and persons assisting with an application shall follow all safety precautions as specified on the container label.

c. All equipment used in pesticide application must be operationally sound and properly calibrated to prevent unreasonable adverse effects on the environment.

d. All pesticides that require posting on the label or with a forty-eight-hour-reentry period or greater must be posted by the applicator or the applicator's designate under contract. There are two options for properly posting fields.

Option 1: The signs must be a minimum of eight inches by eleven inches [20.32 centimeters by 27.94 centimeters] with one-half-inch [1.270-centimeter] lettering and be easily readable. The signs must be posted at all normal entrances to the field and on all corners which are along normally traveled roads. These signs can be a maximum of one-half mile [.80 ~~kilometers~~ kilometer] apart. The signs must contain the following information: Danger - field sprayed with (pesticide name). The field is safe for reentry on (date).

Option 2: Flags used by aerial applicators when marking field areas that have been sprayed can be used for posting. Such flags must be at least four inches by eight feet [10.16 centimeters by 2.438 meters]. The lettering on the flags must be fluorescent with a white background and must be easily readable. The signs must be dropped outside the field boundaries within fifty feet [15.24 meters] of all normal entrances to the field and all corners along normally traveled roads. These signs can be a maximum of one-fourth mile [.402 kilometer] apart along normally traveled roads. The signs must contain the following language: DANGER - KEEP OUT - THIS FIELD SPRAYED WITH A PESTICIDE. BEFORE ENTRY, CONTACT (business name and phone number).

The business name and phone number can be printed on the flag or, if the flag gives directions to refer to the attached cardboard, the business name and phone number can be printed on the cardboard.

Along with the lettering a skull and crossbones must be printed on the flag in a larger size than the largest lettering. The lettering for "Danger - Keep Out" must be at least three-fourths of an inch [1.905 centimeters]. The lettering for the remaining wording must be at least three-eighths of an inch [.953 centimeter].

2. Storage.

a. All pesticides, except bulk pesticides, shall be stored in their original container and in accordance with label recommendations. All labels of stored pesticides shall be plainly visible. All pesticide containers must have a proper label affixed to them.

b. All pesticides shall be stored in dry, well-ventilated spaces, and in a manner which will not endanger humans, animals, or the environment, nor contaminate food or feed.

c. If a storage area contains a floor drain, it must be sealed or self-contained.

3. Transportation.

a. All pesticides, except bulk pesticides, shall be transported in their original containers. All pesticides must be transported in a secure manner to avoid breakage of containers, spills, or any other manner of contamination.

b. Pesticides shall not be transported with foodstuffs, feed, or any other product or material so as to pose a hazard to humans, animals, or the environment.

c. Equipment contaminated in the transportation of pesticides shall be cleaned and decontaminated prior to any other use.

4. Disposal.

a. Empty pesticide containers shall be stored in accordance with label recommendations and in a manner which will not endanger humans, animals, or the environment.

b. Empty nonreturnable pesticide containers shall be triple-rinsed or equivalent. Secondary use of such containers which would endanger humans, animals, or the environment is prohibited.

c. Pesticide containers shall be disposed of in accordance with label directions and in a manner which will not endanger humans, animals, or the environment.

History: Amended effective April 15, 1985; October 1, 1990; July 1, 1992.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06, 4-35-20

60-03-01-10. Registration, packaging, repackaging, storage, and transportation of bulk pesticides for each business location.

1. Registration - Establishment number requirements.

   a. Any person that repackages bulk pesticides ~~or custom mixes any quantity of pesticide to be applied by another person~~ must have an environmental protection agency establishment number.

   b. Any person that makes a mix of any quantity of pesticide, to be applied by another person, and holds the mix in inventory, must have an environmental protection agency establishment number.

      The person making the mix must supply the person applying the mix with end-use labeling for each pesticide in the mix. The end-use labeling must have the facilities establishment number printed on it.

   c. The environmental protection agency establishment number and end-use labeling must be attached to bulk pesticide storage tanks.

   ~~c.~~ d. The environmental protection agency establishment number and end-use labeling must accompany or be attached to the mobile bulk pesticide container.

   e. Any person that custom blends any quantity of pesticide to be applied by another person must ensure that end-use labeling for all pesticides in the blend accompanies the blend to the point of end use. No establishment number is required for the blending facilities.

2. Storage and transportation.

   a. The transportation and storage of all bulk pesticides must be in compliance with the manufacturer's label requirements.

   b. The transportation of bulk pesticides must meet all applicable standards of state and United States department of transportation rules and regulations.

   c. Bulk pesticide storage ~~tanks~~ containers must be made of materials and so constructed to be compatible with the pesticide stored and the conditions of storage, including any specifications that may appear on the pesticide labels and labeling.

   d. ~~Nonmobile bulk pesticide storage containers must be on a site with additional structure constructed as a means of containment. The structure must be constructed of sufficient size and material so as to contain any spilled or discharged materials and have a capacity of a minimum~~

~~of one hundred ten percent of the single largest nonmobile bulk pesticide storage container.~~

Bulk storage containers and ~~permanent~~ loading areas must be constructed and located on a site in a manner so that pesticides will not contaminate streams and water supplies.

~~f.~~ e. All permanent bulk storage ~~tanks~~ containers must be equipped with a locking withdrawal valve or must be stored in a secure locked area. The valves or storage area must be locked during nonbusiness hours.

~~g.~~ f. Bulk pesticide storage ~~tanks~~ containers that are going to be refilled with a different pesticide must be cleaned and rinsed according to both the repackager's and manufacturer's agreed upon written instructions and all former labeling must be removed.

3. Liquid bulk pesticides.

a. Outdoor storage:

(1) Liquid bulk pesticide storage containers must be on a site which has an additional containment structure. The structure must be constructed of sufficient size and material, approved by the pesticide registrant, so as to contain any spilled or discharged materials. Any outdoor liquid bulk pesticide storage facility constructed after June 5, 1992, must have a containment capacity of a minimum of one hundred twenty-five percent of the single largest bulk pesticide storage container.

(2) Contaminated rainwater must be collected within this structure. Rainwater and contaminated rainwater cannot accumulate beyond twenty-five percent of the secondary containment's capacity or seven days, whichever comes first.

b. Indoor storage. Liquid bulk pesticide storage facilities located within an enclosed structure must be on a site which has an additional containment structure. The structure must be constructed of sufficient size and material, approved by the pesticide registrant, so as to contain any spilled or discharged materials. Any indoor liquid bulk pesticide storage facility must have a capacity of a minimum of one hundred ten percent of the single largest bulk pesticide storage container.

4. Dry bulk pesticides.

a. Outdoor storage facilities:

(1) Bulk dry pesticide storage facilities must have a six-inch [15.24-centimeter] high curb as an additional containment structure. No storage container may be placed closer than three feet [91.44 centimeters] from the curb. Except during loading, stored dry bulk pesticide must be covered by a roof or tarpaulin that will exclude precipitation from the pesticide. Storage containers must be placed on a concrete or other impervious surfaced floor, on pallets or on a raised platform to prevent water from contacting the pesticide.

(2) Contaminated rainwater must be collected within this structure. Rainwater and contaminated rainwater cannot accumulate beyond twenty-five percent of the secondary containment's capacity or seven days, whichever comes first.

b. Indoor storage facilities. Storage facilities located in an enclosed structure must have a minimum of a six-inch [15.24-centimeter] curb as an additional containment structure. No storage container may be placed closer than three feet [91.44 centimeters] from the curb, except where the curb is adjacent to a facility wall.

5. Prohibitions.

a. The transfer of bulk pesticides must be under the control of the repackager. Filling or refilling of containers is prohibited unless they are capable of holding, in undivided quantities, ~~one hundred ten~~ fifty-five United States gallons [~~416.40~~ 208.2 liters] or greater, or two hundred pounds [90.72 kilograms] net dry weight~~, or the chemical manufacturer has submitted container specifications to the department and received written approval from the department~~.

b. Bulk pesticide storage tanks may not be placed underground.

c. Repackaging at any location that does not have an environmental protection agency producer establishment number is prohibited.

d. Repackaging of pesticides without the written agreement of the manufacturing company is prohibited.

e. Repackaging at any location other than at a loading site is prohibited.

f. Repackaging into improperly labeled containers is prohibited.

g. Repackaging into containers not designated as reusable by the chemical and container manufacturer is prohibited.

h. Repackaging into containers with a capacity less than ~~one hundred ten~~ fifty-five gallons [~~416.39~~ 208.2 liters] ~~or not approved in writing by the department~~ is prohibited.

i. Repackaging for resale from a nonpermanent bulk storage tank is prohibited.

History: Effective April 15, 1985; amended effective October 1, 1990; July 1, 1992.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06, 4-35-15, 4-35-20

TITLE 61

Pharmacy, Board of

JUNE 1992

CHAPTER 61-02-02

61-02-02-01. **Building standards for pharmacies.** Any new pharmacy, or any existing pharmacy which is being remodeled, except in the cases of institutional practice, must comply with the following provisions:

1. **Approval of plans.** The prescription area, merchandising area, waiting area, storeroom, restroom, and all partitions, doors, windows, and fixtures shall be indicated on floor plans showing appropriate elevations submitted to the board at the time the application for a new pharmacy is filed, or prior to remodeling. Such plans shall be submitted to the board prior to proceeding with the new construction. Before a pharmacy permit is issued, the plans submitted must meet the approval of the board.

2. **Minimum size of the prescription area.** The minimum size of the prescription area, including adjacent patient consultation and information area and drug storage areas shall be not less than ~~five hundred~~ one thousand square feet [~~46.45~~ 92.90 square meters], with an additional two hundred fifty square feet [23.23 square meters], to be used but not restricted to prescription receiving, ~~patient counseling,~~ checkout, and entrance area, but in all cases shall be large enough to carry out efficiently the elements of the practice of pharmacy at the level of activity of that operation. All of the allotted square footage space, including adequate shelving, shall lend itself to efficient pharmaceutical practice so as to permit free movement and visual surveillance. A patient consultation and information center must be provided. This patient consultation and information center may not be located in the

prescription area or drug storage area. The patient consultation and information center must afford the patient privacy from visual or auditory detection or surveillance by any unauthorized person or persons. The patient consultation and information center must be accessible by a patient by provision of an entrance and exit that does not require the patient to enter or traverse the prescription area or drug storage areas.

3. **Prescription compounding counter.** There shall be a prescription compounding counter which shall provide a minimum of sixteen square feet [1.49 square meters] of unobstructed working space for one pharmacist, and a minimum of twenty-four square feet [2.23 square meters] of unobstructed working space where two or more pharmacists are on duty at any one time.

   The floor area to be occupied by the dispensing pharmacists shall extend the full length of the prescription compounding counter, and shall be clear and unobstructed for a minimum distance of thirty inches [76.2 centimeters] from the counter.

4. **Prescription area.** The prescription area shall be separated from other areas in such a manner that prescription or nonproprietary drugs or devices are inaccessible to the reach of any unauthorized person.

5. **Light and ventilation.** The prescription area and all storerooms shall be well-lighted, ventilated, and kept free of obnoxious odors.

6. **Refrigerator.** The restricted area shall contain a refrigerator for its exclusive use.

7. **Change in location of a pharmacy.** Before a licensed pharmacy changes the location of its business, or its physical dimensions or elements of physical security, it shall first submit the changes to the board for its approval that the changes do conform with all rules of the board.

8. **Storage of other merchandise - telephone.** The prescription department shall not be used for storage of merchandise other than that used in the preparation or dispensing of medical needs. If such stored material is present, such area shall not be included as part of the prescription department. A telephone shall be immediately accessible in the prescription area, and the telephone number shall coincide with the telephone number on prescription labels.

9. **Building standards variations.** The board of pharmacy recognizes that the building standards for pharmacies will depend on the type of pharmaceutical services offered, and therefore, variations for required building standards may be granted by the board of pharmacy.

History: Amended effective August 1, 1983; April 1, 1988; June 1, 1992.
General Authority: NDCC 28-32-02, 43-15-10(9), 43-15-10(11), 43-15-10(12), 43-15-10(14)
Law Implemented: NDCC 28-32-03, 43-15-01(16), 43-15-10(9), 43-15-10(11), 43-15-10(12), 43-15-10(14)

STAFF COMMENT: Article 61-10 contains all new material but is not underscored so as to improve readability.

ARTICLE 61-10

WHOLESALE DRUG DISTRIBUTORS

Chapter
61-10-01 Wholesale Drug Distributors

CHAPTER 61-10-01
WHOLESALE DRUG DISTRIBUTORS

Section
61-10-01-01 Scope
61-10-01-02 Purpose
61-10-01-03 Definitions
61-10-01-04 Wholesale Drug Distributor Licensing Requirement
61-10-01-05 Minimum Required Information for Licensure
61-10-01-06 Minimum Qualifications
61-10-01-07 Personnel
61-10-01-08 Violations and Penalties
61-10-01-09 Minimum Requirements for the Storage and Handling of Prescription Drugs and for the Establishment and Maintenance of Prescription Drug Distribution Records

61-10-01-01. Scope. This article applies to any person, partnership, corporation, or business firm engaging in the wholesale distribution of any prescription drugs in the state of North Dakota.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1

61-10-01-02. Purpose. The purpose of this article is to implement the Prescription Drug Marketing Act of 1987 by providing minimum standards, terms, and conditions for the licensing by the North Dakota state board of pharmacy of persons who engage in wholesale distribution in the state of North Dakota of any prescription drugs.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1; 21 USC 353(e)

61-10-01-03. Definitions. As used in this article:

1. "Article" or "this article" means all of the terms and provisions contained in article 61-10, including sections 61-10-01-01 through 61-10-01-09, inclusive, and any amendments or additions to said article or any of said sections.

2. "Board of pharmacy" means the North Dakota state board of pharmacy.

3. "Blood" means whole blood collected from a single donor processed either for transfusion or further manufacturing.

4. "Blood component" means that part of blood separated by physical or mechanical means.

5. "Drug sample" means a unit of a prescription drug that is not intended to be sold and is intended to promote the sale of the drug.

6. "Manufacturer" is defined as provided in subsection 2 of North Dakota Century Code section 43-15.1-01.

7. "Prescription drug" is defined as provided in subsection 4 of North Dakota Century Code section 43-15.1-01.

8. "Wholesale drug distribution" is defined as provided in subsection 5 of North Dakota Century Code section 43-15.1-01, provided that:

   a. Concerning the exclusion from the definition of "wholesale drug distribution" for "intracompany sale" set forth in subdivision a of subsection 5 of North Dakota Century Code section 43-15.1-01, such "sale" includes any transaction or transfer between any division, subsidiary, parent, and/or affiliated or related company under common ownership and control of a corporate entity.

   b. For purposes of subdivision a of this subsection and subdivision d of subsection 5 of North Dakota Century Code section 43-15.1-01, "common control" means the power to direct or cause the direction of the management and policies of a person or organization, whether by ownership by stock, voting rights, by contract, or otherwise.

   c. For purposes of subdivision e of subsection 5 of North Dakota Century Code section 43-15.1-01, "emergency medical reasons" includes transfers of prescription drugs by a retail pharmacy to another retail pharmacy to alleviate a temporary shortage, except that the gross dollar value of such transfers may not exceed five percent of the total prescription drug sales revenue of either the transferor

or transferee retail pharmacy during any twelve-consecutive-month period.

d. "Wholesale drug distribution" does not include the sale, purchase, or trade of blood and blood components intended for transfusion.

9. "Wholesale drug distributor" is defined as provided in subsection 6 of North Dakota Century Code section 43-15.1-01.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1

61-10-01-04. Wholesale drug distributor licensing requirement. Every wholesale drug distributor whether located in this state or any other state or foreign territory who engages in wholesale drug distribution of any prescription drugs in the state of North Dakota must be licensed by the board of pharmacy in accordance with this article and North Dakota Century Code chapter 43-15.1 before engaging in wholesale distribution of any prescription drugs in the state of North Dakota.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1-04, 43-15.1-05

61-10-01-05. Minimum required information for licensure.

1. Each wholesale drug distributor shall provide to the board of pharmacy the following minimum information as part of the application for the license described in this article or North Dakota Century Code chapter 43-15.1 and as part of any application for renewal of such license:

   a. The name, full business address, and telephone number of the licensee;

   b. All trade or business names used by the licensee;

   c. Addresses, telephone numbers, and the names of contact persons for all facilities used by the licensee for the storage, handling, and distribution of prescription drugs;

   d. The type of ownership or operation, i.e., partnership, corporation, or sole proprietorship; and

   e. The names of the owner or operator, or both, of the licensee, including:

      (1) If a person, the name of the person;

(2) If a partnership, the name of each partner, and the name of the partnership;

(3) If a corporation, the name and title of each corporate officer and director, the corporate names, and the name of the state of incorporation; and

(4) If a sole proprietorship, the full name of the sole proprietor and the name of the business entity.

2. The board of pharmacy may provide for a single license for a business entity operating more than one facility within the state, or for a parent entity with divisions, subsidiaries, and/or affiliate companies within the state when operations are conducted at more than one location and there exists joint ownership and control among all the entities.

3. Changes in any information in subsection 1 must be submitted to the board of pharmacy by the licensee within thirty days of any change.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1-04, 43-15.1-05, 43-15.1-06

61-10-01-06. Minimum qualifications.

1. The board of pharmacy shall consider, at a minimum, the following factors in reviewing the qualifications for licensure of persons who engage in wholesale distribution of prescription drugs within the state of North Dakota:

   a. Any convictions of the applicant under any federal, state, or local laws relating to drug samples, wholesale or retail drug distribution, or distribution of controlled substances;

   b. Any felony convictions of the applicant under federal, state, or local laws;

   c. The applicant's past experience in the manufacture or distribution of prescription drugs, including controlled substances;

   d. The furnishing by the applicant of false or fraudulent material in any application made in connection with drug manufacturing or distribution;

   e. Suspension or revocation by federal, state, or local government of any license currently or previously held by the applicant for the manufacture or distribution of any drugs, including controlled substances;

f. Compliance with licensing requirements under previously granted licenses, if any;

g. Compliance with requirements to maintain or make available to the board of pharmacy or to federal, state, or local law enforcement officials, or both, those records required under this section;

h. Any other factors or qualifications the board of pharmacy considers relevant to and consistent with the public health and safety; and

i. Other factors or requirements contained in subsection 5 of North Dakota Century Code section 43-15.1-04.

2. The board of pharmacy has the right to deny a license to an applicant if it determines that the granting of such a license would not be in the public interest. Public interest considerations must be based on factors and qualifications that are directly related to the protection of the public health and safety.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1-04, 43-15.1-05

61-10-01-07. Personnel. As a condition for receiving and retaining a wholesale drug distributor license, the licensee shall require each person employed in any prescription drug wholesale distribution activity to have education, training, and experience, or any combination thereof, sufficient for that person to perform the assigned functions in such a manner as to provide assurance that the drug product quality, safety, and security will at all times be maintained as required by law.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1-04, 43-15.1-05

61-10-01-08. Violations and penalties.

1. The board of pharmacy has the authority to restrict or suspend any licenses granted under this article or pursuant to North Dakota Century Code chapter 43-15.1 upon conviction of any violation of federal, state, or local drug laws or regulations which constitutes a clear and present danger to the public health and safety in the state of North Dakota. Before any license may be restricted or suspended, a wholesale distributor has a right to prior notice and a hearing pursuant to North Dakota Century Code chapter 28-32.

2. The board of pharmacy may restrict or suspend any license granted under this article and North Dakota Century Code chapter 43-15.1 for willful and serious violations of this article which constitute a clear and present danger to the public health and safety in the state of North Dakota in the manner provided in subsection 1.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1-08

61-10-01-09. Minimum requirements for the storage and handling of prescription drugs and for the establishment and maintenance of prescription drug distribution records. The following constitutes minimum requirements for the storage and handling of prescription drugs, and for the establishment and maintenance of prescription drug distribution records by wholesale drug distributors and their officers, agents, representatives, and employees:

1. **Facilities.** All facilities at which prescription drugs are stored, warehoused, handled, held, offered, marketed, or displayed shall:

   a. Be of suitable size and construction to facilitate cleaning, maintenance, and proper operations;

   b. Have storage areas designed to provide adequate lighting, ventilation, temperature, sanitation, humidity, space, equipment, and security conditions;

   c. Have a quarantine area for storage of prescription drugs that are outdated, damaged, deteriorated, misbranded, or adulterated, or that are in immediate or sealed, secondary containers that have been opened;

   d. Be maintained in a clean and orderly condition; and

   e. Be free from infestation by insects, rodents, birds, or vermin of any kind.

2. **Security.**

   a. All facilities used for wholesale drug distribution must be secure from unauthorized entry.

      (1) Access from outside the premises must be kept to a minimum and be well-controlled.

      (2) The outside perimeter of the premises must be well-lighted.

(3) Entry into areas where prescription drugs are held must be limited to authorized personnel.

b. All facilities must be equipped with an alarm system to detect entry after hours.

c. All facilities must be equipped with a security system that will provide suitable protection against theft and diversion. When appropriate, the security system must provide protection against theft or diversion that is facilitated or hidden by tampering with computers or electronic records.

3. Storage. All prescription drugs must be stored at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such drugs, or with requirements in the current edition of an official compendium, such as the United States Pharmacopeia/National Formulary.

a. If no storage requirements are established for a prescription drug, the drug may be held at "controlled" room temperature, as defined in an official compendium, to help ensure that its identity, strength, quality, and purity are not adversely affected.

b. Appropriate manual, electromechanical, or electronic temperature and humidity recording equipment, devices, or logs, or combination thereof, must be utilized to document proper storage of prescription drugs.

c. The recordkeeping requirements in subsection 6 must be followed for all stored drugs.

4. Examination of materials.

a. Upon receipt, each outside shipping container must be visually examined for identity and to prevent the acceptance of contaminated prescription drugs or prescription drugs that are otherwise unfit for distribution. This examination must be adequate to reveal container damage that would suggest possible contamination or other damage to the contents.

b. Each outgoing shipment must be carefully inspected for identity of the prescription drug products and to ensure that there is no delivery of prescription drugs that have been damaged in storage or held under improper conditions.

c. The recordkeeping requirements in subsection 6 must be followed for all incoming and outgoing prescription drugs.

5. Returned, damaged, and outdated prescription drugs.

   a. Prescription drugs that are outdated, damaged, deteriorated, misbranded, or adulterated must be quarantined and physically separated from other prescription drugs until they are destroyed or returned to their supplier.

   b. Any prescription drugs whose immediate or sealed outer or sealed secondary containers have been opened or used must be identified as such, and must be quarantined and physically separated from other prescription drugs until they are either destroyed or returned to the supplier.

   c. If the conditions under which a prescription drug has been returned cast doubt on the drug's safety, identity, strength, quality, or purity, then the drug must be destroyed, or returned to the supplier, unless examination, testing, or other investigation proves that the drug meets appropriate standards of safety, identity, strength, quality, and purity. In determining whether the conditions under which a drug has been returned cast doubt on the drug's safety, identity, strength, quality, or purity, the wholesale drug distributor shall consider, among other things, the conditions under which the drug has been held, stored, or shipped before or during its return and the condition of the drug and its container, carton, or labeling, as a result of storage or shipping.

   d. The recordkeeping requirements in subsection 6 must be followed for all outdated, damaged, deteriorated, misbranded, or adulterated prescription drugs.

6. Recordkeeping.

   a. Wholesale drug distributors shall establish and maintain inventories and records of all transactions regarding the receipt and distribution or other disposition of prescription drugs. These records must include the following information:

      (1) The source of the drugs, including the name and principal address of the seller or transferor, and the address of the location from which the drugs were shipped;

      (2) The identity and quantity of the drugs received and distributed or disposed of; and

      (3) The dates of receipt and distribution or other disposition of the drugs.

b. Inventories and records must be made available for inspection and photocopying by authorized federal, state, or local law enforcement agency officials for a period of two years following disposition of the drugs.

c. Records described in this section that are kept at the inspection site or that can be immediately retrieved by computer or other electronic means must be readily available for authorized inspection during the retention period. Records kept at a central location apart from the inspection site and not electronically retrievable must be made available for inspection within three business days of a request by an authorized official of a federal, state, or local law enforcement agency.

7. **Written policies and procedures.** Wholesale drug distributors shall establish, maintain, and adhere to written policies and procedures, which must be followed for the receipt, security, storage, inventory, and distribution of prescription drugs, including policies and procedures for identifying, recording, and reporting losses or thefts, and for correcting all errors and inaccuracies in inventories. Wholesale drug distributors must include in their written policies and procedures the following:

   a. A procedure whereby the oldest approved stock of a prescription drug product is distributed first. The procedure may permit deviation from this requirement, if such deviation is temporary and appropriate.

   b. A procedure to be followed for handling recalls and withdrawals of prescription drugs. Such procedure must be adequate to deal with recalls and withdrawals due to:

      (1) Any action initiated at the request of the food and drug administration or other federal, state, or local law enforcement or other government agency, including the board of pharmacy;

      (2) Any voluntary action by the manufacturer to remove defective or potentially defective drugs from the market; or

      (3) Any action undertaken to promote public health and safety by replacement of existing merchandise with an improved product or new package design.

   c. A procedure to ensure that wholesale drug distributors prepare for, protect against, and handle any crisis that affects security or operation of any facility in the event of strike, fire, flood, or other natural disaster, or other situations of local, state, or national emergency.

d. A procedure to ensure that any outdated prescription drugs must be segregated from other drugs and either returned to the manufacturer or destroyed. This procedure must provide for written documentation of the disposition of outdated prescription drugs. This documentation must be maintained for two years after disposition of the outdated drugs.

8. **Responsible persons.** Wholesale drug distributors shall establish and maintain lists of officers, directors, managers, and other persons in charge of wholesale drug distribution, storage, and handling, including a description of their duties and a summary of their qualifications.

9. **Compliance with federal, state, and local law.** Wholesale drug distributors shall operate in compliance with applicable federal, state, and local laws and regulations.

   a. Wholesale drug distributors shall permit the board of pharmacy's authorized personnel and authorized federal, state, and local law enforcement officials, to enter and inspect their premises and delivery vehicles, and to audit their records and written operating procedures, at reasonable times and in a reasonable manner, to the extent authorized by law. Such officials are required to show appropriate identification prior to being permitted access to wholesale drug distributors' premises and delivery vehicles.

   b. Wholesale drug distributors that deal in controlled substances shall register with the North Dakota controlled substances board and with the drug enforcement administration, and shall comply with all applicable state, local, and drug enforcement administration regulations.

10. **Salvaging and reprocessing.** Wholesale drug distributors are subject to the provisions of any applicable federal, state, or local laws or regulations that relate to prescription drug product salvaging or reprocessing, including all applicable provisions of this article.

History: Effective June 1, 1992.
General Authority: NDCC 43-15.1-07
Law Implemented: NDCC 43-15.1-04, 43-15.1-05

TITLE 67

Public Instruction, Superintendent of

NOVEMBER 1992

CHAPTER 67-07-03

67-07-03-01. The program application. Qualifying school districts may apply for purchased services supplemental payments by submitting an application to the superintendent which must include:

1. Documentation of the date and vote by which participating school boards approved the plan and agreed to submit an application to the department, by submission of a completed school board resolution form provided by the superintendent.

2. A detailed description of the educational services to be purchased for up to three years.

3. A description of how the purchased services will increase the educational opportunities for students.

4. A detailed time schedule for the implementation and maintenance of the educational services program including, if appropriate, the third-year election process.

5. A detailed cost description of the services to be purchased and implemented.

In order to be eligible to receive payments for the ~~entire~~ next school year, applications must be submitted to the superintendent by ~~July thirty-first~~ February first of the previous school year ~~for which payments are desired~~ or at a later date with prior approval of the superintendent.

History: Effective October 1, 1991; amended effective November 1, 1992.
General Authority: NDCC 15-27.7-01
Law Implemented: NDCC 15-27.7

TITLE 69

Public Service Commission

SEPTEMBER 1992

ARTICLE 69-02 (CHAPTER 69-02-01)

69-02-01-01. Applicability. This article ~~shall apply~~ applies to all ~~practice and procedure~~ proceedings before the public service commission unless ~~rendered~~ inconsistent ~~by~~ with a specific statute or rule, in which ~~instance~~ case the more specific statute or rule ~~shall apply~~ applies.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-01-02. Address - Sessions. The ~~principal~~ office of the public service commission ~~shall be~~ is in the state capitol, Bismarck, North Dakota. The commission ~~shall be considered as~~ is continually in session.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-01-03. Communications. All correspondence to and filings ~~forwarded to~~ with the commission ~~shall~~ must be ~~submitted~~ on eight and one-half by eleven -inch [21.59 by 27.94-centimeter] paper and ~~shall~~ must be addressed to:

Executive Secretary ~~to the Commission~~
Public Service Commission
State Capitol
Bismarck, North Dakota ~~58505~~ 58505-0480

Documents must be printed, typewritten, or otherwise mechanically reproduced. The left, top, and bottom margins must be one inch [2.54 centimeters] deep on all pages. Each filing must contain a transmittal letter summarizing the authorization, permission, or relief requested, including the name and address of the person making the filing, and identify each item in the filing.

History: Amended effective August 1, 1981; September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-01-04. Case numbers and title. Each matter ~~coming formally~~ before the commission ~~will be known as~~ is a case and ~~shall~~ will be given a docket number and title, descriptive of the subject matter. The number and title ~~shall~~ must be used on all ~~papers in~~ filings and correspondence concerning the case ~~and, as far as possible, any communication to the commission in any particular case shall bear the number of the case~~.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-01-05. Personal and representative appearances. Participants may appear in any proceeding in person or by an attorney or other qualified representative.

The following persons may appear in any proceeding: (1) an individual in the individual's own behalf; (2) a member of a partnership; (3) ~~a bona fide~~ an officer or ~~duly~~ authorized employee of a corporation, association, ~~or~~ group~~; and (4) an officer or employee of a state~~, government agency, department, or ~~political~~ subdivision ~~of the state or other governmental authority representing the state agency, department, or political subdivision in any proceeding~~.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-01-06. Practice before the commission.

1. ~~Person~~ Party in own interest. Any ~~person~~ party may appear before the commission in the ~~person's~~ party's own right ~~if the person has a bona fide interest in the subject matter of the proceeding~~.

2. Attorneys. Attorneys at law who are admitted to practice ~~before the courts of the state of~~ in North Dakota and, with the commission's permission, attorneys admitted to practice in

any other jurisdiction may ~~represent any party to a proceeding. Any member of the bar of another state may be permitted by the commission to appear in and conduct a cause or matter while retaining the member's residence in another state~~ practice before the commission.

3. Other persons. Any other person who ~~shall file proof to the satisfaction of the commission that the person is possessed of~~ possesses the necessary legal or technical qualifications to enable the person to render valuable service may ~~be permitted to~~, with the commission's permission, practice before the commission.

4. Rules of conduct. All persons appearing before the commission ~~or an examiner~~ must conform to the standards of ethical conduct required of practitioners before the courts of the state of North Dakota. The commission or a hearing officer may bar a person from appearing before the commission for improper conduct.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-01-07. Parties.

1. Classification. Parties to proceedings before the commission are designated as applicants, complainants, petitioners, intervenors, protestants, or respondents, according to the nature of the proceeding and the ~~relationship of the parties thereto~~ party's interest.

2. ~~Applicants~~ Applicant. ~~Persons~~ An applicant is a person filing a formal written ~~requests~~ request with the commission for some right, privilege, or authorization ~~which the commission may give under statutory or other authority granted to it are designated as applicants~~.

3. Complainant. ~~Persons~~ A complainant is a person who ~~complain~~ complains to the commission of acts done or omitted to be done in violation of ~~some~~ law ~~administered by the commission, or in violation of some~~, rule, ~~regulation,~~ or order ~~issued by the commission, are designated as complainants~~.

4. Petitioner. ~~Persons~~ A petitioner is a person seeking relief~~,~~ not otherwise designated ~~herein, are designated as petitioners~~.

5. Intervenor. ~~Persons~~ An intervenor is a person, other than ~~the~~ an original ~~parties~~ party to a pending proceeding, who ~~voluntarily become parties thereto with leave of the commission are designated as intervenors~~ becomes a party under

section 69-02-02-05. Admission as an intervenor shall not be construed as recognition by the commission that the intervenor might be aggrieved by any order of the commission in the proceeding.

6. Protestant. ~~Persons~~ A protestant is a person opposing on grounds of private or public interest the approval of an application, petition, motion, or other matter under consideration by the commission ~~are designated as protestants~~.

7. Respondent. ~~Persons~~ A respondent is a person subject to ~~any statute or other delegated~~ the authority ~~administered by~~ of the commission to whom an order or notice is issued by the commission instituting a proceeding or investigation on its own initiative ~~and persons subject to any statute or other delegated authority administered by the commission or any rule, order, or regulation issued or promulgated thereunder~~ or against whom ~~any~~ a complaint is filed ~~are designated as respondents~~.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-01-08. Investigation ~~on commission's own motion~~. The commission may ~~at any time~~, upon its own motion or upon the complaint of any person, institute investigation proceedings and ~~order~~ hold investigatory hearings in any ~~action or thing done or omitted to be done by any public utility, common carrier, or party~~ matter under its jurisdiction ~~which the commission may believe is in violation of the law or of any order, rule, or regulation of the commission~~. ~~It~~ In addition to the evidence presented by the parties, the commission may, through its staff or otherwise, secure and present such evidence as it ~~may consider~~ considers necessary or desirable in any proceeding ~~in addition to the evidence presented by the parties~~.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08, 49-01-07

69-02-01-09. Definitions. As used in this article except as otherwise required by the context:

1. "Commission" and "commissioner" ~~means~~ mean the public service commission, and a member thereof, respectively.

2. "Commission's staff" includes the commission's experts, employees, and attorneys.

3. ~~"Examiner" includes any one or more of the members of the commission duly designated, or one or more trial examiners~~

~~appointed according to law and duly designated to preside at hearings or conferences.~~ "Executive secretary" means the executive secretary or office of the executive secretary of the commission.

4. ~~"Executive secretary" means the executive secretary or office of the executive secretary of the commission.~~ "Hearing officer" includes any one or more of the members of the commission duly designated, or one or more hearing officers appointed according to law and duly designated to preside at hearings or conferences.

5. "Participants" includes any party or person admitted by the commission to participate in a proceeding, including the commission's staff.

6. ~~"Persons" includes individuals, partnerships, corporations, and associations or organized groups.~~ "Person" includes any individual, partnership, corporation, association, organized group including governmental agencies and subdivisions and trade associations.

7. "Public utility" includes any association, person, firm, corporation, or agency engaged or employed in any business ~~that comes~~ which is under the ~~general~~ jurisdiction of the commission. (See North Dakota Century Code section 49-01-01.)

8. "Tariff" includes any rate, joint rate, fare, toll, schedule, price schedule, classification, contract, practice, rule, regulation, or service, which is required by law to be filed with the commission.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

CHAPTER 69-02-02

69-02-02-01. Informal complaint.

1. Form and disposition. Informal complaints may be made orally or in writing ~~addressed to the commission~~. Letters to the commission will be considered ~~as~~ informal complaints. ~~Matters thus presented will~~ Informal complaints may be handled by any of the following methods:

   a. Correspondence or other informal communications.

   b. Conference with the ~~party or~~ parties ~~complained of~~.

   c. Formal investigation ~~instituted by~~ upon motion of the commission ~~upon its own motion~~.

   d. ~~Such~~ Any other appropriate manner ~~as the commission shall deem to be appropriate and warranted by the facts and the nature of the complaint in an endeavor~~ to bring about ~~satisfaction of the complaint~~ a resolution without formal hearing.

2. ~~Complaints as to rates~~ Rate complaints. Complaints ~~with respect to~~ concerning the rates or charges of any heat, gas, or electrical~~, water, or telephone~~ public utility made by less than ten percent of the consumers or purchasers ~~will~~ shall be treated as informal complaints.

History: Amended effective September 1, 1992.
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 ~~corporation,~~ person~~, chamber of commerce, board of trade, civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, body politic or municipal corporation~~. Complaints ~~shall~~ will be ~~made~~ in writing ~~setting~~ and set forth ~~any~~ the act or ~~thing done or omitted to be done by any public utility in violation of or claimed to be in violation of any provision of law, or any order, rule, or regulation of the commission. Any public utility shall have the right to complain on any of the grounds upon which complaint may be made by other parties~~ omission complained of. If the complaint is against the reasonableness of any rate or charge of any heat, gas, or electrical~~, water, or telephone~~ public utility, the commission cannot entertain ~~the same~~ 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~~, water, or telephone~~ service.

2. Form and content. ~~Each~~ A formal complaint ~~shall~~ must show the venue, "Before the Public Service Commission of North Dakota" and ~~shall~~ will contain a heading showing the name of the complainant and the name of ~~the~~ each respondent ~~and will bear~~. The complaint must include the name ~~and~~, address, and phone number of each complainant's attorney, if any. The complaint ~~shall~~ will be ~~so~~ drawn ~~as~~ to fully ~~completely~~ advise the respondent and the commission of ~~the facts constituting~~ the ~~ground~~ factual and legal grounds of the complaint, ~~the provisions of the statutes, rules, regulations, and orders relied upon involving the authority of the commission,~~ the injury complained of, and ~~a clear, concise statement of~~ the specific relief sought.

3. Verification. All formal complaints ~~shall~~ will be verified ~~under oath~~ by the person filing same~~, or officer~~ or other person having knowledge of the facts set forth.

4. Number of copies. At the time the ~~complainant files the original~~ complaint is filed, the complainant must also file ~~copies thereof equal in number to five more than the number of respondents named in the complaint~~ a copy for each respondent plus seven additional copies.

~~7.~~ 5. Sufficiency of complaint. Upon the filing of a formal complaint, the commission ~~shall examine same to ascertain~~ will determine whether ~~or not~~ it states a prima facie case and conforms to this article. If ~~the commission finds that~~ the complaint does not state a prima facie case or does not conform to this article, ~~it shall~~ the commission will notify the complainant ~~or the complainant's attorney to that effect,~~ and provide the complainant ~~shall be given~~ an opportunity to amend within a specified time. If the complaint is not ~~so~~ amended ~~within such time or extension thereof as the commission may for good cause shown grant~~, it will be dismissed. The filing of an answer ~~will~~ is not ~~be deemed~~ an admission of the sufficiency of the complaint~~, but a motion to dismiss may be made at the hearing~~.

~~5.~~ 6. 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 ~~shall~~ will serve ~~a true copy of~~ the complaint and notice ~~for~~ of hearing ~~upon the respondent~~ personally, or by ~~registered~~ certified mail~~, as the~~

~~commission may direct,~~ at least forty-five days before the time specified for hearing ~~thereof unless the service~~. Service of ~~such~~ a complaint ~~or~~ and notice of hearing ~~is~~ may be waived, in writing, by the respondent~~, or unless the~~. The parties may agree upon a ~~definite~~ time and place for hearing ~~thereof~~, with the consent of the commission. ~~However, in~~ In case of an emergency the commission ~~in its discretion~~ 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.

~~6. Satisfaction of complaint. If the respondent desires to satisfy the complaint, the respondent may file with the commission, within five days after the service of the complaint, a statement of the relief which the respondent is willing to give. The commission shall immediately forward a copy thereof to the complainant. If, in the complainant's opinion, the satisfaction meets the complaint, the complainant shall make written request to the commission that the complaint be dismissed. Such request shall be forwarded to the commission not less than ten days prior to the time of hearing. If the complainant is of the opinion that the satisfaction does not meet the complaint, the complainant shall so notify the commission, whereupon the commission shall notify the respondent that the latter must answer the complaint.~~

History: Amended effective September 1, 1992.
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 ~~filed with the commission shall~~ must contain: (a) the ~~correct~~ title of the proceeding and docket number; (b) the name and address of each answering party; (c) a specific denial of ~~such~~ each material ~~allegations~~ allegation of the complaint ~~as are~~ which is controverted by the respondent; ~~and~~ (d) a statement of any new matter which may constitute a defense; and (e) the name, address, and phone 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.

~~2.~~ 3. Verification. An answer must be signed and verified by the ~~respondent~~ person filing the same or other person having knowledge of the facts set forth.

~~3.~~ 4. Service and number of copies. The original answer and ~~four~~ seven copies thereof must be filed with the executive secretary of the commission~~,~~ ~~and,~~ ~~at the same time,~~. The respondent shall serve a copy of ~~the~~ its answer ~~shall be served~~ personally, or by ~~registered~~ certified mail, upon each complainant ~~or the complainant's attorney by the respondent making such answer~~. The respondent shall certify to the ~~secretary~~ commission that the service has been made.

History: Amended effective September 1, 1992.
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. ~~All applications shall~~ Applications must be in writing and, under oath, ~~shall~~ must: (a) set forth the full name and post-office address of the applicant; (b) state clearly and concisely the authorization or permission sought; and (c) cite by appropriate reference the statutory provision or other authority under which the commission authorization or permission is sought.

2. Verification. ~~Every application will~~ Applications must be signed and verified by the party filing the ~~same~~ application.

3. Number of copies. ~~At the time the~~ An original and seven copies of an application ~~is~~ must be filed~~,~~ ~~three additional copies thereof must also be filed~~.

4. Articles of incorporation or partnership agreement.

   a. Corporations. If the applicant is a corporation, a certified copy of its articles of incorporation ~~shall~~ 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 ficticious name certificate.

   c. If the applicant's articles of incorporation or partnership agreement have already been filed with the commission in some prior proceeding, it ~~shall be~~ is sufficient if this fact is stated in the application and reference is made ~~of~~ to the ~~subject matter~~ case number and number of the prior proceeding.

5. Financial statement. Whenever the commission ~~shall require~~ requires the filing of a financial statement by any utility, this statement ~~shall~~ must be prepared as of the last day of the most recent calendar quarter~~,~~ ~~except, where possible,~~ unless a more recent ~~date may be submitted~~ statement is available. ~~Such~~ Each financial ~~statements shall~~ statement must include:

a. A balance sheet of the form and style usually followed in the particular industry. Sufficient detail ~~shall~~ 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.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-02-05. Intervention. ~~In any formal proceeding, any~~ Any person ~~having~~ with a substantial interest in ~~the subject matter of any~~ a proceeding may petition ~~for leave~~ to intervene in ~~such~~ that proceeding ~~and may become a party thereto upon compliance~~ by complying with ~~the provisions of~~ this section. ~~In general such petitions will not~~ An intervention may be granted ~~unless it shall be found: (1) that such person~~ if the petitioner has a statutory right to be ~~made~~ a party to ~~such proceedings~~ the proceeding; or ~~(2) that such person~~ the petitioner has a ~~property or financial~~ legal interest which may ~~not~~ be ~~adequately represented by existing parties~~ substantially affected by the proceeding, and ~~such~~ the intervention would not unduly broaden the issues or delay the proceeding. The commission may impose conditions and limitations on an intervention to promote the interests of justice.

1. Contents of petition to intervene. A petition ~~for leave~~ to intervene ~~shall~~ must be in writing~~, unless made at the commencement of a hearing,~~ and must set forth the grounds ~~of the proposed~~ for intervention, the position and interest of the petitioner in the proceeding, what the petitioner would contribute to the hearing, and whether the petitioner's position is in support of or in opposition to the relief sought.

2. When filed. A petition ~~for leave~~ to intervene in any proceeding ~~shall~~ must be filed at least ten days prior to ~~or at the commencement of~~ the hearing, but not after except for good cause shown.

3. Number of copies. The petitioner ~~shall furnish~~ will serve a copy of the petition ~~to~~ on each party to the proceeding and ~~shall furnish~~ will file with the commission ~~with~~ the original and ~~three~~ seven copies ~~thereof~~.

4. Effect. Admission as an intervenor shall not be construed as recognition by the commission that such intervenor might be aggrieved by an order of the commission in such proceeding.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.2, 49-01-07

69-02-02-06. Extensions of time. A request for an extension of time ~~in which to perform an act required or allowed to be done at or within a specified time by any rule, regulation, or order of the commission shall~~ must be by timely written motion ~~in writing timely filed with the commission,~~ stating the facts on which the motion rests ~~and conforming to the provisions of section 69-02-02-08. Such extensions of time will be granted or denied by the commission in its discretion~~.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02

Law Implemented: NDCC 49-01-07

69-02-02-07. Amendments and ~~withdrawal~~ withdrawals.

1. Amendments. The commission may ~~in its discretion~~, after notice to the other parties to a proceeding, allow any pleading to be amended ~~or corrected or any omission therein to be supplied, provided that if any such amendment, when allowed, so alters or broadens the issues that it appears proper, the commission~~ and may permit any party affected ~~thereby~~ by the amendment a reasonable time to prepare to meet the changed issues. If the amendment is to an application by a public utility for a rate increase based in whole or in part on the utility's revenue and profitability, and the amendment substantially changes the application, the change must be considered a new filing under North Dakota Century Code section 49-05-06.

2. Withdrawals. A participant desiring to withdraw a pleading filed with the commission may file a notice of withdrawal ~~thereof with the commission~~. The notice ~~shall~~ must set forth the reason for the withdrawal. A copy of the withdrawal notice must be served upon all other participants ~~to the proceeding~~ and a certificate of service to that effect must be filed with the notice of withdrawal. This section ~~shall~~ does not ~~be construed as allowing~~ allow, without express permission of the commission, withdrawal of any pleading in any proceeding in which a hearing has been held or convened.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 49-01-07

69-02-02-07.1. Amendment at hearing. Substantial change from or amendment to the original application which occurs during hearing must be considered an amendment to the pleadings under section 69-02-02-07.

History: Effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-02-08. Motion. ~~After a hearing has commenced in a proceeding, a request may be made by motion for any procedural or interlocutory ruling or relief desired.~~ All ~~other~~ motions shall be in writing, unless made at a hearing, and shall be served on the other parties to the proceeding ~~by the moving parties~~.

1. Argument. The commission may~~,~~ ~~in its discretion,~~ set any motion for oral argument.

2. Disposition. The ~~examiner~~ hearing officer designated to preside at a hearing is authorized to rule upon any motion not formally acted upon by the commission prior to the commencement of the hearing, ~~wherein the~~ if an immediate ruling is essential in order to proceed with the hearing~~, and upon any motion filed and made after the commencement thereof and prior to the decision in the proceedings. However, no motion made before or during a hearing,~~. If a ruling upon ~~which~~ a motion would involve or constitute a final determination of the proceeding, ~~shall~~ the motion may not be ruled upon by ~~an examiner~~ a hearing officer.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-02-09. Show cause orders.

1. The commission may, by order, compel any person to whom it has granted authority to show cause why the authority should not be suspended, changed, or revoked in whole or in part. The term "authority" includes a certificate, license, and permit.

2. The commission may, by order, compel any person subject to its jurisdiction to show cause why the person has failed to comply with applicable laws, rules, or orders of the commission.

3. The ~~show cause~~ order to show cause shall specifically advise the respondent of the violation and of the time and place of the hearing on ~~such~~ the order.

~~3.~~ 4. An order to show cause must be accompanied by an affidavit setting forth the specific factual and statutory basis upon which the order was issued.

5. ~~When~~ At the conclusion of show cause proceedings, the commission ~~finds that the respondent has committed, or is committing, the alleged violation, the commission~~ may enter a cease and desist order or any order ~~the commission~~ it deems just and reasonable.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

CHAPTER 69-02-03

69-02-03-01. To adjust or settle proceedings. ~~In order to provide an opportunity for a settlement of a proceeding, or any of the issues therein, there may be held at any time prior to or during hearings before the commission or an examiner such informal conferences of parties for the admission and consideration of facts, arguments, offers of settlement, or proposals of adjustments as time, the nature of the proceeding, and the public interest may permit. Unaccepted proposals of settlement, adjustment, procedure to be followed, or proposed stipulations not agreed to shall be privileged and not admissible in evidence against any party.~~ Conferences may be held to expedite the orderly conduct and disposition of the hearing. Conferences may concern the following:

1. Simplification of issues.

2. Necessity or desirability of amendments to the pleadings.

3. Simultaneous exchange or imposition of a timetable for the exchange of printed testimony and exhibits proposed to be offered in evidence.

4. Admissions or stipulations of facts not in dispute.

5. Admissions and stipulations of authenticity of documents.

6. Limitation of the number of witnesses.

7. Limitation of the time allowed for the testimony of witnesses.

8. Offers and proposals of settlement and adjustment.

9. Other matters that may be necessary or desirable to expedite the proceeding.

10. Unaccepted proposals of settlement, adjustment, procedure, or stipulations are privileged and not admissible in evidence against any party.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 28-32-08.3, 49-01-07

69-02-03-02. To expedite hearings. ~~To expedite the orderly conduct and disposition of any hearing, at such prehearing conferences as may be held, there may be considered, in addition to any offer of settlement or proposals of adjustment, the possibility of the following:~~

~~1. The simplification of issues.~~

~~2. The necessity or desirability of amendments to the pleadings.~~

~~3. The exchange and acceptance of service of exhibits proposed to be offered in evidence.~~

~~4. The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which may properly shorten the hearing.~~

~~5. The limitation of the number of witnesses.~~

~~6. Such other matters as may properly be dealt with to aid in expediting the orderly conduct of the proceeding.~~ Repealed effective September 1, 1992.

General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 49-01-07~~

69-02-03-03. Initiation of conferences. ~~The~~ Upon its own motion or the motion of any party, the commission~~, with or without motion,~~ or a hearing officer may direct that a ~~prehearing~~ conference be held and order the parties to appear. ~~Upon motion by a party, the examiner may direct the parties to such proceedings to appear for prehearing conference to consider the matters outlined in section 69-02-03-03.~~ Due notice of the time and place of ~~such~~ the conference ~~will~~ must be given to all parties ~~to the proceeding~~.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 49-01-07

69-02-03-04. Conference results ~~stipulated~~. Upon conclusion of the ~~prehearing~~ conference, ~~the parties shall immediately reduce~~ the results ~~thereof~~ must be immediately reduced to writing ~~to the form of a written stipulation which recites the matters agreed upon, and the~~. The original and ~~four~~ seven copies ~~thereof shall~~ must be filed with the commission. ~~Any such stipulation~~ Stipulations may be received in evidence at a hearing and, when and so received, shall be binding on the parties with respect to the matters ~~therein stipulated~~ concerned. All stipulations are subject to commission approval.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 28-32-08.3, 49-01-07

CHAPTER 69-02-04

69-02-04-01. Notice. In those proceedings in which a hearing is to be held, the commission will~~, by order or otherwise,~~ assign a time and place for hearing. Notice of the hearing ~~will~~ must be posted in the office of the commission, and ~~will~~ must be served ~~upon~~ on the parties and ~~such~~ other persons ~~that may be~~ 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 involving the rights of persons who are members of the public generally, notice of hearing ~~shall~~ must be given by ~~mailing a copy of the notice to the chairman of the board of county commissioners in each county wherein its citizens who are or will be affected reside, and to the chief executive officer of each city affected in the county. In addition, the commission will serve notice of the hearing by~~ legal publication ~~thereof to be printed~~ in the ~~official~~ North Dakota daily newspaper of ~~each county or counties in which the subject matter involved is located~~ the affected area. Notice ~~of publication shall~~ 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 ~~shall~~ 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, ~~the~~ an electric, gas, or ~~telephone~~ telecommunications public utility proposing a change in rates shall notify ~~individually~~ its subscribers individually of the proposed change by billing ~~stuffer~~ insert or other appropriate method approved by the commission. If a hearing has been ordered by the commission, the notice ~~shall~~ 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, the notice ~~shall~~ must include a summary sheet describing the absolute dollar and percentage impact of the proposed rate changes upon revenues by the various classes of services offered by the petitioning utility and ~~shall~~ must include a list of petitioner's business office locations where the proposed rate schedules and a comparison of present and proposed rates can be examined by the public. The notice ~~shall~~ must also contain in bold type the following statement: The rate changes described in this notice have been requested by (specific utility).

History: Amended effective October 1, 1980; September 1, 1982; September 1, 1992.

General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-05, 28-32-08, 49-01-07

69-02-04-02. Appearances. ~~Interested parties~~ Each interested party shall enter ~~their appearances~~ an appearance at the beginning of the hearing by giving ~~their~~ the party's name and address and briefly stating ~~whether they appear in support of the complaint or application, in opposition thereto, or otherwise~~ the capacity in which the party appears. All ~~such~~ appearances ~~shall~~ must be noted on the record ~~with a notation in whose behalf each appearance is made. Included in such appearances shall be the names~~. The name and position of ~~the members~~ each member of the commission's staff participating in the hearing or investigation must be included in the record as an appearance.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-04-03. Continuance. After hearings are scheduled, continuances ~~will not~~ may be granted by the commission ~~except~~ for good ~~and sufficient~~ cause. A motion for continuance ~~may~~ must be ~~made orally at a hearing or~~ in writing, unless made at the commencement of a hearing, and must be filed with the ~~secretary~~ commission, and served on ~~opposing counsel or parties. Such motions shall~~ each party. The motion must be ~~presented~~ made as far in advance of the date fixed for hearing as possible ~~to ensure favorable action~~. The commission may effect a continuance upon its own motion. When a substantive hearing officer is designated, the substantive hearing officer may rule on continuances unless the commission directs otherwise.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 49-01-07

69-02-04-04. Consolidation. The commission, upon its own motion or upon motion by any party, may order two or more proceedings involving a similar question of law or facts to be consolidated for hearing where rights of the parties or the public interest will not be prejudiced by ~~such procedure~~ the consolidation.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-04-05. Waiver of hearing - Shortened procedure. In any proceeding in which the commission is authorized to act after opportunity for hearing, ~~such~~ opportunity ~~shall be deemed to have been~~ is afforded by service of notice ~~of the application or other initial pleading or filing where the commission fixes~~ fixing a reasonable period

of time within which any person desiring to be heard may file a protest or ~~petition~~ request for a hearing. ~~Upon the expiration of such period of time, in the absence of~~ If a protest or ~~a~~ request for hearing is not filed within the time provided, the commission may ~~forthwith~~ dispose of the matter ~~upon~~ on the basis of the ~~pleading and~~ pleadings, other submittals, and the studies and recommendations of the staff. A party not requesting oral hearing in the party's pleading ~~shall be~~ is deemed to have waived a hearing for the purpose of ~~such~~ the decision, but ~~shall~~ not ~~be bound by such waiver~~ for the ~~purposes~~ purpose of ~~an application~~ applying for rehearing with respect to ~~an order so entered~~ the decision. If a person requests a hearing but does not show good cause, the commission may determine the matter without a hearing.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-11.1, 49-01-07

69-02-04-06. Order of procedure. In ~~hearings on formal complaints, petitions, and applications~~ their respective hearing, the complainant, petitioner, or applicant~~, as the case may be,~~ shall open and close. In hearings on an order to show cause or involving investigation and suspension of rates, tariffs, or schedules, the respondent shall open and close. In ~~hearings on~~ all other ~~investigations~~ hearings, the ~~examiner~~ hearing officer may direct who shall open and close. ~~In hearings on an order to show cause, the respondent shall open and close.~~ When proceedings have been consolidated for hearing, the ~~examiner~~ hearing officer shall designate who shall open and close. Intervenors shall follow the parties in whose behalf the intervention is made; where the intervention is not in support of an original party, the ~~presiding~~ hearing officer shall designate at which stage ~~such~~ the intervenor shall be heard. In proceedings where the evidence is materially within the knowledge or control of another party or participant, the foregoing order ~~or presentation~~ may be varied by the ~~examiner~~ hearing officer.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-04-07. ~~Examiner~~ Hearing officer. When evidence is to be taken in a proceeding, either the commission, any member thereof, or one or more of its ~~examiners, when~~ duly designated ~~for that purpose,~~ hearing officers may preside at the hearing. Hearing officers are designated as procedural or substantive.

1. Authority delegated. ~~An examiner duly designated by the commission to preside at a hearing shall have the authority, within the commission's powers and subject to its rules to~~ The hearing officer may:

   a. Regulate the course of hearing.

b. Administer ~~oath~~ oaths.

c. Issue subpoenas.

d. Take depositions or cause ~~same~~ depositions to be taken.

e. Receive evidence.

f. Rule upon offers of proof ~~and to receive evidence~~.

~~f.~~ g. Hold ~~appropriate~~ conferences before or during hearings.

~~g.~~ h. Dispose of procedural matters ~~but not to dispose of motions made during hearings to dismiss proceedings or other motion which involves~~ so long as the disposition does not involve a final determination of proceedings.

~~h.~~ i. ~~Within the examiner's discretion or upon direction of the commission, certify~~ Certify any question to the commission for its consideration and disposition.

~~i. Take any other action necessary or appropriate to discharge the duties vested in the examiner, consistent with statutory or other authorities under which the commission functions and with the rules, regulations, and policies of the commission.~~

j. Exclude evidence ~~which is cumulative or repetitious~~.

k. Authorize any party to furnish and serve designated late filed exhibits within a specified time after the close of the hearing.

l. ~~Order~~ Authorize discovery.

m. Request or require that the parties file briefs, memoranda, or proposed findings of fact and conclusions of law, and set a schedule for filing and serving same.

n. Take any other action necessary or appropriate to discharge the duties vested in the hearing officer.

2. Limitations. ~~Examiners shall perform no duties inconsistent with their responsibilities as such.~~ In addition, substantive hearing officers shall issue recommended findings of fact, conclusions of law, and orders. Substantive hearing officers may rule on continuances unless the commission directs otherwise.

3. No ~~examiner~~ hearing officer shall, in any proceeding for an adjudication required by statute to be determined on the record after opportunity for hearing, consult any person or

party on any fact in issue the consultation is unless upon notice and opportunity for all parties to participate.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 28-32-12.1, 28-32-12.2, 49-01-07

69-02-04-08. Appeal to commission from ruling of ~~examiner~~ hearing officer. An appeal may be taken to the full commission from a ruling of ~~an examiner~~ a hearing officer during the course of a hearing only where extraordinary circumstances necessitate a prompt decision by the commission to prevent detriment to the public interest. Any offer of proof made in connection with an objection taken to any ruling of the ~~examiner~~ hearing officer rejecting or excluding proffered oral testimony ~~shall~~ must consist of a statement of the substance of the evidence which ~~counsel~~ the offering party contends would be adduced by such testimony; and, if the excluded evidence refers to or consists of documentary evidence ~~in documentary or written form or reference to documents or records~~, a copy of ~~such evidence shall~~ it must be marked for identification and ~~shall constitute~~ constitutes part of the offer of proof.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 49-01-07

69-02-04-09. Oral argument.

1. Before ~~examiner~~ hearing officer. ~~When, in the opinion of the examiner, time permits and the nature of the proceedings, the complexity or the importance of the issues of fact or law involved, and the public interest warrant, such examiner may, either on the examiner's own motion or at the request of any party at or before the close of the taking of testimony, allow and fix~~ The hearing officer may set a time for the presentation of oral argument ~~imposing such limits of~~ when time permits and the nature of the proceedings, the complexity or importance of the issues, and the public interest warrant. The hearing examiner may impose appropriate time ~~on the argument as deemed appropriate. Such~~ limits. Oral arguments ~~shall~~ will be transcribed and bound with the transcript of testimony.

2. Before the full commission. A request ~~for authority~~ to present oral argument before the full commission may be made at any time ~~during the hearing, at the conclusion of the taking of evidence, or on brief~~. The commission will ~~announce and fix~~ set the time for oral argument, if allowed, and may impose time limits upon the arguments.

History: Amended effective September 1, 1992.

General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-08.1, 49-01-07

69-02-04-10. Briefs - Proposed findings of fact and conclusions of law.

1. Each party to ~~any~~ a proceeding may file proposed findings of fact and conclusions of law, briefs, or memoranda of law. However, the ~~examiner~~ hearing officer may direct any party to file proposed findings of fact and conclusions of law, briefs, or memoranda of law.

2. The ~~examiner shall~~ hearing officer will fix the time for the filing and service of proposed findings of fact and conclusions of law, briefs, or memoranda of law, ~~giving due regard to the nature of the proceeding, the magnitude of the record, and the complexity or importance of the issues involved,~~ and ~~the examiner shall fix~~ the order in which ~~such briefs~~ each shall be filed.

3. ~~Should a party find that it is unable to meet the date for filing and serving proposed findings of fact and conclusions of law, briefs, or memoranda of law, said party should so notify the commission and the other parties in writing, therein setting forth the reasons for such inability together with a request for an extension of time to a date certain for filing and service.~~

~~4.~~ When it is ordered that proposed findings of fact and conclusions of law, briefs, or memoranda of law be filed and served, and where the party that initiated the proceeding fails to file and serve by the due date, ~~specified without complying with subsection 3,~~ the commission ~~on its own motion or the motion of any party~~ may~~, in its discretion,~~ dismiss the proceeding. ~~Such failure in the case of~~ Failure to file when due by an intervenor, protestant, or respondent may be ~~deemed~~ considered a waiver of the right to participate further ~~in the proceeding, and the commission on its own motion or the motion of any party may so order~~.

~~5.~~ 4. Exhibits should not be reproduced in a brief, but may~~, if desired,~~ be reproduced in an appendix to the brief. Every brief of more than twenty pages shall contain a subject index, with page references, and ~~a~~ an alphabetical list of all ~~cases cited, alphabetically arranged,~~ citations with references to the pages where the citations appear. ~~All briefs shall~~ Briefs must be as concise as possible.

~~6.~~ 5. ~~All briefs shall~~ Briefs must be accompanied by a certificate showing service upon all parties ~~or their attorneys~~ who appeared at the hearing. ~~Five~~ An original and seven copies of

each brief ~~shall~~ will be ~~furnished for the use of~~ filed with the commission ~~unless otherwise directed by the examiner~~.

~~7.~~ 6. The time within which ~~any pleading, motion, brief, or exceptions may be filed, or the time within which~~ any act is required to be performed or may be performed~~, as provided by any rule or order of the commission, shall~~ will be ~~so~~ computed ~~as to exclude the first day and include the last day, provided, that when the last day of such period falls on Saturday, Sunday, a legal holiday under the laws of this state, or a day on which the offices of the commission for any reason are not open for business, the computation of time shall omit such day and begin on the first day thereafter which does not fall on such day~~ in accordance with the North Dakota Rules of Civil Procedure.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

CHAPTER 69-02-05

69-02-05-01. Rules of evidence. ~~The admissibility of evidence shall be determined generally~~ Evidence is admissible in accordance with the ~~practice in the district courts of this state~~ North Dakota Rules of Evidence. The commission or the ~~examiner~~ hearing officer, however, may waive the ~~usual common law or statutory~~ rules of evidence where such waiver is necessary to ascertain the substantial rights of ~~the public and interested parties~~ a party but only relevant evidence may be admitted. A waiver of the rules of evidence must be stated specifically. When objection is made to the admissibility of evidence, the ~~examiner~~ hearing officer may receive ~~such~~ the evidence subject to later ruling by the commission. ~~Any ex parte written communication to the commission regarding a particular proceeding before the commission shall be delivered to the secretary of the commission who shall place the ex parte communication in public files associated with the pending proceeding, but separate from the record material upon which the commission can rely in reaching its decision.~~

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-05-02. Witnesses. Witnesses will be orally examined under oath ~~before the examiner~~ unless their testimony is taken by deposition as provided in section 69-02-05-04. Written testimony of any witness may be received when properly supported by the oral testimony of its author on direct examination subject to cross-examination and motion to strike.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-06, 28-32-21.2, 49-01-07

69-02-05-03. Subpoena.

1. Subpoenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the commission upon its own motion, will issue only upon written application ~~in writing to the commission or examiner, except that during a hearing such application may be orally on the record before the commission or the examiner who shall have the authority to determine the relevancy and the materiality of the evidence sought and to issue such subpoena if warranted. Written application shall specify~~.

2. A party must show the general relevance and ~~materiality~~ reasonable scope of the ~~testimony or documentary~~ evidence sought~~, including, as to documentary evidence, specifications~~

~~as nearly as may be of the documents desired and the facts to be proved by them~~ before a subpoena will issue for the production of documentary evidence. Subpoenas for the production of documentary evidence must be authorized in writing.

3. The cost of serving ~~such~~ a subpoena ~~shall~~ must be paid by the party requesting it. Any witness who is subpoenaed under the provisions of this rule and who appears at the hearing ~~shall~~ must receive the same fees and mileage as witnesses in the district courts of this state, and ~~such~~ the costs will be paid by the party at whose instance the witness appears. No witness fees will be allowed except on a subpoena.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-09, 49-01-07

69-02-05-04. Depositions, interrogatories, and other discovery.

1. A party must request permission to conduct discovery in writing, showing good cause and obtain written approval before undertaking discovery.

2. The deposition of a witness required in any proceeding before the commission may be taken in ~~the same manner and on the same notice as in any action pending in the district court of this state~~ accordance with the North Dakota Rules of Civil Procedure.

3. Any witness whose deposition is taken shall receive the same fees and mileage as a witness in a civil case in the district court, and ~~such~~ the costs ~~shall~~ must be paid by the party at whose instance the ~~witness's~~ deposition is taken.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-05-05. Stipulations. The parties ~~to any proceeding or investigation before the commission~~ may~~,~~ ~~by stipulation in writing filed with the commission or orally entered in the record,~~ agree upon all or part of the facts ~~or any portion thereof~~ involved in the controversy~~,~~. A stipulation must be in writing unless made orally at the hearing and ~~such stipulation shall~~ may be ~~regarded and used~~ received as evidence at the ~~hearings~~ hearing.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-05.1, 49-01-07

69-02-05-06. Documentary evidence. Where relevant and material ~~matter offered in~~ evidence ~~by any party~~ is embraced in a book, paper, or a document containing other matter not material or relevant, the offering party must plainly designate the relevant and material matter ~~so offered~~. If the other matter is ~~in such volume as~~ so voluminous that it would unnecessarily encumber the record, ~~such book, paper, or document~~ it will not be received in evidence ~~but~~. It may be marked for identification and, if ~~properly~~ authenticated, the relevant and material matter may be read into the record, or~~,~~ ~~if the examiner directs, a true copy of such matter in proper form shall~~ copied and be received as an exhibit ~~and like copies delivered by the party offering the same to all~~. All parties ~~or their attorneys~~ appearing at the hearing ~~who~~ shall be afforded an opportunity to examine the entire book, paper, or document and ~~to~~ offer in evidence ~~in like manner~~ any ~~portions thereof~~ portion found to be material and relevant. Any matter contained in a report or other document on file with the commission may be offered in evidence by ~~merely~~ specifying the report, document, or other file containing the matter so offered.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-05-07. Exhibits. Exhibits must be on paper of good quality ~~and so prepared as to~~, be plainly legible and durable ~~whether printed, typewritten, mimeographed, photographed, or otherwise,~~ and ~~if possible should be folded to a size~~ may not ~~to~~ exceed eight and one-half by ~~fourteen~~ eleven inches [21.59 by ~~35.56~~ 28.21 centimeters]. If an exhibit exceeds the size limit, it is acceptable if it can be folded to conform to the size requirement. Whenever practicable, the sheets of each exhibit and ~~line~~ lines of each sheet should be numbered, and, if the exhibit consists of five or more sheets, the first sheet or title page should contain a brief statement of what the exhibit purports to show with reference by sheet and line to illustrative or typical example contained in the exhibit. Whenever practicable, documents ~~produced~~ sponsored by a single witness ~~shall~~ should be assembled and bound together, suitably arranged, and indexed so that they may be identified and offered as one exhibit. The source of all material contained in any exhibit should be ~~definitely~~ shown.

1. Copies. ~~Six~~ Seven copies of each exhibit ~~will~~ must be ~~furnished for the use of the commission whenever practicable. Copies must also be available~~ provided, in addition to a copy for ~~all parties of record in a proceeding~~ each party.

2. ~~Rate cases~~ Prefiling. ~~In rate or other proceedings involving detailed and complicated accounting exhibits, the~~ The commission may permit or require the ~~applicant to file and serve copies thereof within a specified time~~ filing and serving of exhibits in advance of the hearing in order to enable ~~protestants and the commission's staff~~ participants to

~~study the same and~~ prepare cross-examination ~~with reference thereto~~.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-05-08. Official notice. The commission may take notice of any fact ~~or facts set forth~~ in its ~~duly established regulations, annual reports, or any statistical data~~ records and files, to which reference is made on the record at the hearing~~, on any public utility, or~~ and any ~~facts which are~~ fact judicially noticed by the courts of this state. Official notice will be taken without offer or production of that portion of any tariff or schedule which is the subject matter of an order of investigation or suspension.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-06, 49-01-07

69-02-05-09. Former employees. Except with the written permission of the commission, no former employee of the commission or member of the attorney general's staff assigned to the commission may appear in a representative capacity or as an expert witness on behalf of other parties at any time within six months after severing the employee's or member's association with the commission, nor may the employee or member appear after ~~said~~ the ~~six months'~~ six-month period in any proceeding ~~wherein~~ in which the employee or member previously took an active part when associated with the commission.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-05-10. Interrogatories to parties. ~~Any interrogatories required in any proceeding before the commission may be requested in the same manner as in an action pending in the district court of this state.~~ Repealed effective September 1, 1992.

General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 49-01-07~~

69-02-05-11. Ex parte communications. Ex parte communications, as defined in North Dakota Century Code section 28-32-12.1, are strictly prohibited. Any ex parte written communication to the commission must be filed with the executive secretary of the commission who shall disclose the communications to the parties and place the communication in a public file associated with the pending proceeding, but separate

from the record material upon which the commission can rely in reaching its decision.

History: Effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-12.1, 49-01-07

CHAPTER 69-02-06

69-02-06-01. Petition to reopen. At any time after the conclusion of a hearing ~~in a proceeding~~, but before ~~entering and issuance by the commission of its~~ the final order is issued or a rule is adopted, any party ~~to a proceeding~~ may file ~~with the commission~~ a petition to reopen the proceeding for the purpose of taking additional evidence.

1. Contents. The petition ~~shall~~ must set forth clearly the facts claimed to constitute the grounds requiring reopening of the proceeding, including ~~the~~ any material changes of fact or law alleged to have occurred since the conclusion of the hearing.

2. Service. A copy of the petition to reopen ~~shall~~ must be served by the petitioning party upon all parties ~~to the proceedings or their attorneys of record,~~ and a certificate to that effect ~~will~~ must be attached to the petition when filed with the commission. The original and ~~three~~ seven copies must be filed with the commission.

3. Responses. Within ten days following the service of ~~any~~ a petition to reopen, any other party ~~to the proceeding~~ may file ~~with the commission the party's answer thereto, and in default thereof shall be deemed to have waived~~ a response. The response must be served on the parties and the original response and certificate of service and seven copies must be filed with the commission. Failure to file a response is a waiver of any objection to the granting of ~~such~~ the petition.

4. Order to reopen. If~~,~~ ~~after the hearing in a proceeding, either before or after the issuance of its final order,~~ the commission ~~shall have~~ has reason to believe the conditions of fact or law have so changed as to require, or that public interest requires, the reopening of ~~such~~ a proceeding, the commission ~~will~~ may issue an order ~~for the reopening of the same~~ to reopen.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-06-02. Petition for ~~rehearing~~ reconsideration.

1. Time for filing. A petition for ~~rehearing of a proceeding~~ reconsideration must be filed within fifteen days after ~~a copy~~ notice of the decision has been ~~delivered to the petitioning party by the commission~~ given under North Dakota Century Code section 28-32-13.

2. Content. The petition ~~shall~~ must state ~~concisely the alleged errors in the commission's decision or order and~~ the specific grounds ~~relied~~ upon ~~by the petitioner. If an order of the commission is sought to be vacated, reversed, or modified by reason of matters that have arisen since the hearing and decision or order, or by reason of a consequence that would result from the compliance therewith, the matters relied upon by the petitioner shall be set forth in the petition~~ which the petition rests or a statement of any further showing to be made. The petition must also state if a rehearing or oral argument is requested.

3. Service. A petition ~~for rehearing shall~~ must be served by the petitioner upon all parties ~~to the proceeding or their attorneys of record,~~ and a certificate to that effect ~~will~~ must be ~~forwarded~~ attached to and filed with the commission at the time the petition is filed. The original and ~~three~~ seven copies must be filed with the commission.

4. Responses. Within ten days ~~following~~ after the service of the petition, any party to the proceeding may file with the commission an orginal and seven copies of the party's ~~answer thereto, and in default thereof shall be deemed to have waived~~ response. Failure is a waiver of any objection to the granting of the petition.

History: Amended effective September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-06-03. Appeal. ~~Any party to any proceeding heard by the commission may appeal from a decision within thirty days after notice thereof has been given as more fully appears in North Dakota Century Code section 28-32-15.~~ Repealed effective September 1, 1992.

General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 49-01-07~~

CHAPTER 69-02-07

69-02-07-01. Generally. An application for the ~~promulgation,~~ amendment, repeal, or adoption of any commission rule ~~or regulation~~ shall state the precise wording of the proposed rule ~~and regulation~~ and shall state briefly the reasons for ~~such promulgation,~~ amendment, repeal, or adoption. The commission may, at any time, propose adoption, amendment, or repeal of any rule ~~or regulation~~. Hearings will be held on all proposed substantive rules and may also be held on proposed procedural rules.

History: Amended effective December 1, 1990; September 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

NOVEMBER 1992

CHAPTER 69-07-04

69-07-04-01. Definition of grain elevator weighmaster. ~~For the purpose of the administration of North Dakota Century Code chapter 60-09, a grain elevator weighmaster in North Dakota is one who weighs grain, inspects car and truck seals, inspects cars and trucks for leakage, inspects the hopper before and after weighing to see that the full contents of a car or truck accepted has been included in the weight, and one whose weight services are conducted only on facilities where the physical plant is such that the spouting to the hopper from the car or from the hopper to the car is such that the flow of grain cannot be manually rerouted.~~ Repealed effective November 1, 1992. Determined repealed by the office of the Legislative Council pursuant to subsection 3 of North Dakota Century Code section 28-32-03 because the authority for adoption of the rules was repealed by S.L. 1991, ch. 375, § 1.

General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 60-09-01~~

69-07-04-02. Application for license. ~~An application form for the license as a grain elevator weighmaster may be obtained by writing to the public warehousing division, public service commission, state capitol, Bismarck, North Dakota 58505. The application shall be accompanied by the license fee of five dollars.~~ Repealed effective November 1, 1992. Determined repealed by the office of the Legislative Council pursuant to subsection 3 of North Dakota Century Code section 28-32-03 because the authority for adoption of the rules was repealed by S.L. 1991, ch. 375, § 1.

General Authority: ~~NDCC 28-32-02~~

Law Implemented: ~~NDCC 60-09-01~~

69-07-04-03. Conditions of issuance. ~~Upon consideration of the application and such other information as the commission may deem necessary for the proper administration of its responsibilities in this matter, the commission will determine whether the applicant is a proper party to be licensed as a grain elevator weighmaster under the laws of the state of North Dakota. Should the applicant be advised that the applicant's request has been favorably acted upon, the applicant will supply the necessary corporate surety company bond as provided by law, the form of which is prescribed by the commission. Upon receipt of the surety bond and upon determining that it is in proper order, the commission will issue a license.~~ Repealed effective November 1, 1992. Determined repealed by the office of the Legislative Council pursuant to subsection 3 of North Dakota Century Code section 28-32-03 because the authority for adoption of the rules was repealed by S.L. 1991, ch. 375, § 1.

General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 60-09-01~~

69-07-04-04. Official weight certificate. ~~An official weight certificate prepared in quadruplicate in the name of the state of North Dakota on the prescribed form must be issued by the grain weighmaster for each quantity of grain weighed by the weighmaster. The IN weight certificates and OUT weight certificates shall be separately prenumbered consecutively with the prefix letter designated by the commission for each weighing station.~~

~~Color of weight certificates shall be:~~
~~Original IN certificate - buff.~~
~~Original OUT certificate - green.~~
~~First copy of either - blue.~~
~~Second copy of either - white.~~
~~Third copy of either - pink.~~
~~Disposition of weight certificates:~~
~~Original to person requesting the official weight.~~
~~First copy to the sponsoring agency.~~
~~Second copy shall be sent daily to the public warehousing division of the public service commission.~~
~~Third copy to be retained on file by the weighmaster.~~
~~Duplicate certificates may be issued by the weighmaster from a separate unnumbered pad which is clearly identified as being a duplicate and on which the number of the original weight certificate is clearly identified.~~ Repealed effective November 1, 1992. Determined repealed by the office of the Legislative Council pursuant to subsection 3 of North Dakota Century Code section 28-32-03 because the authority for adoption of the rules was repealed by S.L. 1991, ch. 375, § 1.

General Authority: ~~NDCC 60-09-02~~

Law Implemented: ~~NDCC 60-09-02~~

69-07-04-05. Additional books and records. ~~The weighmaster's employer shall be responsible for the maintenance of such additional books and records as will permit a verification and determination of all of the weighing activities of the weighmaster as well as the full and complete cost of rendering this service and all revenues obtained therefrom.~~ Repealed effective November 1, 1992. Determined repealed by the office of the Legislative Council pursuant to subsection 3 of North Dakota Century Code section 28-32-03 because the authority for adoption of the rules was repealed by S.L. 1991, ch. 375, § 1.

General Authority: ~~NDCC 60-09-02~~
Law Implemented: ~~NDCC 60-09-02~~

TITLE 71

Retirement Board

JUNE 1992

CHAPTER 71-05-01

71-05-01-01. Definitions. As used in North Dakota Century Code chapter 39-03.1:

1. "Covered employment" means employment with the North Dakota highway patrol.

2. "Medical examination" means an examination conducted by a doctor licensed to practice in North Dakota that includes a diagnosis of the disability, the treatment being provided for the disability, the prognosis and classification of the disability, and a statement indicating how the disability prevents the individual from performing the duties of a highway patrolman.

3. "Office" means the administrative office of the public employees retirement system.

4. "Permanent and total disability" means ~~any medically determinable physical or mental impairment which is static or deteriorating, and the prognosis does not indicate an anticipated recovery from the disability, and results in the individual's inability to be engaged in any gainful occupation for which the person is, or could become, reasonably fitted by education, training, or experience~~ the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than twelve months.

5. "Plan administrator" means the executive director of the North Dakota public employees retirement system.

6. "Substantial gainful activity" is to be based upon the totality of the circumstances including: consideration of an individual's training, education, experience, their potential for earning at least seventy percent of their predisability earnings; and other items deemed significant on a case-by-case basis. Eligibility is based on an individual's employability and not actual employment status.

History: Effective November 1, 1990; amended effective October 1, 1991; June 1, 1992.
General Authority: NDCC 39-03.1-06
Law Implemented: NDCC 39-03.1-07

CHAPTER 71-05-02

71-05-02-02. Determination of disability - Procedures.

1. Application.

   a. Application for disability benefits must be made within one year from the last date of covered employment on the form provided by the plan administrator.

   b. If the member is unable or unwilling to file an application, the member's employer or legal representative may file the member's disability application.

   c. The application must explain the cause of the disability, the limitations caused by the disability, the treatment being followed, and the effect of the disability on the individual's ability to be engaged in any gainful occupation for which the person is, or could become, reasonably fitted by education, training, or experience.

2. Medical examination.

   a. The applicant for disability retirement must provide the plan administrator with medical examination reports.

   b. An initial medical examination should be completed by the member's attending or family physician on the medical examination form provided by the plan administrator. If deemed necessary by the board's medical consultant, an additional examination must be completed by a specialist in the disability involved. Available medical or hospital reports may be accepted in lieu of a medical examination report if deemed acceptable by the medical consultant.

   c. The member is liable for any costs incurred by the member in undergoing medical examinations and completing and submitting the necessary medical examination reports, medical reports, and hospital reports.

3. Medical consultant.

   a. The board will retain a medical doctor to act as its consultant on disability retirement applications.

   b. The medical consultant shall review all medical information provided by the applicant.

   c. The medical consultant will be responsible to advise the plan administrator of the medical diagnosis and whether the condition is a permanent and total disability. ~~The~~

~~medical consultant shall use the medical evaluation criteria established by the social security administration as a basis for determining whether an applicant suffers a permanent and total disability.~~

4. Decision.

   a. The plan administrator shall consider applications for disability benefits and shall make a written decision whether an applicant is entitled to benefits. The decision must be mailed to the applicant's address of record.

   b. The applicant may appeal an adverse determination to the board by providing a written notice of appeal within sixty days of the date that the plan administrator mailed the decision.

   c. The board shall consider all appeals at regularly scheduled board meetings. The applicant must be notified of the time and date of the meeting and may attend or be represented. The plan administrator shall provide to the board for its consideration a case history brief that includes membership history, medical examination summary, and the medical consultant's conclusions and recommendations. The board shall make the determination for eligibility at the meeting unless additional evidence or information is needed. The discussion concerning disability applications must be confidential and closed to the general public.

5. Payment of annuity. If awarded, the disability annuity is payable on, or retroactive to, the first day of the month following the member's termination from covered employment.

6. Redetermination and recertification.

   a. A disabled annuitant's eligibility must be recertified on July first following the second anniversary date of disability retirement. An additional recertification is required on July first five years thereafter. The plan administrator may require additional recertifications, or waive the necessity for a recertification, if the facts warrant this action.

   b. The plan administrator will send a recertification form to the disabled annuitant to be completed and sent back to the fund.

   c. The plan administrator may require the disabled annuitant to be reexamined by a doctor at the annuitant's own expense. The submission of medical reports by the member,

and the review of those reports by the board's medical consultant, may satisfy the reexamination requirement.

d. The plan administrator will make the recertification decision and bring the matter to the board only if warranted.

e. If it is determined that the disability annuitant was not eligible for benefits during any time period when benefits were provided, the plan administrator may do all things necessary to recover the erroneously paid benefits.

History: Effective November 1, 1990; amended effective June 1, 1992.
General Authority: NDCC 39-03.1-06, 39-03.1-11
Law Implemented: NDCC 39-03.1-11

SEPTEMBER 1992

ARTICLE 71-02 (CHAPTER 71-02-01)

71-02-01-01. Definitions. As used in North Dakota Century Code chapter 54-52 and this article:

1. "Accumulated contributions" means the total of all of the following:

   a. The employee account fund balance accumulated under the prior plan as of June 30, 1977.

   b. The vested portion of the employee's "vesting fund" accumulated under the prior plan as of June 30, 1977.

   c. The member's mandatory contributions made after July 1, 1977.

   d. The interest on the sums determined under subdivisions a, b, and c, compounded annually at the rate of five percent from July 1, 1977, to June 30, 1981, six percent from July 1, 1981, through June 30, 1986, and one-half of one percent less than the actuarial interest assumption from July 1, 1986, to the member's termination of employment or retirement.

   e. The sum of any employee purchase or repurchase payments.

2. "Actuarial equivalent" means a benefit calculated to be of equal value to the benefit otherwise payable when computed on the basis of assumptions and methods adopted for this purpose by the board.

3. "Alternative retirement system" means the teachers' fund for retirement, the highway patrolmen's retirement system, and the teachers' insurance and annuity association of America.

4. ~~"Annual enrollment period" is the period of time between May fifteenth and June fifteenth when temporary or part time employees can enroll in the public employees retirement system.~~

~~5.~~ "Beneficiary" means any person in receipt of a benefit provided by this plan or any person designated by a participating member to receive benefits.

~~6.~~ 5. "Claim" means the right to receive a monthly retirement allowance, the receiving of a retirement allowance, or the receiving of a disability benefit.

~~7.~~ 6. "Continuously employed" means any period of employment uninterrupted by voluntary or involuntary termination or discharge. A member who has taken a leave of absence approved by the member's employer, not to exceed a year unless approved by the executive director, and returns to employment shall be regarded as continuously employed for the period.

~~8.~~ 7. "Contribution" means the payment into the fund of nine and twelve-hundredths percent of the salary of a member.

~~9.~~ 8. "Interruption of employment" is when an individual is inducted (enlists or is ordered or called to active duty into the armed forces of the United States) and leaves an employment position with a state agency or political subdivision, other than a temporary position. The individual must have left employment to enter active duty and must make application for reemployment within ninety days of discharge under honorable conditions.

~~10.~~ 9. "Leave of absence" means the period of time up to one year for which an individual may be absent from covered employment without being terminated. At the executive director's discretion, the leave of absence may be extended not to exceed two years.

~~11.~~ 10. "Office" means the administrative office of the public employees retirement system.

~~12.~~ 11. "Participating employer" means an employer who contributes to the North Dakota public employees retirement system.

~~13.~~ 12. "Pay status" means a member is receiving a retirement allowance from the fund.

~~14.~~ 13. "Permanent and total disability" means the inability to engage in any substantial gainful activity by reason of any medically

determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than twelve months.

~~15.~~ 14. "Plan administrator" means the executive director of the North Dakota public employees retirement system or such other person or committee as may be appointed by the board of the North Dakota public employees retirement system from time to time.

~~16.~~ 15. "Plan year" means the twelve consecutive months commencing July first of the calendar year and ending June thirtieth of the subsequent calendar year.

~~17.~~ 16. "Prior plan" means the state employees' retirement system which existed from July 1, 1966, to June 30, 1977.

~~18.~~ 17. "Retiree" means an individual receiving a monthly allowance pursuant to chapter 54-52.

~~19.~~ 18. "Service credit" means increments of time to be used in the calculation of retirement benefits. Service credit may be earned as stated in section 71-02-03-01 or may be purchased or repurchased according to section 71-02-03-02.1.

~~20.~~ 19. "Substantial gainful activity" is to be based upon the totality of the circumstances including: consideration of an individual's training, education, experience, their potential for earning at least seventy percent of their predisability earnings; and other items deemed significant on a case-by-case basis. Eligibility is based on an individual's employability and not actual employment status.

~~21.~~ 20. "Termination of employment" means a severance of employment by not being on the payroll of a covered employer for a minimum of one month. Approved leave of absence does not constitute termination of employment.

History: Amended effective September 1, 1982; November 1, 1990; September 1, 1991; January 1, 1992; September 1, 1992.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52

CHAPTER 71-02-02

71-02-02-01. Membership - General rule. Each eligible employee shall become a member of the public employees retirement system upon filing a membership form with the office, and the beginning of contributions to the fund. In addition, the following requirements apply:

1. A temporary employee must complete a participation agreement before becoming a member. Application must be completed within: Six months of the date of hire as a temporary employee~~,~~, or within six months of a change in status from a permanent position to temporary~~, or during the annual enrollment period~~.

2. Contributions for temporary employees must be submitted no later than the sixth working day of the month for the previous month's salary.

3. Delinquent payments of over thirty days, for reasons other than leave of absence, will result in termination of eligibility to participate as a temporary member for the remainder of the plan year.

4. Upon taking a refund, future participation as a temporary member is waived.

5. A member may not participate as both a permanent and a temporary member. Permanent employment has precedence.

6. An elected official must enroll or waive participation in writing within six months of taking office.

History: Amended effective September 1, 1982; November 1, 1990; September 1, 1992.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52-01(3), 54-52-02.9, 54-52-05

CHAPTER 71-02-07

71-02-07-03. Return to service - Disabled member. If the recipient of a disability benefit under North Dakota Century Code chapter 54-52 returns to work, said member is responsible for reporting employment to the public employees retirement system.

1. If a member is working in a permanent full-time position and is eligible to participate in the public employees retirement system ~~and receiving a monthly social security disability benefit~~, monthly benefits from the public employees retirement system must be suspended. If ~~an~~ the individual is not able to continue employment for at least nine months as a result of the disability and continues to ~~be eligible for a social security disability benefit~~ meet eligibility requirements under the plan, said member may resume disability status with the public employees retirement system.

2. If a member ~~is receiving a disability benefit from social security and~~ returns to employment not covered under the public employees retirement system, the disability benefit will continue for ~~as long as the individual retains eligibility for the social security benefit and receives a monthly disability benefit payment from that agency~~ up to nine months.

~~3. If a member becomes ineligible for a social security disability benefit, the disability benefit from the public employees retirement system will be discontinued on the date said member became ineligible for disability status.~~

History: Effective November 1, 1990; amended effective September 1, 1992.
General Authority: NDCC 54-52-04, 54-52-17
Law Implemented: NDCC 54-52-17

TITLE 74

Seed Commission

JUNE 1992

CHAPTER 74-04-01

74-04-01-02. General requirements and responsibilities.

1. Participation and responsibility.

   a. Participation in this seed potato program is voluntary and may be withdrawn prior to the first inspection.

   b. Responsibilities.

      (1) The inspections, approvals, certification, and production of these rules and regulations will be done by the state seed department.

      (2) The farming, sanitation practices, storing, and packing will be the grower's responsibility.

2. General requirements.

   a. Potatoes to be eligible for the program shall have been in a certification program and winter tested for eligibility.

   b. Fields will pass two or more inspections given by visual examination of a representative sample of the plants which method and size of sample will be determined by the state seed department.

   c. Fields passing inspection will be stored in a seed warehouse and sorted to grade at shipping time.

d. Responsibility for the quality of work done in sorting the potatoes falls upon the grower or a thoroughly qualified agent authorized by the grower.

e. Requirements for certification are not complete on any lot of eligible potatoes until properly tagged as described in this chapter and an official seed grade inspection certificate has been issued. Official seed grade inspections are compulsory.

f. The official tags will be issued only on order or authorization from the grower. These tags are to be attached to the container at the time the potatoes are being graded or loaded for shipment so as to constitute an effective seal. Tags must not be applied to stock other than that indicated on the tags. Bulk shipments, truck or railcar, when thoroughly disinfected, may be considered the container.

g. Resorting or regrading. If a lot of potatoes fails to meet certified seed grade requirement upon inspection, they are to be reconditioned to meet the requirement or the official tags must be removed.

h. Reconditioning while in transit. In the case of any circumstance making it essential to recondition seed in transit, permission must be obtained from the state seed department.

i. Latent virus testing. Serological testing for latent viruses shall be voluntary and a requirement for only virus-tested seed. Virus-tested seed meeting established tolerances may be indicated on the tag.

j. Upon the discretion of the state seed department, potato seed lots originating from out of state may be subjected to a laboratory test for the detection of seedborne pathogens. Eligibility for recertification of any seed lot so tested must be based on that laboratory test.

k. Failure to comply with any of the requirements of this chapter may be cause for rejection or cancellation of the lot or the certification of any seed as seed potatoes.

3. **Violations.** The state law specifically states the use of the term "certified" or the term "registered" or any term or terms conveying a meaning substantially equivalent to the meaning of any said terms, either orally or in writing, printing, marking, or otherwise in reference to or in connection with or in advertising or characterizing or labeling seed potatoes or the containers thereof is prohibited, unless such potatoes shall have been duly inspected and certified pursuant to the provisions of the law. Any violation of this law and any

person on conviction thereof, shall be fined not more than one hundred dollars and cost for first offense and not more than five hundred dollars and costs of prosecution for subsequent offenses.

History: Amended effective December 1, 1981; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-04. Application fees and restrictions.

1. Application for field inspection must be received in the state seed department, university station, Fargo, North Dakota, not later than June fifteenth. There is a ~~twenty-five cent~~ one dollar per acre [.40 hectare] cash penalty for later applications.

2. At least one-half the fees and all due accounts must accompany the applications.

3. Applications are subject to cancellation in the case of crop failure or other valid reason and the application fee, minus twenty-five dollars will be returned if the request reaches the state seed department before the inspector arrives in the general locality of the field. However, in such a case, the crop must be plowed under or destroyed so as not to create a possible disease hazard.

4. Separate application forms are required for latent virus testing.

5. Loss by drown outs, if over twenty-five percent of the field, will be allowed after the first inspection only. No adjustments will be made thereafter.

6. Fees, which are subject to change, are:

   a. Field inspection, ~~ten~~ fifteen dollars per acre [.40 hectare] including tags and bulk fees; minimum fee per farm, ~~fifty~~ one hundred dollars; and minimum fee per field, ~~ten~~ fifteen dollars.

   b. Late penalty, ~~twenty-five cents~~ one dollar per acre [.40 hectare].

   c. Latent virus testing - single virus test, ~~thirty~~ fifty cents per acre [.40 hectare]; minimum fee fifteen dollars per field.

   d. Grade inspection, six and one-half cents per hundredweight [45.36 kilograms].

7. Prompt payment of all fees will be required at all times.

History: Amended effective December 1, 1981; December 1, 1987; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-05. Seed potato farm requirements.

1. All potato fields on the farm or in the farming operation must be eligible and entered for certification. A farming operation means all potato fields in the farming operation whether actually grown by the applicant or under growing agreements with common equipment and storages.

2. All equipment and storages in the potato operation must be used only on the acreage [hectarage] entered for certification.

3. Parts of fields will not be accepted or certified.

4. ~~Seed potatoes entered for certification will be grown a minimum of one hundred feet [30.48 meters] from uncertified potatoes.~~ Boundaries of certified seed potato fields must be clearly defined. Adequate separation from uncertified fields must be maintained and are the responsibility of the certified seed potato grower. The definition of adequate separation is at the discretion of the state seed department or its representative. Field separation of a certified field from an uncertified field must be established prior to the second inspection.

5. Seed potatoes will not be planted on ground that was cropped to potatoes the previous year, unless the ground is fumigated.

6. Strips or markers are ~~recommended~~ required between seed lots and varieties.

7. Equipment and storages must be cleaned and disinfected at least once annually.

History: Amended effective December 1, 1981; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-06. Seed eligibility.

1. North Dakota seed stocks.

   a. Seed lots of North Dakota origin to be eligible will have been grown under the seed certification program in the

previous season passing field inspection and the winter test.

b. Seed stocks not having a winter test may be accepted on an observational basis but only ~~with prior approval from the department~~ after they have been laboratory tested and only with prior approval from the state seed department. The cost of laboratory testing will be borne by the applicant. The same field inspection fee structure will apply to this application.

2. Seed stocks from other sources. Seed lots from sources other than North Dakota will be of the foundation or approved classification and have passed a winter ~~test~~ grow-out or laboratory test on a sample of the lot that is equal to or greater than the size of the winter test sample as outlined in this bulletin.

3. Tags or purchase proof must accompany the application to provide sufficient evidence as to origin and quantity of seed.

History: Amended effective December 1, 1981; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-07. Seed classification and limited generation.

~~1. All seed potatoes shall be limited in the number of years they may be reproduced.~~

~~2. All stocks shall originate from disease-tested material.~~

~~3. Basic seed must be disease-tested seed developed in seed plots grown in tuber units and have specific standards established by the state seed department. Seed stocks will be grown a limited number of generations.~~

~~4. Foundation seed must be seed meeting standards for recertification.~~

~~a. Foundation seed will be produced on farms found to be free of bacterial ring rot. If no bacterial ring rot is found on the farm the next year following an infection, the seed stocks may be reentered for inspection. However, if bacterial ring rot is found the second year, all seed stocks must be removed from the farm. But all new seed stocks are strongly recommended following an infection of ring rot on the farm.~~

~~b. Excessive blackleg symptoms will be cause for rejection as foundation stock.~~

~~5. Foundation seed stocks shall be limited to five generations of propagation, dependent upon seed availability. Generation numbers increase with years of reproduction from the original seed source. Nuclear stock will be minitubers or plantlets or stem cuttings.~~

1. All seed potatoes must be limited to seven years of reproduction in the field. Seed lots may be reproduced beyond this limit with prior approval of the state seed department providing the seed lot has been winter tested and eligible for recertification.

2. Prenuclear seed stocks must originate from tissue-culture derived plantlets, minitubers, microtubers, or pathogen-tested stem cuttings. Experimental breeding selections may originate from disease-tested material. The first year of reproduction of these stocks will be regarded as nuclear seed stock (generation zero).

3. Prenuclear seed stocks intended to be grown in the field as nuclear (G0) seed potatoes must be laboratory tested and be demonstrated to be free of the following pathogens:

   a. Corynebacterium sepedonicum (ring rot).

   b. Erwinia carotovora (blackleg and soft rot).

   c. Potato virus A.

   d. Potato virus M.

   e. Potato virus X.

   f. Potato virus Y.

   g. Potato leafroll virus.

   h. Potato spindle tuber viroid.

4. Basic seed must originate from sources described above and developed in seed plots grown in tuber-units and have met specific field inspection and winter test standards established by the state seed department. Seed stocks will be grown a limited number of generations.

5. Foundation seed must be seed meeting standards for recertification.

   a. Foundation seed will be produced on farms found to be free of bacterial ring rot for three years. All seed stocks must be replaced on a farm in which bacterial ring rot has been found.

b. Excessive blackleg symptoms will be cause for rejection as foundation stock.

6. Generation numbers increase with years of field reproduction from the original seed source. Generation five will be the final generation of seed eligible for recertification. The certified seed class is not eligible for recertification. If seed availability is low for a specific potato variety, seed lots with more advanced generation numbers may be eligible for recertification providing the seed lot has passed a winter test and prior approval of the state seed department has been obtained.

7. Seed lots may be downgraded or advanced in generation if they do not meet the disease tolerances for that generation or they may be placed in the certified class and sold by their generation number as certified seed providing they meet the specifications for that class. Disease tolerances for each generation of seed are outlined in the section on field inspection standards.

History: Effective December 1, 1981; amended effective December 1, 1987; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-08. Field inspection standards.

1. Each seed potato field will be visibly inspected based on sample inspection. The method of inspection and sample size will be at the discretion of the state seed department but a minimum of one hundred plants per acre [.40 hectare] will be inspected.

2. The field tolerance established will be based on visible symptoms in the samples inspected. Diseases which cannot be observed visibly may be present.

	~~First Inspection~~	~~Second Inspection~~	~~Third Inspection~~
~~Varietal mixture tolerances~~			~~0.3 percent~~
~~Disease tolerance Spindle tuber viroid~~	~~0.1 percent~~	~~0.1 percent~~	~~0.1 percent~~
~~Rugose, crinkle and severe leaf rolling mosaics~~	~~0.5 percent~~	~~0.3 percent~~	~~0.3 percent~~
~~Leaf roll~~	~~0.5 percent~~	~~0.3 percent~~	~~0.3 percent~~
~~Total serious well-defined virus~~	~~0.8 percent~~	~~0.5 percent~~	~~0.5 percent~~

~~Mild mosaic~~	~~2.0 percent~~	~~1.0 percent~~	~~1.0 percent~~
~~*Bacterial ring rot~~	~~0.0 percent~~	~~0.0 percent~~	~~0.0 percent~~

First Inspection Disease Tolerances (%)

Generation

	0	1	2	3	4	5	Certified
Varietal mixture	0.1	0.2	0.3	0.5	0.5	0.5	0.5
Spindle tuber viroid	0.0	0.0	0.0	0.0	0.1	0.1	0.1
Severe mosaics (PVY)	0.2	0.3	0.4	0.5	0.5	0.5	0.7
Leaf roll (PLRV)	0.2	0.3	0.4	0.5	0.5	0.5	0.7
Total serious virus	0.2	0.3	0.4	0.5	0.5	0.5	0.7
*Bacterial ring rot	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Second and all Subsequent Inspections

Disease Tolerances (%)

Generation

	0	1	2	3	4	5	Certified
Varietal mixture	0.0	0.1	0.2	0.3	0.3	0.3	0.3
Spindle tuber viroid	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Severe mosaics (PVY)	0.0	0.1	0.2	0.3	0.3	0.3	0.5
Leaf roll (PLRV)	0.0	0.1	0.2	0.3	0.3	0.3	0.5
Total serious virus	0.0	0.1	0.2	0.3	0.3	0.3	0.5
*Bacterial ring rot	0.0	0.0	0.0	0.0	0.0	0.0	0.0

* The zero tolerance means that no amount is permissible when inspected. It does not mean that the seed is absolutely free of disease or disease causing agents, but that none was found during inspection.

Varieties that do not express visible disease symptoms. Potato varieties that do not express visible disease symptoms of a specific pathogen may be subjected to a laboratory test to determine the levels of the pathogen in a seed lot. This testing may occur during the growing season or during the winter test, or both, and may affect eligibility of the seed lot.

Blackleg. Since the blackleg disease may be latent, the inspector will record only the percentage observed during the first and second inspection, and no tolerance will be established. However, any excessive amount can be cause for rejection. Blackleg observations shall be based upon sample plants exhibiting the characteristic black, inky, soft, slimy, decomposed tissue of the stem.

Wilt. Only the percentage noted will be recorded on the first and second inspection, and may include other factors such as maturity, drought, or alkali problems but any excessive amount may be cause for rejection.

There will be zero tolerance for potato wart, powdery scab, corky ring spot, gangrene, golden nematode, root knot nematode, tuber moths or other such injurious pests that have never been found in North Dakota seed potato fields.

Tolerances for potato virus x tested seed. All of the above tolerances will apply, including a requirement that bacterial ring rot must not have been found on the farm during the season~~, and no more than one-tenth of one percent serious visible virus in the field~~. Seed lots with no more than two percent potato virus x infection may be identified as virus x tested on certification tags.

~~Latent virus - potato virus x, s, and m each virus two percent.~~

3. Field conditions.

   a. Insect control must be maintained early and until the vines are killed or matured. Fields suffering undue insect injury may be disqualified for certification. A grower will notify the inspector of the date of spraying and spray material applied.

   b. Vine killing. If a field has not received final inspection, the grower must obtain approval from the inspector before killing the vines. Furthermore, if the inspector deems it appropriate, strips of unkilled vines must be left in the seed fields to facilitate final inspections. When strips are left for inspection, the first twelve rows (if a six-row planter was used, eight rows if a four-row planter was used) must not be vine-killed. It will be the responsibility of the seed producer to identify where seed planting began. Approximately ten percent of the seed field acreage must be left in strips.

   c. Any condition such as excess weeds, hail injury, foreign plants, chemical damage, soil conditions, or insect damage that interferes with proper inspection may disqualify the seed for certification.

   d. Roguing is permitted and recommended in many cases but must be done before the inspector arrives in the field.

   e. Presence of disease or conditions not mentioned heretofore which may impair seed quality shall constitute cause for rejection or additional testing before final certification. Stocks which show an excessive percentage

of total serious virus in official southern sample tests shall be considered ineligible for certification tags.

4. Appeal inspection of rejected fields will be considered, provided application is made within three days after rejection, the field is in good condition for inspection, and no additional roguing is done previous to reinspection.

5. Bacterial ring rot control.

   a. ~~Any grower having ring rot in the farming operation may not sell seed in the state for recertification during the next growing season.~~ All seed produced by a farming operation in which bacterial ring rot has been found will be ineligible for recertification the following year.

   b. If the farming operation is found to be infected, all equipment and storages must be cleaned and disinfected.

   c. ~~It is strongly recommended that an infected farming operation purchase all new seed.~~ A farming operation found to be infected on three consecutive years is required to repurchase all new seed, clean, and disinfect the operation under the supervision of the state seed department before being eligible to enter any seed for certification.

   d. A farming operation found to be infected on three consecutive years shall be required to purchase all new seed, clean, and disinfect the operation under the supervision of the state seed department before entering any seed for certification.

History: Effective December 1, 1981; amended effective June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-09. Winter testing program.

1. All foundation and basic seed potato fields must be randomly sampled and tested if the grower intends to plant the same seed lot or sell to growers who intend to enter the lot for certification the following year. Only seed lots with three-tenths of one percent total serious virus or less during field inspections are eligible for winter testing.

2. The results will be based on visible inspection of the plants for virus or viruslike symptoms from the sample the grower submitted.

3. Other factors such as vigor, other diseases, and any factor that might impair seed quality will be considered in the winter testing program.

4. Information concerning sample size and time to submit samples will be available from the state seed department.

5. Lots failing the winter test will be ineligible for planting in the certification program.

6. In the event of frost or other serious malfunctions of the winter grow-out test, eligibility of a seed lot will be based on the current field readings or a laboratory test at the discretion of the state seed department.

7. Seed lots showing excessive amounts of virus in the winter test may be disqualified for tags or final certification. The level at which to disqualify the lot will be established by the seed commissioner.

History: Effective December 1, 1981; amended effective December 1, 1987; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-10. Storage and packaging requirements.

1. A storage to be eligible must have been cleaned and disinfected prior to harvest. Storages not previously used for certified seed must be inspected by the state seed department.

2. Seed potatoes to be eligible for final certification tags must be stored in a warehouse containing only seed potatoes which have been field inspected. Such warehouses may contain field inspected stocks rejected for seed certification for causes other than such diseases as ring rot.

3. Equipment for handling, sorting, or grading can be used only on certified stock, but also must be cleaned and disinfected.

4. Containers.

   a. Graded stocks ~~shall~~ must be placed in new sacks or in clean~~, disinfected~~ crates or bulk containers which are tagged or marked in an approved manner to indicate the lot contains certified seed potatoes.

   b. Brands or markings must feature "North Dakota" as the production area.

   c. No used bags may be brought into the farming operation.

d. It is highly recommended that all containers be disinfected for the grower's own protection.

5. Out-of-state storage. Growers, upon special application, may be permitted final certification on eligible stocks in approved nearby storages outside the state.

6. Bin inspection. Certified storages may be checked by an authorized inspector during the storage season.

7. Yield and storage reports. Before tags will be issued for a lot of potatoes, a report will be given to the state seed department stating yield of each field entered for certification and the location of the storages.

8. Transfers of seed potatoes to other parties. A lot of seed potatoes eligible for final certification may be transferred to another party along with tags provided authorization is given by the state seed department.

9. Each bin containing certified seed potatoes must be plainly labeled for certification with the grower's name and address, hundredweight [45.36 kilograms] or bushels [35.24 liters], variety, and field identification.

10. All basic and foundation seed lots and other seed lots intended for recertification must be stored in identifiable, clearly separated bins. Bins containing two or more seed lots of a variety without a divider or some other method of separation will be downgraded to the appropriate generation or disease tolerance level.

History: Effective December 1, 1981; amended effective December 1, 1987; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

74-04-01-11. Official North Dakota seed potato grades. Final grade determination shall be made based on physical defects, size, shape, and cleanliness. Two grades, first or blue tag, and second or yellow tag, are available for shipment outside the state. A white tag is available but restricted to shipments within the state. The potatoes will be packed in new burlap sacks or clean, disinfected containers identified by official tags attached as to variety, crop year, grower and accompanied by an official state or federal grade certificate. United States department of agriculture revised standards, effective March 1987, for seed potatoes shall be the official guide for applying and interpreting all definitions and terms used in North Dakota seed potato grades. Grade inspection will be made on a sample basis.

1. First grade blue tag seed potatoes shall consist of unwashed potatoes of one variety which must meet the following requirements:

   a. Shape:

      (1) Fairly well-shaped except for long varieties.

         (a) Dryland type (see definitions section 74-04-01-01).

         (b) Except for shape (see definitions section 74-04-01-01).

   b. Free from:

      (1) Freezing injury.

      (2) Blackheart.

      (3) Soft rot and wet breakdown.

      (4) Late blight tuber rot.

      (5) Bacterial ring rot.

      (6) Nematode or tuber moth injury.

      (7) Fresh cuts or fresh broken off second growth.

   c. Free from serious damage caused by:

      (1) Hollow heart.

      (2) Vascular ring discoloration.

      (3) Wireworm.

   d. Free from damage by soil and other causes (see definitions section 74-04-01-01 and classification of defects, section 6, tables I and II of section 74-04-01-11).

   e. Size:

      (1) Minimum size, unless otherwise specified, must be one and ~~seven eighths~~ one-half inches [~~47.6~~ 38.1 millimeters] ~~for round or intermediate shaped varieties and one and three quarters inches [44.5 millimeters] for long varieties~~ in diameter.

      (2) Maximum size may not exceed twelve ounces [340.2 grams] for round or intermediate shaped varieties and fourteen ounces [396.9 grams] for long varieties.

(3) For all varieties, size B must be from one and one-half inches [38.1 millimeters] to not more than two and one-quarter inches [57.1 millimeters] in diameter.

f. Tolerances. In order to allow for variations incident to proper grading and handling in the foregoing grade, the following tolerances, by weight, are provided as specified:

(1) For defects:

(a) Ten percent for potatoes in any lot which are seriously damaged by hollow heart.

(b) Ten percent for potatoes in any lot which are damaged by soil. (See definitions section 74-04-01-01).

(c) Five percent for potatoes in any lot which are seriously damaged by vascular ring discoloration.

(d) Potatoes affected by silver scurf are not grade factors.

(e) Not more than ten percent of the potatoes seriously damaged by wireworm.

~~(d)~~ (f) Eleven percent for potatoes which fail to meet the remaining requirements of grade, including therein not more than six percent for external defects and not more than five percent for internal defects; provided that included in these tolerances not more than the following percentages shall be allowed for the defects listed:

	Percent
Bacterial ring rot	0.00
Late blight tuber rot	1.00
Damage by dry-type or moist-type Fusarium tuber rot	2.00
Nematode or tuber moth injury	0.00
Frozen, soft rot, or wet breakdown	0.50
Varietal mixture	0.50

(2) For off-size:

(a) Undersize. Five percent for potatoes in any lot which fail to meet the required or specified minimum size.

(b) Oversize. Ten percent for potatoes in any lot which fail to meet the required or specified maximum size.

2. Second grade yellow tag ~~(or such other color as determined by the state seed department)~~ potatoes shall consist of unwashed potatoes that meet the requirements for blue tag grade except for defects caused by hollow heart, wireworm, internal discoloration, firmness, sprouts, and sunken, flattened or depressed areas with or without underlying flesh discolored, and are not seriously damaged by soil and for increase in maximum size, and for increased tolerance for defects listed below:

a. Tolerances.

(1) For defects:

(a) Twenty percent for potatoes seriously damaged by hollow heart.

(b) ~~Not more than ten percent of the potatoes seriously damaged by wireworm.~~ Firmness, sprouts, wireworm, internal discoloration, sunken, flattened, or depressed areas with or without underlying flesh discolored are not grade factors.

(c) Twenty percent for potatoes which fail to meet the remaining requirements of the grade; provided, that included in this amount not more than six percent shall be seriously damaged and included therein not more than one-half of one percent shall be allowed for potatoes which are frozen or affected by soft rot or wet breakdown.

~~(d) Firmness, sprouts, internal discoloration, sunken, flattened, or depressed areas with or without underlying flesh discolored are not grade factors.~~

(2) Size. Maximum size, unless otherwise specified may not exceed fourteen ounces [396.90 grams] for round or intermediate shaped varieties and sixteen ounces [453.60 grams] for long varieties.

3. White tag. Official white identification tags will be furnished on request for potatoes which passed field inspection requirements and are being transferred for seed

purposes, within the state of North Dakota only. Such stock shall meet United States number two grade requirements, except for defects caused by firmness, sunburn, hollow heart, wireworm, and sunken, flattened or depressed areas with or without underlying flesh discolored. Not more than two percent shall be damaged by ~~dry rot~~ dry-type or moist-type fusarium tuber rot. Unless otherwise specified, the maximum size shall be fourteen ounces [396.60 grams] and one and one-half inches [38.1 millimeters] minimum. State seed department grade inspection on white tag lots is not compulsory, but may be obtained upon request.

4. Application of tolerances. Individual samples may not have more than double the tolerances specified, except that at least one defective and one off-size potato may be permitted in any sample; provided that en route or at destination, one-tenth of the samples may contain three times the tolerance permitted for potatoes which are frozen or affected by soft rot or wet breakdown; and provided, further, that the averages for the entire lot are within the tolerances specified for the grade.

5. Samples for grade and size determination. Individual samples shall consist of at least twenty pounds [9.06 kilograms]. The number of such individual samples drawn for grade and size determination will vary with the size of the lot.

6. Classification of defects.

   a. Brown discoloration following skinning, dried stems, flattened depressed areas (showing no underlying flesh discoloration), greening, skin checks, and sunburn do not affect seed quality and may not be scored against the grade.

   b. Table I - External defects.

	DAMAGE		
Defect	When materially detracting from the appearance of the potato	OR	When removal causes a loss of more than 5 percent of the total weight of the potato
Air cracks			x
Bruises.			x
Cuts and broken-off second			

growth (healed). .	x	x
Elephant hide (scaling)	x	
Enlarged, discolored, or sunken lenticels .	x	
Folded ends	x	
Second growth. . . .	x	
Shriveling	When more than moderately shriveled, spongy, or flabby.	
Sprouts	When more than 20 percent of the potatoes in any lot have any sprout more than 1 inch [25.4 mm] in length.	
Surface cracking . .	x	x
Flea ~~beatle~~ beetle injury . . .	x	x
Grub damage	x	x
Rodent and/or bird damage	x	x
Wireworm or grass damage	Any hole more than 3/4 inch [19.1 mm] long or when the aggregate length of all holes is more than 1 1/4 inches [31.8 mm][1].	
~~Dry rots~~ Dry-type or moist-type fursarium rot.		x
Rhizoctonia	x	
Scab, pitted	x	x
Scab, russet	When affecting more than 1/3 of the surface.	
Scab, surface . . .	When affecting more than 5 percent of the surface.	
~~Silver scurf . . . .~~	~~When affecting more than 25 percent of the surface.~~	
Growth cracks . . .	When seriously detracting from the appearance.	
Pressure bruises and sunken areas - with underlying flesh discolored		When removal causes a loss of more than 10 percent of the total weight.

[1]Definitions of damage and serious damage are based on potatoes that are two and one-half inches [63.5 mm] in diameter or six ounces [170.10 g] in weight. Correspondingly lesser or greater areas are permitted on smaller or larger potatoes.

c. Table II - Internal defects.

DAMAGE			
Defect	When materially detracting from the appearance of the potato	OR	When removal causes a loss of more than 5 percent of the total weight of the potato
Ingrown sprouts	. . . . .		x
Internal discoloration occurring interior to the vascular ring (such as, internal brown spot, mahogany browning and heat necrosis).	When more than the equivalent of three scattered light brown spots 1/8 inch [3.2 mm] in diameter[1].		
All other internal discoloration excluding discoloration confined to the vascular ring.	. . . . .		x

SERIOUS DAMAGE			
Defect	When seriously detracting from the appearance of the potato	OR	When removal causes a loss of more than 10 percent of the total weight of the potato
Internal discoloration confined to the vascular ring.	. . . . .		x
Hollow heart or hollow heart with discoloration.	When affected area exceeds that of a circle 3/4 inch [19.1 mm] in diameter[1].		

[1]Definitions of damage and serious damage are based on potatoes that are two and one-half inches [63.5 mm] in diameter or six ounces [170.10 g]

in weight. Correspondingly lesser or greater areas are permitted on smaller or larger potatoes.

7. Classification and serological tested stocks.

   a. Foundation seed classification may be indicated on the tag provided the lot meets foundation standards.

   b. Serologically tested stocks for potato virus x, potato virus s, or potato virus m may be so indicated on the tag if within the specified tolerance during the current growing season.

Blue and yellow tag shipments must be inspected and meet respective grade requirements.

History: Effective December 1, 1981; amended effective June 1, 1985; December 1, 1987; June 1, 1992.
General Authority: NDCC 4-10-03
Law Implemented: NDCC 4-10-04

TITLE 75

Department of Human Services

AUGUST 1992

AGENCY SYNOPSIS: The Department of Human Services is responsible for the administration of the Medical Assistance (Medicaid) program pursuant to N.D.C.C. ch. 50-24.1. The department is the "single state agency" responsible to administer the program in conformance with the requirements for Medical Assistance state plans imposed under federal law. 42 U.S.C. § 1396a, et seq. The department has heretofore established rules governing various aspects of the Medical Assistance program. N.D. Admin. Code ch. 75-02-02, Medical Services. N.D. Admin. Code ch. 75-02-02.1 describes the requirements for establishing eligibility for Medicaid benefits.

Chapter 75-02-02.1 establishes, in detail, the principles for determination of eligibility for Medicaid benefits. This program is extraordinarily complex as a consequence of the state's efforts to conform all aspects of the program to federal requirements. A failure to conform to the federal requirements would preclude the receipt of federal moneys which currently pay approximately 70% of the costs of Medicaid benefits furnished under the program.

The amendments to chapter 75-02-02.1 are intended to conform eligibility determinations in the Medicaid program, in all respects, to applicable federal and state laws. For the most part, the rules do not contain or describe significant departures from existing departmental policies concerning determinations of eligibility for Medicaid benefits.

N.D. Admin. Code ch. 75-02-02.1 contains 43 sections. The amendments to these sections are:

<u>75-02-02.1-01, Definitions</u>: Adds one definition and amends several of the 35 defined terms used in the chapter.

<u>75-02-02.1-02, Application and Redetermination</u>: Applies the requirements concerning recipients in periodic redeterminations of eligibility to guardians who act on behalf of their wards.

75-02-02.1-02.1, Applicant's or Guardian Duty to Establish Eligibility: Replaces section 75-02-02.1-07, and applies application responsibility to guardians who apply on behalf of wards.

75-02-02.1-05, Covered Groups: Clarifies the description of certain children and pregnant women who may be eligible for Medicaid benefits.

75-02-02.1-06, Applicant's Choice of Aid Category: States the applicant's right to choose a category which is of greatest benefit to the applicant.

75-02-02.1-07, Applicant's Duty to Establish Eligibility: Transferred to section 75-02-02.1-02.1.

75-02-02.1-08, Selecting Medicaid Unit Members: Corrects reference to maximum age of persons covered as children.

75-02-02.1-09, Assignment of Rights to Recover Medical Costs: Clarifies requirements and excepts pregnant women from assignment requirements.

75-02-02.1-13, Social Security Numbers: Provides for exception to social security number requirements for those who have applied for, but not yet received a number.

75-02-02.1-14, Blindness and Disability: Clarifies the circumstances when the department need not rely on the Social Security Administration for determination of blindness or disability.

75-02-02.1-15, Incapacity of a Parent: Clarifies the standard for determining if a parent is incapacitated.

75-02-02.1-18, Coverage for Aliens: Clarifies the circumstances in which aliens can become recipients of Medicaid benefits.

75-02-02.1-20, Extended Medicaid Benefits to Certain Families Who Cease Receipt of Aid to Families With Dependent Children: Clarifies the provision of continued Medicaid benefits to AFDC recipients who lose AFDC eligibility because of specified factors.

75-02-02.1-21, Continuous Eligibility for Pregnant Women and Newborns: Clarifies that in described circumstances newborns become and continue eligible for Medicaid benefits.

75-02-02.1-22, Eligibility for Qualified Medicare Beneficiaries: Clarifies the determination of eligibility for limited benefits available to certain low income beneficiaries.

75-02-02.1-23, Eligibility for Qualified Disabled and Working Individuals: Clarifies the determination of eligibility for limited Medicaid benefits available to certain disabled persons with earned income.

75-02-02.1-24, Spousal Impoverishment Prevention: Clarifies the provisions for consideration of income and assets owned by a married couple where one member of the couple is receiving care in a nursing facility. Parts of this section are transferred to section 75-02-02.1-34.

75-02-02.1-25, Asset Considerations: Clarifies the requirements concerning the consideration of assets in determinations of eligibility in cases of married but separated persons, and children living with married but separated parents.

75-02-02.1-27, Exempt Assets: Clarifies assets which are exempted in considering asset limits.

75-02-02.1-28, Excluded Assets: Clarifies assets which are not treated as available in determining the application of asset limits. Requires that certain excluded assets not be commingled in nonexcluded assets.

75-02-02.1-29, Forms of Asset Ownership: Clarifies the powers of an owner of jointly held assets.

75-02-02.1-31, Trusts: Clarifies the treatment of trusts for Medicaid eligibility purposes.

75-02-02.1-32, Valuation of Assets: Clarifies the method of determining the value of contractual rights to receive money payments for Medicaid eligibility purposes.

75-02-02.1-33, Disqualifying Transfers: Clarifies the circumstances in which a transfer for less than adequate consideration can lead to the loss of Medicaid benefits for the transferor or the transferor's family.

75-02-02.1-34, Income Considerations: Clarifies the consideration of income in cases of married but separated persons, and children living with married but separated parents. Adds provisions formerly included in section 75-02-02.1-24.

75-02-02.1-35, Budgeting: Transferred to section 75-02-02.1-41.2.

75-02-02.1-36, Disregarded Income: Clarifies the types of income which are not counted in determining Medicaid eligibility. Some materials proposed for inclusion in this section were instead incorporated in new section 75-02-02.1-41.1.

75-02-02.1-37, Unearned Income: Clarifies special policies with respect to the consideration of certain nonrecurring unearned lump sum payments.

75-02-02.1-38, Earned Income: Clarifies special policies with respect to the earned income of certain self-employed persons.

75-02-02.1-39, Income Deductions: Clarifies amounts of income which are deducted in determining income available to meet medical needs. Some

materials proposed for inclusion in this section were instead incorporated in new section 75-02-02.1-41.1.

75-02-02.1-40, Income Levels: Clarifies the level of income below which no income is treated as being available to meet medical needs. Some materials previously included in this section were incorporated into new section 75-02-02.1-41.1.

75-02-02.1-41, Deeming of Income: Clarifies circumstances where income will be treated as being available to an applicant or recipient of Medicaid benefits.

75-02-02.1-41.1, Recipient Liability: Describes the process for determining that amount of an applicant's or recipient's income which is available to meet the applicant's or recipient's medical needs.

75-02-02.1-41.2, Budgeting: Describes the method of determining the amount of Medicaid benefits to which an individual or Medicaid unit may receive.

CHAPTER 75-02-02.1

75-02-02.1-01. Definitions. For the purposes of this chapter:

1. "Agency" means the North Dakota department of human services.

2. "Aid to families with dependent children" means ~~aid to families with dependent children,~~ a program administered under North Dakota Century Code chapter 50-09 and title IV-A of the Social Security Act [42 U.S.C. 601 et seq.].

3. "Asset" means any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.

4. "Blind" has the same meaning as the term has when used by the social security administration in the supplemental security income program.

5. "Child" means a person, under twenty-one, or, if blind or disabled, under age eighteen, who is not living independently.

6. "County agency" means the county social service board.

7. "Department" means the North Dakota department of human services.

8. "Disabled" has the same meaning as the term has when used by the social security administration in the supplemental security income program.

9. "Disabled adult child" means a disabled or blind person over the age of twenty-one who became blind or disabled before age twenty-two.

10. "Earned income" means income which is currently received as wages, salaries, commissions, or profits from activities in which an individual or family is engaged through either employment or self-employment. There must be an appreciable amount of personal involvement and effort, on the part of the individual or family, for income to be considered "earned".

11. "Full calendar month" means the period which begins at midnight on the last day of the previous month and ends at midnight on the last day of the month under consideration.

12. "Good faith effort to sell" means an honest effort to sell in a manner which is reasonably calculated to induce a willing buyer to believe that the property offered for sale is actually for sale at a fair price. A good faith effort to sell includes, at a minimum, making the offer at a stated minimum price equal to seventy-five percent of fair market value (sixty-six and two-thirds percent of fair market value with respect to determination of qualified disabled and working individual benefits under section ~~75-02-02.1-08~~ 75-02-02.1-23), in the following manner:

    a. To any coowner, joint owner, possessor, or occupier of the property, and, if no buyer is thereby secured~~.~~;

    b. To the regular market for such property, if any regular market exists, and, if no buyer is thereby secured~~.~~;

    c. By public advertisement for sale in a newspaper of general circulation, the circulation area of which includes the location of any property resource offered for sale, which advertisement was published successively for two weeks if the newspaper is a weekly publication and for one week if the newspaper is a daily publication, and which includes a plain and accurate description of the property and the name, address, and telephone number of a person who will answer inquiries and receive offers.

13. "Home" ~~means~~ includes, when used in the phrase "the home occupied by the ~~medical assistance~~ medicaid unit", the ~~residence occupied by the medical assistance unit, including the~~ land on which ~~it~~ the home is located, provided that the acreage [hectarage] does not exceed one hundred sixty contiguous acres [64.75 hectares] if rural or two acres [.81 hectares] if located within the established boundaries of a city.

14. "Institutionalized person" means a person who is an inpatient in a nursing facility ~~or a swing bed facility, or who receives~~

~~home or community-based services and with respect to whom there has been a determination that, but for the provision of home or community-based services, the person would require the level of care provided in a nursing facility~~, the state hospital, or the Anne Carlsen school-hospital, or who receives swing bed care in a hospital.

15. "Living independently" means, in ~~references~~ reference to a child under the age of twenty-one or, if blind or disabled, under the age of eighteen, a status which arises in any of the following circumstances:

    a. The applicant or recipient has served a tour of active duty with the armed services of the United States and lives separately and apart from the parent.

    b. The applicant or recipient has married, even though that marriage may have been dissolved or annulled in a court of law.

    c. The applicant or recipient has lived separately and apart from both parents for at least six consecutive months ~~prior to making application for medicaid benefits~~ after the date the applicant or recipient left a parental home, continues to live separately and apart from both parents, and has received no support or assistance from either parent ~~during that period~~ while living separately and apart. For purposes of this subdivision, periods when the applicant or recipient is attending an educational or training facility, receiving care in a specialized facility, or is an institutionalized person are deemed to be periods when the applicant or recipient was living with a parent~~, whether or not the place of abode during school terms was with either parent~~.

    d. Both parents from whom support could ordinarily be sought, and the property of such parents, is outside the jurisdiction of the courts of the United States or any of the United States.

16. "Medicaid" means a program implemented pursuant to North Dakota Century Code chapter 50-24.1 and 42 U.S.C. 1396 et seq. to furnish medical assistance, as defined in 42 U.S.C. 1396d(a), to persons determined eligible for medically necessary, covered medical, and remedial services.

17. "Medicaid unit" means an individual, a married couple, or a family with children under twenty-one years of age (or, with respect to a blind or disabled child, under eighteen years of age), whose income and assets are considered in determining eligibility for any member of that unit, without regard to whether the members of the unit all physically reside in the same location.

18. "Medicare cost sharing" means the following costs:

    a. (1) Medicare part A premiums; and

       (2) Medicare part B premiums;

    b. Medicare coinsurance;

    c. Medicare deductibles; and

    d. Twenty percent of the allowed cost for medicare covered services where medicare covers only eighty percent of the allowed costs.

19. "Occupied" means, when used in the phrase "the home occupied by the medicaid unit", the home the medicaid unit is living in or, if temporarily absent from, possessed with an intention to return and the capability of returning within a reasonable length of time. Property is not occupied if the right to occupy has been given up through a rental or lease agreement, whether or not that rental or lease agreement is written. Property is not occupied by an individual in long-term care or the state hospital, with no spouse, disabled adult child, or child under age twenty-one at home, unless a physician has certified that the individual is likely to return home within six months.

20. "Persons deemed to be receiving aid to families with dependent children" means those persons who are not receiving an aid to families with dependent children money payment, but who must be treated as recipients of such benefits because federal law or regulations so provides.

21. "Pre-need funeral service contract" has the same meaning provided for in subsection 2 of North Dakota Century Code section 43-10.1-01.

22. "Property which is essential to earning a livelihood" means property which the applicant or recipient owns, and which the applicant or recipient is actively engaged in using to earn income, and where the total benefit of such income is derived for the applicant or recipient's needs. An applicant or recipient is actively engaged in using the property of that individual contributes significant current personal labor in using the property for income-producing purposes. The payment of social security taxes on the income from such current personal labor is an indicator of the active use of the property. Property from which an applicant or recipient is merely receiving rental or lease income is not essential to earning a livelihood. <u>With respect to determination of qualified medicare beneficiary benefits under section 75-02-02.1-22, qualified disabled and working individual benefits under section 75-02-02.1-23, and benefits determined</u>

by applying section 75-02-02.1-24, concerning spousal impoverishment prevention, liquid assets may be included as property essential to earning a livelihood. The amount of a liquid asset used exclusively in a trade or business, which is essential to earning a livelihood, is limited to an amount reasonably necessary for the continuation of the business. Liquid assets may not otherwise be treated as property essential to earning a livelihood.

23. "Property which is not saleable without working an undue hardship" means property which the owner has made a good faith effort to sell which has produced no buyer willing to pay an amount equaling or exceeding seventy-five percent of the property's fair market value (sixty-six and two-thirds percent of the property's fair market value with respect to determination of qualified disabled and working individual benefits under section ~~75-02-02.1-08~~ 75-02-02.1-23), and which is continuously for sale. Property may not be included within this definition at any time earlier than the first day of the first month in which a good faith effort to sell is begun.

24. "Regulation", as used in 42 CFR 431.210, 431.244, and 435.912, includes any written statement of federal or state law or policy, including, but not limited to, federal and state constitutions, statutes, regulations, rules, policy manuals or directives, policy letters or instructions, and relevant controlling decisions of federal or state courts.

25. "Remedial services" means those services, provided in specialized facilities, which produce the maximum reduction of physical or mental disability and restoration of the facilities' residents to the residents' best possible level of functioning.

26. "Specialized facility" means a residential facility, including a basic care facility, a licensed family foster care home for children or adults, a licensed group foster care home for children or adults, a transitional living facility, a facility established to provide quarters to clients of a sheltered workshop, and any other facility determined by the department to be a provider of remedial services, but does not mean an acute care facility or a nursing facility.

~~26.~~ 27. "State agency" means the North Dakota department of human services.

~~27.~~ 28. "Supplemental security income" means ~~supplemental security income,~~ a program administered under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].

~~28.~~ 29. "The act" means the Social Security Act [42 U.S.C. 301 et seq.].

~~29.~~ 30. "Title II" means title II of the Social Security Act [42 U.S.C. 401 et seq.].

~~30.~~ 31. "Title IV-A" means title IV-A of the Social Security Act [42 U.S.C. 601 et seq.].

~~31.~~ 32. "Title IV-D" means title IV-D of the Social Security Act [42 U.S.C. 651 et seq.].

~~32.~~ 33. "Title IV-E" means title IV-E of the Social Security Act [42 U.S.C. 670 et seq.].

~~33.~~ 34. Title XVI" means title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].

~~34.~~ 35. "Unearned income" means income which is not earned income.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-02. Application and redetermination.

1. Application.

   a. All individuals wishing to make application for medicaid must have the opportunity to do so, without delay.

   b. An application is a written request made by a person desiring assistance under the medicaid program, or by a proper person seeking such assistance on behalf of another person, to a county social service board, a disproportionate share hospital, as defined in section 1923(a)(3)(A) of the Act [42 U.S.C. 1396r-4(a)(1)(A)], or a federally qualified health center, as described in section 1905(1)(2)(B) of the Act [42 U.S.C. 1396d(1)(2)(B)]. A proper person means any person of sufficient maturity and understanding to act responsibly on behalf of the applicant.

   c. An application must be in writing and signed on a prescribed application form.

   d. A prescribed application form must be signed by the applicant if the applicant is physically and mentally able to do so. An application made on behalf of an applicant adjudged incompetent by a court must be signed by the guardian.

e. Information concerning eligibility requirements, available services, and the rights and responsibilities of applicant and recipients must be furnished to all who require it.

f. A relative or other interested party may file an application in behalf of a deceased person to cover medical costs incurred prior to the deceased person's death.

g. The date of application is the date an application, signed by an appropriate person, is received at a county social service board office, a disproportionate share hospital, or a federally qualified health center.

2. **Redetermination.** A redetermination must be made within thirty days after a county agency has received information indicating a possible change in eligibility status, when a recipient enters a nursing facility, and in any event, no less than annually. A recipient or recipient's guardian has the same responsibility to furnish information during a redetermination as an applicant or an applicant's guardian has during an application.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-02.1. Applicant's or guardian's duty to establish eligibility. It is the responsibility of the applicant or guardian of the applicant for medicaid to provide information sufficient to establish the eligibility of each individual for whom assistance is requested, including, but not limited to, the furnishing of a social security number, and the establishment of age, identity, residence, citizenship, blindness, disability, and financial eligibility in each of the months in which medicaid benefits are sought.

History: Effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-05. **Covered groups.** Within the limits of legislative appropriation, four broad coverage groups are included under the medicaid program. Within each coverage group, one or more aid categories is established. These coverage groups do not define eligibility for medicaid benefits. Any person who is within a coverage group must also demonstrate that all other eligibility criteria are met.

1. Categorically needy groups include:

a. Persons who are receiving cash assistance payments through aid to families with dependent children.

b. Persons who are deemed to be recipients of aid to families with dependent children including:

   (1) Individuals denied an aid to families with dependent children payment solely because the amount would be less than ten dollars;

   (2) Individuals whose aid to families with dependent children payments are reduced to zero by reason of recovery of overpayment of aid to families with dependent children funds;

   (3) Families who were receiving aid to families with dependent children cash assistance payments in at least three of the six months immediately preceding the month in which they became ineligible as a result (wholly or partly) of the collection or increased collection of child or spousal support and are deemed to be recipients of aid to families with dependent children, and continue eligible for medicaid for four calendar months following the month for which the final cash payment was made;

   (4) Children for whom adoption assistance maintenance payments are made under title IV-E;

   (5) Children for whom foster care maintenance payments are made under title IV-E;

   (6) Children who are living in North Dakota and are receiving title IV-E adoption assistance payments from another state; and

   (7) Children in a foster care placement in North Dakota and receiving a title IV-E foster care payment from another state.

c. Families which received aid to families with dependent children payments in at least three of the six months immediately preceding the month in which the family became ineligible for aid to families with dependent children solely because of increased hours of, or income from, employment of the caretaker relative; or which became ineligible for aid to families with dependent children solely because a member of the family lost one of the time-limited aid to families with dependent children earned income disregards (the thirty dollar earned income disregard and the disregard of one-third of earned income).

d. Pregnant women whose pregnancy has been medically verified and who would be eligible for an aid to families with dependent children cash payment on the basis of the income and asset requirements of the state-approved aid to families with dependent children plan.

e. ~~Women who, while pregnant, apply for and are found eligible for medicaid,~~ Eligible pregnant women who applied for medicaid during pregnancy continue to be eligible, as though they were pregnant, for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

f. Children born to eligible pregnant women who have applied for and been found eligible for medicaid on or before the day of the child's birth, ~~with respect to~~ for sixty days after the day of the child's birth and for the remaining days of the month in which the sixtieth day falls.

g. Aged, blind, or disabled individuals who are receiving supplemental security income payments or who appear on the state data exchange as zero payment as a result of supplemental security income's recovery of an overpayment or who are suspended because the individuals do not have a protective payee, provided that the more restrictive medicaid criteria is met.

h. Individuals who meet the more restrictive requirements of the medicaid program and qualify for supplemental security income benefits under section 1619(a) or 1619(b) of the Act [42 U.S.C. 1382h(a) or 1382h(b)].

i. Essential spouses of, or persons essential to, individuals who received benefits, in December 1973 under the state's approved plan for title XVI of the Social Security Act (repealed), who were grandfathered into the supplemental security income program and who have continuously received benefits under the supplemental security income program and the medicaid program since the inception of the supplemental security income program, but only if the essential spouse of, or person essential to, the individual continues to reside with the individual.

2. Optional categorically needy groups include:

a. All individuals under age twenty-one who are not receiving aid to families with dependent children, but whose income and assets are at or below the aid to families with dependent children program limits.

b. All individuals under age twenty-one who are residing in adoptive homes and who have been determined under the state-subsidized adoption program to be eligible as

provided in state law and in accordance with the requirements of the department.

c. All individuals under age twenty-one who qualify on the basis of financial eligibility for medicaid and who are residing in foster homes or private child care institutions licensed or approved by the department, irrespective of financial arrangements, including children in a "free" foster home placement.

3. Medically needy groups include:

a. Eligible caretaker relatives and individuals under age twenty-one in aid to families with dependent children families who do not meet financial or certain technical aid to families with dependent children requirements (i.e., work requirements) for a cash payment, but meet medically needy income and asset standards.

b. All individuals under the age of twenty-one who qualify for and require medical services on the basis of insufficient income and assets, but who do not qualify as categorically needy, including children in stepparent families who are ineligible for aid to families with dependent children or children in non-IV-E foster care.

c. Pregnant women whose pregnancy has been medically verified and who, except for income and assets, would be eligible as categorically needy.

d. Pregnant women whose pregnancy has been medically verified and who qualify on the basis of financial eligibility.

e. Eligible pregnant women who applied for medicaid during ~~their pregnancies~~ pregnancy, and for whom recipient liability for the month was met no later than on the date ~~the~~ each pregnancy ends, continue to be eligible, as though ~~they were~~ pregnant, for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

f. Aged, blind, or disabled individuals who would be eligible for supplemental security income benefits or certain state supplemental payments, but who have not applied for cash assistance or have sufficient income or assets to meet their maintenance needs.

g. Individuals under age twenty-one (who have been certified as needing the service) or age sixty-five and over in the state hospital who qualify on the basis of financial eligibility.

4. Poverty level groups include:

a. Pregnant women whose pregnancy has been medically verified and who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level.

b. Eligible pregnant women who applied for medicaid during their pregnancy who continue to be eligible for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

c. Children under the age of six who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level.

d. Children, age six or older, born after September 30, 1983, who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred percent of the poverty level.

e. Qualified medicare beneficiaries are aged, blind, or disabled individuals who are entitled to medicare part A benefits, meet the medically needy nonfinancial criteria, have assets no greater than twice the supplemental security income resource standards, and have income at or below one hundred percent of the poverty level.

f. Qualified disabled and working individuals are individuals entitled to enroll in medicare part A under section 1818a of the Social Security Act [42 U.S.C. 1395i-2(a)], have income no greater than two hundred percent of the federal poverty level, have assets no greater than twice the supplemental security income resource standard, and are not eligible for medicaid under any other provision. The supplemental security income program income and asset methodologies must be used and none of the more restrictive 209b criteria may be applied.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-06. Applicant's choice of aid category ~~or coverage group~~. A person who could establish eligibility under more than one aid category ~~or coverage group~~ may have eligibility determined under the aid category ~~or coverage group~~ the person selects. Except with respect to qualified medicare beneficiaries, who may also establish eligibility as ~~categorically needy or medically needy~~ aged, blind, or disabled, a person may establish eligibility under only one aid category ~~and only one coverage group~~.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-07. Applicant's duty to establish eligibility. ~~It is the responsibility of the applicant for medicaid to establish the eligibility of each individual for whom assistance is requested, including, but not limited to, the furnishing of a social security number, and the establishment of age, identity, residence, citizenship, blindness, disability, and financial eligibility in each of the months in which medicaid benefits are sought.~~ Repealed effective December 1, 1991.

History: ~~Effective December 1, 1991.~~
General Authority: ~~NDCC 50-06-16, 50-24.1-04~~
Law Implemented: ~~NDCC 50-24.1-01~~

75-02-02.1-08. Selecting medicaid unit members. An applicant or recipient who is also a caretaker of children under ~~twenty-two~~ twenty-one years of age may select the children who will be included in the medicaid unit. Anyone whose needs are included in the unit for any month is subject to all medicaid requirements which may affect the unit. The financial responsibility of relatives must be considered with respect to all members of the assistance unit.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-09. Assignment of rights to recover medical costs.

1. The applicant and each individual for whom assistance is requested must, as a condition of eligibility, execute all necessary documents to protect his or the agency's rights to payment from any third party or private insurer, including, but not limited to, the execution of assignments provided for under North Dakota Century Code sections 50-24.1-02 and 50-24.1-02.1, for medical care and services included under this plan, the need for which arises out of injury, disease, or disability of the applicant or recipient for medicaid; assign rights to medical support from any absent parent when a child is deprived of parental support or care due to the absence of one or both parents; and cooperate with the department and county agency in obtaining payment and medical support and establishing paternity of a child in the medicaid unit with respect to whom paternity has not been established. The requirement for the assignment of rights to medical support from absent parents continues through the month in

which the ~~child reaches the age of nineteen years or completes high school (or its equivalent), whichever comes first.~~ latest of the following occurs:

a. The child reaches age eighteen.

b. The child graduates from high school, provided that graduation does not occur after the month of the child's nineteenth birthday.

c. Child support obligations, imposed by a court for periods after the child reaches age eighteen, are terminated.

2. For purposes of this section:

a. "Cooperate in obtaining payment and medical support" includes:

(1) Appearing at a state or local office designated by the department or county agency to provide information or evidence relevant to the case;

(2) Appearing as a witness at a court or other proceeding;

(3) Providing information, or attesting to lack of information, under penalty of perjury;

(4) Paying to the department any support or medical care funds received that are covered by the assignment of rights; and

(5) Taking any other reasonable steps to assist in establishing paternity and securing medical support and payments.

b. "Deprived of parental support or care due to the absence of one or both parents" means a situation which occurs when all of the following factors are present:

(1) The parent is physically absent from the home;

(2) The nature of the parent's absence is such as to interrupt or terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and

(3) The known or indefinite duration of the absence precludes relying on the parent to perform the parent's functions in planning for the present support or care of the child.

c. "Private insurer" includes any commercial insurance company offering health or casualty insurance to individuals or groups, including both experience-related insurance contract and indemnity contracts; any profit or nonprofit prepaid plan offering either medical services or full or partial payment for services covered by the medicaid program; and any organization administering health or casualty insurance plans for professional associations, employer-employee benefit plans, or any similar organization offering these payments or services, including self-insured and self-funded plans.

d. "Third party" means any individual, entity, or program that is or may be liable to pay all or a part of the expenditures for services furnished under medicaid, including a parent or other person who owes a duty to provide medical support to or on behalf of a child for whom medicaid benefits are sought.

3. The department or the county agency may take any action or impose any requirement upon an applicant or recipient as may be reasonably necessary to determine the liability of third parties and private insurers. Any action which may be taken, and any requirement which may be imposed under 42 CFR 433.138, as necessary to determine such liability, may be required of an applicant or recipient as a condition of eligibility.

4. The assignment of rights to benefits, except medical support benefits, is automatic under North Dakota Century Code section 50-24.1-02.1. However, as a condition of eligibility, the applicant or recipient may be required to execute a written assignment whenever appropriate to facilitate establishment of liability of a third party or private insurer.

5. An individual must cooperate in establishing paternity of a child born out of wedlock for whom he or she can legally assign rights, and obtaining medical ~~care~~ support and payments for himself, herself, and any other individual for whom he or she can legally assign rights, unless:

   a. The individual is a pregnant woman whose pregnancy has been medically verified ~~and who meets the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred and thirty-three percent of the poverty level~~;

   b. The individual ~~is~~ was an eligible pregnant woman who applied for medicaid during her pregnancy who continues to be eligible for sixty days after her pregnancy ends, and for the remaining days of the month in which the sixtieth day falls; or

   c. Cooperation is waived by the county agency for good cause.

6. The county agency may waive the requirements of subsection 5 for good cause if it determines that cooperation is against the best interests of the child. A county agency may determine that cooperation required under subsection 5 is against the best interests of the child only if:

   a. The applicant's or recipient's cooperation in establishing paternity or securing medical support is reasonably anticipated to result in:

      (1) Physical harm to the child for whom support is to be sought;

      (2) Emotional harm to the child for whom support is to be sought;

      (3) Physical harm to the parent or caretaker relative with whom the child is living which reduces such person's capacity to care for the child adequately;

      (4) Emotional harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it reduces such person's capacity to care for the child adequately; or

   b. At least one of the following circumstances exists, and the county agency believes that because of the existence of that circumstance, in the particular case, proceeding to establish paternity or secure medical support would be detrimental to the child for whom support would be sought.

      (1) The child for whom support is sought was conceived as a result of incest or forcible rape;

      (2) Legal proceedings for the adoption of the child are pending before a court of competent jurisdiction; or

      (3) The applicant or recipient is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep or relinquish the child for adoption, and the discussions have not gone on for more than three months.

7. Physical harm and emotional harm must be of a serious nature in order to justify a waiver under subsection 6.

8. A waiver under subsection 6 due to emotional harm may only be based on a demonstration of an emotional impairment that substantially impairs the individual's functioning. In determining a waiver under subsection 6, based in whole or in part upon the anticipation of emotional harm to the child, the

parent, or the caretaker relative, the county agency must consider:

a. The present emotional state of the individual subject to emotional harm;

b. The emotional health history of the individual subject to emotional harm;

c. Intensity and probable duration of the emotional impairment;

d. The degree of cooperation to be required; and

e. The extent of involvement of the child in the paternity establishment or support enforcement activity to be undertaken.

9. A determination to grant a waiver under subsection 6 must be reviewed no less frequently than every six months to determine if the circumstances which led to the waiver continue to exist.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-10. Eligibility - Current and retroactive.

1. Except for qualified medicare beneficiaries, current eligibility may be established from the first day of the month in which the application was received, and for periods after that day until a redetermination is required, based upon information in the completed application and any necessary verification.

2. Except for qualified medicare beneficiaries, retroactive eligibility may be established for as many as three calendar months prior to the month in which the application was received, if eligibility can be established in each of those months for which benefits are sought and all factors of eligibility are met during each month of retroactive benefits sought, except that the assets which would have been allowed for an ineligible community spouse are not treated as exceeding the asset limit of an institutionalized spouse. If a previous application has been taken and denied in the same month, eligibility for that entire month may be established based on the current application. Retroactive eligibility may be established even if there is no eligibility in the month of application.

3. An applicant or recipient determined eligible for part of a month is eligible for the entire calendar month unless a specific factor prevents eligibility during part of that month. Examples of specific factors include:

   a. An applicant is born in the month, in which case the date of birth is the first date of eligibility;

   b. An individual enters the state, in which case the date of entry is the first date of eligibility unless the individual was receiving medicaid benefits from another state, in which case the later of the date of entry or the day after the last day of eligibility under the other state's medicaid program is the first date of eligibility; and

   c. An individual is discharged from a public institution, in which case the date of eligibility is the date of discharge.

4. Eligibility for qualified medicare beneficiaries begins in the month following the month in which the eligibility determination is made.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-13. Social security numbers. A social security number must be furnished as a condition of eligibility, for each individual for whom medicaid benefits are sought, except:

1. A newborn child for the first sixty days after the date of birth; ~~and~~

2. With respect to emergency benefits provided to aliens who are not lawfully admitted~~.~~; and

3. For individuals who have applied for, but not yet received, social security numbers.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-14. Blindness and disability.

1. In any instance in which a determination is to be made as to whether any individual is disabled, each medical report form

and social history will be reviewed by technically competent persons, not less than a physician and a social worker qualified by professional training and pertinent experience, acting cooperatively, who are responsible for the department's decision that the applicant does or does not meet the appropriate definitions of disability.

2. In any instance in which a determination is to be made whether an individual is blind, there will be an examination by a physician skilled in the diseases of the eye, or by an optometrist, whichever the individual may select. Each eye examination report will be reviewed by the state supervising ophthalmologist who is responsible for comparing that report with the state's definition of blindness and for determining:

   a. Whether the individual meets the definition of blindness; and

   b. Whether and when reexaminations are necessary for periodic redeterminations of eligibility.

3. The agency shall decline to determine blindness or disability when such a determination is made pursuant to the processing of a supplemental security income benefit application or an old-age and survivors' insurance benefit payments application by the social security administration, or its contractee, for that purpose.

4. The agency may not make an independent determination of disability if the social security administration has made a disability determination or will make a disability determination within ninety days after the date of application.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 CFR Part 435

75-02-02.1-15. Incapacity of a parent.

1. A child, if otherwise eligible for medicaid benefits, is "deprived of parental support or care" when the child's parent has a physical or mental defect which ~~significantly interferes with~~ is of such a debilitating nature as to reduce substantially or eliminate his or her capacity to earn a livelihood (breadwinner) or to discharge his or her responsibilities as a homemaker and provider of child care (homemaker) for a period of thirty days or more.

2. If the incapacitated parent is a breadwinner, the incapacity must be such that it reduces substantially ~~precludes~~ or

eliminates employment in his or her usual occupation or another occupation to which he or she may be able to adapt. The fact that a breadwinner may have to change occupation or work location does not establish incapacity. A breadwinner may establish incapacity by demonstrating that he or she has reached age sixty-five.

3. If the incapacitated parent is a homemaker, the incapacity must be such that it reduces substantially ~~precludes~~ or eliminates the performance of usual homemaking tasks and the furnishing of necessary care to children.

4. ~~If, prior to onset of the incapacitating condition, a parent was gainfully employed, was usually engaged in that employment for one hundred or more hours per month, the parent is regarded as a breadwinner. Any parent not regarded as a breadwinner is regarded as a homemaker.~~

~~5.~~ A determination that a parent is disabled or blind, made by the social security administration, constitutes adequate substantiation of incapacity for purposes of this section.

~~6.~~ 5. A parent continues to be incapacitated, for purposes of this section, if the incapacity is not reasonably subject to remediation, or if the parent makes reasonable progress towards remediation of the incapacity. For purposes of this section, "reasonable progress towards remediation of the incapacity" means:

a. In the case of an incapacitated homemaker, cooperation with medical practitioners who prescribe a course of treatment intended to remediate or limit the effect of the incapacity, including, but not limited to, physical therapy, counseling, use of prosthesis, drug therapy and weight loss; and

b. In the case of an incapacitated breadwinner, cooperation which is required of an incapacitated homemaker, cooperation with vocational practitioners, cooperation with vocational and functional capacity evaluations and reasonable progress in a course of training or education intended to qualify the parent to perform an occupation which, with that training or education, the parent would have the capacity to perform.

~~7.~~ 6. A parent who engages in activities which are inconsistent with the claimed incapacity may be determined to not be incapacitated based upon those activities.

~~8.~~ 7. The department may require a parent to demonstrate reasonable progress towards remediation of the incapacity, and may set reasonable deadlines for such demonstrations.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-16. State of residence. A resident of the state is a person who is living in the state voluntarily and not for a temporary purpose. Temporary absences from the state with subsequent returns to the state, or intent to return when the purpose of the absence has been accomplished, do not interrupt continuity of residence. Residence is retained until abandoned or established in another state.

1. For persons entering the state, the earliest date of eligibility is the date of entry. Residence may not be established for persons who are receiving medicaid benefits from another state.

2. Individuals under age twenty-one.

   a. For any individual under age twenty-one who is living independently from his or her parents or who is married and capable of indicating intent, the state of residence is the state where the individual is living with the intention to remain there permanently or for an indefinite period.

   b. For any individual who is receiving foster care or adoption assistance payments, under title IV-E, from another state and ~~are~~ is living in North Dakota, North Dakota is the state of residence for medicaid purposes.

   c. For any individual under age twenty-one not residing in an institution, whose medicaid eligibility is based on blindness or disability, the state of residence is the state in which the individual is living.

   d. For any other noninstitutionalized individual under age twenty-one, the state of residence is determined by the rules governing residence under the aid to families with dependent children program.

   e. For any institutionalized individual, under age twenty-one, who is neither married nor living independently, residence is that of the parents or legal guardian at the time of placement. Only if the parental rights have been terminated, and a guardian or custodian appointed, may the residence of the guardian or custodian be used. If the individual has been abandoned by his or her parents and does not have a guardian, the individual is a resident of the state in which he or she lives.

3. Individuals age twenty-one and over:

a. For any individual not residing in an institution, the state of residence is the state where the individual is living with the intention to remain there permanently or for an indefinite period or is entering the state with a job commitment or seeking employment.

b. Institutionalized individuals age twenty-one and older.

(1) Except as provided in paragraph 2, the state of residence is the state where the individual is living with the intention to remain there permanently or for an indefinite period.

(2) For an institutionalized individual who became incapable of indicating intent before age twenty-one, the state of residence is that of the parent or guardian making application, at the time of placement or, if the individual is institutionalized in that state, at the time of application. If the individual has no guardian, the application is not made by either parent, and the placement was not made by another state, the state of residence is the state in which the individual is physically present.

4. Terms used in this subsection have the meaning given in subsection 3 of section 75-02-02.1-19 and, for purposes of this subsection, a "person incapable of indicating intent" means one who:

a. Has an intelligence quotient of forty-nine or less, or a mental age of seven or less, based upon tests acceptable to the division of mental health of the department of human services;

b. Has been found by a court of competent jurisdiction to be an incapacitated person as defined in subsection 1 of North Dakota Century Code section 30.1-20-01;

c. Has been found by a court of competent jurisdiction to be legally incompetent; or

d. Is found incapable of indicating intent based on medical documentation obtained from a physician or surgeon, clinical psychologist, or other person licensed by the state in the field of mental retardation.

5. Notwithstanding any other provision of this section except subsections 6 through 9, individuals placed in out-of-state institutions by a state retain residence in that state regardless of the individual's indicated intent or ability to indicate intent. The application of this subsection ends when a person capable of indicating intent leaves an institution in which the person was placed by this state. Providing

information about another state's medicaid program or about the availability of health care services and facilities in another state, or assisting an individual in locating an institution in another state, does not constitute a state placement.

6. For any individual receiving a state supplemental payment, the state of residence is the state making the payment.

7. For any individual on whose behalf payments for regular foster care or state adoption assistance are made, the state of residence is the state making the payment.

8. If an interstate reciprocal residency agreement has been entered into between this state and another state pursuant to 42 CFR 435.403(k), the state of residence of an affected individual is the state determined under that agreement.

9. When two or more states cannot agree which state is the individual's state of residence, the state of residence is the state in which the individual is physically present.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 CFR Part 435

75-02-02.1-18. Coverage for aliens. ~~An alien is eligible for medicaid:~~

1. ~~If~~ Aliens lawfully admitted for permanent residence. An alien who is lawfully admitted for permanent residence~~,~~ ~~or~~ under color of law is eligible for medicaid if all other requirements for eligibility are met.

~~2. If all of the following conditions are met:~~

~~a. The alien is not lawfully admitted;~~

2. Aliens lawfully admitted for a temporary or specific period. An alien may be lawfully admitted for a temporary or specific period of time. Such aliens are not eligible for medicaid because they do not meet the requirement that residence be permanent. Examples include aliens with student visas, visitors, tourists, some workers, and diplomats.

3. Aliens not lawfully admitted. Aliens not lawfully admitted for permanent residence are eligible for emergency services if, and only if:

~~b.~~ a. The alien has a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms

of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in:

(1) Placing health in serious jeopardy;

(2) Serious impairment to bodily functions; or

(3) Serious dysfunction of any bodily organ or part; and

b. The alien's need for emergency service continues.

~~c.~~ 4. The alien who meets the medical criteria in subdivision ~~b~~ a of subsection 3 must also meet all other eligibility requirements for medicaid except the requirements concerning furnishing social security numbers and verification of alien status~~,~~ ~~and~~. Eligibility for medicaid ends when the emergency service has been provided.

~~d. The alien's need for the emergency service continues.~~

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-20. Extended medicaid benefits to certain ~~former recipients~~ families who cease receipt of aid to families with dependent children benefits. ~~Former recipients~~ Families who cease receipt of aid to families with dependent children benefits, and who continue to cooperate in obtaining payment and medical support, continue to be eligible for medicaid benefits without making further application for medicaid benefits in certain circumstances.

1. In the case of ~~former recipients of aid to~~ families ~~with dependent children benefits~~ who received aid to families with dependent children benefits in at least three of the six-month immediately preceding the month in which the ~~former recipients~~ family became ineligible solely because of the hours of, or income from, employment of the caretaker relative in the ~~aid to families with dependent children~~ family unit; or because a member of the ~~aid to families with dependent children~~ family unit loses the aid to families with dependent children disregard of thirty dollars of earned income; or the aid to families with dependent children disregard of one-third of earned income, medicaid benefits may continue for up to twelve months if:

a. In the first six-month period, the caretaker relative:

(1) Has a dependent child living in the home; and

(2) Remains a resident of the state; or

b. In the second six-month period, the caretaker relative:

(1) Has a dependent child living in the home;

(2) Remains a resident of the state;

(3) Remains employed (in cases where aid to families with dependent children ineligibility resulted from increases in hours of, or income from, employment of the caretaker relative); and

(4) Has gross earned income, less child care expenses the caretaker relative is responsible for, which, in either of the three month periods consisting of the fourth, fifth, and sixth months or the seventh, eighth, and ninth months, when totaled and divided by three, do not exceed one hundred and eighty-five percent of the poverty level.

2. A recipient who seeks eligibility under subsection 1 of this section must report and verify income and child care expenses for the fourth, fifth, and sixth months by the twenty-first day of the seventh month, and for the seventh, eighth, and ninth months by the twenty-first day of the tenth month. Failure to report income ~~and child care expenses~~ in the seventh month and the tenth month, or receipt of income in excess of one hundred and eighty-five percent of the poverty level, causes ineligibility effective on the last day, respectively, of the seventh month or the tenth month. ~~No ten day advance notice of closing need be furnished if a case is ineligible due to this subsection; however, a notice of closing must be sent before the effective date of the closing.~~

3. In the case of ~~former recipients of aid to families with dependent children benefits~~ families who received aid to families with dependent children benefits in at least three of the six months immediately preceding the month in which the ~~former recipients become~~ family becomes ineligible solely or partly as a result of the collection or increased collection of child or spousal support, medicaid benefits may continue for four calendar months following the month for which the final aid to families with dependent children benefit was paid if the caretaker relative:

a. Has a dependent child living in the home; and

b. Remains a resident of the state.

4. A ~~former recipient of aid to families with dependent children benefits, who~~ family which seeks to demonstrate the receipt of aid to families with dependent children benefits in at least

three of the six months immediately preceding the month in which the former aid to families with dependent children recipient became ineligible, must have been receiving aid to families with dependent children benefits in this state in the month immediately preceding the month in which the ~~former aid to families with dependent children recipient~~ family became ineligible.

5. Benefits provided under this section may not be continued after the described period of eligibility even if the decision to close the case is appealed.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-21. Continuous eligibility for pregnant women and newborns. Notwithstanding the coverage group, if a pregnant woman, whose pregnancy has been medically verified, becomes eligible for medicaid, she continues eligible, without regard to any increase in income of the medicaid unit, for sixty days after the day her pregnancy ends, and for the remaining days of the month in which the sixtieth day fell. A child born to a woman who is eligible on the day of the child's birth is eligible and continues to be eligible for medicaid, without regard to the child's income or assets, for sixty days after the day of birth, and for the remaining days of the month in which the sixtieth day fell.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-22. Eligibility of qualified medicare beneficiaries.

1. Qualified medicare beneficiaries are entitled only to medicare cost sharing benefits described in subsection 18 of section 75-02-02.1-01.

2. Asset limits. The following asset limits apply to qualified medicare beneficiaries eligibility determinations. No person may be found to be a qualified medicare beneficiary unless the total value of all assets, not described in subsection 4, does not exceed:

   a. Four thousand dollars for a one-person unit; or

   b. Six thousand dollars for a two-person unit.

3. Provision of this chapter governing asset considerations (75-02-02.1-25), valuation of assets (75-02-02.1-32), and forms of asset ownership (75-02-02.1-29) apply to qualified medicare beneficiary eligibility determinations except:

   a. Half of a liquid asset held in common with another qualified medicare beneficiary is presumed available;

   b. Assets owned by a child, under age twenty-one, in the unit are not considered available in determining qualified medicare beneficiary eligibility for the child's parent, except that all liquid assets held in common by the child and the parent are considered available to the parent; and

   c. Assets owned by a spouse who is not residing with an applicant for or recipient of qualified medicare beneficiary benefits are not considered available in determining qualified medicare beneficiary eligibility unless they are liquid assets held in common.

4. Excluded assets for purposes of this section:

   a. The assets described in subsections 2 through 5 of section 75-02-02.1-27 and a residence occupied by the person, the person's spouse, or the person's dependent relative are excluded. Terms used in this section have the following meanings:

      (1) "Residence" includes all contiguous lands, including mineral interests, upon which it is located. The residence may include a mobile home suitable for use, and being used, as a principal place of residence. Rural property contiguous to the residence is excluded, even if rented or leased to a third party. The residence is excluded during the temporary institutionalization or other absence of the individual from the residence, so long as the individual intends to return. However, a six-month absence due to institutionalization ends the exclusion.

      (2) "Relative" means a child, stepchild, grandchild, parent, stepparent, grandparent, aunt, uncle, niece, nephew, brother, sister, stepbrother, stepsister, half brother, half sister, first cousin, or in-law.

      (3) "Dependency" includes financial, medical, and other forms of dependency. Financial dependency exists with respect to someone whom a taxpayer is able to claim a deduction on a federal income tax return.

b. Property which is excluded under subsections 1, 2, and 4 through ~~9~~ 10 of section 75-02-02.1-28 is excluded for purposes of this section.

c. Burial funds of up to one thousand five hundred dollars each, plus earnings on excluded funds in and after the month of application, held for the individual and for the individual's spouse are excluded. Burial funds may consist of revocable burial contracts; revocable burial trusts; other revocable burial arrangements, including the value of installment sales contracts for burial spaces; cash; financial accounts such as savings or checking accounts; or other financial instruments with a definite cash value, such as stocks, bonds, and certificates of deposit. The fund must be unencumbered and available for conversion to cash on very short notice. The fund may not be commingled with nonburial-related assets and must be identified as a burial fund by title of account or a signed statement. Burial insurance, irrevocable trusts, or any other irrevocable arrangement for burial must be considered at face value for meeting the burial fund exclusion. Combined face value of an individual's life insurance policies with a total face value of one thousand five hundred dollars or less must be considered toward this exclusion. Cash ~~values~~ surrender value of an individual's life insurance with a total face value in excess of one thousand five hundred dollars may be applied towards the burial fund exclusion.

d. A burial space or agreement which represents the purchase of a burial space held for the individual, the individual's spouse, or any other member of the individual's immediate family is excluded. The burial space exclusion is in addition to the burial fund exclusion set forth in subdivision c. Only one item intended to serve a particular burial purpose, per individual, may be excluded. For purposes of this subdivision:

(1) "Burial space" means a burial plot, granite, crypt, or mausoleum; a casket, urn, niche, or other repository customarily and traditionally used for a deceased's bodily remains; a vault or burial container; a headstone, marker, or plaque; and prepaid arrangements for the opening and closing of the gravesite or for care and maintenance of the gravesite.

(2) "Held for" means the individual currently has title to or possesses a burial space intended for the individual's use or has a contract with a funeral service company for specified burial spaces for the individual's burial, such as an agreement which

represents the individual's current right to use of the items at the amount shown; but does not mean any arrangement where the individual does not currently own the space, or does not currently have the right to use the space, or where the seller is not currently obligated to provide the space.

(3) "Other member of the individual's immediate family" means the individual's parents, minor or adult children, siblings, and the spouses of those persons, whether the relationship is established by birth, adoption, or marriage, except that a relationship established by marriage ends if the marriage ends.

e. At the option of individual, and in lieu of (but not in addition to), the burial fund described in subdivision c and the burial space or agreement described in subdivision d, any prepayments or deposits which total three thousand dollars or less, and the interest accrued thereon after July 1, 1987, made under a pre-need funeral service contract. The individual must verify that the deposit is made in a manner such that the individual may obtain the deposit within five days after making a request directly to the financial institution, and without furnishing documents maintained by the funeral establishment or waiting for the financial establishment to secure permission from the funeral establishment.

f. Property essential to self-support is excluded.

(1) "Property essential to self-support" means:

(a) Property which the applicant or recipient owns, up to an equity value of six thousand dollars, which produces annual income at least equal to six percent of the excluded amount, and with respect to which the applicant or recipient is not actively engaged in using to produce income. Two or more properties may be excluded if each such property produces at least a six percent return and the combined equity value does not exceed six thousand dollars. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars and is a countable asset if it produces an annual return of less than six percent of equity. The property must be in current use, or, if not in current use, there must be a reasonable expectation that the use will resume, and the annual return test will be met within twelve months of the last use or, if the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last

use. If the property produces less than a six percent return, the property may nonetheless be excluded, for a period of no more than twenty-four months, beginning with the first day of the tax year following the one in which the return dropped below six percent, only if the lower return is for reasons beyond the control of the applicant or recipient and there is a reasonable expectation that the property will again produce a six percent return.

(b) Nonbusiness property which the applicant or recipient owns, up to an equity value of six thousand dollars, when used to produce goods or services essential to daily activities, or, for instance, when used to grow produce or livestock solely for consumption in the individual's ~~households~~ household. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars. The property must be in current use or, if not in current use, the asset must have been in such use and there must be a reasonable expectation that the use will resume within twelve months of the last use or, if the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last use.

~~(2) Two or more properties of the type described in subparagraph a of paragraph 1 may be excluded if each such property produces at least a six percent return and if the combined equity value of such properties does not exceed six thousand dollars.~~

~~(3) Equity in property of the type described in subparagraph a of paragraph 1 is a countable asset to the extent that equity exceeds six thousand dollars and is a countable asset if it produces an annual return of less than six percent of equity.~~

~~(4) Equity in property of the type described in subparagraph b of paragraph 1 is a countable asset to the extent that equity exceeds six thousand dollars.~~

~~(5) Assets excluded under this subdivision must be in current use in the type of activity described; or, if not in current use, the assets must have been in such use and there must be a reasonable expectation that the use will resume, and, with respect to property of the type described in subparagraph a of paragraph 1, the annual return test will be met:~~

~~(a) Within twelve months of the last use; or~~

~~(b) If the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last use.~~

~~(6)~~ (2) Liquid assets are not property essential to self-support ~~except when used as part of a trade or business~~.

~~f.~~ g. Lump sum payments of title II or supplemental security income benefits for six consecutive months following the month of receipt.

~~g.~~ h. Real property, the sale of which would cause undue hardship to a coowner, is excluded for so long as the coowner uses the property as a principal residence, would have to move if the property were sold, and has no other readily available housing.

~~h.~~ i. Life insurance that generates a cash surrender value if the face value of all such life insurance policies on the life of that person total one thousand five hundred dollars or less.

~~i.~~ j. Assets set aside, by a blind or disabled (but not an aged) ~~person~~ supplemental security income recipient, as a part of a plan to achieve self-support which has been approved~~, if the person is a supplemental security income recipient, or would be approved, if the person were a supplemental security income recipient,~~ by the secretary of the United States department of health and human services are excluded.

k. The value of assistance, paid with respect to a dwelling unit occupied by the applicant or recipient, or by the applicant's or recipient's spouse, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].

l. For the nine-month period beginning with the month in which received, any amount received by the applicant or recipient, or the applicant's or recipient's spouse, from a fund established by a state to aid victims of crime, to the extent that the applicant or recipient, or the applicant's or recipient's spouse, demonstrates that such amount was paid in compensation for expenses incurred or losses suffered as a result of a crime.

m. For the nine-month period beginning after the month in which received, relocation assistance provided by a state

or local government to an applicant or recipient, or to the applicant's or recipient's spouse, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.] which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636].

n. For the month of receipt and the following month, any refund of federal income taxes made to an applicant or recipient, or to the applicant's or recipient's spouse, by reason of section 32 of the Internal Revenue Code of 1986 (relating to earned income tax credit) and any payment made to an applicant or recipient, or to the applicant's or recipient's spouse, by an employer under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income credit).

5. Assets excluded under subsection 4 must be identifiable to be excluded:

6. a. Income ~~calculation~~ calculations to determine qualified medicare beneficiary eligibility must consider income in the manner provided for in section 75-02-02.1-34, income considerations; section 75-02-02.1-36, disregarded income; section 75-02-02.1-37, unearned income; section 75-02-02.1-38, earned income; and section 75-02-02.1-39, income deductions; except:

(1) ~~Supplemental security income lump sum payments are not treated as income in the six months following the months in which the benefit is received.~~

~~(2)~~ Married individuals living separate and apart from a spouse are treated as single individuals.

(2) Income disregards under subsection 1 of section 75-02-02.1-36 are available even if the person resides in a nursing facility, the state hospital, or the Anne Carlsen school-hospital.

(3) The deductions described in subdivisions a, b, d, and h of subsection 1 of section 75-02-02.1-39, income deductions, are not allowed.

(4) The deductions described in subdivision i of subsection 1 and subdivision e of subsection 2 of section 75-02-02.1-39, income deductions, are allowed even if the person receives swing bed care in a hospital or resides in a nursing facility, the state hospital, or the Anne Carlsen school-hospital.

(5) The deduction described in subdivision f of subsection 2 of section 75-01-02.1-39, income deductions, is not allowed.

(6) Where a blind or disabled (but not an aged) supplemental security income recipient has a plan for achieving self-support which has been approved by the secretary of the United States department of health and human services, amounts of income necessary to and actually contributed to the plan are deducted.

b. A qualified medicare beneficiary applicant is eligible if countable income is equal to or less than one hundred percent of the official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2), applicable to a family of the size involved, and if he or she meets all of the requirements described in this section~~, but is otherwise ineligible~~.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-23. Eligibility of qualified disabled and working individuals.

1. Qualified disabled and working individuals are entitled only to medicare cost-sharing benefits described in paragraph 1 of subdivision a of subsection 18 of section 75-02-02.1-01.

2. Asset limits. The following asset limits apply to qualified disabled and working individual eligibility determinations. No person may be found to be a qualified disabled and working individual unless the total value of all assets not described in subsection 4 does not exceed:

   a. Four thousand dollars for a one-person unit; or

   b. Six thousand dollars for a two-person unit.

3. Provisions of this chapter governing asset considerations (75-02-02.1-25), valuation of assets (75-02-02.1-32), and forms of asset ownership (75-02-02.1-29) apply to qualified disabled and working individual eligibility determinations except:

   a. Half of a liquid asset held in common with another qualified disabled and working individual is presumed available;

b. Assets owned by a child, under age twenty-one, in the unit are not considered available in determining qualified disabled and working individual eligibility for the child's parent except that all liquid assets held in common by the child and the parent are considered available to the parent; and

c. Assets owned by a spouse who is not residing with an applicant for or recipient of qualified disabled and working individual benefits are not considered available in determining qualified disabled and working individual eligibility unless they are liquid assets held in common.

4. Excluded assets for purposes of this section.

a. The assets described in subsections 2 through 5 of section 75-02-02.1-27 and a residence occupied by the person, the person's spouse, or the person's dependent relative are excluded from consideration in determining qualified disabled and working individual eligibility. Terms used in this section have the following meaning:

(1) "Residence" includes all contiguous lands, including mineral interests, upon which it is located. The residence may include a mobile home suitable for use, and being used, as a principal place of residence. Rural property contiguous to the residence is exempt, even if rented or leased to a third party. The residence remains exempt during the temporary institutionalization or other absence of the individual from the residence, so long as the individual intends to return. However, a six-month absence due to institutionalization ends the exemption.

(2) "Relative" means a child, stepchild, grandchild, parent, stepparent, grandparent, aunt, uncle, niece, nephew, brother, sister, stepbrother, stepsister, half brother, half sister, first cousin, or in-law.

(3) "Dependency" includes financial, medical, and other forms of dependency. Financial dependency exists with respect to someone whom a taxpayer is able to claim a deduction on a federal income tax return.

b. Property which is excluded under subsections 1, 2, and 4 through ~~9~~ 10 of section 75-02-02.1-28 is excluded for purposes of this section.

c. Burial funds of up to one thousand five hundred dollars each, plus earnings on excluded funds in and after the month of application, held for the individual and the individual's spouse are excluded. Burial funds may

consist of revocable burial contracts; revocable burial trusts; other revocable burial arrangements, including the value of installment sales contracts for burial spaces; cash; financial accounts such as savings or checking accounts; or other financial instruments with a definite cash value, such as stocks, bonds, and certificates of deposit. The fund must be unencumbered and available for conversion to cash on very short notice. The fund may not be commingled with nonburial-related assets and must be identified as a burial fund by title of account or by a signed statement. Burial insurance, irrevocable trusts, or any other irrevocable arrangement for burial must be considered at face value for meeting the burial fund exclusion. Combined face value of an individual's life insurance policies with a total face value of one thousand five hundred dollars or less must be considered toward this exclusion. Cash values of an individual's life insurance with a total face value in excess of one thousand five hundred dollars may be applied towards the burial fund exclusion.

d. A burial space or agreement which represents the purchase of a burial space held for the individual, the individual's spouse, or any other member of the individual's immediate family is excluded. The burial space exclusion is in addition to the burial fund exclusion set forth in subdivision c. Only one item intended to serve a burial particular purpose, per individual, may be excluded. For purposes of this subdivision:

(1) "Burial space" means a burial plot, granite, crypt, or mausoleum; a casket, urn, niche, or other repository customarily and traditionally used for a deceased's bodily remains; a vault or burial container; a headstone, marker, or plaque; and prepaid arrangements for the opening and closing of the gravesite or for care and maintenance of the gravesite.

(2) "Held for" means the individual currently has title to or possesses a burial space intended for the individual's use or has a contract with a funeral service company for specified burial spaces for the individual's burial, such as an agreement which represents the individual's current right to use of the items at the amount shown; but does not mean any arrangement where the individual does not currently own the space, or does not currently have the right to use the space, or where the seller is not currently obligated to provide the space.

(3) "Other members of the individual's immediate family" means the individual's parents, minor or adult children, siblings, and the spouses of those persons, whether the relationship is established by birth, adoption, or marriage, except that a relationship established by marriage ends if the marriage ends.

e. Property essential to self-support is excluded.

(1) "Property essential to self-support" means:

(a) Property which the applicant or recipient owns, up to an equity value of six thousand dollars, which produces annual income at least equal to six percent of the excluded amount, and with respect to which the applicant or recipient is not actively engaged in using to produce income. Two or more properties may be excluded if each such property produces at least a six percent return and the combined equity value does not exceed six thousand dollars. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars and is a countable asset if it produces an annual return of less than six percent of equity. The property must be in current use, or, if not in current use, there must be a reasonable expectation that the use will resume, and the annual return test will be met within twelve months of the last use or, if the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last use. If the property produces less than a six percent return, the property may nonetheless be excluded, for a period of no more than twenty-four months, beginning with the first day of the tax year following the one in which the return dropped below six percent, only if the lower return is for reasons beyond the control of the applicant or recipient and there is a reasonable expectation that the property will again produce a six percent return.

(b) Nonbusiness property which the applicant or recipient owns, up to an equity value of six thousand dollars, when used to produce goods or services essential to daily activities, or, for instance, when used to grow produce or livestock solely for consumption in the individual's households. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars. The property must be in current use or, if not in current use, the

asset must have been in such use and there must be a reasonable expectation that the use will resume within twelve months of the last use or, if the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last use.

~~(2) Two or more properties of the type described in subparagraph a of paragraph 1 may be excluded if each such property produces at least a six percent return and if the combined equity value of such properties does not exceed six thousand dollars.~~

~~(3) Equity in property of the type described in subparagraph a of paragraph 1 is a countable asset to the extent that equity exceeds six thousand dollars and is a countable asset if it produces an annual return of less than six percent of equity.~~

~~(4) Equity in property of the type described in subparagraph b of paragraph 1 is a countable asset to the extent that equity exceeds six thousand dollars.~~

~~(5) Assets excluded under this subdivision must be in current use in the type of activity described, or, if not in current use, the asset must have been in such use and there must be a reasonable expectation that the use will resume, and, with respect to property of the type described in subparagraph a of paragraph 1, the annual return test will be met:~~

~~(a) Within twelve months of the last use; or~~

~~(b) If the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last use.~~

~~(6)~~(2) Liquid assets are not property essential to self-support except when used as part of a trade or business.

f. Lump sum payments of title II or supplemental security income benefits are excluded for six consecutive months following the month of receipt.

g. Real property, the sale of which would cause undue hardship to a coowner, is excluded for so long as the coowner uses the property as a principal residence, would have to move if the property were sold, and has no other readily available housing.

h. Life insurance that generates a cash surrender value is excluded if the face value of all such life insurance

policies of that person total one thousand five hundred dollars or less.

i. Assets set aside, by a blind or disabled (but not an aged) ~~person~~ supplemental security income recipient, as a part of a plan to achieve self-support which has been approved~~, if the person is a supplemental security income recipient, or would be approved if the person were a supplemental security income recipient,~~ by the secretary of the United States department of health and human services, are excluded.

j. The value of assistance, paid with respect to a dwelling unit occupied by the applicant or recipient, or by the applicant's or recipient's spouse, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].

k. For the nine-month period beginning with the month in which received, any amount received by the applicant or recipient, or the applicant's or recipient's spouse, from a fund established by a state to aid victims of crime, to the extent that the applicant or recipient, or the applicant's or recipient's spouse, demonstrates that such amount was paid in compensation for expenses incurred or losses suffered as a result of a crime.

l. For the nine-month period beginning after the month in which received, relocation assistance provided by a state or local government to an applicant or recipient, or to the applicant's or recipient's spouse, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.] which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636].

m. For the month of receipt and the following month, any refund of federal income taxes made to an applicant or recipient, or to the applicant's or recipient's spouse, by reason of section 32 of the Internal Revenue Code of 1986 (relating to earned income tax credit) and any payment made to an applicant or recipient, or to the applicant's or recipient's spouse, by an employer under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income credit).

5. Assets excluded under subsection 4 must be identifiable to be excluded.

6. a. Income ~~calculation~~ calculations to determine qualified disabled and working individual eligibility must consider income in the manner provided for in section 75-02-02.1-34, income considerations; section 75-02-02.1-36, disregarded income; section 75-02-02.1-37, unearned income; section 75-02-02.1-38, earned income, and section 75-02-02.1-39, income deductions, except:

(1) ~~Supplemental security income lump sum payments are not treated as income in the six months following the month in which the benefit is received;~~

~~(2)~~ Married individuals living separate and apart from a spouse are treated as single individuals; and

~~(3)~~ (2) The deductions described in subdivisions a, b, d, and h of subsection 1 of section 75-02-02.1-39, income deductions, are not allowed.

(3) Where a blind or disabled (but not an aged) supplemental security income recipient has a plan for achieving self-support which has been approved by the secretary of the United States department of health and human services, amounts of income necessary to, and actually contributed to, the plan are excluded.

b. A qualified disabled and working individual applicant is eligible if countable income is equal to or less than two hundred percent of the official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2), applicable to a family of the size involved, and if he or she meets all of the requirements described in this section; but is otherwise ineligible for medicaid.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: 50-24.1-02

75-02-02.1-24. Spousal impoverishment prevention.

1. Definitions. For purposes of this section:

a. "Community spouse" means the spouse of an institutionalized spouse.

~~b. "Community spouse countable asset allowance" means:~~

~~(1) With respect to applicants who began a continuous period of institutionalization before September 30, 1989, all countable assets of the applicant and the~~

~~community spouse up to a maximum of twenty-five thousand dollars.~~

~~(2) With respect to applicants who began a continuous period of institutionalization on or after September 30, 1989, one-half of all countable assets of the applicant and the community spouse up to the maximum amount permitted under 42 U.S.C. 1396r-5(f)(2)(A)(ii)(II), as adjusted pursuant to 42 U.S.C. 1396r-5(g), plus:~~

~~(a) Any additional amount transferred under a court order in the manner and for the purpose described in subdivision c of subsection 4; or~~

~~(b) Any additional amount established through a fair hearing conducted under subsection 4;~~

~~(3) Notwithstanding the provisions of paragraph 2, the community spouse countable asset allowance include all countable assets of the applicant and the community spouse up to a maximum of twenty-five thousand dollars.~~

~~c. "Community spouse monthly income allowance" means the greater of:~~

~~(1) An amount by which the monthly needs allowance exceeds the amount of monthly income otherwise available to the community spouse; or~~

~~(2) If a court has entered an order against an institutionalized spouse for monthly payments for the support of the community spouse, the amount of the monthly payment so ordered.~~

~~d. "Countable assets" includes all assets except those listed in paragraphs 1 through 14.~~

~~(1) A residence and all contiguous lands, including mineral interests, upon which it is located. A residence may include a mobile home suitable for, and being used as, a principal place of residence. Rural property contiguous to the residence is within this exception, even though the property is rented or leased to a third party.~~

~~(2) Household goods, personal effects, and an automobile or other vehicle primarily used for personal transportation.~~

~~(3) A burial fund of up to one thousand five hundred dollars, plus earnings on excluded funds in and after~~

~~the month of application. Burial funds may consist of revocable burial contracts, revocable burial trusts, other revocable burial arrangements, including the value of installment sales contracts for burial spaces, cash, financial accounts such as savings or checking accounts, or other financial instruments with a definite cash value, such as stocks, bonds, and certificates of deposit. The fund must be unencumbered and available for conversion to cash on very short notice. The fund may not be commingled with nonburial-related assets and must be identified as a burial fund by title of account or written statement. Burial insurance, irrevocable trusts, or any other irrevocable arrangement for burial must be considered at face value for meeting the burial fund exclusion. Combined face value of an individual's life insurance with a total face value of one thousand five hundred dollars or less must be considered toward this exclusion. Cash values of an individual's life insurance with a total face value in excess of one thousand five hundred dollars may be applied towards the burial fund exclusion.~~

~~(4) A burial space or agreement which represents the purchase of a burial space held for the individual, the individual's spouse, or any other member of the individual's immediate family. The burial space exclusion is in addition to the burial fund exclusion set forth in paragraph 3. Only one item intended to serve a particular burial purpose, per individual, may be excluded. For purposes of this paragraph:~~

~~(a) "Burial space" means a burial plot, granite, crypt, or mausoleum, a casket, urn, niche, or other repository customarily and traditionally used for a deceased's bodily remains, a vault or burial container, a headstone, marker, or plaque, and prepaid arrangements for the opening and closing of the gravesite or for care and maintenance of the gravesite.~~

~~(b) "Held for" means the individual currently has title to or possesses a burial space intended for the individual's use or has a contract with a funeral service company for specified burial spaces for the individual's burial, such as an agreement which represents the individual's current right to use of the items at the amount shown, but does not mean any arrangement where the individual does not currently own the space, or does not currently have the right to use the space, or where the seller is not currently obligated to provide the space.~~

~~(5) Property essential to self-support.~~

~~(a) "Property essential to self-support" means:~~

~~[1] Property which the applicant or recipient owns, with an equity value not exceeding six thousand dollars, which produces annual income at least equal to six percent of equity value, and which the applicant or recipient is not actively engaged in using to produce income; and~~

~~[2] Nonbusiness property which the applicant or recipient owns, up to an equity value of six thousand dollars, when used to produce goods or services essential to daily activities, or, for instance, when used to grow produce or livestock solely for consumption in the individual's household.~~

~~(b) Two or more properties with a combined equity value totaling six thousand dollars or less may be excepted if each such property produces at least a six percent annual return on equity and if the combined equity value of such properties does not exceed six thousand dollars.~~

~~(c) Equity in property which produces an annual return on equity of at least six percent is a countable asset to the extent that equity exceeds six thousand dollars.~~

~~(d) Equity in property which produces an annual return on equity of less than six percent is a countable asset.~~

~~(e) Assets excluded under this paragraph must be in current use in the type of activity described, or, if not in current use, the asset must have been in such use and there must be a reasonable expectation that the use will resume, and, with respect to property of the type described in item 1 of subparagraph a, the annual return test will be met:~~

~~[1] Within twelve months of the last use; or~~

~~[2] If the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last use.~~

~~(f) Liquid assets are not property essential to self-support except when used as part of a trade or business.~~

~~(6) Assets set aside, by a blind or disabled (but not an aged) individual, as a part of a plan, approved by the social security administration, for the individual to achieve self-support.~~

~~(7) Stock in regional or village corporations held by natives of Alaska during the twenty-year period in which the stock is inalienable pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1606(h) and 1607(c)].~~

~~(8) Assistance received under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.] or other assistance provided pursuant to a federal statute on account of a catastrophe which is declared to be a major disaster by the president, and interest received on such assistance for a nine-month period beginning on the date such funds are received.~~

~~(9) Any amounts received from the United States which are attributable to underpayments of benefits due for one or more prior months, under title II or title XVI of the Act [42 U.S.C. 401 et seq. and 1381 et seq.] for a six-month period beginning on the date such amounts are received.~~

~~(10) The value of assistance, paid with respect to a dwelling unit occupied by the community spouse, under the United States Housing Act of 1937, [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].~~

~~(11) For the nine-month period beginning with the month in which received, any amount received by the applicant or recipient, or the community spouse, from a fund established by a state to aid victims of crime, to the extent that the applicant or recipient, or the community spouse demonstrates that such amount was paid in compensation for expenses incurred or losses suffered as a result of a crime.~~

~~(12) For the nine-month period beginning after the month in which received, relocation assistance provided by a state or local government to an applicant or recipient, or to a community spouse, comparable to assistance provided under title II of the Uniform~~

~~Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.] which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636].~~

~~(13) For the month of receipt and the following month, any refund of federal income taxes made to an applicant or recipient, or to the community spouse, by reason of section 32 of the Internal Revenue Code of 1986 (relating to earned income tax credit) and any payment made to an applicant or recipient, or to the community spouse, by an employer under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income credit).~~

~~(14) Cash surrender value of a life insurance policy owned by the applicant or recipient, or the community spouse, if the total cash surrender value of all such policies is less than one thousand five hundred dollars.~~

~~e.~~ b. "Family member" means only minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse. For purposes of applying this definition, a family member is dependent only if he or she is, and may properly be, claimed as a dependent on the federal income tax return filed by the institutionalized spouse or the community spouse, or filed jointly by both.

~~f.~~ c. "Institutionalized spouse" means an individual who:

(1) Is ~~in a~~ receiving swing bed ~~or~~ care in a hospital or is in the state hospital or a nursing facility and, at the beginning of his or her institutionalization, is likely to be in ~~a swing bed or nursing~~ the facility for at least thirty consecutive days (even though he or she does not actually remain in the facility for thirty consecutive days); and

(2) Is married to a spouse who is not ~~in a~~ receiving swing bed ~~or~~ care in a hospital or care in the state hospital or a nursing facility.

~~g.~~ d. "Monthly maintenance needs allowance" means for a community spouse, the maximum amount permitted under 42 U.S.C. 1396r-5(d)(3)(C), as adjusted pursuant to 42 U.S.C. 1396r-5(g).

~~2. Treatment of income.~~

~~a. No income of the community spouse may be deemed available to the institutionalized spouse during any month in which an institutionalized spouse is in the institution.~~

~~b. After an institutionalized spouse is determined or redetermined to be eligible for medicaid, in determining the amount of the institutionalized spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the institutionalized spouse's monthly income the following amounts in the following order:~~

~~(1) A personal needs allowance.~~

~~(2) A community spouse monthly income allowance, but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.~~

~~(3) A family allowance, for each family member, equal to one-third of an amount, determined in accordance with 42 U.S.C. 1396r-5(d)(3)(A)(i), less the monthly income of that family member.~~

~~(4) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse.~~

~~c. In determining the amount of income of an eligible institutionalized spouse or a community spouse:~~

~~(1) In the case of income from a trust, except as provided in paragraph 2, income must be attributed in accordance with this chapter, including section 75-02-02.1-31.~~

~~(2) Income must be considered available to each spouse as provided in the trust or in the absence of a specific provision in the trust:~~

~~(a) If payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;~~

~~(b) If payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and~~

~~(c) If payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered~~

~~available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).~~

~~d. Unless the institutionalized spouse can establish that the ownership interests in income are otherwise:~~

~~(1) In the case of income for which there is no instrument establishing ownership, one-half of the income must be considered available to each spouse; or~~

~~(2) Unless the instrument providing the income otherwise specifically provides:~~

~~(a) If payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;~~

~~(b) If payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and~~

~~(c) If payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).~~

~~e. Veterans administration aid and attendance payments and veterans administration reimbursements for unusual medical expenses are not income, and must be treated as received in the months in which the increased medical need or unusual medical expense was incurred and expended in such months for such increased medical need or unusual medical expense.~~

~~3.~~ 2. Treatment of countable assets.

a. Assessment. At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization of the institutionalized spouse which begins on or after September 30, 1989, and upon receipt of relevant

documentation of resources, the total value described in subdivision b shall be assessed and documented.

b. Total joint countable assets. There shall be computed, as of the beginning of the first continuous period of institutionalization of the institutionalized spouse which begins on or after September 30, 1989:

(1) The total value of the countable assets to the extent either the institutionalized spouse or the community spouse has an ownership interest; and

(2) A spousal share ~~which~~:

(a) With respect to eligibility determinations made before July 1, 1992, is equal to one-half of such total value~~.~~; and

(b) With respect to eligibility determinations made on or after July 1, 1992, is equal to all countable assets up to the maximum amount permitted under 42 U.S.C. 1396r-5(f)(2)(A)(ii)(II), as adjusted pursuant to 42 U.S.C. 1396r-5(g).

c. In determining the assets of the institutionalized spouse at the time of application, all countable assets held by the institutionalized spouse, the community spouse, or both, must be considered available to the institutionalized spouse to the extent they exceed the community spouse countable asset allowance.

d. During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this chapter, no countable assets of the community spouse may be deemed available to the institutionalized spouse.

e. The institutionalized spouse is not ineligible by reason of assets determined under subdivision c to be available for the cost of care where:

(1) The institutionalized spouse has assigned to the state any rights to support from the community spouse; or

(2) ~~The institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment, but the state has the right to bring a support proceeding against a community spouse without such assignment; or~~

~~(3)~~ It is determined that a denial of eligibility would work an undue hardship because the presumption described in subsection 4 of section 75-02-02.1-25 has been rebutted.

f. An institutionalized spouse is allowed the medically needy asset limit of three thousand dollars.

g. An institutionalized spouse is asset eligible if the total value of all countable assets of the community spouse and the institutionalized spouse is less than the total of the community spouse asset limit and the institutionalized spouse asset limit. The assets may be owned by either spouse provided that the institutionalized spouse complies with the requirements of subdivision h.

h. Permitting transfer of assets to community spouse. Transfers from spouse to spouse do not disqualify an applicant from receipt of medicaid benefits. In order to facilitate such transfers from an institutionalized spouse to a community spouse, where necessary to maximize the community spouse asset allowance, a brief period of time is permitted for such transfers after the institutionalized spouse is determined eligible for medicaid. During this period, such assets are not counted as available to the institutionalized spouse even though the assets are not yet transferred.

(1) An institutionalized spouse may transfer an amount equal to the community spouse countable asset allowance, but only to the extent the assets of the institutionalized spouse are transferred to, or for the sole benefit of, the community spouse.

(2) A transfer under paragraph 1 must be made by the end of the third calendar month after the month in which the eligibility decision is made.

(3) When an eligible institutionalized spouse exceeds the asset limits due to an increase in the value of assets or the receipt of assets not previously owned, an institutionalized spouse may transfer additional assets to the community spouse equal to no more than the current maximum community spouse countable asset allowance less the total value of assets transferred to, or for the sole benefit of, the community spouse, under paragraph 1 or previously transferred under this paragraph.

(4) A transfer under paragraph 3 must be made by the end of the third calendar month of a period which begins with the month in which the institutionalized spouse exceeded the asset limit.

(5) If a transfer made under paragraph 1 or 3 causes the total value of all assets owned by the community spouse immediately prior to the transfer under paragraph 1, plus the value of all assets transferred under paragraph 1, plus the value of all assets transferred under paragraph 3, equals or exceeds the current maximum community spouse asset allowance, no further transfer may be made under paragraph 3.

(6) If a court has entered an order against an institutionalized spouse for the support of a community spouse, assets required by such order to be transferred, by the institutionalized spouse to the community spouse, may not be counted as available to the institutionalized spouse even though the assets are not yet transferred.

3. Community spouse countable asset allowance. A community spouse may retain or receive assets, which do not exceed the community spouse countable asset allowance, for purposes of determining the medicaid eligibility of the institutionalized spouse. The community spouse countable asset allowance means the spousal share determined under paragraph 2 of subdivision b of subsection 2, plus:

a. Any additional amount transferred under a court order in the manner and for the purpose described in paragraph 5 of subdivision h of subsection 2; or

b. Any additional amount established through a fair hearing conducted under subsection 7.

4. Countable and excluded assets. Countable assets include all assets which are not specifically excluded. Excluded assets are:

a. A residence occupied by the community spouse. For purposes of this subdivision, "residence" includes all contiguous lands, including mineral interests, upon which it is located. The residence may include a mobile home suitable for use, and being used, as a principal place of residence. Rural property contiguous to the residence is excluded, even if rented or leased to a third party. The residence is excluded during temporary absence of the community spouse from the residence, so long as the community spouse intends to return.

b. Household goods, personal effects, and an automobile or other vehicle primarily used for personal transportation.

c. A burial fund of up to one thousand five hundred dollars, plus earnings on excluded funds in and after the month of application. Burial funds may consist of revocable burial

contracts; revocable burial trusts; other revocable burial arrangements, including the value of installment sales contracts for burial spaces; cash; financial accounts such as savings or checking accounts; or other financial instruments with a definite cash value, such as stocks, bonds, and certificates of deposit. The fund must be unencumbered and available for conversion to cash on very short notice. The fund may not be commingled with nonburial-related assets and must be identified as a burial fund by title of account or signed statement. Burial insurance, irrevocable trusts, or any other irrevocable arrangement for burial must be considered at face value for meeting the burial fund exclusion. Combined face value of an individual's life insurance with a total face value of one thousand five hundred dollars or less must be considered toward this exclusion. Cash surrender value of an individual's life insurance with a total face value in excess of one thousand five hundred dollars may be applied towards the burial fund exclusion.

d. A burial space or agreement which represents the purchase of a burial space held for the individual, the individual's spouse, or any other member of the individual's immediate family. The burial space exclusion is in addition to the burial fund exclusion set forth in subdivision c. Only one item intended to serve a particular burial purpose, per individual, may be excluded. For purposes of this subdivision:

(1) "Burial space" means a burial plot, granite, crypt, or mausoleum; a casket, urn, niche, or other repository customarily and traditionally used for a deceased's bodily remains; a vault or burial container; a headstone, marker, or plaque; and prepaid arrangements for the opening and closing of the gravesite or for care and maintenance of the gravesite.

(2) "Held for" means the individual currently has title to or possesses a burial space intended for the individual's use or has a contract with a funeral service company for specified burial spaces for the individual's burial, such as an agreement which represents the individual's current right to use of the items at the amount shown; but does not mean any arrangement where the individual does not currently own the space, or does not currently have the right to use the space, or where the seller is not currently obligated to provide the space.

(3) "Other members of the individual's immediate family" means the individual's parents, minor or adult children, siblings, and the spouses of those persons,

whether the relationship is established by birth, adoption, or marriage, except that a relationship established by marriage ends if the marriage ends.

e. At the option of the institutionalized spouse, and in lieu of (but not in addition to) the burial fund described in subdivision c and the burial space or agreement described in subdivision d, any prepayments or deposits which total three thousand dollars or less, and the interest accrued thereon after July 1, 1987, made under a pre-need funeral service contract for the institutionalized spouse. The institutionalized spouse must verify that the deposit is made in a manner such that the institutionalized spouse may obtain the deposit within five days after making a request directly to the financial institution, and without furnishing documents maintained by the funeral establishment or writing for the financial institution to secure permission from the funeral establishment.

f. Property essential to self-support.

(1) "Property essential to self-support" means:

(a) Property which the community spouse or the institutionalized spouse owns, with an equity value not exceeding six thousand dollars, which produces annual income at least equal to six percent of equity value, and which neither spouse is actively engaged in using to produce income. Two or more properties may be excluded if each such property produces at least a six percent return and the combined equity value does not exceed six thousand dollars. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars and is a countable asset if it produces an annual return of less than six percent of equity. The property must be in current use, or, if not in current use, there must be a reasonable expectation that the use will resume, and the annual return test will be met within twelve months of the last use or, if the nonuse is due to the disabling condition of the community spouse or the institutionalized spouse, within twenty-four months of the last use. If the property produces less than a six percent return, the property may nonetheless be excluded, for a period of no more than twenty-four months, beginning with the first day of the tax year following the one in which the return dropped below six percent, only if the lower return is for reasons beyond the control of the community spouse or institutionalized

spouse and there is a reasonable expectation that the property will again produce a six percent return.

(b) Nonbusiness property which the community spouse or the institutionalized spouse owns, up to an equity value of six thousand dollars, when used to produce goods or services essential to daily activities, or, for instance, when used to grow produce or livestock solely for consumption in the community spouse's household. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars. The property must be in current use or, if not in current use, the asset must have been in such use and there must be a reasonable expectation that the use will resume within twelve months of the last use or, if the nonuse is due to the disabling condition of the community spouse or institutionalized spouse, within twenty-four months of the last use.

(2) Liquid assets are not property essential to self-support.

g. Assets set aside, by a blind or disabled (but not an aged) individual, as a part of a plan, approved by the social security administration, for the individual to achieve self-support.

h. Stock in regional or village corporations held by natives of Alaska during the twenty-year period in which the stock is inalienable pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1606(h) and 1606(c)].

i. Assistance received under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.] or other assistance provided pursuant to a federal statute on account of a catastrophe which is declared to be a major disaster by the president, and interest received on such assistance for a nine-month period beginning on the date such funds are received. When retained, this asset must be identifiable and not commingled with other assets.

j. Any amounts received from the United States which are attributable to underpayments of benefits due for one or more prior months, under title II or title XVI of the Act [42 U.S.C. 401 et seq. and 1381 et seq.] for a six-month period beginning on the date such amounts are received.

k. The value of assistance, paid with respect to a dwelling unit occupied by the community spouse, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the

National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].

l. For the nine-month period beginning with the month in which received, any amount received by the applicant or recipient, or the community spouse, from a fund established by a state to aid victims of crime, to the extent that the applicant or recipient, or the community spouse, demonstrates that such amount was paid in compensation for expenses incurred or losses suffered as a result of a crime.

m. For the nine-month period beginning after the month in which received, relocation assistance provided by a state or local government to an applicant or recipient, or to a community spouse, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.] which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636].

n. For the month of receipt and the following month, any refund of federal income taxes made to an applicant or recipient, or to the community spouse, by reason of section 32 of the Internal Revenue Code of 1986 (relating to earned income tax credit) and any payment made to an applicant or recipient, or to the community spouse, by an employer under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income credit).

o. Life insurance that generates a cash surrender value, if the face value of all such life insurance policies on the life of that person total one thousand five hundred dollars or less.

p. Property which is excluded under subsections 1, 2, 4, and 6 through 10 of section 75-02-02.1-28.

5. Treatment of income. Income calculations to determine medicaid eligibility for an institutionalized spouse must consider income in the manner provided for in section 75-02-02.1-34, income considerations; sections 75-02-02.1-36, disregarded income; section 75-02-02.1-37, unearned income; section 75-02-02.1-38, earned income; and section 75-02-02.1-39, income deductions, except:

a. No income of the community spouse may be deemed available to the institutionalized spouse during any month in which an institutionalized spouse is in the institution.

b. After an institutionalized spouse is determined or redetermined to be eligible for medicaid, in determining the amount of the institutionalized spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the institutionalized spouse's monthly income the following amounts in the following order:

(1) A personal needs allowance.

(2) A community spouse monthly income allowance, but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(3) A family allowance, for each family member, equal to one-third of an amount, determined in accordance with 42 U.S.C. 1396r-5(d)(3)(A)(i), less the monthly income of that family member.

(4) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse.

6. Medicaid eligibility application. The provisions of this section describing the treatment of income and assets for the community spouse do not describe that treatment for the purposes of determining medicaid eligibility for the community spouse or for children of the community spouse.

~~4.~~ 7. Notice and fair hearing.

a. Notice must be provided of the amount of the community spouse income allowance, of the amount of any family allowances, of the method of computing the amount of the community spouse countable asset allowance, and of the right to a fair hearing respecting ownership or availability of income and assets, and the determination of the community spouse monthly income or countable asset allowance. The notice must be provided, upon a determination of medicaid eligibility of an institutionalized spouse, to both spouses, and upon a subsequent request by either spouse or a representative acting on behalf of either spouse, to the spouse making the request.

b. Fair hearing. A community spouse or an institutionalized spouse is entitled to a fair hearing under chapter 75-01-03 if application for medicaid has been made on behalf of the institutionalized spouse and either spouse is dissatisfied with a determination of:

(1) The community spouse monthly income allowance;

(2) The amount of monthly income otherwise available to the community spouse as determined in calculating the community spouse monthly income allowance;

(3) The computation of the spousal share of countable assets ~~under subdivision b of subsection 3~~;

(4) The attribution of countable assets ~~under subdivision c of subsection 3~~; or

(5) The determination of the community spouse countable asset allowance.

c. Any hearing respecting the determination of the community spouse countable asset allowance must be held within thirty days of the request for the hearing.

d. If either spouse establishes that the community spouse needs income, above the level provided by the monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, the monthly maintenance needs allowance for that spouse must be increased to an amount adequate to provide necessary additional income.

e. If either spouse establishes that the assets included within the community spouse countable asset allowance generate an amount of income inadequate to raise the community spouse's income to the monthly needs allowance, to the extent that total assets permit the community spouse countable asset allowance for that spouse must be increased to an amount adequate to provide such a monthly maintenance needs allowance.

~~5. Permitting transfer of assets to community spouse.~~

~~a. An institutionalized spouse may transfer an amount equal to the community spouse countable asset allowance, but only to the extent the assets of the institutionalized spouse are transferred to, or for the sole benefit of, the community spouse.~~

~~b. A transfer under subdivision a must be made within sixty days after the date of the institutionalized spouse's application for medicaid, and within the remaining days of the month in which the sixtieth day falls.~~

~~c. If a court has entered an order against an institutionalized spouse for the support of a community spouse, a transfer of assets required by such order to be transferred, by the institutionalized spouse to the community spouse, may not produce a period of ineligibility for the institutionalized spouse.~~

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: 50-24.1-02; 42 USC 1396r-5

75-02-02.1-25. Asset considerations.

1. All assets must be considered in establishing eligibility for medicaid.

2. Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. Assets will be reasonably evaluated. A determination that an asset is deemed available is a determination that the asset is actually available. An asset may be sold or exchanged for another asset. An asset acquired in an exchange or with the proceeds from a sale continues to be treated as an asset subject to the asset limits, exemptions, and exclusions applicable to the type of asset which was acquired. This subsection does not supersede other provisions of this chapter which describe or require specific treatment of assets, or which describe specific circumstances which require a particular treatment of assets.

3. The financial responsibility of any individual for any applicant or recipient of medicaid is limited to the responsibility of spouse for spouse and parents for a child under age twenty-one or, if blind or disabled, under age eighteen. Such responsibility is imposed upon applicants or recipients as a condition of eligibility for medicaid. Except as otherwise provided in this section, the assets of the spouse and of the parents of a child under age twenty-one or, if blind or disabled, under age eighteen, are deemed available to an applicant or recipient, even if those assets are not actually contributed. For purposes of this subsection, biological and adoptive parents, but not stepparents, are treated as parents.

4. It is presumed that all spousal assets are actually available ~~to aged, blind, or disabled individuals~~ where financial responsibility is imposed pursuant to subsection 3. In order to rebut this presumption, the applicant or recipient must demonstrate that the spousal assets are unavailable despite reasonable and diligent efforts to access such assets. The rebuttal of this presumption does not preclude the department from exercising the powers granted to it by North Dakota

Century section 50-24.1-02.1. Except as provided in subdivisions a, b, ~~and~~ c, and d, no applicant or recipient who has a statutory or common law cause of action for support out of the assets of a spouse, but who has failed to diligently pursue that cause of action, may rebut the presumption. Any applicant or recipient who documents any of the following circumstances will have rebutted the presumption without further proof:

a. A court order, entered following a contested case, determines the amounts of support that a spouse must pay to the applicant or recipient.

b. The spouse from whom support could ordinarily be sought, and the property of such spouse, is outside the jurisdiction of the courts of the United States or any of the United States.

c. ~~The~~ In cases where section 75-02-02.1-24 does not apply, the applicant or recipient has been subject to marital separation, with or without court order, ~~for at least two years prior to making application for medical assistance benefits, and there has been no contact whatever between the applicant or recipient and his or her spouse for the same two year period~~ the parties have not separated for the purpose of securing medicaid benefits, and the spouse of the applicant or recipient has refused to furnish information about the spouse's assets sufficient to determine eligibility.

d. In cases where section 75-02-02.1-24 applies, the assets are those properly treated as belonging to the community spouse.

5. It is presumed that all parental assets are actually available to a child under age twenty-one or, if blind or disabled, under age eighteen, where financial responsibility is imposed pursuant to subsection 3. This presumption may be rebutted by a showing that the child under age twenty-one or, if blind or disabled, under age eighteen, is ~~living independently.~~:

a. Living independently;

b. A child for whom adoption assistance maintenance payments are made under title IV-E;

c. A child for whom foster care maintenance payments are made under title IV-E;

d. A child, living in North Dakota, receiving title IV-E adoption assistance payments from another state;

e. A child, in a foster care placement in North Dakota, receiving a title IV-E foster care payment from another state; or

f. Living with a parent who is separated from the child's other parent, with or without court order, if the parents did not separate for the purpose of securing medicaid benefits, and the parent with whom the child is not living has refused to furnish information about that parent's assets sufficient to determine eligibility.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-27. Exempt assets. Except as provided in sections 75-02-02.1-22 and 75-02-02.1-23, the following assets are exempt from consideration in determining medicaid eligibility:

1. The home occupied by the medicaid unit, including trailer homes being used as living quarters;

2. Personal effects, wearing apparel, household goods, and furniture;

3. One motor vehicle;

4. Indian trust or restricted lands and the proceeds from the sale thereof, so long as those proceeds are impressed with the original trust; and

5. Indian per capita funds and judgments funds awarded by either the Indian claims commission or the court of claims after October 19, 1973, interest and investment income accrued on such Indian per capita or judgment funds while held in trust, and purchases made using interest or investment income accrued on such funds while held in trust. The funds must be identifiable and distinguishable from other funds. Commingling of per capita funds, judgment funds, and interest and investment income earned on those funds, with other funds, results in loss of the exemption.

6. Funds distributed under the provisions of the Old Age Assistance Claims Settlement Act, as amended [25 U.S.C. 2301 et seq.].

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-28. Excluded assets. Except as provided in sections 75-02-02.1-22 and 75-02-02.1-23, the following types of property interests will be excluded in determining if the available assets of an applicant or recipient exceed asset limits:

1. Property which is essential to earning a livelihood. Such property may be excluded only during months in which the applicant or recipient is actively engaged in using the asset to earn a livelihood. Assets which are used seasonably are excluded as long as continued seasonal use is reasonably anticipated.

2. Property which is not saleable without working an undue hardship. Such property may not be excluded earlier than the first day of the month in which good faith attempts to sell are begun, and continues to be excluded only for so long as the asset continues to be for sale.

   a. Persons seeking to establish retroactive eligibility must demonstrate that good faith attempts to sell were begun and continued in each of the months for which retroactive eligibility is sought. Information concerning attempts to sell, which demonstrate that an asset is not saleable without working an undue hardship, are relevant to establishing eligibility in the month in which the good faith attempts to sell are begun, but are not relevant to months prior to that month and do not relate back to prior months.

   b. Property may not be shown to be not saleable without working an undue hardship if the owner of the property fails to take action to collect amounts due and unpaid with respect to the property or otherwise fails to assure the receipt of regular and timely payments due with respect to the property.

3. Any prepayments or deposits which total three thousand dollars or less, and the interest accrued thereon after July 1, 1987, made under a pre-need funeral service contract for each applicant or recipient in the medicaid unit. The applicant or recipient must verify that the deposit is made in a manner such that the applicant or recipient may obtain the deposit within five days after making a request directly to the financial institution, and without furnishing documents maintained by the funeral establishment or waiting for the financial institution to secure permission from the funeral establishment.

4. Home replacement funds, derived from the sale of an excluded home, and if intended for the purchase of another excluded home, until the last day of the third month following the month in which the proceeds from the sale are received. When

retained, this asset must be identifiable and not commingled with other assets.

5. Unspent assistance, and interest earned on unspent assistance, received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288] or some other federal statute, because of a presidentially declared major disaster, for nine months after receipt, and for up to an additional nine months, if circumstances beyond the person's control prevent the repair or replacement of the damaged, or destroyed property, and keep the person from contracting for such repair or replacement. When retained, this asset must be identifiable and not commingled with other assets.

6. Payments, interest earned on the payments, and in-kind items received for the repair or replacement of lost, damaged, or stolen excluded assets are excluded for nine months after receipt, and for up to an additional nine months, if circumstances beyond the person's control prevent the repair or replacement of the lost, damaged, or stolen assets, and keep the person from contracting for such repair or replacement. When retained, this asset must be identifiable and not commingled with other assets.

7. Agent orange payments. When retained, this asset must be identifiable and not commingled with other assets.

8. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [Pub. L. 100-383]. When retained, this asset must be identifiable and not commingled with other assets.

9. German reparation payments to survivors of the holocaust, and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act, which have been retained and not commingled with other assets.

10. Unspent financial assistance provided for attendance costs to undergraduate ~~and graduate~~ students under programs in title IV of the Higher Education Act or for attendance costs under bureau of Indian affairs student assistance programs. When retained, this asset must be identifiable and not commingled with other assets.

11. For the month of receipt and the following month, any refund of federal income taxes made to the applicant or recipient, by reason of section 32 of the Internal Revenue Code of 1986 (relating to earned income tax credit) and any payment made to an applicant or recipient by an employer under section 3507 of the Internal Revenue Code of 1986 (relating to the advance payment of earned income tax credit).

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02, 50-24.1-02.3

75-02-02.1-29. Forms of asset ownership.

1. Ownership of real or personal property or accounts can take various forms. The first basic consideration is the distinction between real and personal property. Real property relates to land and those things, such as houses, barns, and office buildings, which are more or less permanently attached to it. Personal property describes all other things which are subject to individual rights. The distinction is really between movable objects, generally created by man, and the immovable earth. It is the permanency of the land, and the need for a permanent frame of reference governing the ownership of that land, that has led to most of the legal distinctions between real and personal property.

2. The owner of property is not always an individual or a married couple. Since the various types of property ownership may affect the valuation of the applicant's or recipient's assets, it is important to carefully record information relating to such property.

   a. "Fee" or "fee simple" ownership is a term applied to real property in which the "owner" has the sole ownership interest. A fee simple interest will, in theory, last as long as the land. Even though one owner dies, that owner has the power to sell or to "will" the property. The resulting series of owners each has a fee simple. A fee simple ownership interest is not changed when the property is mortgaged. The mortgage merely secures the owner's promise to repay a debt. If the debt is not paid, the owner may be obliged to forfeit the property. Fee simple ownership may be individual or may be shared.

   b. Shared ownership means that the ownership interest in the property is vested in more than one person. Shared ownership may be by "joint tenancy" or by "tenancy in common". Shared ownership occurs both with real property and with valuable personal property of a semipermanent nature (such as accounts, motor vehicles, and mobile homes).

      (1) In joint tenancy, each of two or more joint tenants has an equal interest in the whole property. On the death of one of two joint tenants, the survivor becomes the sole owner. On the death of one of three or more joint tenants, the survivors remain joint tenants in the entire interest. It is possible for

any joint tenant, acting independently, to convert the joint tenancy to a tenancy in common by selling his interest ~~to a person who was not one of the original joint tenants~~.

(2) In tenancy in common, two or more persons have an undivided fractional interest in the whole property. There is no "right of survivorship" in a tenancy in common. On the death of one of the tenants in a tenancy in common, the surviving tenants gain nothing, and the estate of the deceased tenant thereafter owns the deceased tenant's share.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-31. Trusts. A trust is an arrangement whereby a person (the "grantor" or "trustor") gives property to another (the "trustee") with instructions to use the property for the benefit of a third person (the "beneficiary"). The property placed in trust is called the "principal" or "corpus". The positions of grantor, trustee, and beneficiary occur in all trusts, but it is not uncommon for a single trust to involve more than one grantor, trustee, or beneficiary. It is also not uncommon for a grantor to establish a trust where the grantor is also a beneficiary or where the trustee is also a beneficiary. Trusts are often very individualized arrangements, and generalizations about them can prove inaccurate. However, the trust may have an effect on eligibility whether the applicant is a grantor, trustee, or beneficiary.

1. Revocable - irrevocable. Trusts may be categorized in many ways, but the revocability of a trust is a fundamental one. A revocable trust is one where someone, usually the grantor, has the power to remove the property from the trust, or otherwise end the trust. An irrevocable trust is one where that power does not exist. The determination of trust revocability is not based solely on a trust declaration of irrevocability. A trust where a power to amend is reserved to the grantor, or granted to some other person, is treated as a revocable trust. Even a trust which, on its face, appears clearly to be irrevocable, may be revoked with the consent of the grantor and the beneficiaries.

   a. If the grantor of a trust is also the sole beneficiary, trust assets are treated as the grantor's assets for medicaid purposes.

   b. If the grantor of a trust and all trust beneficiaries are part of a medicaid unit, trust assets are treated as the grantor's assets for medicaid purposes.

c. Trust assets of a revocable trust are treated as the grantor's assets for medicaid purposes.

d. The amount from an actually irrevocable trust deemed available to a beneficiary of that trust is the greater of the amount which must be distributed to the beneficiary under the terms of the trust, whether or not that amount is actually distributed, and the amount which is actually distributed (unless the trust is a medicaid-qualifying trust or a support trust).

2. Medicaid-qualifying trusts.

a. For purposes of this subsection~~,~~ ~~"medicaid qualifying trust"~~ :

(1) "Medicaid-qualifying trust" means a trust established, other than by will, by an individual or the individual's spouse, under which the individual may be the beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

(2) "A trust established by an individual or the individual's spouse" includes trusts created or approved by courts or by the individual or the individual's spouse where the property placed in trust is intended to satisfy or settle a claim made by or on behalf of the individual or the individual's spouse against any third part.

b. The amount from ~~a~~ an irrevocable medicaid-qualifying trust deemed available to the grantor or the grantor's spouse is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of this subdivision, "grantor" means the individual referred to in paragraph 1 of subdivision a.

c. This subsection applies ~~without regard to~~:

(1) ~~Whether or not~~ Even though the medicaid-qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medicaid; ~~or~~ and

(2) Whether or not the discretion described in paragraph 1 of subdivision a is actually exercised.

3. Support trust.

a. For purposes of this subsection, "support trust" means a trust which has, as a purpose, the provision of support or care to a beneficiary. The purpose of a support trust is indicated by language such as "to provide for the care, support, and maintenance of . . ."; "to provide as necessary for the support of . . ."; or "as my trustee may deem necessary for the support, maintenance, medical expenses, care, comfort, and general welfare". No particular language is necessary, but words such as "care", "maintenance", "medical needs", or "support" are usually present. The term includes trusts which may also be called "discretionary support trusts" or "discretionary trusts", so long as support is a trust purpose. This subsection applies without regard to:

(1) Whether or not the support trust is irrevocable or is established for purposes other than to enable a beneficiary to qualify for medicaid or any other benefit program where availability of benefits requires the establishment of financial need; or

(2) Whether or not the discretion ~~described in subdivision a~~ is actually exercised.

b. Except as provided in subdivisions c and d, the amount from a support trust deemed available to the beneficiary, the beneficiary's spouse, and the beneficiary's children is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the beneficiary, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the beneficiary.

c. A beneficiary of a support trust, under which the distribution of payments to the beneficiary is determined by one or more trustees who are permitted to exercise any discretion with respect to that distribution, may show that the amounts deemed available under subdivision b are not actually available by:

(1) Commencing proceedings against the trustee or trustees in a court of competent jurisdiction;

(2) Diligently and in good faith asserted in the proceeding that the trustee or trustees is required to provide support out of the trust; and

(3) Showing that the court has made a determination, not reasonably subject to appeal, that the trustee must pay some amount less than the amount determined under subdivision b.

d. If the beneficiary makes the showing described in subdivision c, the amount deemed available from the trust is the amount determined by the court.

e. Any action by a beneficiary or the beneficiary's representative, or by the trustee or the trustee's representative, in attempting a showing under subdivision c, to make the department, the state of North Dakota, or a county agency a party to the proceeding, or to show to the court that medicaid benefits may be available if the court limits the amounts deemed available under the trust, precludes the showing of good faith required under subdivision c.

4. **Discretionary trusts.**

a. For purposes of this subsection, "discretionary trust" means any trust in which one or more trustees is permitted to exercise any discretion with respect to distribution to the beneficiary, but does not ~~mean~~ include any trust within the definition of a "support trust", as that term is defined in subsection 3.

b. The amounts from a discretionary trust deemed available to a beneficiary are the amounts actually distributed by the trustee or trustees. Distribution from a discretionary trust is treated as income in the month received and an asset thereafter.

5. **Other trusts.**

a. For purposes of this subsection, "other trusts" means any trust which is not an "irrevocable trust", as that term is explained in subsection 1; a "medicaid-qualifying trust", as that term is defined in subsection 2; a "support trust", as that term is defined in subsection 3; or a "discretionary trust", as that term is defined in subsection 4.

b. The amount from an "other trust" deemed available to a beneficiary of that trust is the greater of the amount which must be distributed to that beneficiary under the terms of the trust, whether or not that amount is actually distributed, and the amount which is actually distributed.

6. **Applicant as trustee.** An applicant or recipient who is a trustee has the legal ownership of trust property and the legal powers to distribute income or trust assets which are described in the trust. However, those powers may be exercised only on behalf of trust beneficiaries. If the trustee or other members of the medicaid unit are not also beneficiaries or grantors to whom trust income or assets are

treated as available under subsection 1, 2, 3, 4, or 5, trust assets are not available to the trustee.

7. Trust terms. Trusts may provide that trust benefits are intended only for a beneficiary's "special needs", and require the trustee to take into consideration the availability of public benefits and resources, including medicaid. Some trusts may provide that the trust is not to be used to supplant or replace public benefits, including medicaid benefits. Some trusts may contain terms which attempt to declare or make the determination of the availability of trusts assets for medicaid purposes. If a medicaid-qualifying trust or support trust contains such terms, the amount available to the medicaid applicant or recipient is the amount provided in subsection 2 or 3, assuming, for the purposes of making that determination, that the applicant or recipient is ineligible for medicaid.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396a(k)

75-02-02.1-32. Valuation of assets. It is not always possible to determine the value of assets with absolute certainty, but it is necessary to determine a value in order to determine eligibility. The valuation must be based on reasonably reliable information. It is the responsibility of the applicant or recipient, or the persons acting on behalf of the applicant or recipient, to furnish reasonably reliable information. However, because an applicant or recipient may not be knowledgeable of asset values, and particularly because that person may have a strong interest in the establishment of a particular value, whether or not that value is accurate, some verification of value must be obtained. Useful sources of verification include, but are not limited to:

1. With respect to liquid assets: account records maintained by banking facilities.

2. With respect to personal property other than liquid assets:

   a. Publicly traded stocks, bonds and securities: stock brokers.

   b. Autos, trucks, mobile homes, boats, or any other property listed in published valuation guides accepted in the trade: the valuation guide.

   c. With respect to harvested grains or produce: grain buyers, grain elevator operators, produce buyers; and, for crops grown on contract: the contract.

d. With respect to stock in corporations not publicly traded: appraisers, accountants.

e. With respect to other personal property: dealers and buyers of that property.

3. Real property.

a. With respect to surface interests: market value or "true and full" value from tax records, whichever represents an approximation of fair market value; real estate agents; appraisers; loan officers in local banking institutions. If a valuation from a source offered by the applicant or recipient is greatly different from fair market value established by tax records, an explanation for the difference must be made, particularly if the applicant or recipient may be able to influence the person furnishing the valuation.

b. With respect to mineral interests: appraisers, specializing in minerals, mineral buyers, geologists.

4. Divided or partial interests. Divided or partial interests include assets held by the applicant or recipients; jointly or in common with persons who are not in the medicaid unit; assets where the applicant or recipient or other persons within the medicaid unit own only a partial share of what is usually regarded as the entire asset; and interests where the applicant or recipient owns only a life estate or remainder interest in the asset.

a. Liquid assets. The value of a partial or shared interest in a liquid asset is equal to the total value of that asset.

b. Personal property other than liquid assets and real property other than life estates and remainder interests. The value of a partial or shared interest is a proportionate share of the total value of the asset equal to the proportionate share of the asset owned by the applicant or recipient.

c. Life estates and remainder interests.

(1) Real property interests may be divided in terms of the time when the owner of the interest is entitled to possession of the property. The owner of a life estate (life tenant) is entitled to possession of the real property for a period measured by the lifetime of a specific person or persons. A life tenant has the right to use the property and is entitled to any rents or profits from the property. A life tenant may sell the life estate, but such a sale does not

change the identity of the person or persons whose lifetimes measure the duration of the life estate. A life estate may be referred to as a "life lease".

(2) When a life estate is created, a right to possess the property, after the death of the life tenant, must also be created. That right is called a "remainder interest", and the owner of that right is called a "remainderman". Upon the death of the life tenant, the remainderman owns the property. The remainderman is not entitled to possess or use the property until the death of the life tenant. The remainderman does have the right to sell the remainder interest.

(3) A life estate may be created where the right to possess the property returns, upon the death of the life tenant, to the person or entity which created the life estate. This rare form of ownership may arise when a legal entity which does not die a natural death (i.e., a trust or corporation) creates a life estate. The right to have possession of property returned after the end of a life estate is properly called a "reversion", but is treated as a remainder interest for purposes of valuation.

(4) Life estate and remainder interest tables. These tables must be used to determine the value of a life estate or remainder interest. In order to use the table, it is necessary to first know the age of the life tenant or, if there are more than one life tenants, the age of the youngest life tenant; and the fair market value of the property which is subject to the life estate or remainder interest. The value of a life estate is found by selecting the appropriate age in the table and multiplying the corresponding life estate decimal fraction times the fair market value of the property. The value of a remainder interest is found by selecting the appropriate age of the life tenant in the table and multiplying the corresponding remainder interest decimal fraction times the fair market value of the property.

Life Estate and Remainder Interest Table

Age	Life Estate	Remainder Interest
0	.97188	.02812
1	.98988	.01012
2	.99017	.00983
3	.99008	.00992
4	.98981	.01019
5	.98938	.01062

6	.98884	.01116
7	.98822	.01178
8	.98748	.01252
9	.98663	.01337
10	.98565	.01435
11	.98453	.01547
12	.98329	.01671
13	.98198	.01802
14	.98066	.01934
15	.97937	.02063
16	.97815	.02185
17	.97700	.02300
18	.97590	.02410
19	.97480	.02520
20	.97365	.02635
21	.97245	.02755
22	.97120	.02880
23	.96986	.03014
24	.96841	.03159
25	.96678	.03322
26	.96495	.03505
27	.96290	.03710
28	.96062	.03938
29	.95813	.04187
30	.95543	.04457
31	.95254	.04746
32	.94942	.05058
33	.94608	.05392
34	.94250	.05750
35	.93868	.06132
36	.93460	.06540
37	.93026	.06974
38	.92567	.07433
39	.92083	.07917
40	.91571	.08429
41	.91030	.08970
42	.90457	.09543
43	.89855	.10145
44	.89221	.10779
45	.88558	.11442
46	.87863	.12137
47	.87137	.12863
48	.86374	.13626
49	.85578	.14422

50	.84743	.15257
51	.83674	.16126
52	.82969	.17031
53	.82028	.17972
54	.81054	.18946
55	.80046	.19954
56	.79006	.20994
57	.77931	.22069
58	.76822	.23178
59	.75675	.24325
60	.74491	.25509
61	.73267	.26733
62	.72002	.27998
63	.70696	.29304
64	.69352	.30648
65	.67970	.32030
66	.66551	.33449
67	.65098	.34902
68	.63610	.36390
69	.62086	.37914
70	.60522	.39478
71	.58914	.41086
72	.57261	.42739
73	.55571	.44429
74	.53862	.46138
75	.52149	.47851
76	.50441	.49559
77	.48742	.51258
78	.47049	.52951
79	.45357	.54643
80	.43659	.56341
81	.41967	.58033
82	.40295	.59705
83	.38642	.61358
84	.36998	.63002
85	.35359	.64641
86	.33764	.66236
87	.32262	.67738
88	.30859	.69141
89	.29526	.70474
90	.28221	.71779
91	.26955	.73045
92	.25771	.74229
93	.24692	.75308
94	.23728	.76272

95	.22887	.77113
96	.22181	.77819
97	.21550	.78450
98	.21000	.79000
99	.20486	.79514
100	.19975	.80025
101	.19532	.80468
102	.19054	.80946
103	.18437	.81563
104	.17856	.82144
105	.16962	.83038
106	.15488	.84512
107	.13409	.86591
108	.10068	.89932
109	.04545	.95455

(5) In some cases, the life tenant may suffer from a condition which is likely to cause death at an unusually early age. That circumstance decreases the value of the life estate and increases the value of the remainder interest. The existence of such a condition must be verified by a medical statement which estimates the remaining duration of life in years. The estimated remaining duration of life may be used, in conjunction with a ~~mortability~~ mortality table, to determine the comparable age for application of the life estate and remainder interest table.

5. Contractual rights to receive money payments:

a. For various reasons, but usually because an applicant or recipient has sold property with a contract to receive a series of payments, rather than one payment, an applicant or recipient may own contractual rights to receive money payments. Such contractual rights are available assets subject to the asset limits. If the applicant or recipient has sold real property or a mobile home, and received in return a promise of payments of money at a later date, usually to be made periodically, and an attendant promise to return the property if the payments are not made, the arrangement is usually called a "contract for deed". The essential feature of the contract for deed is the right to receive future payments, usually coupled with a right to get the property back if the payments are not made. Contractual rights to receive money payments also arise out of other types of transactions. The valuable contract document may be called a note, accounts receivable, mortgage, or by some other name.

b. ~~Because such~~ The value of contracts which provide interest at rates at or above the posted yields of the federal national mortgage association (Fannie Mae), as posted for standard conventional fixed rate mortgages, as published in the Wall Street Journal at its most recent publication of posted yields, is equal to the principal balance plus interest due to the time of valuation, provided that the contract is not in default. Some contracts may have been entered into when interest rates were lower, or ~~because~~ a low interest rate or no interest may have been charged in a transaction between relatives~~,~~ ~~the contract~~. These contracts may not be saleable or negotiable at face value. That is not to say that such contractual rights have no value. A proper valuation may be made by a process called "discounting", which will take into account the changes in the interest rates. The discounted value may be determined by the applicant or recipient through the application of paragraph 1 or by the legal services division of the state agency under paragraph 2.

(1) The discounting process requires estimating the present value of the money payments described in the contract. The formula for present value is:

$$PV = S \frac{1}{(1 + i)n} \text{ or } \frac{S}{(1 + i)n} \text{ or } S(1 + \cancel{+}\ \underline{i})^{-n} \text{ where}$$

PV = present value of future sum of money
S = future sum of money
i = earnings rate for each compounding period
n = number of periods

The information to apply the formula is derived from the contract except for the factor "i". The earnings rate to be used for the factor "i" is the posted yields of the federal national mortgage association (Fannie Mae), as posted for standard conventional fixed rate mortgages, as published in the Wall Street Journal at its most recent publication of posted yields. The application of this formula will produce the highest reasonable determination of fair market value of the contractual rights to receive money payments. In the event the contract is in default, and there is no reasonable expectation that payments on the contract will be brought current within one year's time, the factor "S" is equal to the total of all outstanding principal and interest due on the contract and the factor "n" equals one.

(2) A request for ~~the discounted value~~ a valuation, accompanied by the contract documents, may be sent to the legal services division. The request must

indicate if the payments on the contract are current. If the payments are not current, the request must indicate the amount of each payment made and time each such payment was made.

c. In some cases, the price and terms of a contract for deed may, in combination, be extremely favorable to the buyer. If the sale is made with a minimal downpayment, low interest rates, a long payment period, or a combination of any of those factors, the effect may be a transfer for less than adequate consideration. In such cases, the valuation must also indicate the fair market value of the property sold as of the date of sale and the value of the contractual rights immediately after the sale.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-33. Disqualifying transfers.

1. a. Except as provided in subsections 2 and 3, a person is ineligible for nursing facility services, swing bed services, and medicaid waivered services for a period of time, determined under this subsection, following the disposal of any asset by the person or the person's spouse for less than fair market value.

b. The period of ineligibility begins with the month in which such assets were transferred, and the number of months in the period is equal to the lesser of:

(1) Thirty months; or

(2) The total uncompensated value of the assets so transferred, divided by the average monthly cost of nursing facility care in North Dakota in the year of application.

c. A person is not ineligible because of subdivision a to the extent that the asset was the person's home and the home was transferred to:

(1) The person's spouse;

(2) The person's son or daughter who is under age twenty-one or blind or disabled;

(3) The person's brother or sister who has an equity interest in the home and who was residing in the home for a period of at least one year immediately before

the date the person became an institutionalized person;

(4) The person's son or daughter (other than a child described in paragraph 2) who was residing in the person's home for a period of at least two years immediately before the date the person became an institutionalized person, and who provided care to the person which permitted the person to reside in the person's home, rather than in an institution or facility.

d. A person is not ineligible because of subdivision a to the extent that the assets were transferred ~~in~~:

(1) To the person's child described in paragraph 2 of subdivision c; or

(2) In trust for the sole benefit of the person, the person's spouse, or the person's child described in paragraph 2 of subdivision c.

e. A person is not ineligible because of subdivision a to the extent that the person shows that:

(1) He or she intended to dispose of the assets either at fair market value or other valuable consideration, and makes a satisfactory showing that he or she had an objectively reasonable belief that adequate consideration was received;

(2) The assets were transferred exclusively for a purpose other than to qualify for medicaid; or

(3) ~~With~~ A denial of eligibility would work an undue hardship, with respect to periods after the asset is returned, because the assigned or transferred asset has been returned to the assignor or transferor.

f. A person is not ineligible because of subdivision a to the extent that the asset transferred was:

(1) Household goods, personal effects, or an ~~automobile with an equity value of four thousand five hundred dollars or less~~ exempt motor vehicle.

(2) A burial fund of up to one thousand five hundred dollars, plus earnings on the burial fund.

(3) A burial space or agreement which represents the purchase of a burial space held for the transferor, the transferor's spouse, or any other member for the transferor's immediate family.

(4) Property essential to self-support, which means:

(a) Property which the transferor owns, ~~with an equity value not exceeding~~ to the extent the equity value does not exceed six thousand dollars, which produces annual income at least equal to six percent of equity value, and which the transferor is not actively engaged in using to produce income;

(b) Nonbusiness property which the transferor owns, ~~up to an~~ to the extent the equity value ~~of~~ does not exceed six thousand dollars when used to produce goods or services essential to daily activities or, for instance, when used to grow produce or livestock solely for consumption in the transferor's household; and

(c) Property which is essential to ~~self-support~~ earning a livelihood.

(5) Assets set aside, by a blind or disabled (but not an aged) transferor, as a part of a plan approved by the social security administration, for the transferor to achieve self-support.

(6) Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288], or other assistance provided pursuant to a federal statute on account of a catastrophe which is declared to be a major disaster by the president, and interest earned on that assistance, but only for nine months following receipt of that assistance.

(7) Any amounts received from the United States which are attributable to underpayments of benefits due from one or more prior months, under title II or title XVI of the Act [42 U.S.C. 401 et seq. and 1381 et seq.], but only for six months following receipt of those amounts.

(8) The value of assistance, paid with respect to a dwelling unit occupied by the transferer, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].

(9) Any amounts received by the transferor from a fund established by a state to aid victims of crime, to the extent that the transferor demonstrates that the

amount was paid in compensation for expenses incurred or losses suffered as a result of a crime, but only for nine months following receipt of the amount.

(10) Relocation assistance amounts provided by a state or local government to the transferor, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.], which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636], but only for nine months following receipt of the amounts.

~~(11) Transferred to the transferor's spouse before the transferor was determined eligible for medicaid.~~

~~(12) Transferred to the transferor's community spouse, by a transferor who is an institutionalized person, within sixty days after the date of the transferor's application for medicaid benefits, and within the remaining days of the month in which the sixtieth day falls, but only to the extent necessary to provide the community spouse with assets which do not exceed the community spouse resource allowance in effect on the date initial medicaid eligibility was determined.~~

g. There is a presumption that a transfer for less than adequate consideration was made for purposes which include the purpose of qualifying for medicaid:

(1) In any case in which the person's assets remaining after the transfer produce income which, when added to other income available to the person, totals an amount insufficient to meet all living expenses and medical costs reasonably anticipated to be incurred in the month of transfer and in the twenty-nine months following the month of the transfer;

(2) In any case in which an application or inquiry about medicaid benefits was made by or on behalf of the person and the person making inquiry was informed of medicaid asset limits; or

(3) In any case in which the person was an applicant for or recipient of medicaid at the time the transfer was made.

h. An applicant or recipient who claims that an asset was transferred exclusively for a purpose other than to qualify for medicaid must show that a desire to receive medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subdivision g.

i. For purposes of this ~~subsection, "adequate consideration" means~~ section:

(1) "Adequate consideration" means:

(a) In the case of an asset which is not subject to reasonable dispute concerning its value, such as cash, bank deposits, stocks, and fungible commodities, one hundred percent of fair market value; and

~~(2)~~ (b) In the case of an asset which is subject to reasonable dispute concerning its value, seventy-five percent of fair market value ~~established before the sale~~.

(2) "Uncompensated value" means the difference between fair market value and the value of any consideration received.

2. a. Except as provided in subsection 3, assignment or transfer of a nonexempt property for less than adequate consideration, made prior to July 1, 1988, whenever made with the intent to render the assignor or transferor, or a family member eligible for medicaid benefits, produces ineligibility. An amount equal to the fair market value of the property transferred will be treated as though the assignor or transferor had retained the property. An individual found ineligible as a result of a disqualifying assignment or transfer will remain ineligible until the individual becomes legally obligated to pay for medical expenses, not paid for by any other third party, equal to the difference between the fair market value of the property and the amount of compensation actually received. The return of an assigned or transferred asset to the assignor or transferor will nullify the disqualifying assignment or transfer, and the returned asset is thereafter treated as any other asset.

b. There are legitimate instances when a property assignment or transfer may be valid. The applicant or recipient should be given full opportunity to state the reasons for having made the property assignment or transfer, and the statements should be considered in relation to the following questions:

(1) Was adequate consideration received?

(2) How recent was the assignment or transfer?

(3) Is the applicant's or recipient's stated purpose reasonable in view of the circumstances prevailing at the time of the assignment or transfer?

(4) Would it have been reasonable to anticipate that the assignment or transfer of property at the time it occurred would result in an earlier need for assistance?

(5) Was there some consideration other than cash?

(6) Did the transferee have a legal or equitable interest in the property transferred?

c. An assignment or transfer of property for less than adequate consideration, made at any time after two years prior to the first date of application or inquiry for medicaid or after a previous application for medicaid has been made and denied because of excess property resources, shall be presumed to have been made for the purpose of rendering the applicant eligible for medicaid. This presumption may be rebutted by substantial evidence of an intent which is inconsistent with the presumed intent.

3. The provisions of subsections 1 and 2 may not be applied to deny, to qualified medicare beneficiaries and to qualified disabled and working individuals, benefits available solely due to their status as qualified medicare beneficiaries and qualified disabled and working individuals.

4. Where the assignee or transferee is a relative of the assignor or transferor, services or assistance furnished by the assignee or transferee to the assignor or transferor may not be treated as consideration for the transferred property unless provided pursuant to a valid contract entered into prior to the rendering of the service or assistance.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396p(c)

75-02-02.1-34. Income considerations.

1. All income must be considered in establishing eligibility~~, in the flexible application of income to medical costs not in the state plan,~~ and in determining a recipient's liability ~~toward~~ for the medical costs.

2. Only such income as is actually available will be considered. Income is actually available when it is at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has

the lawful power to make the income available or to cause the income to be made available. Income will be reasonably evaluated. A determination that income is deemed available is a determination that the income is actually available. This subsection does not supersede other provisions of this chapter which describe or require specific treatment of income, or which describe specific circumstances which require a particular treatment of income.

3. The financial responsibility of any individual for any applicant or recipient of medicaid will be limited to the responsibility of spouse for spouse and parents for a child under age twenty-one or, if blind or disabled, under age eighteen. Such responsibility is imposed upon applicants or recipients as a condition of eligibility for medicaid. Except as otherwise provided in this section, the income of the spouse and of the parents of a child under age twenty-one or, if blind or disabled, under age eighteen are deemed available to the applicant or recipient, even if that income is not actually contributed. For purposes of this subsection, biological and adoptive parents, but not stepparents, are treated as parents.

   a. It is presumed that all spousal income is actually available ~~to aged, blind, or disabled individuals~~ where financial responsibility is imposed pursuant to this subsection. In order to rebut this presumption, the applicant or recipient must demonstrate that the spousal income is unavailable despite reasonable and diligent efforts to access such income. The rebuttal of this presumption does not preclude the department from exercising the powers granted to it by North Dakota Century Code section 50-24.1-02.1. Except as provided in paragraphs 1, 2, and 3, no applicant or recipient who has a statutory or common law cause of action for support from a spouse, but who has failed to diligently pursue that cause of action, may rebut the presumption. Any applicant or recipient who documents any of the following circumstances will have rebutted the presumption without further proof:

      (1) A court order, entered following a contested case, determines the amounts of support that a spouse must pay to the applicant or recipient.

      (2) The spouse from whom support could ordinarily be sought, and the property of such spouse, is outside the jurisdiction of the courts of the United States or any of the United States.

      (3) ~~The~~ In cases where section 75-02-02.1-24 does not apply, the applicant or recipient has been subject to marital separation, with or without court order, ~~for~~

~~at least two years prior to making application for medical assistance benefits, and there has been no contact whatever between the applicant or recipient and his or her spouse for the same two year period~~ the parties have not separated for the purpose of securing medicaid benefits, and the spouse of the applicant or recipient has refused to furnish information about the spouse's income sufficient to determine eligibility.

(4) In cases where section 75-02-02.1-24 applies, income is that properly treated as belonging to the community spouse.

b. It is presumed that all parental ~~assets are~~ income is actually available to a child under age twenty-one or, if blind or disabled, under age eighteen, where financial responsibility is imposed pursuant to this subsection. This presumption may be rebutted by a showing that the child is ~~living independently.~~:

(1) Living independently;

(2) A child for whom adoption assistance maintenance payments are made under title IV-E;

(3) A child for whom foster care maintenance payments are made under title IV-E;

(4) A child, living in North Dakota, receiving title IV-E adoption assistance payments from another state;

(5) A child, in foster care placement in North Dakota, receiving a title IV-E foster care payment from another state; or

(6) Living with a parent who is separated from the child's other parent, with or without court order, if the parents did not separate for the purpose of securing medicaid benefits, and the parent with whom the child is not living has refused to furnish information about that parent's income sufficient to determine eligibility.

4. Income may be received weekly, biweekly, monthly, intermittently, or annually. However income is received, a monthly income amount must be computed. Lump-sum income will be attributed to an appropriate month as provided for in sections 75-02-02.1-37 and 75-02-02.1-38. All other income must be treated as received in the month in which it is normally received.

5. Payments from any source, which are or may be received as a result of a medical expense or increased medical need ~~(such as veterans administration aid and attendance or indemnity insurance payments)~~, are not income. ~~Such payments must be treated as received in the months in which the medical expense or increased medical need was incurred and expended in such month for such medical expense or increased medical need.~~ These payments include veterans administration aid and attendance and veterans administration reimbursements for unusual medical expenses.

   a. Veterans administration aid and attendance benefits must be considered as payments received in the months the benefit was intended to cover and must be applied to the medical expense incurred in those months; and

   b. Veterans administration reimbursements for unusual medical expenses must be considered as payments received in the months in which the increased medical expense occurred and must be applied to the medical expense incurred in those months.

6. Determining ownership of income.

   a. For purposes of this subsection, "instrument" means any writing that evidences a right to the payment of money except that a check or money order is an instrument only if issued by a governmental agency, an employer of the payee, or an underwriter of life insurance.

   b. In the case of income from a trust:

      (1) Except as provided in paragraph 2, income must be attributed in accordance with this chapter, including section 75-02-02.1-31; or

      (2) Income must be considered available to each spouse as provided in the trust or, in the absence of a specific provision in the trust, in accordance with subdivision d.

   c. In the case of income from an instrument, subject to subdivision f, income must be considered available to each spouse as provided in the instrument or, in the absence of a specific provision in the instrument, in accordance with subdivision d.

   d. In the case of income from a trust, or based on an instrument, which has no specific provision for payment to a spouse:

      (1) If payment of income is made solely to or in the name of the institutionalized spouse or the community

spouse, the income shall be considered available only to that respective spouse;

(2) If payment of income is made to or in the names of both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(3) If payment of income is made to or in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

e. In the case of income not from a trust in which there is no instrument establishing ownership, subject to subdivision f, one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

f. Except in the case of income from a trust, the rules for determining ownership of income are superseded to the extent that the institutionalized spouse can establish that the ownership interests are otherwise than as provided in those rules.

g. In cases where neither spouse is institutionalized, or treated as being institutionalized, income considered available to either spouse is considered available to the other spouse as well.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-35. Budgeting.

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

~~a. "Base month" means the calendar month prior to the processing month.~~

~~b. "Best estimate" means an income, expense, or circumstance prediction based on past amounts of income and expense and known factual information concerning future circumstances which affect eligibility, expenses to be incurred, or income to be received in the recipient liability month. A prediction based on past circumstances and income and~~

~~expense amounts uses those circumstances and income and expense amounts which occurred in the base month. Factual information concerning future circumstances must be based on information by which the applicant or recipient demonstrates known changes or highly probable changes to the income, expense, or circumstances which offset eligibility, from the base month to the recipient liability month.~~

~~c. "Processing month" means the month between the base month and the recipient liability month.~~

~~d. "Prospective budgeting" means computation of a household's eligibility and recipient liability based on the best estimate of income, expenses, and circumstances for a recipient liability month.~~

~~e. "Recipient liability month" means the calendar month for which eligibility and recipient liability is being computed.~~

~~2. Computing recipient liability for previous month. Compute the amount of recipient liability by use of actual verified information, rather than best estimate, in each of the previous months for which eligibility is sought.~~

~~3. Computing recipient liability for the current month and next month at time of approval of the application. Compute the amount of the recipient liability prospectively for the current month and the next month. The income received or best estimate of income to be received during the current month must be used to compute the recipient liability for the current month. The best estimates of income to be received during the next month must be used to compute the recipient liability for the next month.~~

~~4. Computing recipient liability for ongoing cases.~~

~~a. For cases with fluctuating income, compute the recipient liability using verified income, expenses, and circumstances which existed during the base month, unless factual information concerning future circumstances is available. Recipients must report their income, expenses, and other circumstances on a monthly basis to determine continued eligibility.~~

~~b. For cases with stable income, compute the recipient liability using the best estimate of income, expenses, and circumstances. Recipients with stable income must report changes in income, expenses, and other circumstances within ten days of the day they became aware of the change. A determination of continued eligibility, after a~~

~~change is reported and demonstrated, is based on a revised best estimate which takes the changes into consideration.~~

~~5. Budgeting procedures used when adding individuals to an eligible unit. Individuals may be added to an eligible unit up to one year prior to the current month, provided the individual meets all eligibility criteria for medicaid, provided that, the eligible unit was eligible in all of the months in which eligibility for the individual is established, and provided that, the individual was in the unit in the months with respect to which eligibility for that individual is sought. Recipient liability will be based on the unit's actual income and circumstances when adding each individual for retroactive periods. Recipient liability must be based on the unit's income and circumstances from the base month, plus the best estimate of each individual's income and circumstances when adding each individual to the current or next month.~~

~~6. Budgeting procedures when deleting individuals from a case. When a member of an existing unit is expected to leave the unit during the recipient liability month, that person is considered to be a member of the unit until the end of the recipient liability month.~~ Repealed effective December 1, 1991.

History: ~~Effective December 1, 1991.~~
General Authority: ~~NDCC 50-06-16, 50-24.1-04~~
Law Implemented: ~~NDCC 50-24.1-02~~

75-02-02.1-36. Disregarded income.

1. The following types of income must be disregarded in determining medicaid eligibility for all persons except those residing in nursing facilities, the state hospital, the Anne Carlsen school-hospital, and intermediate care facilities for the mentally retarded, and those persons receiving swing bed care in hospitals:

~~1.~~ a. Money payments made by the department in connection with foster care or the subsidized adoption program;

~~2.~~ b. Occasional small gifts;

~~3.~~ c. County general assistance that may be issued on an intermittent basis to cover emergency type situations;

~~4.~~ d. Income received as a housing allowance by programs sponsored by the United States department of housing and urban development and rent supplements or utility payments provided through the housing assistance program;

~~5.~~ e. Income of an individual living in the parental home if the individual is not included in the medicaid unit;

~~6.~~ f. Mandatory and optional supplementation payments;

~~7.~~ g. Educational loans, scholarships, grants, awards, and work study received by an undergraduate student~~, educational assistance provided for attendance costs to undergraduate and graduate students under programs in title IV of the Higher Education Act, and for attendance costs under bureau of Indian affairs student assistance programs~~;

~~8.~~ h. In-kind income except in-kind income received in lieu of wages;

~~9.~~ i. Per capita judgment funds paid to members of any Indian tribe under Pub. L. 92-254 or Pub. L. 93-134;

~~10.~~ j. Compensation received by volunteers participating in the action program as stipulated in the Domestic Volunteer Service Act of 1973 [Pub. L. 93-113], including foster grandparents, older American community service program, retired senior volunteer program, service corps of retired executives, volunteers in service to America, and university year for action;

~~11.~~ k. Benefits received through the low income home energy assistance program;

~~12.~~ l. Training funds received from vocational rehabilitation;

~~13.~~ m. Training allowances of up to thirty dollars per week provided through the tribal work experience program, community work experience program, job assistance program, or job search. Funds in excess of thirty dollars per week are treated as unearned income;

~~14.~~ n. Income tax refunds and earned income credits;

~~15.~~ o. Needs-based payments, support services, and relocation expenses provided through programs established under the Job Training Partnership Act and through the job opportunities and basic skills program;

~~16.~~ p. Income derived from submarginal lands, conveyed to Indian tribes and held in trust by the United States, as required by Pub. L. 94-114;

~~17.~~ q. Income earned by ~~an eligible~~ a child, including income received through volunteers in service to America and Job Training Partnership Act; provided that~~,~~ the child is a full-time student or a part-time student who is not employed one hundred hours or more per month. A child

retains status as a student during summer vacation if the child intends to return to school in the fall;

~~18.~~ r. Payments from the family subsidy program~~, except payments which are made to reimburse the cost of medical services furnished by medicaid~~;

~~19.~~ s. The first fifty dollars per month of current child support received on behalf of children in the medicaid unit;

~~20.~~ t. Interest earned on ~~checking~~ and accured to accounts;

~~21.~~ u. Payments made to recipients under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [Pub. L. 91-646];

~~22.~~ v. Tax-exempt portions of payments made as a result of the Alaska Native Claims Settlement Act [Pub. L. 92-203];

~~23.~~ w. Payments to certain United States citizens of Japanese ancestry, resident Japanese aliens, and eligible Aleuts made under the Wartime Relocation of Civilians Reparations Act [Pub. L. 100-383];

~~24.~~ x. Agent orange payments;

~~25.~~ y. A loan ~~for~~ from any source that is subject to a written agreement requiring repayment by the recipient;

~~26.~~ z. ~~Supplemental medical insurance benefit, the~~ The medicare part B premium refunded by the social security administration;

~~27.~~ aa. Crime Victims Reparation Act payments;

~~28.~~ bb. Lump-sum supplemental security income benefits in the month in which the benefit is received;

~~29. Income used to determine an aid to families with dependent children benefit;~~

~~30.~~ cc. German reparation payments made to survivors of the holocaust, and reparation payments made under sections 500 through 506 of the Austrian General Social Insurance Act; and

~~31. For so long as 38 U.S.C. 3203(f) remains effective, forty-five dollars of veterans administration improved pensions paid to a veteran who has neither spouse nor child and who resides in a medicaid-approved nursing facility;~~

~~32. Supplemental security income lump-sum payments, which are disregarded in the month received and treated as assets thereafter; and~~

~~33.~~ dd. Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288] or some other federal statute, because of a presidentially declared major disaster, and interest earned on that assistance.

2. Only the following types of income may be disregarded in determining medicaid eligibility for persons residing in nursing facilities, the state hospital, the Anne Carlsen school-hospital, and intermediate care facilities for the mentally retarded, and for persons receiving swing bed care in hospitals.

   a. Occasional small gifts; and

   b. For so long as 38 U.S.C. 32-03(f) remains effective, forty-five dollars of veterans administration improved pensions paid to a veteran who has neither spouse nor child and who resides in a medicaid-approved nursing facility.

3. For purposes of this section:

   a. "Full-time student" means a person who attends school on a schedule equal to a full curriculum.

   b. "Student" means a child under the age of twenty-one years who regularly attends and makes satisfactory progress in a course of elementary or secondary school, college, university, or vocational training.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-37. Unearned income.

1. Gross income includes unearned income which is received in a fixed amount each month, and unearned income received in a lump-sum.

2. Recurring unearned lump-sum payments are prorated over the number of months the payment is intended to cover.

3. All nonrecurring unearned lump-sum payments, except ~~supplemental security income,~~ veterans administration aid and attendance~~,~~ and veterans administration reimbursements for

unusual medical expenses, ~~and major disaster relief payments~~ must be considered as income in the month received and assets thereafter.

~~a. Supplemental security income lump-sum payments must be disregarded as income in the month received and treated as assets thereafter;~~

~~b. Veterans administration aid and attendance benefits must be considered as payments received in the months the benefit was intended to cover and must be applied to the medical expense incurred in such months;~~

~~c. Veterans administration reimbursements for unusual medical expenses must be considered as payments received in the months in which the increased medical expense occurred and must be applied to the medical expense incurred in such months; and~~

~~d. Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288] or some other federal statute, because of a presidentially declared major disaster, and interest earned on that assistance treated as an asset.~~

4. Interest and dividend income paid directly to the applicant or recipient is income in the month received. Interest accrued but not paid is an asset.

5. One-twelfth of the annual amount of lease payments deposited in individual Indian moneys accounts by the bureau of Indian affairs is income in each month and may be determined:

   a. By totaling all payments in the most recent full calendar year and dividing by twelve;

   b. By totaling all payments in the twelve-month period ending with the previous month and dividing by twelve; or

   c. If the applicant or recipient demonstrates, by furnishing lease documents or reports, that the deposit amount will be substantially different than the annual amount which would be determined under subdivision a or b, by totaling all payments likely to be made in the twelve-month period beginning with the month in which the lease arrangement changed and dividing by twelve.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-38. Earned income.

1. Net earned income is determined by adding monthly net income from self-employment to other monthly earned income and subtracting the applicable deductions.

2. "Monthly net income from self-employment" means:

   a. In the case of self-employed persons whose business does not require the purchase of goods for sale or resale, seventy-five percent of gross monthly earnings from self-employment.

   b. In the case of self-employed persons whose business requires the purchase of goods for sale or resale, seventy-five percent of the result determined by subtracting cost of goods purchased from gross receipts, determined monthly.

   c. In the case of a business which furnishes room and board, monthly gross receipts less one hundred dollars per room and board client.

   d. In the case of self-employed persons in a service business which requires the purchase of goods or parts for repair or replacement, twenty-five percent of gross monthly earnings from self-employment.

   e. In the case of self-employed persons who receive income other than monthly, ~~the amount determined under paragraph 1 is the monthly net income from self-employment unless any of the circumstances described in paragraph 2 are demonstrated.~~

      ~~(1)~~ ~~Twenty-five~~ if the most recently available federal income tax return will accurately predict income, twenty-five percent of gross annual income, plus the gain or minus the loss resulting from the sale of capital items, plus ordinary gains or minus ordinary losses, divided by twelve~~, or~~.

      ~~(2)~~ If the most recent available federal income tax return ~~reports income for a fiscal year which ended more than eighteen months before the month for which eligibility is being determined, if~~ will not accurately predict income because the business has been recently established, because the business has been terminated or subject to severe reversal, ~~if~~ because the applicant or recipient makes a convincing showing that actual net income is substantially less than ~~net income as determined under paragraph 1, or if~~ twenty-five percent of gross profit, or because the county agency determines for any reason that

actual net profits are substantially greater than ~~annual net income as determined under paragraph 1~~ twenty-five percent of gross profit, an amount determined by the county agency to represent the best estimate of ~~annual net income for the calendar year within which the eligibility month occurs, divided by twelve, is the~~ monthly net income from self-employment will be used. A self-employed individual must provide, on a monthly basis, the best information available on income and cost of goods. Income statements, when available, shall be used as a basis for computation. If the business is farming, or any other seasonal business, the annual net income, divided by twelve, is the monthly net income.

3. If earnings from more than one month are received in a lump-sum payment, the payment must be divided by the number of months in which the income was earned, and the resulting monthly amounts are attributed to each of the months with respect to which the earnings were received.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-39. Income deductions.

1. The deductions described in this subsection must be allowed on either earned income or unearned income.

   a. The cost of premiums for health insurance carried by an individual or family. This cost may be deducted from income in the month the premium is ~~incurred~~ paid or may be prorated over the months for which the premium affords coverage. If the individual or family carries health insurance policies with duplicate coverage, the individual may choose the policy for which the premium is deducted. This deduction may not be made in determining qualified medicare beneficiary and qualified disabled and working individual eligibility. For purposes of this deduction, premiums for health insurance include payments made for insurance, health care plans, or nonprofit health service plan contracts which provide benefits for hospital, surgical, and medical care, but do not include payments made for coverage which is:

      (1) Limited to disability or income protection coverage;

      (2) Automobile medical payment coverage;

      (3) Supplemental to liability insurance;

(4) Designed solely to provide payments on a per diem basis, daily indemnity, or nonexpense-incurred basis; or

(5) Credit accident and health insurance.

b. (1) ~~Medical expenses incurred and claimed by ineligible members of the medicaid unit.~~ Medical expenses for necessary medical or remedial care may be deducted if the expense is:

(a) Incurred by a member of a medicaid unit in the month for which eligibility is being determined;

(b) Provided by a medical practitioner licensed to furnish the care;

(c) Not subject to payment by any third party, including medicaid and medicare;

(d) Not incurred for nursing facility services, swing bed services, or medicaid-waivered services during a period of ineligibility determined under section 75-02-02.1-33; and

(e) Claimed.

(2) Each medical or remedial care expense claimed for deduction must be documented by the applicant or recipient in a manner which describes the service, the date of the service, the amount of cost incurred~~, the amount of the cost remaining unpaid, the amount of the cost previously applied in determining medicaid benefits for any medicaid recipient~~, and the name of the service provider.

(3) This deduction may not be made in determining qualified medicare beneficiary and qualified disabled and working individual eligibility.

c. Court-ordered child and spousal support payments actually paid by a member of the medicaid unit on behalf of a person who is not a member of the medicaid unit.

d. The cost of premiums for a nursing insurance policy carried by an individual or the individual's spouse. This cost may be deducted from income in the month the premium is paid or may be prorated over the months for which the premium affords coverage. If the individual or family carries nursing insurance policies with duplicate coverage, the individual may choose the policy for which the premium is deducted. This deduction may not be made

in determining qualified medicare beneficiary and qualified disabled and working individual eligibility.

e. Reasonable child care expenses, not otherwise reimbursed, necessary to engage in employment or training.

f. With respect to each individual in the medicaid unit who is employed or in training, but who is not aged, blind, disabled, or a child, thirty dollars as a work or training allowance.

g. Transportation expenses necessary to secure medical care provided for a member of the medicaid unit.

h. The cost of remedial care for an individual residing in a specialized facility. This deduction is limited to the difference between the facility rate and the regular medically needy income level. This deduction may not be made in determining qualified medicare beneficiary and qualified disabled and working individual eligibility.

i. ~~For~~ Except with respect to income from aid to families with dependent children, supplemental security income, aid and attendance veterans' benefits, housebound veterans' benefits, veterans' clothing allowance, and need-based veterans' pensions, all aged, blind, and disabled applicants or recipients other than those residing in a nursing facility, the state hospital, or the Anne Carlsen school-hospital, or receiving swing bed care in hospitals, twenty dollars, provided that ~~when~~:

(1) When more than one aged, blind, or disabled ~~persons live~~ person lives together, no more than a total of twenty dollars may be deducted~~.~~;

(2) When both earned and unearned income is available, this deduction must be made from unearned income; and

(3) When only earned income is available, this deduction must be made before deduction of sixty-five dollars plus one-half of the remaining monthly gross income made under subdivision e of subsection 2.

2. The deductions described in this subsection may be allowed only on earned income.

a. For all applicants or recipients except for aged, blind, or disabled applicants or recipients, mandatory payroll deductions and union dues ~~actually paid or~~ withheld, or ninety dollars, whichever is greater;

b. Mandatory retirement plan deductions;

c. Union dues actually paid;

d. Expenses of a blind person, reasonably attributable to earning income~~, if the blind person is:~~

~~(1) Under age sixty-five; or~~

~~(2) Age sixty-five or older, who received supplemental security income payments due to blindness for the month before the person attained age sixty-five~~;

~~d. Expenses for items or services which are directly related to enabling an impaired person to work and which are necessarily incurred by that person because of a physical or mental impairment, in any month in which the individual meets all supplemental security income nonincome criteria and meets the supplemental security income test; and in any continuous subsequent month in which the person meets all supplemental security income nonincome criteria and meets the supplemental security income test after deductions made under this subdivision.~~

e. For all aged, blind, or disabled applicants or recipients other than those residing in a nursing facility, the state hospital, or the Anne Carlsen school-hospital, or receiving swing bed care in a hospital, sixty-five dollars plus one-half of the remaining monthly gross earned income; provided that, when more than one aged, blind, or disabled person lives together, no more than sixty-five dollars, plus one-half of the remaining combined earned income, may be deducted; and

f. For all aged, blind, or disabled applicants or recipients residing in a nursing facility, the state hospital, or the Anne Carlsen school-hospital, or receiving swing bed care in a hospital, mandatory payroll deductions actually withheld.

3. A deduction of ~~actual~~ payments made for services of a guardian or conservator may be made, up to a maximum deduction equal to the greater of:

a. Five percent of gross monthly income ~~from benefit programs (i.e., supplemental security income, social security administration, veterans benefits and railroad retirement), but~~ excluding nonrecurring lump-sum payments ~~of such benefits~~; or

b. An amount specifically approved as a reasonable fee in an order of a court with jurisdiction over the guardianship or conservatorship.

~~4. For purposes of this section:~~

~~a. "Full time student" means a person who attends school on a schedule equal to a full curriculum.~~

~~b. "Student" means a child under the age of twenty one years who regularly attends and makes satisfactory progress in a course of elementary or secondary school, college, university, or vocational training.~~

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-40. Income levels.

1. Levels of income for maintenance, in total dollar amounts, will be used as a basis for establishing financial eligibility for medicaid. The income levels applicable to individuals and units are:

   a. Categorically needy income levels.

      (1) Categorically needy aid to families with dependent children recipients - The income level which establishes aid to families with dependent children eligibility. Eligibility for medicaid exists as a result of aid to families with dependent children eligibility.

      (2) Categorically needy aged, blind, and disabled recipients - The income level which establishes supplemental security income eligibility.

   b. Medically needy income levels.

      (1) Regular income levels. Regular income levels are applied when a medicaid individual or unit resides in ~~their~~ the individual's or the unit's own home or in a specialized facility, and when a medicaid individual has been screened as requiring nursing ~~facility~~ care, but elects to receive home and community-based services. The family size is increased for each unborn when determining the appropriate family size.

Number of Persons	Income Level Monthly	Yearly
1	$345	$4140
2	400	4800
3	435	5220
4	530	6360
5	600	7200

6	665	7980
7	705	8460
8	740	8880
9	770	9240
10	795	9540

For each person in the medicaid unit above ten, add twenty-one dollars to the monthly amount and two hundred and fifty-two dollars to the yearly amount.

(2) Nursing ~~home~~ care income level. The nursing ~~home~~ care income level must be applied to residents receiving care in nursing facilities, ~~swing bed hospital facilities,~~ intermediate care facilities for the developmentally disabled, the state hospital, ~~and~~ or the Anne Carlsen school-hospital, or receiving swing bed care in a hospital. This income level is forty-five dollars monthly and five hundred ~~and~~ forty dollars yearly. This income level is effective for all full calendar months of nursing care for single individuals and for individuals with eligible family members at home. For institutionalized individuals with an ineligible community spouse, this income level is effective in the month of entry, during full calendar months, and in the month of discharge.

(3) Community spouse income level. The community spouse income level for a community spouse who is eligible for medicaid is subject to subdivision a, paragraph 1 of subdivision b, or subdivision c. The level for an ineligible community spouse is the maximum amount permitted under 41 U.S.C. 1396r-5(d)(3)(C), as adjusted pursuant to 42 U.S.C. 1396r-5(g)~~, plus an amount, for each~~.

(4) Family member income level. Each additional family member living with the community spouse~~,~~ is allowed an income level equal to one-third of an amount determined in accordance with 42 U.S.C. 1396r-5(d)(3)(A)(i), less the monthly income of that family member. For purposes of this paragraph, "family member" has the meaning given in subdivision b of subsection 1 of section 75-02-02.1-24.

c. Poverty income level.

(1) Pregnant women and children under age six. The income level is equal to one hundred and thirty-three percent of the official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2), applicable to a family of the size involved.

The family size is increased for each unborn when determining the appropriate family size.

(2) Qualified medicare beneficiaries. Income levels will be applied to individuals or family members living together whose family includes a member who is aged, blind, or disabled and who is entitled to part A benefit under medicare. These income levels apply regardless of living arrangements. Individuals living apart from other family members are allowed separate income levels. The income level is equal to one hundred percent of the official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2), applicable to the family of the size involved.

(3) Children born after September 30, 1983. The income level is equal to one hundred percent of the official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2), applicable to a family of the size involved, with respect to individuals and families including individuals born after September 30, 1983, who have attained at least the age of six years. The family size is increased for each unborn when determining the appropriate family size.

(4) Extended medicaid benefits. The income level is equal to one hundred and eighty-five percent of the official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2), applicable to a family of the size involved. The family size is increased for each unborn when determining the appropriate family size.

(5) Qualified disabled and working individuals. Income levels will be applied to individuals or family members living together whose family includes a member who is disabled and who is entitled to part A benefits under medicare. The income levels apply regardless of living arrangements. Individuals living apart from other family members are allowed separate income levels. The income level is equal to two hundred percent of the official poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2), applicable to the family of the size involved.

2. ~~There shall be a flexible measurement of available income which will be applied in the following order:~~

   ~~a. Reasonable work-related expenses for producing any earned income as determined by the department;~~

   ~~b. Payments made for necessary health insurance coverage;~~

   ~~c. Appropriate income deductions and disregards as determined by the department;~~

   ~~d. For maintenance, so that any income in an amount at or below the established income level will be protected for maintenance; and~~

   ~~e. Payments made for noncovered necessary medical and remedial care prescribed or ordered by a medical practitioner acting within the scope of practice permitted under state law.~~

~~3. All the remaining income will be applied to costs of medical care included in the state plan.~~

~~4.~~ Determining the appropriate income level in special circumstances.

   a. A child who is temporarily living out of the home of the child's parents, for the purpose of attending school, is not treated as living independently, but is allowed the regular income level for ~~a family of~~ one in addition to the income level applicable for the family unit remaining at home.

   b. During a month in which an individual with an eligible community spouse at home enters a nursing facility or leaves a nursing facility to return home, a month in which an individual enters a specialized facility or leaves a specialized facility to return home, or a month in which an individual elects to receive home and community-based services or terminates that election, the individual will be included in a family unit which also includes persons remaining at home for the purpose of determining the family size and the application of the appropriate medically needy income level.

   c. ~~In the case of an individual without family members remaining at home, whose physician certifies that the individual is likely to return home within six months after entry into a nursing facility, a medically needy income level for a family of one is allowed for the first six calendar months that the individual remains in the nursing facility, or until the physician determines that the individual is no longer likely to return home within~~

~~six months after entry into the nursing facility, whichever occurs first.~~ An individual without dependents who enters a nursing facility may continue at the regular income level for one if a physician certifies that the individual is likely to return to his or her home within six months.

d. A child who is living outside of the parental home, but who is not living independently; or a spouse who is temporarily living outside of the home to attend training or college, to secure medical treatment, because of temporary work relocation required by an employer, or for other reasons beyond the control of the spouse, is allowed a separate income level during all full calendar months during which the child or spouse lives outside the home.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-41. Deeming of income. Except as otherwise provided in this section, one hundred percent of the income of the ineligible medicaid unit in the home which exceeds the appropriate medicaid income level will be deemed to be available to all individuals residing in the home. "Individuals residing in the home" include individuals who are physically present, individuals who are temporarily absent, individuals attending educational facilities, individuals receiving acute medical care, and individuals receiving service in a specialized facility. ~~Only twenty-five~~

1. Twenty-five percent of the income of that ineligible medicaid unit which exceeds the appropriate medicaid income level will be deemed available to an eligible individual receiving services in a specialized facility.

2. None of the income of the medicaid unit in the home will be deemed available to an eligible individual who resides, or is treated as residing, outside of the home of the medicaid unit on other than a temporary basis~~, or to an eligible child under the age of twenty-one who is living independently~~. Individuals who reside in a facility which provides nursing care services to them are residing outside the home on other than a temporary basis. Individuals receiving home and community-based services are treated as residing outside the home on other than a temporary basis.

3. None of the income of the medicaid unit in the home will be deemed available to an eligible child under the age of twenty-one or, if blind or disabled, under age eighteen, who is:

a. Living independently;

b. A child for whom adoption assistance maintenance payments are made under title IV-E;

c. A child for whom foster care maintenance payments are made under title IV-E;

d. A child, living in North Dakota, receiving title IV-E adoption assistance payments from another state; or

e. A child, in foster care placement in North Dakota, receiving a title IV-E foster care payment from another state.

History: Effective December 1, 1991; amended effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-41.1. Recipient liability. Recipient liability is the amount of monthly net income remaining after all appropriate deductions, disregards, and medicaid income levels have been allowed. All such income must be considered to be available for the payment of medical services provided to the eligible individual or family.

1. Expenses for necessary medical or remedial care, incurred by a member of the medicaid unit in a month prior to the month for which eligibility is being determined, may be subtracted from recipient liability to determine remaining recipient liability, provided that:

   a. The expense was incurred in a month during which the member of the medicaid unit receiving the medical or remedial care was not a medicaid recipient;

   b. The expense was not previously applied in determining eligibility for, or the amount of, medicaid benefits for any medicaid recipient;

   c. The medical or remedial care was provided by a medical practitioner licensed to furnish the care;

   d. The expense is not subject to payment by any third party, including medicaid and medicare;

   e. The expense was not incurred for swing bed services provided in a hospital, nursing facility services, or medicaid-waivered services during a period of ineligibility determined under section 75-02-02.1-33; and

f. Each expense claimed for subtraction is documented by the applicant or recipient in a manner which describes the service, the date of the service, the amount of the cost incurred, the amount of the cost remaining unpaid, the amount of the cost previously applied in determining medicaid benefits for any medicaid recipient, and the name of the service provider.

2. The medicaid unit must apply the remaining recipient liability to expenses of necessary medical care incurred by a member of the medicaid unit in the month for which eligibility is being determined. The medicaid unit is eligible for medicaid benefits to the extent the current expenses of necessary medical care exceed remaining recipient liability.

History: Effective December 1, 1991.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-41.2. Budgeting.

1. Definitions. For purposes of this section:

a. "Base month" means the calendar month prior to the processing month.

b. "Best estimate" means an income, expenses, or circumstance prediction based on past amounts of income and expenses and known factual information concerning future circumstances which affect eligibility, expenses to be incurred; or income to be received in the recipient liability month. Factual information concerning future circumstances must be based on information by which the applicant or recipient demonstrates known changes or highly probable changes to the income, expenses, or circumstances which offset eligibility, from the base month to the recipient liability month.

c. "Processing month" means the month between the base month and the recipient liability month.

d. "Prospective budgeting" means computation of a household's eligibility and recipient liability based on the best estimate of income, expenses, and circumstances for a recipient liability month.

e. "Recipient liability month" means the calendar month for which eligibility and recipient liability is being computed.

2. Computing recipient liability for previous month. Compute the amount of recipient liability by use of actual verified

information, rather than best estimate, in each of the previous months for which eligibility is sought.

3. Computing recipient liability for the current month and next month at time of approval of the application. Compute the amount of the recipient liability prospectively for the current month and the next month. The income received or best estimate of income to be received during the current month must be used to compute the recipient liability for the current month. The best estimates of income to be received during the next month must be used to compute the recipient liability for the next month.

4. Computing recipient liability for ongoing cases.

   a. For cases with fluctuating income, compute the recipient liability using verified income, expenses, and circumstances which existed during the base month, unless factual information concerning future circumstances is available. Recipients must report their income, expenses, and other circumstances on a monthly basis to determine continued eligibility.

   b. For cases with stable income, compute the recipient liability using the best estimate of income, expenses, and circumstances. Recipients with stable income must report changes in income, expenses, and other circumstances within ten days of the day the recipients became aware of the change. A determination of continued eligibility, after a change is reported and demonstrated, is based on a revised best estimate which takes the changes into consideration.

5. Budgeting procedures used when adding individuals to an eligible unit. Individuals may be added to an eligible unit up to one year prior to the current month, provided the individual meets all eligibility criteria for medicaid, the eligible unit was eligible in all of the months in which eligibility for the individual is established, and the individual was in the unit in the months with respect to which eligibility for that individual is sought. Recipient liability will be based on the unit's actual income and circumstances when adding each individual for retroactive periods. Recipient liability must be based on the unit's income and circumstances from the base month, plus the best estimate of each individual's income and circumstances when adding each individual to the current or next month.

6. Budgeting procedures when deleting individuals from a case. When a member of an existing unit is expected to leave the unit during the recipient liability month, that person may remain as a member of the unit until the end of the recipient liability month.

story: Effective December 1, 1991.
neral Authority: NDCC 50-06-16, 50-24.1-04
Implemented: NDCC 50-24.1-02

NOVEMBER 1992

CHAPTER 75-02-02.1

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code section 75-02-02.1-33, Disqualifying Transfers.

The proposed amendments remove provisions concerning transfers which disqualify an applicant from receipt of Medicaid benefits. Transfers made for less than adequate consideration formerly had the effect of disqualifying an applicant. However, with respect to transfers made on or after July 1, 1988, federal law precludes a general determination of ineligibility for Medicaid benefits. Only nursing home benefits can be denied, and those benefits can be denied for no more than thirty months after the date of transfer.

Because very few current applicants for Medicaid benefits have made transfers, prior to July 1, 1988, which would have a current effect on Medicaid benefits, it is now appropriate to remove the provisions relating to those older transfers. These amendments have that effect.

75-02-02.1-33. Disqualifying transfers.

1. a. Except as provided in ~~subsections 2 and 3~~ subsection 2, a person is ineligible for nursing facility services, swing bed services, and medicaid waivered services for a period of time, determined under this subsection, following the disposal of any asset by the person or the person's spouse for less than fair market value.

b. The period of ineligibility begins with the month in which such assets were transferred, and the number of months in the period is equal to the lesser of:

(1) Thirty months; or

(2) The total uncompensated value of the assets so transferred, divided by the average monthly cost of nursing facility care in North Dakota in the year of application.

c. A person is not ineligible because of subdivision a to the extent that the asset was the person's home and the home was transferred to:

(1) The person's spouse;

(2) The person's son or daughter who is under age twenty-one or blind or disabled;

(3) The person's brother or sister who has an equity interest in the home and who was residing in the home for a period of at least one year immediately before the date the person became an institutionalized person;

(4) The person's son or daughter (other than a child described in paragraph 2) who was residing in the person's home for a period of at least two years immediately before the date the person became an institutionalized person, and who provided care to the person which permitted the person to reside in the person's home, rather than in an institution or facility.

d. A person is not ineligible because of subdivision a to the extent that the assets were transferred:

(1) To the person's child described in paragraph 2 of subdivision c; or

(2) In trust for the sole benefit of the ~~person, the~~ person's spouse, or the person's child described in paragraph 2 of subdivision c.

e. A person is not ineligible because of subdivision a to the extent that the person shows that:

(1) He or she intended to dispose of the assets either at fair market value or other valuable consideration, and makes a satisfactory showing that he or she had an objectively reasonable belief that adequate consideration was received;

(2) The assets were transferred exclusively for a purpose other than to qualify for medicaid; or

(3) A denial of eligibility would work an undue hardship, with respect to periods after the asset is returned, because the assigned or transferred asset has been returned to the assignor or transferor.

f. A person is not ineligible because of subdivision a to the extent that the asset transferred was:

(1) Household goods, personal effects, or an exempt motor vehicle.

(2) A burial fund of up to one thousand five hundred dollars, plus earnings on the burial fund.

(3) A burial space or agreement which represents the purchase of a burial space held for the transferor, the transferor's spouse, or any other member for the transferor's immediate family.

(4) Property essential to self-support, which means:

(a) Property which the transferor owns, to the extent the equity value does not exceed six thousand dollars, which produces annual income at least equal to six percent of equity value, and which the transferor is not actively engaged in using to produce income;

(b) Nonbusiness property which the transferor owns, to the extent the equity value does not exceed six thousand dollars when used to produce goods or services essential to daily activities or, for instance, when used to grow produce or livestock solely for consumption in the transferor's household; and

(c) Property which is essential to earning a livelihood.

(5) Assets set aside, by a blind or disabled (but not an aged) transferor, as a part of a plan approved by the social security administration, for the transferor to achieve self-support.

(6) Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288], or other assistance provided pursuant to a federal statute on account of a catastrophe which is declared to be a major disaster by the president, and interest

earned on that assistance, but only for nine months following receipt of that assistance.

(7) Any amounts received from the United States which are attributable to underpayments of benefits due from one or more prior months, under title II or title XVI of the Act [42 U.S.C. 401 et seq. and 1381 et seq.], but only for six months following receipt of those amounts.

(8) The value of assistance, paid with respect to a dwelling unit occupied by the transferer, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].

(9) Any amounts received by the transferor from a fund established by a state to aid victims of crime, to the extent that the transferor demonstrates that the amount was paid in compensation for expenses incurred or losses suffered as a result of a crime, but only for nine months following receipt of the amount.

(10) Relocation assistance amounts provided by a state or local government to the transferor, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.], which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636], but only for nine months following receipt of the amounts.

g. There is a presumption that a transfer for less than adequate consideration was made for purposes which include the purpose of qualifying for medicaid:

(1) In any case in which the person's assets remaining after the transfer produce income which, when added to other income available to the person, totals an amount insufficient to meet all living expenses and medical costs reasonably anticipated to be incurred in the month of transfer and in the twenty-nine months following the month of the transfer;

(2) In any case in which an application or inquiry about medicaid benefits was made by or on behalf of the person and the person making inquiry was informed of medicaid asset limits; or

(3) In any case in which the person was an applicant for or recipient of medicaid at the time the transfer was made.

h. An applicant or recipient who claims that an asset was transferred exclusively for a purpose other than to qualify for medicaid must show that a desire to receive medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subdivision g.

i. For purposes of this section:

(1) "Adequate consideration" means:

(a) In the case of an asset which is not subject to reasonable dispute concerning its value, such as cash, bank deposits, stocks, and fungible commodities, one hundred percent of fair market value; and

(b) In the case of an asset which is subject to reasonable dispute concerning its value, seventy-five percent of fair market value.

(2) "Uncompensated value" means the difference between fair market value and the value of any consideration received.

~~2. a. Except as provided in subsection 3, assignment or transfer of a nonexempt property for less than adequate consideration, made prior to July 1, 1988, whenever made with the intent to render the assignor or transferor, or a family member eligible for medicaid benefits, produces ineligibility. An amount equal to the fair market value of the property transferred will be treated as though the assignor or transferor had retained the property. An individual found ineligible as a result of a disqualifying assignment or transfer will remain ineligible until the individual becomes legally obligated to pay for medical expenses, not paid for by any other third party, equal to the difference between the fair market value of the property and the amount of compensation actually received. The return of an assigned or transferred asset to the assignor or transferor will nullify the disqualifying assignment or transfer, and the returned asset is thereafter treated as any other asset.~~

~~b. There are legitimate instances when a property assignment or transfer may be valid. The applicant or recipient should be given full opportunity to state the reasons for having made the property assignment or transfer, and the~~

~~statements should be considered in relation to the following questions:~~

~~(1) Was adequate consideration received?~~

~~(2) How recent was the assignment or transfer?~~

~~(3) Is the applicant's or recipient's stated purpose reasonable in view of the circumstances prevailing at the time of the assignment or transfer?~~

~~(4) Would it have been reasonable to anticipate that the assignment or transfer of property at the time it occurred would result in an earlier need for assistance?~~

~~(5) Was there some consideration other than cash?~~

~~(6) Did the transferee have a legal or equitable interest in the property transferred?~~

~~c. An assignment or transfer of property for less than adequate consideration, made at any time after two years prior to the first date of application or inquiry for medicaid or after a previous application for medicaid has been made and denied because of excess property resources, shall be presumed to have been made for the purpose of rendering the applicant eligible for medicaid. This presumption may be rebutted by substantial evidence of an intent which is inconsistent with the presumed intent.~~

~~3.~~ 2. The provisions of ~~subsections 1 and 2~~ subsection 1 may not be applied to deny, to qualified medicare beneficiaries and to qualified disabled and working individuals, benefits available solely due to their status as qualified medicare beneficiaries and qualified disabled and working individuals.

~~4.~~ 3. Where the assignee or transferee is a relative of the assignor or transferor, services or assistance furnished by the assignee or transferee to the assignor or transferor may not be treated as consideration for the transferred property unless provided pursuant to a valid contract entered into prior to the rendering of the service or assistance.

History: Effective December 1, 1991; amended effective December 1, 1991; June 1, 1992.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396p(c)

CHAPTER 75-02-06

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care.

The Department of Human Services is responsible for the administration of the Medicaid program pursuant to North Dakota Century Code chapter 50-24.1. The department is the "single state agency" responsible to administer the program in conformance with the requirements for Medicaid state plans imposed under federal law. 42 U.S.C. § 1396a, et seq. The department has heretofore established rules governing various aspects of the Medicaid program, including North Dakota Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care. North Dakota Administrative Code chapter 75-02-06 supplements the requirements of North Dakota Century Code chapter 50-24.4, Nursing Home Rates.

The amendments to North Dakota Administrative Code chapter 75-02-06 are limited in scope. The purpose is to achieve clarity in a number of areas.

Subsection 4 of section 75-02-06-02.4, concerning indirect care costs involving plant operations, is amended to clarify the allocation of costs.

Subsection 2 of section 75-02-06-04.1, concerning the requirements for funding of depreciation, is amended to clarify the effect of certain withdrawals from funded depreciation accounts.

Subsection 18 of section 75-02-06-12.1, concerning nonallowable costs, is amended to clarify that the allowability of vehicle travel costs is limited to the standard mileage rate established by the Internal Revenue Service.

Section 75-02-06-14, concerning resident days, is amended to clarify the consideration, as resident days, of medical assistance hospital days spent in a public institution, and to clarify the treatment of residents admitted to the facility through a hospice program.

Subsection 1 of section 75-02-06-16, concerning rate determinations, is amended to clarify the process for establishing rates.

Subsection 5 of section 75-02-06-16, concerning rate determinations, is amended to clarify the minimum adjustment which will result in a rate change.

Subsection 1 of section 75-02-06-18, reviewer criteria, is amended to remove subjective "experience" qualification criteria for establishing reviewer competency.

75-02-06-02.4. Indirect care costs. Indirect care costs include all costs specifically identified in this section. Indirect care costs must be included in total, without direct or indirect allocation to other cost categories unless specifically provided for elsewhere.

1. Administration: Direct costs for administering the overall activities of the facility include, but are not limited to:

   a. Salary and employment benefits for administrators, except that in a facility of sixty or fewer beds, part of an administrator's salary may be allocated to other cost categories provided adequate records identifying the hours and services provided are maintained by the facility.

   b. Salary and employment benefits for assistant administrators, top management personnel, accounting personnel, clerical personnel, admitting personnel, data processing personnel, purchasing, receiving, and store personnel, medical director, security personnel, and of all personnel not designated in other cost categories.

   c. Board of directors' fees and related travel expenses.

   d. Security services.

   e. Supplies except as specifically provided for in the direct care, other direct care, and other cost centers of the indirect care cost category.

   f. Insurance, except insurance included as a fringe benefit.

   g. Telephone and telegraph.

   h. Postage and freight.

   i. Membership dues and subscriptions.

   j. Professional fees for services such as legal, accounting, and data processing.

   k. Central or home office costs including property costs except as provided for in section 75-02-06-06.1.

   l. Advertising and personnel recruitment costs.

   m. Management consultants and fees.

   n. Bad debts and collection fees as provided for in section 75-02-06-10.

   o. Business meetings, conventions, association meetings, and seminars.

p. Travel, except as necessary for training programs for personnel required to maintain licensure, certification, or professional standards requirements.

q. Training, except for training for personnel which is required to maintain licensure, certification, or professional standards requirements.

r. Business office functions.

s. Any costs which cannot be specifically classified to other cost categories.

2. Chaplain:

a. Salary and employment benefits for all personnel assigned to meet the spiritual needs of the residents.

b. Supplies and other expenses related to meeting the spiritual needs of the residents.

3. Pharmacy: Compensation for pharmacy consultants.

4. Plant operations:

a. Salary and employment benefits for a director of plant operations, engineers, carpenters, electricians, plumbers, caretakers, and all other personnel performing tasks related to maintenance or general plant.

b. The cost of heating and cooling, electricity, water, sewer and garbage, and cable television.

c. Repairs and maintenance contracts and purchased services.

d. Supplies necessary for repairs and maintenance of the facility, including hardware, building materials and tools, other maintenance-related supplies, and noncapitalized equipment not included elsewhere.

e. Motor vehicle operating <u>and resident transportation</u> expenses.

5. Housekeeping:

a. Salary and employment benefits for a director of housekeeping, housekeepers, and other cleaning personnel.

b. Cost of cleaning supplies such as soaps, waxes, polishes, household paper products such as hand towels and toilet paper, and noncapitalized cleaning equipment.

c. Contracted services for housekeeping.

6. Dietary:

   a. Salary and employment benefits for a director of dietary, nutritionists, dieticians, cooks, and kitchen personnel involved in the preparation and delivery of food.

   b. The cost of dietary supplies and utensils including dietary paper products, silverware, and noncapitalized kitchen and dining equipment.

7. Medical records: Salary and employment benefits for medical records' personnel performing maintenance.

History: Effective January 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-02.6. Cost allocations.

1. Direct costing of allowable costs will be used whenever possible. For facilities which cannot direct cost, the following allocation methods are to be used:

   a. For nursing facilities that are combined with a hospital or have more than one license (including basic care), the following allocation methods must be used:

      (1) Nursing salaries which cannot be reported based on actual costs are to be allocated using time studies. Time studies must be conducted at least semiannually for a two-week period or quarterly for a one-week period. The time study must represent a typical period of time when employees are performing normal work activities in each of their assigned areas of responsibilities. Allocation percentages based on the time studies are to be used starting with the next pay period following completion of the time study or averaged for the report year. The methodology used by the facility may not be changed without approval by the department. If time studies are not completed, nursing salaries will be allocated based on revenues for resident services.

      (2) Salaries for a director of nursing or nursing supervisors which cannot be reported based on actual costs or time studies must be allocated based on nursing salaries or full-time equivalents (FTEs) of nursing staff.

      (3) Staff development or inservice trainer salaries must be allocated to nursing and therapies based on the ratio of nursing and therapy salaries to total

salaries, to non-long term care based on the ratio of non-long term care salaries to total salaries, and to administration based on the ratio of total salaries less nursing salaries, therapy salaries, and non-long term care salaries to total salaries.

(4) Other nursing costs must be allocated based on resident days.

(5) Therapy costs, other than therapy salaries and purchased services, must be allocated based on the ratio of therapy salaries and purchased services in the nursing facility to total therapy salaries and purchased services.

(6) Dietary and food costs must be allocated based on number of meals served or in-house resident days.

(7) Laundry costs must be allocated on the basis of pounds of laundry.

(8) Activity costs must be allocated based on in-house resident days.

(9) Social service costs must be allocated based on resident days.

(10) Housekeeping costs must be allocated based on weighted square footage.

(11) Plant operation costs must be allocated based on weighted square footage.

(12) Medical records costs must be allocated based on the number of admissions or discharges and deaths.

(13) Pharmacy costs for consultants must be allocated based on in-house resident days.

(14) Administration costs must be allocated on the basis of the percentage of total adjusted cost, excluding property, administration, and chaplain, in each facility.

(15) Property costs must be allocated first to a cost center based on square footage. The property costs allocated to a given cost center will then be allocated using the methodologies set forth in this section for that particular cost center.

(16) Chaplain costs must be allocated based on the percentage of total costs, excluding property, administration, and chaplain.

(17) Employment benefits must be allocated based on the ratio of salaries to total salaries.

b. If any of the allocation methods in subdivision a cannot be used by a facility, a waiver request may be submitted to the medical services division. The request must include an adequate explanation as to why the referenced allocation method cannot be used by the facility. The facility must also provide a rationale for the proposed allocation method. Based on the information provided, the department will determine the allocation method that will be used to report costs.

c. Malpractice, professional liability insurance, therapy salaries, and purchased therapy services must be direct costed.

d. The costs of operating a pharmacy must be included as non-long term care costs.

e. For purposes of this subsection, "weighted square footage" means the allocation of the facility's total square footage, excluding common areas, identified first to a cost category and then allocated based on the allocation method described in this subsection for that cost category.

2. For nursing facilities that cannot directly identify salaries and employment benefits to a cost category, the following cost allocation methods must be used:

a. Salaries, excluding staff development and inservice trainer salaries, must be allocated using time studies. Time studies must be conducted semiannually for a two-week period or quarterly for a one-week period. The time study must represent a typical period of time when employees are performing normal work activities in each of their assigned areas of responsibilities. Allocation percentages based on the time studies are to be used starting with the next pay period following completion of time study or averaged for the reporting year. The methodology used by the facility may not be changed without approval by the department. If time studies are not completed, salaries and employment benefits will be allocated entirely to the indirect care costs, if any of the employee's job duties are included in this cost category. Otherwise, salaries and employment benefits will be other direct care costs.

b. Staff development and inservice trainer salaries must be allocated to nursing and therapies based on the ratio of nursing and therapy salaries to total salaries and to

administration based on the ratio of total salaries less nursing and therapy salaries to total salaries.

c. Employment benefits must be allocated based on the ratio of salaries in the cost category to total salaries.

3. Nursing facilities which operate or are associated with nonresident-related activities, i.e., apartment complexes, shall allocate all costs, except administration costs, in the manner required by subsection 1, and shall allocate administration costs as follows:

a. If the costs of the nonresident-related activities exceed five percent of total nursing facility cost, exclusive of property, administration, and chaplain costs, administration costs must be allocated on the basis of the percentage of total cost, excluding property, administration, and chaplain.

b. If the costs of the nonresident-related activities are less than five percent of total nursing facility costs, exclusive of property, administration, and chaplain costs, administration costs must be allocated to each such activity based on the percent gross revenues for the activity is of total gross revenues; provided, however, that the allocation will not be based on a percentage exceeding two percent for each activity.

c. If the provider can document, to the satisfaction of the department, that none of the nursing facility resources or services are used in connection with the nonresident-related activities, no allocation need be made.

d. The provisions of this subsection do not apply to the activities of hospital and basic care facilities associated with a nursing facility.

History: Effective January 1, 1990; amended effective January 1, 1992; November 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-04.1. Funded depreciation.

1. Funding of depreciation is the practice of placing funds, including nonborrowed bond reserve and sinking funds, in a segregated account for the acquisition of depreciable assets used in rendering resident care or for other capital purposes related to resident care. Other capital purposes include capital debt liquidation, such as principal payments for bonds and mortgages.

2. All provisions of this subsection must be met in order to qualify as funding of depreciation. If the provisions are not met, income earned on investments will be offset to interest expense.

   a. The action to fund depreciation must be approved by the appropriate managing body of the facility.

   b. The fund or funds must be clearly designated in the facility's records as funded depreciation accounts.

   c. The total market value of the funded depreciation fund, including loans made pursuant to subsection 5, must be available, unless contractually committed as provided in subsection 8 or 9, on an as-needed basis for the acquisition of the facility's depreciable assets used to render resident care, or for other capital purposes related to resident care. Loans made from funded depreciation must be available.

   d. Income earned on investments in the fund must be deposited in and become part of the funded depreciation account.

   e. Deposits to the funded depreciation account must remain for six months or more to be considered as funded depreciation. Deposits of less than six months are not eligible for the benefits of the funded depreciation account. Investment income earned prior to elapse of the six-month period will not be offset unless the deposits are actually withdrawn <u>and then only if the withdrawal is not for capital purposes</u>.

   f. Funded depreciation may not be restricted for a specific or future purpose.

   g. When a provider invests or transfers the assets of the fund to a home office of a chain organization, or the motherhouse or governing body of a religious order or to other related parties, these assets are considered to be the facility's funds and are subject to all provisions of this section.

3. Total funded depreciation from deposits in excess of accumulated depreciation on resident-related assets will be considered as ordinary investments and the income therefrom will be used to offset interest expense.

4. 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. Withdrawals for general operating purposes or for loans to the general fund are made on a last-in, first-out basis.

5. The facility may borrow from funded depreciation to obtain working capital for normal operating expenses used for resident care. In addition, the facility may borrow from funded depreciation accounts of related nursing and hospital facilities if the funded depreciation accounts of the related facilities are maintained in accordance with HCFA-15, section 226. The interest incurred by the general fund is allowable provided the loans are necessary and proper, and provided the funds withdrawn have met the six-month funding requirement. If the funds withdrawn do not meet the six-month funding requirement, interest paid on the loan is not an allowable cost.

6. Interest paid by the general fund to the funded depreciation account is not an allowable cost if the facility borrows the funds to acquire depreciable assets. The facility is expected to use funded depreciation for that purpose.

7. Deposits of funds into the funded depreciation account must be first applied to reduce loans outstanding from the funded depreciation account to the general fund. Until such loans, including related-party loans, are repaid in full, funds deposited in the funded depreciation account will be considered as repayments on the loans and any subsequent interest expense of the general fund to the extent of the repaid loans is not allowable.

8. Available funded depreciation must be withdrawn and used before resorting to borrowing for the acquisition of depreciable assets or other capital purposes. Because it is frequently difficult to time a bond offering or other borrowing to coincide with the exhaustion of available funded depreciation, it is sufficient if available funded depreciation is contractually committed to and expended during the course of construction.

9. Funds are considered available unless committed, by virtue of contractual arrangements, to the acquisition of depreciable assets used to render resident care, or to other capital purposes. Borrowing for a purpose intended by funded depreciation is unnecessary to the extent funded depreciation is available. Thus, interest expense for borrowing up to the amount of available funded depreciation is not an allowable cost.

10. When funded depreciation is used by the facility for other than the acquisition of depreciable assets, other capital purposes related to resident care, or loans to the general fund for current operating costs, the income earned on these funds while on deposit in the funded account will be adjusted in the report year the withdrawal was made. The adjustment will include all offsets not made in prior reporting periods for earnings applicable to these funds.

History: Effective January 1, 1990; amended effective November 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-12.1. Nonallowable costs. Nonallowable costs include, but are not limited to:

1. Costs described as nonallowable under North Dakota Century Code section 50-24.4-07.

2. Interest charges on fines or penalties, bank overdraft charges, and late payment charges.

3. Assessments made by or the portion of dues charged by associations or professional organizations for lobbying costs, contributions to political action committees or campaigns, or litigation, except for successful challenges to decisions made by governmental agencies. Where the breakdown of dues charged to a facility is not provided, the entire cost is nonallowable.

4. Community contributions, employer sponsorship of sports teams, and dues to civic and business organizations, i.e., Lions, Chamber of Commerce, or Kiwanis, in excess of fifteen hundred dollars per cost reporting period.

5. Home office costs which would be nonallowable if incurred by a facility.

6. Stockholder servicing costs, including, but not limited to, annual meetings, annual reports and newsletters, accounting and legal fees for consolidating statements for security exchange commission proposes, stock transfer agent fees, and stockholder and investment analysis.

7. Corporate costs which are not related to resident care, including reorganization costs, costs associated with acquisition of capital stock, and costs relating to the issuance and sale of capital stock or other securities.

8. The full cost of items or services such as telephone, radio, and television, including cable hookups or satellite dishes, located in resident accommodations, excluding common areas, which are furnished solely for the personal comfort of the residents.

9. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose.

10. The cost of 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 equipment was related to resident care.

11. 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 any hospital or facility.

12. Costs which are incurred by the provider's subcontractors, or by the lessor of property which the provider leases, and which become an element in the subcontractor's or lessor's charge to the provider, if such costs would not have been allowable had they been incurred by a provider directly furnishing the subcontracted services, or owning the leased property; provided, however, that no provider shall have a particular item of cost disallowed under this subsection if that cost arises out of a transaction which was completed before July 18, 1984.

13. The cost, in excess of charges, of providing meals and lodging to facility personnel living on premises.

14. Depreciation expense for facility assets which are not related to resident care.

15. Nonnursing facility operations and associated administrative costs.

16. Direct costs or any amount claimed to medicare for medicare utilization review costs.

17. All costs for services paid directly by the department to an outside provider.

18. Travel costs involving the use of vehicles not exclusively used by the facility are allowable only within the limits of this subsection.

    a. Vehicle travel costs may not exceed the ~~amount~~ <u>standard mileage rate</u> established by the internal revenue service.

    b. The facility shall support vehicle travel costs with sufficient documentation to establish that the purpose of the travel is related to resident care.

    c. The facility shall document all costs associated with a vehicle not exclusively used by the facility.

19. Travel costs other than vehicle-related costs are allowable provided they are supported, reasonable, and related to resident care.

20. The fees paid to members of a board of directors for meetings attended must be allowed in an amount not to exceed the compensation paid, per day, to members of the legislative council, pursuant to North Dakota Century Code section 54-35-10. No additional compensation will be allowed for service of employees on the board of directors. Travel costs associated with meetings of boards of directors are allowable to the extent such meetings are held in a location where the organization has a nursing facility.

21. The costs of deferred compensation and pension plans that discriminate in favor of certain employees, excluding the portion of the cost which relates to costs that benefits all eligible employees.

22. Premiums for top management personnel life insurance policies, except that such premiums must be allowed if the policy is included within a group policy provided for all employees, or if such a policy is required as a condition of mortgage or loan and the mortgagee or lending institution is listed as the beneficiary.

23. Personal expenses of owners and employees, such as vacations, boats, airplanes, personal travel or vehicles, and entertainment.

24. Costs which are not adequately documented. Adequate documentation includes written documentation, date of purchase, vendor name, listing of items or services purchased, cost of items purchased, account number to which the cost is posted, and a breakdown of any allocation of costs between accounts or facilities.

25. The following taxes:

    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 transfer 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 such as real estate and sales tax for which exemptions are available to the provider.

e. Taxes on property which is not used in the provision of covered services.

f. Taxes, such as sales taxes, levied against the residents and collected and remitted by the provider.

g. Self-employment (FICA) taxes applicable to individual proprietors, partners, members of a joint venture, etc.

26. The unvested portion of a facility's accrual for sick or annual leave.

27. The cost, including depreciation, of equipment which was purchased with funds received from a local or state agency, exclusive of any federal funds.

28. Hair care, other than routine hair care, when requested by a resident.

29. The cost of education unless:

a. The education was provided by an accredited academic or technical educational facility;

b. The expenses were for materials, books, or tuition;

c. The employee was enrolled in a course of study intended to prepare the employee for a position at the facility, and is in that position; and

d. The facility claims the cost of the education at a rate which does not exceed one dollar per hour of work performed by the employee in the position for which the employee received education at the facility's expense, provided that the amount claimed per employee may not exceed two thousand dollars per year, or an aggregate of eight thousand dollars, and in any event may not exceed the cost to the facility of the employee's education.

History: Effective January 1, 1990; amended effective January 1, 1992; November 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-14. Resident days.

1. A resident day is any day for which service is provided or for which payment is ordinarily sought for the available bed. The amount of remuneration has no bearing on whether a day should be counted or not. Examples of days that must be included are hospital days and therapeutic leave days. Hospital stay days in excess of fifteen consecutive days are not billable to the

department and are not counted as resident days. Medical assistance hospital days in a public institution, i.e., the state hospital or veteran's administration hospital, which are not billable to the department by the nursing facility, are not resident days.

2. Adequate census records must be prepared and maintained on a daily basis by the facility to allow for proper audit of the census data. The daily census records must include:

   a. Identification of the resident.

   b. Entries for all days. Entries are not to be made just by exception.

   c. Identification of type of day, i.e., hospital, in-house.

   d. Identification of the resident's classification.

   e. Monthly totals by resident, by classifications for all residents, and by type of day.

3. Residents admitted to the facility through a hospice program will be identified as private-pay residents for census and billing purposes.

History: Effective September 1, 1980; amended effective December 1, 1983; September 1, 1987; January 1, 1990; November 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-16. Rate determinations.

1. Each cost category actual rate is calculated using the allowable historical operating costs and adjustment factors provided for in subsection 4 divided by standardized resident's days for the direct care cost category and resident days for other direct care, indirect care, and property cost categories. The actual rate as calculated is compared to the limit rate for each cost category to determine the lesser of the actual rate or the limit rate. The lesser rate is given the rate weight of one. The rate weight of one for direct care is then multiplied times the weight for each classification in subsection 5 of section 75-02-06-17 to establish the direct care rate for that classification. The lesser of the actual rate or the limit rate for other direct care, indirect care, and property costs, and the adjustments provided for in subsections 2 and 3 are then added to the direct care rate for each classification to arrive at the established rate for a given classification.

2. a. Incentives. For a facility with an acutal rate below the limit rate for indirect care costs, an amount equal to seventy percent times the difference between the actual rate, exclusive of inflation indices, and the limit rate, exclusive of inflation indices for periods after the report year, up to a maximum of two dollars and sixty cents will be included as part of the indirect care cost rate.

   b. Operating margins. A facility will receive an operating margin of three percent based on the lesser of the actual direct care and other direct care rates or the limit rate exclusive of current inflation indices. The three percent operating margin will then be added to the rate for the direct care and other direct care cost categories.

3. Limitations.

   a. The department shall accumulate and analyze statistics on costs incurred by the nursing facilities. These statistics may be used to establish reasonable ceiling limitations and incentives for efficiency and economy based on reasonable determination of standards of operations necessary for efficient delivery of needed services. These limitations and incentives may be established on the basis of cost of comparable facilities and services and may be applied as ceilings on the overall costs of providing services or on specific areas of operations. It shall be the option of the department to implement the ceilings so mentioned at any time based upon the information available and under guidelines required within the regulations of title XIX.

   b. The department will review, on an ongoing basis, aggregate payments to nursing facilities to determine that payments do not exceed an amount that can reasonably be estimated would have been paid for those services under medicare payment principles. If aggregate payments to nursing facilities exceed estimated payments under medicare, the department may make adjustments to rates to establish the upper limitations so that aggregate payments do not exceed an amount that can be estimated would have been paid under medicare payment principles.

   c. Limits. All facilities except those facilities described in North Dakota Century Code section 50-24.4-13 will be used to establish a limit rate for the direct care, other direct care, and indirect care cost categories. This limit rate will be established using allowable historical operating costs for the base year, and adjustment factors for the rate year as set forth in this subsection. The initial base year is the report year ended June 30, 1988. These limit rates may not be rebased prior to the rate

periods beginning January 1, 1993. The department will review economic trends and factors affecting nursing facilities to determine when rebasing of the limits will occur. Base year costs may not be adjusted in any manner or for any reason not provided for in this subsection.

(1) The limit rate for each of the cost categories will be established using the median rate for the appropriate cost category plus a fixed percentage of the median rate. The fixed percentage is to be determined as follows:

(a) Historical costs for June 30, 1988, as adjusted, will be used to set rates for all facilities in the direct care, other direct care, and indirect care cost categories.

(b) The rates for each cost category will be ranked from low to high. The ninetieth percentile ranking will be determined for the direct care and other direct care cost categories, and the seventy-fifth percentile ranking will be determined for the indirect care cost category.

(c) The fixed percentage will be determined by subtracting the median rate from the percentile ranking rate and dividing the difference by the median rate.

(d) The fixed percentage established under subparagraph c of this paragraph will be used to determine limits if and when rebasing of the limit year occurs.

(2) A facility who has an actual rate that exceeds the limit rate for a cost category will receive the limit rate.

(3) For the rate years beginning January 1, 1990, and ending December 31, 1992, a facility whose actual rate exceeds the limit rate for a cost category will receive a percentage of the difference between the actual rate and the limit rate as follows:

(a) For the rate year beginning January 1, 1990, forty-five percent of the difference will be included in the facility's rate.

(b) For the rate year beginning January 1, 1991, forty-five percent of the difference will be included in the facility's rate.

(c) For the rate year beginning January 1, 1992, twenty-five percent of the difference will be included in the facility's rate.

(4) The limit rates will be adjusted each year to reflect the latest available index of nursing facility costs, prepared by an independent economic forecaster, which is, to the extent reasonably possible, based on the actual historical increase or decrease in base year costs, and which is further adjusted to reflect the forecasted increase or decrease in base year costs to the end of the rate year.

4. Adjustment factors for direct care, other direct care, and indirect care costs.

a. The department will utilize an independent economic forecast method of predicting the factors to be used to adjust historical allowable costs. Where possible, adjustment factors specific to North Dakota will be used to establish the adjustment for each rate year. If specific North Dakota data is not available, regional-specific or national data will be used to establish adjustment factors for each rate year. Individual adjustment factors for the cost components included in this subdivision will be calculated for each rate year.

(1) Salaries.

(2) Employment benefits.

(3) Foods.

(4) Utilities.

(5) Drugs and nursing supplies.

(6) Other costs.

b. An adjustment factor will be separately calculated for direct care, other direct care, and indirect care costs based on the forecasted increase or decrease in the cost components for the eighteen months from the end of the report year to the end of the next rate year.

5. Rate adjustments.

a. Desk audit rate.

(1) The cost report will be reviewed taking into consideration the prior year's adjustments. The facility will be notified by telephone or mail of any

adjustments based on the desk review. Within seven working days after notification, the facility may submit information to explain why the desk adjustment should not be made. The department will review the information and make adjustments which are determined to be appropriate.

(2) The desk audit rate will be effective January first of each rate year and will continue in effect until a final rate is established.

(3) Until a final rate is effective, pursuant to paragraph 3 of subdivision b of this subsection, private-pay rates may not exceed the desk audit rate except as provided for in North Dakota Century Code section 50-24.4-19.

(4) No reconsideration will be given by the department for the desk rate unless the facility has been notified that the desk rate is the final rate.

b. Final rate.

(1) The cost report may be field audited to establish a final rate. If no field audit is performed, the desk audit rate will become the final rate.

(2) The final rate will include any adjustments for nonallowable costs, errors, or omissions that result in a change from the desk audit rate of five cents per day <u>for the rate weight of one</u> or an aggregate of one thousand dollars for the facility, whichever is less, that are found during a field audit or are reported by the facility within twelve months of the rate yearend.

(3) The private-pay rate must be adjusted to the final rate no later than the first day of the second month following receipt of notification by the department of the final rate and is not retroactive except as provided for in subdivision c of this subsection.

(4) If adjustments, errors, or omissions are found after a final rate has been established, the following procedures will be used:

(a) Adjustments, errors, or omissions found within twelve months of establishment of the final rate and resulting in a change of at least five cents per day <u>for the rate weight of one</u> will result in a change to the final rate. The change will be applied retroactively as provided for in this section.

(b) Adjustments, errors, or omissions in excess of one thousand dollars for the facility found later than twelve months after the establishment of the final rate will be included as an adjustment in the report year that the adjustment, error, or omission was found.

c. Adjustment of the total payment rate. The final rate as established will be retroactive to January first of the rate year, except with respect to rates paid by private-paying residents. Rates paid by private-pay residents must be retroactively adjusted and the difference refunded to the resident, if the desk audit rate exceeds the final rate by at least twenty-five cents per day.

6. Rate payments.

a. The rate as established shall be considered as payment for all accommodations and includes all items designated as routinely provided. No payments may be solicited or received from the resident or any other person to supplement the rate as established.

b. The rate as established shall be paid by the department only if the rate charged to private-pay residents for semiprivate accommodations equals the established rate. If at any time the facility discounts the private pay rate for those periods of time that the resident is not in the facility, the discounted rate will be the maximum chargeable to the department for the same service, i.e., hospital or leave days.

c. If the established rate exceeds the private pay rate, on any given date, the facility shall immediately report that fact to the department and charge the department at the lower rate. If payments were received at the higher rate, the facility shall, within thirty days, refund the overpayment. The refund will be the difference between the established rate and the rate charged the private-pay resident times the number of medical assistance resident days paid during the period in which the established rate exceeded the rate charged to private-pay residents, plus interest calculated at two percent over the Bank of North Dakota prime rate on any amount not repaid within thirty days. The refund provision will also apply to all duplicate billings involving the department. Interest charges on these refunds are not allowable costs.

d. Peer groupings, limitations, or adjustments which are based upon data received from or relating to more than one facility will be effective for a rate period. Any change in the data used to establish peer groupings, limitations,

or adjustments will not be used to change such peer groupings, limitations, or adjustments during the rate period, except with respect to the specific facility or facilities to which the data change relates.

7. Partial year.

a. For facilities changing ownership during the rate period, the rate established for the previous owner will be retained. The rate for the next rate period following the change in ownership will be established as follows:

(1) For a facility with four or more months of operation under the new ownership during the report year, a cost report for the period will be used.

(2) For a facility with less than four months of operations under the new ownership during the report year, the rate established for the previous owner will be indexed forward using the adjustment factors as set forth in subsection 4.

b. For a new facility, the department will establish interim rates equal to the limit rates for direct care, other direct care, and indirect care in effect for the rate year in which the facility begins operation, plus the property rate. The property rate will be calculated using projected property costs and certificate of need projected census. The interim rate will be in effect for no less than ten months and no more than eighteen months. Costs for the period in which the interim rates are effective will be used to establish final rates, which will be limited to the lesser of the interim or actual rates. If the final rate for direct care, other direct care, and indirect care costs are less than the interim rates for those costs, a retroactive adjustment as provided for in subsection 5 will be made. A retroactive adjustment to the property rate will be made to adjust projected property costs to actual property costs. For the rate period following submission of any partial year cost report by a facility, census used to establish rates for property and indirect care costs will be the greater of actual census or certificate of need projected census.

(1) If the effective date of the interim rates is on or after the first day of March and on or before June thirtieth, the interim rates will be effective for the remainder of that rate year and will continue through June thirtieth of the subsequent rate year. The facility must file an interim cost report for the period ending December thirty-first of the year in which the facility first provides services. The interim cost report is due March first and is used to

establish actual rates which will be effective July first of the subsequent rate year. The partial year rates established based on the interim cost report will include applicable incentives, margins, phase-ins, and adjustment factors and will not be subject to any cost settle-up. The cost reports for the report year ending June thirtieth of the current and subsequent rate years will be used to determine the final rates for the period that the interim rates were in effect.

(2) If the effective date of the interim rates is on or after July first and on or before December thirty-first, the interim rates will remain in effect through the end of the subsequent rate year. The facility must file a cost report for the partial report year ending June thirtieth of the subsequent rate year. This cost report will be used to establish the rates for the next subsequent rate year. The facility must file an interim cost report for the period July first through December thirty-first of the subsequent rate year. The interim cost report is due on March first and is used, along with the report year cost report, to determine the final rates for the period that the interim rates were in effect.

(3) If the effective date of the interim rate is on or after January first and on or before February twenty-ninth, the interim rates will remain in effect through the end of the rate year in which the interim rates become effective. The facility must file a cost report for the period ending June thirtieth of the current rate year. This cost report will be used to establish the rates for the subsequent rate year. The facility must file an interim cost report for the period July first through December thirty-first of the current rate year. The interim cost report is due on March first and is used, along with the report year cost report, to determine the final rates for the period that the interim rates were in effect. The final rates will be limited to the lesser of the limit rates for the current rate year or the actual rates.

c. For a facility with renovations or replacements in excess of one hundred thousand dollars, and without a significant capacity increase, the rates established for direct care, other direct care, and indirect care, based on the last report year, plus a property rate calculated based on projected property costs and census from the last report year, must be applied to all licensed beds. The projected property rate will be effective at the time the project is

completed and placed into service. The property rate for the subsequent rate year will be based on projected property costs and census imputed based on actual census on all licensed beds existing before the renovation, plus ninety-five percent occupancy of the increase in licensed bed capacity, rather than on property costs actually incurred in the report year.

d. For a facility with a significant capacity increase, the rates established for direct care, other direct care, and indirect care, based on the last report year, must be applied to all licensed beds. An interim property rate will be established based on projected property costs and projected census. The interim property rate will be effective from the first day of the month beginning after the date in which the increase in licensed beds is issued by the department of health and consolidated laboratories through the end of the rate year. The facility must file an interim property cost report following the rate year. The interim cost report is due March first and is used to determine the final rate for property and to establish the amount for a retroactive cost settle-up. The final rate for property is limited to the lesser of the interim property rate or a rate based upon actual property costs. The property rate for the subsequent rate year will be based on projected property costs and census imputed as ninety-five percent of licensed beds, rather than on property costs actually incurred during the report year; and will not be subject to retroactive costs settle-up.

e. For a facility which has no significant capacity increase and no renovations or replacements in excess of one hundred thousand dollars, the rates based on the report year will be applied throughout the rate year for all licensed beds.

f. For a facility with a capacity increase occurring on or after January 1, 1990, but before July 1, 1991, and for a facility with a capacity increase which is not a significant capacity increase, occurring on or after July 1, 1991, but before January 1, 1992, a settle-up for property costs will be made. The settle-up will be based on property costs, actually incurred after the capacity increase was available for use, as reported in the cost report for the report year in which the costs were incurred. No settle-up will be made for costs incurred after December 31, 1991. Settle-up will occur within sixty days after both the cost report and a request for settle-up are received by the department. Any settle-up made before audit is subject to audit. The department may determine and make a settle-up after audit.

g. For a facility terminating its participation in the medical assistance program, whether voluntarily or involuntarily, the department may authorize the facility to receive continued payment until medical assistance residents can be relocated to facilities participating in the medical assistance program.

8. One-time adjustments.

a. Adjustments to meet certification standards.

(1) The department may provide for an increase in the established rate for additional costs that are incurred to meet certification standards. The survey conducted by the state department of health and consolidated laboratories must clearly require that the facility take steps to correct deficiencies dealing with resident care. The plan of correction must identify the salary and other costs that will be increased to correct the deficiencies cited in the survey process.

(2) The facility must submit a written request to the medical services division within thirty days of submitting the plan of correction to the state department of health and consolidated laboratories. The request must contain the following information:

(a) A statement that costs or staff numbers have not been reduced for the report year immediately preceding the state department of health and consolidated laboratories' certification survey.

(b) The number of new staff or additional staff hours and the associated costs that will be required to meet the certification standards.

(c) A detailed list and implementation of any other costs necessary to meet survey standards.

(3) The department will review the submitted information and may request additional documentation or conduct onsite visits. If an increase in costs is approved, the established rate will be adjusted upward not to exceed the limit rate.

(4) Any additional funds provided must be used in accordance with the facility's written request to the department and are subject to audit. If the department determines that the funds were not utilized for the intended purpose, an adjustment will be made in accordance with subsection 5.

b. Adjustments for unforeseeable expenses.

(1) The department may provide for an increase in the established rate for additional costs that are incurred to meet major unforeseeable expenses. Such expenses must be resident related and must be beyond the control of those responsible for the management of the facility.

(2) The facility must submit a written request containing the following information to the medical services division within sixty days after first incurring the unforeseeable expense:

(a) An explanation as to why the facility believes the expense was unforeseeable.

(b) An explanation as to why the facility's management believes the expense was beyond the managerial control of the facility.

(c) A detailed breakdown of the unforeseeable expenses by expense line item.

(3) The department will base its decision on whether the request clearly demonstrates that the economic or other factors that caused the expense were unexpected and arose because of conditions that could not have been anticipated by management based on their background and knowledge of nursing care industry and business trends.

(4) The department will review the submitted information and may request additional documentation or conduct onsite visits. If an increase in costs is approved, the established rate will be adjusted upward not to exceed the limit rate.

(5) Any additional funds provided must be used to meet the unforeseeable expenses outlined in the facility's request to the department and are subject to audit. If the department determines that the funds were not utilized for the intended purpose, an adjustment will be made in accordance with subsection 5.

c. Adjustment to historical operating costs.

(1) A facility may receive a one-time adjustment to historical operating costs when the facility has been found to be significantly below care-related minimum standards described in subparagraph a of paragraph 2 of this subdivision and when it has been determined that the facility cannot meet the minimum standards

through reallocation of costs and efficiency incentives.

(2) The following conditions must be met before a facility can receive the adjustment:

(a) The facility shall document that based on nursing hours and standardized resident days, the facility cannot provide a minimum of one and two-tenths nursing hours per standardized resident day.

(b) The facility shall document that all available resources, including efficiency incentives, if used to increase nursing hours, are not sufficient to meet the minimum standards.

(c) The facility shall submit a written plan describing how the facility will meet the minimum standard if the adjustment is received. The plan must include the number and type of staff to be added to the current staff and the projected cost for salary and fringe benefits for the additional staff.

(3) The adjustment will be calculated based on the costs necessary to increase nursing hours to the minimum standards less any operating margins and incentives included when calculating the established rate. The net increase will be divided by standardized resident days and the amount calculated will be added to the actual rate. This rate will then be subject to any rate limitations that may apply.

(4) If the facility fails to implement the plan to increase nursing hours to one and two-tenths hours per standardized resident day, the amount included as the adjustment will be adjusted in accordance with the methodologies set forth in subsection 5.

(5) If the actual cost of implementing the plan exceeds the amount included as the adjustment, no retroactive settlement will be made.

History: Effective September 1, 1980; amended effective July 1, 1981; December 1, 1983; July 1, 1984; September 1, 1987; January 1, 1990; April 1, 1991; January 1, 1992; November 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-18. Reviewer criteria.

1. The resident classification review form must be completed by a licensed practical nurse or registered nurse who ~~is qualified by experience, has demonstrated competency in nursing,~~ has ~~successfully~~ completed a training program approved by the department, and is certified by the department.

2. If a facility does not employ a sufficient number of registered nurses to provide the required number of reviewers, a substitution of no more than two licensed practical nurses may be made.

3. The department may decertify any certified nurse for incompetency or neglect in completing resident classification review.

4. The maximum number of reviewers a facility may use during each review period is:

   a. Facilities of one hundred beds or less - two reviewers.

   b. Facilities of more than one hundred beds - two reviewers plus one additional reviewer for each fifty beds or part thereof by which the facility exceeds one hundred beds.

5. Information may not be used for the review unless it is documented, readily available to the review nurse, and properly includable in the resident's medical record or is in the resident's medical record.

6. The facilitywide reviews must be conducted during the second full week (Sunday through Saturday) of the month scheduled.

7. A reviewer must use the following qualifiers when completing the resident classification review:

   a. Time period - the time period to be used is the past seven days except when reviewing behaviors. The time period for behaviors is the last fourteen days.

   b. Frequency - number of times the questioned action occurs.

   c. Documentation - specific medical record documentation which is required must be in the resident's medical record, or readily available to the review nurse, and properly includable in the resident's medical record.

History: Effective September 1, 1987; amended effective June 1, 1988; January 1, 1990; November 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

AGENCY SYNOPSIS: Regarding proposed new North Dakota Administrative Code sections 75-02-06-19, Refinancing Incentives, and 75-02-06-20, Resident Personal Funds, to North Dakota Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care.

The Department of Human Services is responsible for the administration of the Medicaid program pursuant to North Dakota Century Code chapter 50-24.1. The department is the "single state agency" responsible to administer the program in conformance with the requirements for Medicaid state plans imposed under federal law. 42 U.S.C. § 1396a, et seq. The department has heretofore established rules governing various aspects of the Medicaid program, including North Dakota Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care. North Dakota Administrative Code chapter 75-02-06 supplements the requirements of North Dakota Century Code chapter 50-24.4, Nursing Home Rates.

The amendments to North Dakota Administrative Code chapter 75-02-06 take the form of two new sections. Section 75-02-06-19 is intended to encourage refinancing of qualified debt in order to achieve long-term net savings. Section 75-02-06-20 is intended to conform this chapter to applicable federal laws.

The cost of borrowing has, in recent months, reduced to levels unseen for a substantial period. Because borrowing costs affect the rate paid for nursing facility care, the opportunity to borrow at low interest rates represents an opportunity for facilities to reduce or limit costs without any adverse effect on the facilities or their residents.

The department has also been aware that substantial refinancing costs must be borne by borrowers who seek to take advantage of current low interest rates. In order to facilitate refinancing, the department has adopted a provision which would allow the inclusion of refinancing costs in the rate.

75-02-06-19. Refinancing incentives.

1. For purposes of this section:

a. "Net savings" means the difference between the scheduled interest costs to be paid on qualified debt immediately prior to refinancing reduced by the total of interest costs to be paid on qualified debt after refinancing and refinancing costs.

b. "Qualified debt" means:

(1) Borrowing by a provider to refinance nursing facility capital debt which existed on April 1, 1992;

(2) Which is completed on or after May 1, 1992, and on or before December 31, 1992; and

(3) Which provides a net aggregate savings, which is at least equal to the greater of fifty thousand dollars or seven and one-half percent of the remaining principal balance immediately before refinancing.

c. "Refinancing costs" means those costs which must be incurred by a provider to complete qualified debt borrowing.

2. Refinancing costs are allowable costs. Refinancing costs may be met through the use of existing provider funds, including funds in funded depreciation accounts or through borrowing.

a. If the existing provider funds are derived from funded depreciation accounts, the refinancing costs will be treated as costs incurred for other capital purposes related to resident care.

b. A provider meeting refinancing costs through the use of existing provider funds may report, as an interest expense in the report year in which the refinancing occurred, an amount equal to twelve percent of the refinancing costs.

c. A provider meeting refinancing costs through borrowing may report the interest expense when that interest expense is incurred.

d. The principal amount of the refinancing costs must be amortized over the period of borrowing for the qualified debt.

e. If refinancing of qualified debt is done in conjunction with new borrowing for capital purposes, the refinancing costs recognized under this section will be limited to a percentage of refinancing costs equal to the percentage the qualified debt is of the total qualified and new debt.

3. This section applies to qualified debt refinancing notwithstanding any other provision of this chapter which calls for a different treatment of the debt and refinancing costs.

History: Effective May 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-20. Resident personal funds.

1. A facility may not require residents to deposit personal funds with the facility.

2. Upon written authorization of a resident or the resident's legal representative, a facility must hold, safeguard, manage, and account for the resident's personal funds deposited with the facility.

3. The facility may not charge the resident for holding, safeguarding, managing, or accounting for the resident's personal funds. Any related administrative costs, including bank charges, must be included in the daily rate. The facility may not impose a charge against a resident's personal funds for any item or service which is included in the daily rate.

4. The facility may maintain a resident's personal funds that do not exceed fifty dollars in a noninterest-bearing account. The facility must deposit any resident's personal funds in excess of fifty dollars in an interest-bearing account that is separate from any of the facility's accounts and that credits all interest earned on the resident's account to such account.

5. The facility must maintain a system that assures a full, complete, and separate accounting, according to generally accepted accounting principles, of each resident's personal funds. An individual financial record must be available on request and a written accounting of transactions must be provided quarterly to the resident or the resident's legal representative.

6. Resident personal funds may not be commingled with any facility funds or with funds of any person other than another resident.

7. Upon death of a resident, the facility must promptly convey the resident's personal funds, and a final accounting of those funds, to the individual administering the resident's estate. For purposes of this section, an "individual administering the resident's estate" includes a person lawfully empowered to facilitate the transfer of small estates without the use of a personal representative.

8. The facility must purchase a surety bond or provide self-insurance to assure the security of all resident personal funds deposited with the facility.

History: Effective May 1, 1992.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

TITLE 79

Oilseed Council

JUNE 1992

CHAPTER 79-02-01

79-02-01-01. Scope. This article is promulgated pursuant to North Dakota Century Code chapter 4-10.2 and ~~North Dakota Century Code~~ section 28-32-02. This article applies to all sunflowers, safflower, rapeseed or canola, crambe, and flax grown in North Dakota or sold to a ~~designated handler~~ first purchaser and shall be applied in conjunction with North Dakota Century Code chapter 4-10.2.

History: Amended effective June 1, 1990; June 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 4-10.2-01

CHAPTER 79-02-02

79-02-02-01. Definitions. Unless otherwise defined, or made inappropriate by context, all words used in this chapter shall have that meaning given to them under North Dakota Century Code chapter 4-10.2. ~~"Designated handler" includes, for the purposes of the assessment and reporting required by North Dakota Century Code chapter 4-10.2, a grower selling the grower's unharvested sunflowers, safflower, rapeseed or canola, crambe, or flax, or delivering the grower's sunflowers, safflower, rapeseed or canola, crambe, or flax from the farm on which they are produced to any storage facility, packaging shed, or processing plant located outside the state.~~

History: Amended effective June 1, 1990; June 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 4-10.2-02

79-02-02-03. Reports - Form and content. Every ~~designated handler~~ first purchaser shall, within fifteen days after the end of each calendar quarter, file a quarterly oilseed promotion report including the remittance of assessment fees for that quarter, with the council in the form and containing the information as prescribed by the council. Calendar quarters shall end on March thirty-first, June thirtieth, September thirtieth, and December thirty-first of each year.

History: Amended effective June 1, 1990; June 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 4-10.2-08

TITLE 81

Tax Commissioner

JUNE 1992

CHAPTER 81-03-01.1

81-03-01.1-06. Income tax exemption for new ~~industry~~ and expanding business.

1. When a taxpayer is granted an exemption from income tax pursuant to North Dakota Century Code chapter 40-57.1, the exemption must be prorated, when necessary, in the first and last years in order to exempt income for a period not to exceed sixty months.

2. The amount of the yearly income tax exemption for new ~~industry~~ and expanding business is limited to income earned from the new ~~industry~~ business or expansion in each tax year reduced by the amount of federal tax assignable to the North Dakota exempt income which was included in federal taxable income.

3. When the project operator is a partnership or S corporation, the income tax exemption flows through to the partners and shareholders.

4. When reapplication for a property tax exemption is required pursuant to North Dakota Century Code chapter 40-57.1, reapplication is also required for the income tax exemption.

5. Termination of the property tax exemption terminates the income tax exemption.

6. The office of the state tax commissioner must be notified of any changes in ownership of a new industry which has been granted an income tax exemption. A change of ownership

includes transfer of a partnership interest or of a stock interest in a subchapter S corporation.

7. The income tax exemption may be claimed by an individual taxpayer on North Dakota form 37.

8. A taxpayer with both exempt and nonexempt activities shall prorate its income pursuant to the provisions of North Dakota Century Code chapter 57-38.1.

   a. If the taxpayer has only North Dakota activity, exempt income must be determined by multiplying income from all activities, exempt and nonexempt, by a fraction, the numerator of which is the sum of its exempt property, sales, and payroll factors and the denominator of which is three.

EXAMPLE:

Facts:	Exempt Plant	Other North Dakota Activity	Total North Dakota Activity
Property	$ 5,000,000	$10,000,000	$15,000,000
Payroll	750,000	1,000,000	1,750,000
Sales	20,000,000	35,000,000	55,000,000

Apportionable income $50,000,000

Computing North Dakota exempt income

Apportionment factor relating to exempt activities:

Property factor	= $ 5,000,000 :	$15,000,000 =	.333333	
Payroll factor	= $ 750,000 :	$ 1,750,000 =	.428571	
Sales factor	= $20,000,000 :	$55,000,000 =	.363636	
			1.12554	: 3 = .37518

.37518 Apportionment factor of exempt activities
$50,000,000 Apportionable income
$18,759,000 Exempt income

   b. Computing North Dakota exempt income of multistate business requires two steps.

      (1) Compute North Dakota income including both exempt and nonexempt activities in the apportionment factor and in apportionable income.

EXAMPLE:

Multistate corporation

Facts: Utilize the same facts in the above example, and add:

Total activity within and without North Dakota

Property	$100,000,000
Payroll	$ 5,000,000
Sales	$200,000,000

Apportionment factor, including tax-exempt activity

Property Factor	= $ 15,000,000	: $100,000,000 =	.15
Payroll Factor	= $ 1,750,000	: $ 5,000,000 =	.35
Sales Factor	= $ 55,000,000	: $200,000,000 =	.275
			.775 : 3 = .258333

$50,000,000
x .25833
$12,916,650 North Dakota income

(2) Apply a second factor to North Dakota income computed in the first step. The second factor is computed in the same way as in subdivision a, as a ratio of exempt North Dakota activity to total North Dakota activity.

$12,916,650 North Dakota income
x .37518 Apportionment factor of exempt activities
$ 4,846,069 North Dakota exempt income

c. When a partial exemption on a project or plant has been granted, the percentage of the project's nonexempt property, payroll, and sales would be added to the other North Dakota taxable activity's factors. For instance, a twenty percent exemption would mean eighty percent of the project's property, payroll, and sales would be added to the other North Dakota factors creating a taxable activity.

d. When a company has only one operating facility which has been granted a partial exemption, North Dakota taxable income shall be computed based on total income of the operation, and a percentage of the income which is equal to the percentage of the exemption shall be deducted from the total.

History: Effective March 1, 1990; amended effective June 1, 1992.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 40-57.1

CHAPTER 81-03-05.1

81-03-05.1-06. Tax credit for research and experimental expenditures. When calculating the tax credit provided for in North Dakota Century Code section 57-38-30.5, the corporation may include only those base period research expenses which were incurred in North Dakota.

History: Effective June 1, 1992.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-30.5

81-03-09-22. Payroll factor - In general.

1. The payroll factor of the apportionment formula for each trade or business of the taxpayer shall include the total amount paid by the taxpayer in the regular course of its trade or business for compensation during the tax period.

2. The total amount "paid" to employees is determined upon the basis of the taxpayer's accounting method. If the taxpayer has adopted the accrual method of accounting, all compensation properly accrued shall be deemed to have been paid. Notwithstanding the taxpayer's method of accounting, at the election of the taxpayer, compensation paid to employees may be included in the payroll factor by use of the cash method if the taxpayer is required to report such compensation under such method for unemployment compensation purposes.

   The compensation of any employee on account of activities which are connected with the production of nonbusiness income shall be excluded from the factor.

   Example a: The taxpayer uses some of its employees in the construction of a storage building which, upon completion, is used in the regular course of taxpayer's trade or business. The wages paid to those employees are treated as a capital expenditure by the taxpayer. The amount of such wages is included in the payroll factor.

   Example b: The taxpayer owns various securities which it holds as an investment separate and apart from its trade or business. The management of the taxpayer's investment portfolio is the only duty of Mr. X, an employee. The salary paid to Mr. X is excluded from the payroll factor.

3. The term "compensation" means gross wages, salaries, commissions, and any other form of remuneration paid directly to employees for personal services before deductions for deferred compensation plans, flexible spending plans, or any other deductions from the gross amounts as set forth in subsection 31 of North Dakota Century Code section 52-01-01. Payments made to an independent contractor or any other person not properly classifiable as an employee for unemployment compensation purposes are excluded. ~~Only amounts paid directly to employees are included in the payroll factor.~~ Amounts considered paid directly include the value of board, rent, housing, lodging, and other benefits or services furnished to employees by the taxpayer in return for personal services provided that such amounts constitute income to the recipient under the Internal Revenue Code. In the case of

employees not subject to the Internal Revenue Code, that is, those employed in foreign countries, the determination of whether such benefits or services would constitute income to the employees shall be made as though such employees were subject to the Internal Revenue Code.

4. The term "employee" means any officer of a corporation, or any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Generally, a person will be considered to be an employee if the person is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contribution Act, except that, since certain individuals are included with the term "employees" in the Federal Insurance Contribution Act who would not be employees under the usual common law rules, it may be established that a person who is included as an employee for purposes of the Federal Insurance Contribution Act is not an employee for purposes of this section.

5. In filing returns with this state, if the taxpayer departs from or modifies the treatment of compensation paid used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

   If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under article IV of the multistate tax compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the treatment of compensation paid, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

History: Amended effective June 1, 1992.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38.1-13, 57-59-01 (art.IV(13))

81-03-09-38. Special rules - Television and radio broadcasting. The following special rules are established in respect to the apportionment of income from television and radio broadcasting.

1. In general. When a person in the business of conducting television or radio broadcasts, either through a network, including owned and affiliated stations, or through an affiliated, unaffiliated, or independent television or radio broadcasting station, has income from sources both within and without this state, the amount of business income from sources within this state must be determined pursuant to North Dakota Century Code chapter 57-38.1 and article IV of North Dakota Century Code section 57-59-01, and the regulations issued thereunder by this state, except as modified by this section.

This section also applies to telecasting by cable television systems.

2. Business and nonbusiness income. For definitions and regulations for determining whether income must be classified as business or nonbusiness income, see sections 81-03-09-03 through 81-03-09-05.

3. Definitions. The following definitions are applicable to the terms contained in this section, unless the context clearly requires otherwise:

   a. "Film" or "film programming" means any and all performances, events, or productions telecast, live or otherwise, on television, including, but not limited to, news, sporting events, plays, stories, or other literary, commercial, educational, or artistic works, in the format of a motion picture, a videotape, disc, or other medium. Each episode of a series of films produced for television constitutes a separate "film" notwithstanding that the series relates to the same principal subject and is produced during one or more television seasons.

   b. "Outer-jurisdictional" property means certain types of tangible personal property, such as orbiting satellites, undersea transmission cables, and the like, that are owned or rented by the taxpayer and used in the business of telecasting or broadcasting, but which are not physically located in any particular state.

   c. "Radio" or "radio programming" means any and all performances, events, or productions broadcast, live or otherwise, on radio, including, but not limited to, news, sporting events, plays, stories, or other literary, commercial, educational or artistic works, in the format of an audiotape, disc, or other medium. Each episode of a series of radio programming produced for radio broadcast constitutes a separate "radio programming" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

   d. "Release date" means the date on which a film is placed into service. A film is placed into service when it is first telecast to the primary audience for which the film was created. Thus, a film is placed into service when it is first publicly telecast for entertainment, educational, commercial, artistic, or other purpose. Each episode of a television series is placed in service when it is first telecast. A film is not placed in service merely because it is completed and therefore in a condition or state of readiness and availability for telecast or, merely because it is telecast to prospective sponsors or purchasers, or is shown in preview before a select audience.

e. "Rent" includes license fees or other payments or consideration provided in exchange for the broadcast or other use of television or radio programming.

f. "Subscriber" to a television system is the individual residence or other outlet which is the ultimate recipient of the transmission.

g. "Tangible personal property" used in the business, whether owned or rented, includes, but is not limited to, camera and sound equipment, sets, props, wardrobes, and other similar equipment or property, but does not include film or radio programming.

h. "Telecast" or "broadcast", used interchangeably, means the transmission of television or radio programming by an electronic signal conducted by radiowaves or microwaves or by wires, lines, coaxial cables, wave guides, fiber optics, or other conduits of communications.

i. "United States" includes and is limited to the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions and territories thereof.

4. Apportionment of business income. The property factor must be determined in accordance with North Dakota Century Code sections 57-38.1-10 through 57-38.1-12, subsections 10, 11, and 12 of article IV of North Dakota Century Code section 57-59-01, and sections 81-03-09-15 through 81-03-09-21. The payroll factor must be determined in accordance with North Dakota Century Code sections 57-38.1-13, 57-38.1-14, subsections 13 and 14 of article IV of North Dakota Century Code section 57-59-01, and sections 81-03-09-22 through 81-03-09-25. The sales factor must be determined in accordance with North Dakota Century Code sections 57-38.1-01, 57-38.1-15, 57-38.1-16, subsections 15 and 16 of article IV of North Dakota Century Code section 57-59-01, and sections 81-03-09-26 through 81-03-09-30, except as modified by this section.

5. Property factor - In general.

a. In the case of rented studios, the net annual rental rate includes only the amount of the basic or flat rental charge by the studio for the use of a stage or other permanent equipment such as sound recording equipment and the like, except that additional equipment rented from other sources or from the studio not covered in the basic or flat rental charge and used for one week or longer, even though rented on a day-to-day basis, must be included. Lump-sum net rental payments for a period which encompasses more than a single income year must be assigned ratably over the rental period.

b. No value or cost attributable to any film or radio programming may be included in the property factor at any time.

6. Property factor denominator.

a. All real property and tangible personal property, other than outer-jurisdictional and film or radio programming property, whether owned or rented, which is used in the business must be included in the denominator of the property factor.

b. Audio or video cassettes, discs, or similar medium containing film or radio programming and intended for sale or rental by the taxpayer for home viewing or listening must be included in the property factor at their original cost. To the extent that the taxpayer licenses or otherwise permits others to manufacture or distribute such cassettes, discs, or other medium containing film or radio programming for home viewing or listening, the value of said cassettes, discs, or other medium must include the license, royalty, or other fees received by the taxpayer capitalized at a rate of eight times the gross receipts derived therefrom during the income year.

c. Outer-jurisdictional, film and radio programming property must be excluded from the denominator of the property factor.

7. Property factor numerator.

a. With the exception of the outer-jurisdictional and film or radio programming property, all real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period must be included in the numerator of the property factor. If tangible personal property, other than outer-jurisdictional and film or radio programming property, is located or used in this state for part of the income year, it must be included in the numerator of the property factor at a value determined by applying the ratio which the number of days the property is located or used in this state bears to the total number of days such property was owned or rented by the taxpayer during the income year.

b. Outer-jurisdictional, film and radio programming property must be excluded from the numerator of the property factor.

Example: XYZ Television Company has a total value of all of its property everywhere of five hundred million dollars, including a satellite valued at fifty million dollars that was used to telecast programming into this

state and one hundred fifty million dollars in film property of which one million dollars' worth was located in this state the entire tax year. The total value of real and tangible personal property other than film programming property, located in this state for the entire income year was valued at two million dollars, and the moveable and mobile property described in subdivision a was determined to be of a value of four million dollars and such moveable and mobile property was used in this state for one hundred days. The total value of property to be attributed to this state would be determined as follows:

Value of property permanently in state:	$ 2,000,000
Mobile and moveable property: (100/365 x $4,000,000):	$ 1,095,600
Total value of property to be included in the state's property factor numerator without apportionment of outer-jurisdictional and film property	$ 3,095,600
Total value of property to be used in the denominator ($500,000,000-$200,000,000)	$300,000,000
Total property factor percent ($3,095,600/$300,000,000):	.0103

8. Payroll factor denominator.

a. The denominator of the payroll factor must include all compensation, including residual and profit participation payments, paid to employees during the income year, including that paid to directors, actors, newscasters, and other talent in their status as employees.

b. Amounts paid or other consideration that is provided to another person, corporation, or other business entity for providing the services of directors, actors, newscasters, and other talent for live television broadcast, film, or radio programming may be included in the payroll factor only upon a finding by the tax commissioner, supported by clear and convincing evidence that such payments or other consideration were at least twenty-five percent of the total compensation paid to employees, and failure to include such other payments or consideration would prevent the apportionment formula from fairly representing the extent of the taxpayer's business activity in this state.

9. Payroll factor numerator. Compensation for all employees who are engaged on location in the production of a live television

broadcast, film or radio programming, as well as any payments or other consideration for the providing of those talent services that are included in the payroll denominator pursuant to subdivision a of subsection 8, must be attributed to the state or states as may be determined by the application of the provisions of North Dakota Century Code sections 57-38.1-13, 57-38.1-14, subsections 13 and 14 of article IV of North Dakota Century Code section 57-59-01, and sections 81-03-09-22 through 81-03-09-25. For purposes of applying North Dakota Century Code sections 57-38.1-13, 57-38.1-14, subsections 13 and 14 of article IV of North Dakota Century Code section 57-59-01, and sections 81-03-09-22 through 81-03-09-25, the persons for whom compensation was included in the payroll denominator pursuant to subdivision b of subsection 8 must be deemed to be employees of the taxpayer.

10. Sales factor denominator. The denominator of the sales factor must include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under subsection 2, and section 81-03-09-34.

11. Sales factor numerator. The numerator of the sales factor must include all gross receipts of the taxpayer from sources within this state, including the following:

    a. Gross receipts, including advertising revenue, from live television, film or radio programming in release to or by television and radio stations located in this state.

    b. Gross receipts, including advertising revenue, from live television, films or radio programming in release to or by a television or radio station, independent or unaffiliated, or network of stations for broadcast must be attributed to this state in the ratio, hereafter "audience factor", that the audience for such station, or owned and affiliated stations in the case of networks, located in this state bears to the total audience for such station, or owned and affiliated stations in the case of networks, within the United States.

    c. The audience factor for television or radio programming must be determined by the ratio that the taxpayer's in-state viewing and listening audience bears to its total United States viewing and listening audience. In the case of television, the audience factor must be determined by reference to the rating statistics as reflected in such sources as Arbitron, Nielsen, or other comparable resources or by the average circulation statistics published annually in the Television and Cable Factbook, "Stations Volume" by Television Digest, Incorporated, Washington, D.C., provided that the source selected is consistently used from year to year for such purpose. In

the case of radio, the audience factor must be determined by reference to rating statistics as reflected in such sources as Arbitron, Birch/Scarborough Research, or other comparable resources, provided that the source selected is consistently used from year to year for such purpose.

d. Gross receipts from live telecasts and films in release to or by a cable television system must be attributed to this state in the audience factor ratio that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system in the United States. If the number of subscribers cannot be accurately determined from the records maintained by the taxpayer, the audience factor ratio must be determined on the basis of the applicable year's subscription statistics published in Cable Vision, International Thompson Communications, Incorporated, Denver, Colorado, if available, or, if not available, by other published market surveys.

e. Receipts from the sale, rental, licensing or other disposition of audio or video cassettes, discs, or similar medium intended for home viewing or listening must be included in the sales factor as provided in North Dakota Century Code section 57-38.1-16, subsection 16 of article IV of North Dakota Century Code section 57-59-01, and section 81-03-09-29.

History: Effective June 1, 1992.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38, 57-38.1, 57-59

CHAPTER 81-09-02

81-09-02-01. Definitions. As used in this chapter and for the administration of North Dakota Century Code chapter 57-51, unless the context otherwise requires:

1. "Casinghead gas" means gas as produced from a well classified as an oil well by the industrial commission.

2. "Commissioner" means the tax commissioner of the state of North Dakota.

3. "Gross value at the well" means fair market value at the time of production.

4. "Natural gas" means gas as produced from a well classified as a gas well by the industrial commission.

5. "Nonoperating interest" means an interest in production from a mineral property which does not share in operating rights. A nonoperating interest includes an overriding royalty interest, a net profit interest, and a carried interest.

6. "Oil" means petroleum, crude oil (including condensate), mineral oil, and casinghead gasoline.

7. "Person" means an individual, partnership, corporation, association, fiduciary, trustee, and any combination thereof.

8. "Producer" means the owner of a working interest or a nonoperating interest, in a well capable of producing oil or gas, or both.

9. "Purchaser" means any buyer of oil or gas after it has been produced, or any processor of gas. Purchaser does not include one who acquires oil or gas in place in the earth through a lease, estate, or other interest.

10. "Return" means any statement, report, or return required by North Dakota Century Code chapter 57-51 to be filed with the commissioner.

11. "Tax" means the oil and gas gross production tax.

12. "Taxpayer" means any person that is responsible for filing a report or paying the tax.

13. "Working interest" means a mineral interest which includes the rights granted to a lessee of property to explore for, produce and own, oil or gas.

History: Effective July 1, 1982; amended effective August 1, 1986; July 1, 1989; June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51

81-09-02-02. Procedure for review of commissioner's determination of additional tax, penalty, and interest.

1. The commissioner will review or audit the returns filed pursuant to North Dakota Century Code chapter 57-51.

2. a. If it is determined that additional tax is due, the commissioner shall notify the taxpayer of this determination within ~~six years of the due date for payment of the tax~~ the applicable time period specified in North Dakota Century Code section 57-51-09.

   b. For the purpose of determining whether there has been a change in tax liability on any return by an amount in excess of twenty-five percent of the amount of tax liability reported on a return, the change in tax liability must be determined on a well or unit basis, as reported on the return. If no tax has been paid on production from a well or unit for any production month, the requirement of a change in the liability in excess of twenty-five percent is automatically met.

   c. The notice of determination must be sent by certified mail with a return receipt requested and it must state the statutory basis for the determination, the reasons for the determination, and the amount of additional tax due along with the applicable penalty and interest.

3. The notice of determination becomes final and irrevocable unless the taxpayer files a protest and statement of grounds with the commissioner pursuant to section 81-01.1-01-06. If a taxpayer protests only a portion of the commissioner's determination, the portion which is not protested becomes finally and irrevocably fixed. The commissioner shall provide a detailed response to the statement of grounds pursuant to section 81-01.1-01-07.

4. Upon request, the commissioner may grant the taxpayer an informal conference.

5. If a protest and statement of grounds are filed, the commissioner shall reconsider the notice of determination. This reconsideration may include further examination by the commissioner of the taxpayer's books, papers, records, or memoranda, pursuant to section 81-01.1-01-03 and North Dakota Century Code sections 57-01-02 and 57-51-07.

6. Pursuant to section 81-01.1-01-08, the commissioner shall send a notice of reconsideration to the taxpayer by certified mail with a return receipt requested stating the amount of additional tax due, along with the applicable penalty and interest.

7. The notice of reconsideration becomes final and irrevocable unless the taxpayer seeks formal administrative review of the notice by filing a complaint and requesting an administrative hearing pursuant to sections 81-01.1-02-01 and ~~81-01.1-02-03~~ 81-01.1-02-02.1. The complaint must be served personally or by certified mail. The provisions of North Dakota Century Code chapter 28-32 apply to and govern the filing of the complaint and the administrative hearing, including any appeal from a decision rendered by the commissioner.

History: Effective July 1, 1982; amended effective August 1, 1986; July 1, 1989; May 1, 1991; June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 28-01-16, 57-01-02, 57-01-11, 57-51-07, 57-51-09

81-09-02-03. Procedure for refund of overpayments, duplicate payments, and erroneous payments of tax.

1. For purposes of this section, "taxpayer" means the party who has actually remitted an overpayment, duplicate payment, or erroneous payment of tax.

2. A claim for credit or refund must be made by filing with the commissioner~~, within six years of the due date for payment of the tax,~~ an amended return~~, or other report as prescribed by the commissioner, accompanied by~~. A claim for refund must also contain a statement outlining the specific grounds upon which the claim for ~~credit or~~ refund is based, the total amount of the refund claimed, a list of the leases and production periods involved, and any documentation supporting the claim for refund.

3. A claim for credit or refund must be made within the applicable time period specified in North Dakota Century Code section 57-51-19. For the purpose of determining whether there has been a change in tax liability on any return by an amount in excess of twenty-five percent of the amount of tax liability reported on a return, the change in tax liability shall be determined on a well or unit basis, as reported on the return. If no tax has been paid on production from a well or unit for any production month, the requirement of a change in the liability in excess of twenty-five percent is automatically met.

4. The commissioner will not issue a tax refund or allow a tax credit for periods prior to the date of the taxpayer's claim for credit or refund in the following situations:

   a. For a tax refund or credit claimed on production from a stripper well property, unless the producer submits to the commissioner the industrial commission's certification of the stripper well property within one year after the end of the stripper well property's qualification period.

   b. For a tax refund or credit claimed on production from a new well, unless the producer submits to the commissioner the industrial commission's new well qualification letter within one year after the new well is completed.

   c. For a tax refund or credit claimed on production from a work-over project, unless the producer submits to the commissioner the industrial commission's work-over qualification letter within one year after the work-over project is completed.

   d. For a tax refund or credit claimed on production from a secondary or tertiary project, unless the operator of the secondary or tertiary project submits the industrial commission's order which certifies the project for the reduced tax rate or for the tax exemption within one year after the end of the period qualifying the project for the reduced rate or within one year after the month in which the first incremental oil was produced.

5. Within thirty days of the claim for refund or credit, the commissioner shall acknowledge receipt of the claim and request additional information if needed. The commissioner shall notify the taxpayer as to the amount of refund or credit granted within a reasonable time of the claim. If the commissioner decides to deny the taxpayer's claim for refund or credit, in part or in full, a notice of refund change must be sent by certified mail with a return receipt requested, and it must state the reasons for the decision.

~~4.~~ 6. The notice of refund change becomes final and irrevocable unless the taxpayer files a protest and statement of grounds with the commissioner pursuant to section 81-01.1-01-06. If a taxpayer protests only a portion of the commissioner's decision, the portion which is not protested becomes finally and irrevocably fixed. The commissioner shall provide a detailed response to the statement of grounds pursuant to section 81-01.1-01-07.

~~5.~~ 7. Upon request, the commissioner may grant the taxpayer an informal conference.

~~6.~~ 8. If a protest and statement of grounds are filed, the commissioner shall reconsider the notice of refund change. This reconsideration may include further examination by the commissioner of the taxpayer's books, papers, records, or memoranda, pursuant to section 81-01.1-01-03 and North Dakota Century Code sections 57-01-02 and 57-01-07.

~~7.~~ 9. Pursuant to section 81-01.1-01-08, the commissioner shall send a notice of reconsideration to the taxpayer by certified mail with a return receipt requested stating the amount of refund or credit denied.

~~8.~~ 10. The notice of reconsideration becomes final and irrevocable unless the taxpayer seeks formal administrative review of the notice by filing a complaint and requesting an administrative hearing pursuant to sections 81-01.1-02-01 and ~~81-01.1-02-03~~ 81-01.1-02-02.1. The complaint must be served personally or by certified mail. The provisions of North Dakota Century Code chapter 28-32 apply to and govern the filing of the complaint and the administrative hearing procedure, including an appeal from any decision rendered by the commissioner.

History: Effective October 1, 1987; amended effective July 1, 1989; May 1, 1991; June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-01-02, 57-01-07, 57-51-19

81-09-02-03.1. ~~No interest~~ Interest on ~~refund or credit~~ refunds. The commissioner does not have the authority to pay interest on a claim for credit ~~or refund~~ of tax. For taxable periods before July 1, 1991, the commissioner does not have the authority to pay interest on a claim for refund of tax. For taxable periods beginning on or after July 1, 1991, interest of ten percent per annum must be paid on tax refunds. The daily interest rate is .000277. Interest is paid for the period from the date the tax is paid until the date the refund is mailed to the taxpayer.

History: Effective July 1, 1989; amended effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-19

81-09-02-03.2. Tax credit requirements. Tax credits, as claimed on amended returns, may be used to reduce the current month's tax liability when both of the following conditions are met:

1. The tax credits are attributable to the twelve-month period immediately preceding the current month's return being filed.

2. The total amount of the tax credits does not exceed ten thousand dollars.

If the conditions above are not met, the taxpayer must submit the amended returns for the commissioner's review and approval prior to reducing a current month's tax liability.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-19

81-09-02-05. Extension of due date for filing a return or paying tax.

1. A taxpayer may request that the due date for payment of the tax be extended by a maximum of fifteen days. In addition, a taxpayer may request that the due date for filing a return be extended. However, if tax is due with the return, the due date for filing will only be extended by a maximum of fifteen days.

2. A taxpayer may request an extension of time either verbally or in writing. A verbal request must be made on or before the due date for paying the tax or filing the return. A written request must be received by the commissioner on or before the due date for paying the tax or filing the return. Both a verbal and written request must advise the commissioner as to why the extension of time is needed.

3. If a request for an extension of time is approved verbally, the taxpayer shall send a letter to the commissioner confirming this fact within five days of the date the request was approved. If a request is not approved verbally, the commissioner shall promptly notify the taxpayer in writing as to whether the request is approved or denied.

4. If a request for an extension of time for filing a return is approved, the taxpayer shall compute and pay with the return extension interest at the rate of twelve percent per annum. The daily interest rate is .000333. Interest is computed from the original due date of the return to the date the tax is paid, which is the date the payment is mailed.

History: Effective July 1, 1989; amended effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-05, 57-51-06

81-09-02-07. ~~[Reserved.]~~ Injected oil. When produced from and injected into the same well, oil must be reported as production upon recovery after injection.

When produced from one well and transported to a second well, oil injected into the second well must be reported as production from the first well and tax is due at the time the oil is transported to the

second well. In determining production from the second well, injected oil must be excluded from production. The amount excluded must be applied against the first oil recovered after injection.

Injected oil includes, but is not limited, to what is commonly known as power oil, frac oil, and load oil.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-02, 57-51-05

81-09-02-08. Determination of gross value. To determine whether oil has been reported at its fair market value, the commissioner will compare the reported value of the oil with the price prevailing for comparable oil in the field in which the oil was produced. If purchases of oil in a field are limited to or dominated by a single purchaser, the commissioner may test the reasonableness of the reported value by comparing it with the price of comparable oil in other fields in the state. The commissioner may also use any other method which is reasonable to determine whether the reported value is indicative of fair market value, including, but not limited to, comparing the reported value with the oil's value upon disposition at downstream points.

To determine whether gas has been reported at its fair market value, the commissioner may use a workback method, a comparable sales method, or any other method which would reasonably ascertain fair market value at the time of production. In applying the workback method, reasonable expenses incurred in gathering and processing the gas, excluding however any expenses relating to exempt gas products that are returned to the lease, will be deducted from the market value of the gas products derived from the wet gas and the resulting value will be compared to the reported gas value. In applying the comparable sales method, the reported gas value will be compared to the sales value of comparable gas in the field in which the gas was produced. If purchases of gas in a field are limited to or dominated by a single purchaser, the commissioner may test the reasonableness of the reported value by comparing it with the price of comparable gas in other fields in the state.

If the commissioner determines pursuant to any reasonable method that the reported value of oil or gas is not equivalent to fair market value, an assessment will be levied for additional tax on the basis of the fair market value of the oil or gas.

This rule is only effective for taxable periods prior to July 1, 1991.

History: Effective March 1, 1990; amended effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51-02

81-09-02-09. ~~[Reserved]~~ Definition of arms length contract. As used in North Dakota Century Code chapter 57-51, "arms length contract" means a contract or agreement executed by a willing buyer and a willing seller, neither party being affiliated. For purposes of this definition, a contract or agreement between affiliated parties is any contract or agreement between a parent and a wholly or partially owned subsidiary, or between entities wholly or partially owned by a common parent, or between persons otherwise affiliated through ownership or economic relationships.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51-01, 57-51-02.3

81-09-02-09.1. Reduction from gas volumes and reporting. To determine the volume of gas upon which gross production tax must be paid, the following may be deducted from the total volume of gas produced and must be reported to the commissioner:

1. Wet gas and gas products exempt from taxation pursuant to subsection 3 of North Dakota Century Code section 57-51-05. The volume of gas to be deducted for the wet gas and gas products must be computed using the formulas prescribed in forms provided by the commissioner.

2. Condensate reported as oil. The volume of gas to be deducted for each barrel of condensate must be computed using the formula prescribed in forms provided by the commissioner.

3. Gas flared from an oil well by a producer that is not subject to taxation pursuant to North Dakota Century Code section 38-08-06.4.

4. In the event a substance is being injected into a reservoir as a part of a tertiary recovery project, and the amount of nonhydrocarbon gas produced from a well is disproportionally increased as a result of the project, the total volume of gas produced from the well may be adjusted subject to the approval of the commissioner in a manner approved by the commissioner.

A producer is not required to report gas flared from an oil well that is not connected to a gas gathering line if the producer submits to the commissioner a chemical analysis of the flared gas, if available, and, after the first year's production, an industrial commission order exempting the producer from the provisions of North Dakota Century Code section 38-08-06.4.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-01, 57-51-05

81-09-02-11. Tax reimbursement. Tax reimbursement to which a producer is entitled in settlement for gas sold must be included when determining gross value at the well. The producer may calculate the tax reimbursement as follows:

Tax reimbursement = 0.052632 x residue value of gas.

Where a producer claims an exempt royalty, the above formula may be modified as follows:

Tax reimbursement = 0.052632 x [residue value - (royalty percentage x residue value)].

This rule is only effective for periods prior to July 1, 1991.

History: Effective August 1, 1986; amended effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-02

81-09-02-12. Postproduction costs for periods prior to July 1, 1991. When reporting the price of oil or gas ~~for purposes of subdivision d of subsection 1 and subdivision c of subsection 2 of North Dakota Century Code section 57-51-06~~ on forms prescribed by the commissioner, postproduction costs incurred by the producer may be deducted from the price paid at the point of sale. These postproduction costs include expenditures made to transport, by pipeline or truck, oil or gas from the point of production to the place of sale.

Nothing in this rule may be construed to limit the commissioner's authority pursuant to subsection 4 of North Dakota Century Code section 57-51-05 (repealed by the 1991 North Dakota Session Laws) and North Dakota Century Code section 57-51-09.

This rule is only effective for periods prior to July 1, 1991.

History: Effective August 1, 1986; amended effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-02, 57-51-06

81-09-02-14. ~~[Reserved]~~ Taxation of volume gains.

1. For purposes of this section, the term "purchaser" includes any transporter of oil.

2. An oil purchaser that benefits from a volume gain which results from differing measurements of the oil, must report and pay tax on the volume gain. An oil purchaser, however, that is detrimentally affected by a volume loss which results from differing measurements of the oil, may carry forward the volume loss to offset a volume gain in subsequent periods.

3. A volume gain or volume loss is calculated in the following manner:

   a. For a purchaser who is not a transporter of oil, by subtracting the total amount of oil received by the purchaser as measured at the well from the total amount of oil delivered by the purchaser as measured at the trunkline. If this calculation results in a positive number, there is a volume gain. If this calculation results in a negative number, there is a volume loss.

   b. For a purchaser who is a transporter of oil, by subtracting the total amount of oil received by the transporter as measured at the well or at the trunkline from the total amount of oil delivered by the transporter as measured at a subsequent point. If this calculation results in a positive number, there is a volume gain. If this calculation results in a negative number, there is a volume loss.

   c. For the purposes of calculating a volume gain or volume loss under this subsection, a volume gain cannot be decreased and a volume loss cannot be increased by oil lost due to spillage, leakage, fire, theft, or any other event resulting in a physical loss of oil.

4. The amount of volume gain and volume loss must be calculated on a monthly basis. A monthly volume gain or loss may be adjusted for a volume gain or loss attributable to production outside North Dakota.

5. Purchasers must file an annual report, on a form prescribed by the commissioner, showing monthly volume gains and losses for the calendar year. The annual report must be filed by the twenty-fifth day of February following the end of the calendar year.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-02, 57-51-05, 57-51-06

81-09-02-15. Exempt royalty interests.

1. A royalty interest in oil or gas is exempt from the gross production tax if the royalty interest is owned by any of the following entities and that entity's immunity from taxation has not been waived by the appropriate governmental authority:

   a. The federal government or an instrumentality of the federal government.

   b. The state of North Dakota or its political subdivisions.

c. An organized Indian tribe, whose land cannot be alienated without consent of the federal government.

2. A royalty interest in production which is owned by a private or charitable organization, whether profit or nonprofit, is not exempt from the gross production tax.

3. ~~The~~ For oil, the value of an exempt royalty interest is limited to the lesser of the following:

   a. The amount of any royalty payments made to the entities listed in subdivisions a, b, and c of subsection 1.

   b. The royalty percentage attributable to the entities listed in subdivisions a, b, and c of subsection 1 times the total amount reported as the gross value at the well.

4. For gas, the volume of an exempt royalty interest is the royalty interest percentage attributable to the entities listed in subdivisions a, b, and c of subsection 1 times the taxable volume of gas.

History: Effective August 1, 1986; amended effective July 1, 1989; March 1, 1990; June 1, 1992.
General Authority: NDCC 57-51-21; NDCon X, 5
Law Implemented: NDCC 57-51-02, 57-51-02.2

CHAPTER 81-09-03

81-09-03-02. Definitions. As used in these sections and for the administration of North Dakota Century Code chapter 57-51.1, unless the context requires otherwise, the following definitions apply:

1. "Completion" or "completed" means an oil well will be considered completed when the first oil is produced through wellhead equipment after production casing has been run.

2. "Drilled" means the spudding of a well.

3. "Incremental production" means the oil which has been classified as incremental by the industrial commission pursuant to subsections 5 and 6 of North Dakota Century Code section 57-51.1-03.

4. "New well" means a well initially drilled and originally completed after April 27, 1987, to a separate and distinct reservoir as recognized by the industrial commission.

5. "Nonincremental production" means the oil which has not been classified as incremental by the industrial commission.

~~4.~~ 6. "Reservoir" means a common source of supply as defined by the industrial commission.

~~5.~~ 7. "Test oil" means oil recovered during and after drilling but before normal completion of a well.

~~6.~~ 8. "Unit" means the total area of land that results from the combining of interests in all or parts of two or more leases or fee interests in order to operate the reservoir as a single production unit subject to a single operating interest. A unit may be formed by an agreement between the mineral interest owners (voluntary unitization) or by order of an agency of the state or federal government (compulsory unitization). A unit does not include "poolings" resulting from the enforcement of spacing requirements. This definition is only effective for periods prior to April 27, 1987.

History: Effective August 1, 1986; amended effective October 1, 1987; March 1, 1990; June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-01(3)(4)(5)(8), 57-51.1-03(3)

81-09-03-05. ~~Certification of a~~ Rate reduction for qualifying secondary and tertiary recovery ~~project well~~ projects. To be eligible for the four percent tax rate, a ~~producer of a well located on a secondary or tertiary recovery project~~ unit operator must have the

project certified as qualifying by the industrial commission and must submit a copy of the certification received from the industrial commission to the tax commissioner. This rule is only effective for secondary or tertiary recovery projects which were commenced prior to July 1, 1991.

History: Effective October 1, 1987; amended effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-01(5)(6)

81-09-03-05.1. Tax incentives for qualifying secondary recovery projects.

1. Exemption from oil extraction tax. The incremental production from a qualifying secondary recovery project is exempt from the oil extraction tax for a period of five years starting with the first day of the first month in which incremental oil is produced from the project. To be eligible for this exemption, a unit operator must have the industrial commission determine the production decline curve for the project and certify that the project is qualified on a technical basis.

2. Reduction in oil extraction tax rate. The nonincremental production from a qualifying secondary recovery project which is not otherwise exempt is subject to tax at a reduced extraction tax rate of four percent starting with the first day of the first month after the project achieves the production increase required pursuant to subsection 5 of North Dakota Century Code section 57-51.1-01. To be eligible for this rate reduction, a unit operator must have the industrial commission certify that the project has achieved the requisite increase in production and a copy of the industrial commission's certification must be submitted to the tax commissioner.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-01(5)(6)

81-09-03-05.2. Tax incentives for qualifying tertiary recovery projects.

1. Exemption from oil extraction tax. The incremental production from a qualifying tertiary recovery project is exempt from the oil extraction tax for a period of ten years starting with the first day of the first month in which incremental oil is produced from the project. To be eligible for this exemption, a unit operator must have the industrial commission determine the production decline curve for the project and certify that the project is qualified on a technical basis.

2. Reduction in oil extraction tax rate. The nonincremental production from a qualifying tertiary recovery project which is not otherwise exempt is subject to tax at a reduced extraction tax rate of four percent starting with the first day of the first month after the project achieves the production increase required pursuant to subsection 6 of North Dakota Century Code section 57-51.1-01. To be eligible for this rate reduction, a unit operator must have the industrial commission certify that the project has achieved the requisite increase in production and a copy of the industrial commission's certification must be submitted to the tax commissioner.

3. Elimination of exemption and rate reduction. If the industrial commission determines that the unit operator is not continuing to operate the unit as a qualifying tertiary recovery project, the exemption and rate reduction provided for in subsections 1 and 2 hereof will be eliminated as of the first day of the first month in which the unit ceased to be operated as a qualified project.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-01(5)(6)

81-09-03-05.3. Reporting requirements for secondary and tertiary recovery projects.

1. Categorization and taxation of production. The unit operator must report on a form prescribed by the commissioner all of the oil produced from the project. The aforementioned production is categorized and taxed in the following manner:

   a. If the five-year or ten-year exemption is in effect, any incremental production is exempt from the oil extraction tax.

   b. If the applicable exemption period has expired, any incremental production is subject to extraction tax at a rate of four percent.

   c. Any nonincremental production attributable to stripper wells, new wells, and worked-over wells is exempt from the oil extraction tax. The volume of this exempt nonincremental production must be calculated by multiplying the actual production from any stripper wells, new wells, and worked-over wells by a fraction the numerator of which is the lesser of the volume of oil projected pursuant to the production decline curve or the total volume of oil produced from the project and the denominator of which is the total volume of oil produced from the project.

d. If a project has been certified as qualifying for a reduced extraction tax rate, any nonincremental production which is not otherwise exempt is subject to extraction tax at a rate of four percent.

e. If a project has not been certified as qualifying for a reduced extraction tax rate, any nonincremental production which is not otherwise exempt is subject to extraction tax at a rate of six and one-half percent.

f. If a project has not been certified as qualifying for a reduced extraction tax rate, any nonincremental production attributable to new wells that are no longer exempt is subject to extraction tax at a rate of four percent. The volume of nonincremental production subject to this reduced rate must be calculated by multiplying the actual production from any new wells that are no longer exempt by a fraction the numerator of which is the lesser of the volume of oil projected pursuant to the production decline curve or the total volume of oil produced from the project and the denominator of which is the total volume of oil produced from the project.

2. Payment of tax. Tax must be paid on all nonexempt oil produced from the project during each month of production. For reporting purposes, oil produced but not sold in the month of production should be valued based on the taxpayer's average sales price for any oil that was sold during the month.

3. Remittance of tax. Tax may be remitted by the unit operator or the unit's working interest owners. However, if tax will be remitted by any working interest owner, the unit operator must provide on a form prescribed by the commissioner the name and address of each working interest owner that will be remitting tax along with the percentage of ownership interest on which the tax will be remitted. In addition, the tax remitted by any working interest owner must be calculated based on the production reported by the unit operator.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-01(5)(6)

81-09-03-06. New well exemption.

1. Oil produced from a new well during the first fifteen consecutive months starting with the date the well was completed is exempt from the oil extraction tax. This fifteen-month period runs consecutively from the date the well is completed even though all or a portion of the exemption may be rendered ineffective by the oil price trigger discussed

below. Test oil is also exempt from the oil extraction tax. Only one new well exemption is allowed per well bore.

2. To be eligible for this exemption, a producer must submit a new well qualification letter signed by a representative of the industrial commission. This qualification letter must state the date the well was spudded, the date the well was completed, and the total volume of test oil recovered prior to completion. The tax commissioner will accept the information provided in the qualification letter subject to confirmation upon audit.

3. If the average price of a barrel of crude oil, as defined in subsection 2 of North Dakota Century Code section 57-51.1-01, ~~between June first and October thirty-first of any year~~ is thirty-three dollars or more, for any consecutive five-calendar-month period, the exemption is ~~eliminated for any well as of November first of that year. The exemption cannot be reinstated except by legislative action. However, oil produced from a new well after the exemption is eliminated is eligible for a reduction in the oil extraction tax rate. This reduction, from six and one-half percent of gross value to four percent of gross value, is effective for only the months of November and December of the year in question. Beginning January first of the year following the year in question and continuing through December thirty-first of that year, the oil extraction tax rate applicable to new wells is six and one-half percent of gross value~~ ineffective. If, however, the average price of oil then declines below thirty-three dollars per barrel for any subsequent consecutive five-calendar-month period, the exemption is reinstated beginning on the first day of the first month following the five-month period in which the average price of crude oil was below thirty-three dollars per barrel.

History: Effective October 1, 1987; amended effective March 1, 1990; June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-03(3)

81-09-03-07. Stripper well exemption. Oil produced from a stripper well property is exempt from the oil extraction tax.

To be eligible for the stripper well exemption, a producer must have its property certified as a stripper well property by the industrial commission and must submit a copy of the certification received from the industrial commission to the tax commissioner.

~~For a property which has more than ten barrels of average daily production, which qualifies as a stripper well property under chapter 724 of the 1987 Session Laws, and which uses as its qualifying period any twelve-month period prior to April 1, 1987, a well operator must~~

~~file an application with the industrial commission by December 31, 1987, to receive an exemption from April 27, 1987, the effective date of chapter 724 of the 1987 Session Laws. If an application is filed with the industrial commission after December 31, 1987, the date the operator actually filed the application will be treated as the date the exemption becomes effective.~~

History: Effective October 1, 1987; amended effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-03(2), 57-51-19

81-09-03-08. Work-over exemption. Oil produced from a qualifying well that has been worked over is exempt from the oil extraction tax for a consecutive twelve-month period starting with the first day of the third month after completion of the work-over project. The twelve-month period runs consecutively from the first day of the third month after completion of the work-over project, even though all or a portion of the exemption may be rendered ineffective by the oil price trigger discussed below.

To be eligible for this exemption, a taxpayer shall submit a work-over qualification letter signed by a representative of the industrial commission. This qualification letter must state that the work-over project meets the requirements set forth in North Dakota Century Code section 57-51.1-03. The letter must also provide the following information:

1. The name of the lease.
2. The location of the well.
3. The name of the party entitled to the tax exemption.
4. The date the notice of intention was filed.
5. The average daily production of the well during the latest six calendar months of continuous production.
6. The cost of the work-over project.
7. The average daily production of the well during the first sixty days after completion of the work-over project, if applicable.
8. The dates on which the work-over project was performed.

The commissioner will accept the information provided in the qualification letter subject to confirmation upon audit.

If the average price of a barrel of crude oil, as defined in subsection 2 of North Dakota Century Code section 57-51.1-01, ~~between June first and October thirty first of any year~~ is thirty-three dollars

or more, the exemption is eliminated ~~for any well as of November first of that year. The exemption cannot be reinstated except by legislative action~~ on all wells beginning the first day of the first month following that five-month period.

If the above trigger provision does occur, and the average price of oil then declines below thirty-three dollars per barrel for any subsequent consecutive five-calendar-month period, the exemption is reinstated for all qualifying wells beginning the first day of the first month following the five months of prices below thirty-three dollars per barrel.

History: Effective March 1, 1990; amended effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-03

81-09-03-09. Trigger provision applicable to reduced oil extraction tax rate. Oil produced from a new well or a qualifying secondary or tertiary recovery project and not otherwise exempt is subject to tax at a reduced extraction tax rate of four percent. However, if the average price of a barrel of crude oil is thirty-three dollars or more, for any consecutive five-calendar-month period, the oil extraction tax rate for the aforementioned production increases to six and one-half percent starting with the first day of the first month following the five-month period where the average price was thirty-three dollars or more. If the oil extraction tax rate is increased from four to six and one-half percent, and after the increase, the average price of oil declines to less than thirty-three dollars per barrel during any subsequent five-calendar-month period, the rate of tax reverts to four percent starting with the first day of the first month following the five-month period where the average price was less than thirty-three dollars.

History: Effective June 1, 1992.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-03

NOVEMBER 1992

CHAPTER 81-01.1-02

81-01.1-02-07. Persons authorized to represent taxpayer.

1. **Taxpayer in own interest.** An individual taxpayer may appear before the hearing officer in the taxpayer's own interest. A corporate taxpayer may be represented by a corporate officer~~, and a~~ or any other duly authorized corporate employee. A partnership may be represented by any general partner.

2. **Attorneys.** An attorney admitted and licensed to practice law in North Dakota may represent a taxpayer before the hearing officer. An attorney, admitted and licensed to practice law in a foreign state or country, but not licensed to practice law in North Dakota, may represent a taxpayer before the hearing officer if that attorney first designates as an associate a resident attorney admitted and licensed to practice law in this state. The name and address of the associate must appear on all documents filed with the office of state tax commissioner. The associate shall appear personally and, unless excused by the hearing officer, shall remain in attendance with the nonresident attorney in all appearances before the hearing officer.

3. **Rules of conduct.** All persons appearing before the hearing officer shall conform to the standard of ethical conduct required of practitioners before the courts of the state of North Dakota.

History: Effective May 1, 1991; amended effective November 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-02.1-02-08. Maintaining certification. An assessment official is required to attend educational sessions in order to maintain certification. All educational sessions must be approved by the state supervisor of assessments.

A county director of tax equalization and a class I city assessor are certified for a term of four years by the state supervisor of assessments. In order to maintain certification, each of these assessment officials shall successfully complete ~~thirty~~ forty hours of approved classroom instruction or ~~thirty~~ forty hours of approved seminars during each four-year certification period.

Certification as a township assessor or a class II city assessor is valid for one year. The certification is renewable by attendance at an approved annual seminar which is conducted by a certified county director of tax equalization.

History: Effective March 1, 1988; amended effective November 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 11-10.1-01(1), 11-10.1-05(1)

81-02.1-02-10. Valuation of nonagricultural property. Any assessment made by a township assessor or class II city assessor of a nonagricultural property, upon which there are buildings and structures with a true and full value of more than five hundred thousand dollars, must be reviewed and approved by a certified county director of tax equalization or a certified class I city assessor prior to the township or city board of equalization annual meeting.

History: Effective November 1, 1992.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 11-10.1-05(2)

81-03-01.1-09. Requirement to report federal changes.

1. The following provisions are applicable for purposes of interpreting subsection 1 of North Dakota Century Code section 57-38-34.4:

   a. If a change or correction to federal taxable income or federal income tax liability is initiated by the United States internal revenue service, the change or correction must be reported to the commissioner even if it does not result in an underpayment or an overpayment of federal income tax.

   b. "Final determination" means a decision, action, or date from which no further action is taken by the taxpayer or the United States internal revenue service to resolve any dispute relating to the change or correction which was made to the taxpayer's federal taxable income or federal income tax liability. A final determination has occurred if any of the following circumstances apply:

      (1) A taxpayer receives a notice or other correspondence from the United States internal revenue service which makes an adjustment to the taxpayer's federal taxable income based on:

         (a) A mathematical or clerical error.

         (b) Any other change or correction where the taxpayer has paid or arranged to pay the underpayment of federal income tax, or where the United States internal revenue service has credited or refunded to the taxpayer an overpayment of federal income tax. A final determination does not occur, however, if a taxpayer pays the tax and then files a claim for credit or refund with the United States internal revenue service.

      (2) A taxpayer waives the restrictions on assessment and collection of all or any part of an underpayment of federal income tax by signing a federal form 870 or any other form prescribed for this purpose by the United States internal revenue service. A final determination does not occur with respect to any part of the underpayment which is not covered by the waiver. Where the signature of an authorized representative of the United States internal revenue service is required to execute this waiver, the date

of final determination is when the taxpayer receives notice of the signing. A final determination does not occur, however, if a taxpayer pays the tax and then files a claim for credit or refund with the United States internal revenue service.

(3) A taxpayer receives a federal statutory notice of deficiency and does not timely file a petition with the United States tax court for redetermination of the assessed underpayment of federal income tax. The date of final determination is when the time period within which to file the petition expires. A final determination does not occur, however, if a taxpayer pays the tax and then files a claim for credit or refund with the United States internal revenue service.

(4) A closing agreement is executed pursuant to United States Internal Revenue Code section 7121 [26 U.S.C. 7121]. The date of final determination is when the taxpayer receives notice of the signing of the closing agreement by an authorized representative of the United States commissioner of internal revenue.

(5) A federal court of law issues a decision which is not appealed or is not subject to appeal.

(6) A federal court of law approves a voluntary agreement stipulating final disposition of a case.

(7) If a taxpayer files a claim for credit or refund of all or any part of an underpayment of federal income tax, as described in paragraphs 1, 2, or 3 of this subdivision, a final determination has occurred if any of the following circumstances apply:

(a) The taxpayer receives notice of the disallowance of the claim for credit or refund from the United States internal revenue service and the taxpayer does not appeal the disallowance or file a suit for refund.

(b) The taxpayer receives notice of the allowance of the claim for credit or refund from the United ~~states~~ States internal revenue service.

(c) Receipt of the refund from the United States internal revenue service, if no prior notice is received.

(d) The provisions of paragraphs 4, 5, or 6 of this subdivision apply.

2. The following provisions are applicable for purposes of interpreting subsection 2 of North Dakota Century Code section 57-38-34.4:

   a. If a taxpayer initiates the filing of the amended federal income tax return, the taxpayer must also file an amended state income tax return even if it does not result in payment of additional tax.

   b. To request a credit or refund of tax, a taxpayer must file an amended state income tax return either within the time period prescribed in subsection 1 of North Dakota Century Code section 57-38-40 or within the ninety-day time period prescribed in subsection 2 of North Dakota Century Code section 57-38-34.4.

3. a. A change or correction to federal taxable income or federal income tax liability must be reported on an amended state income tax return except as provided in subdivision b of this subsection.

   b. An alternative report may be elected to report an increase in North Dakota tax liability as a result of a change or correction to federal taxable income or federal income tax liability. The alternative report must contain the following:

      (1) A statement that the information is submitted in lieu of an amended return pursuant to subdivision b of subsection 3 of section 81-03-01.1-09.

      (2) A description of the change or correction to federal taxable income or federal tax liability and the effect which the change or correction has on the statutory adjustments provided for in North Dakota Century Code sections 57-38-01.2 and 57-38-01.3.

      (3) An allocation or apportionment of the change to North Dakota and a computation of the adjusted North Dakota tax liability.

      This alternative report is subject to audit and assessment as if it were an amended return.

   c. When reporting a change or correction to federal taxable income or federal income tax liability pursuant to subsection 1 of North Dakota Century Code section 57-38-34.4, a taxpayer must also submit the following items:

      (1) A copy of the applicable federal waivers.

(2) A copy of the documentation evidencing that a final determination has been made with respect to the federal change or correction.

History: Effective November 1, 1991; amended effective November 1, 1992.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-34.4

81-03-01.1-10. Employers required to file information returns. Employers are subject to subsection 1 of North Dakota Century Code section 57-38-42 except with respect to the payment of wages to an employee.

History: Effective November 1, 1992.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-42

81-03-04-03. Estimated income tax payment. Any amount received by the tax commissioner designated as an estimated state income tax payment, including an overpayment of income tax that is credited to the taxpayer's estimated income tax for the following tax year, may not be used by the tax commissioner to offset any liability owed to North Dakota by the taxpayer, nor may the taxpayer request that the tax commissioner use any amount designated as an estimated payment to offset a state liability of the taxpayer. Prior to crediting an overpayment of income tax to the taxpayer's estimated income tax for the following tax year, the tax commissioner may apply an overpayment to offset unpaid child support or may apply an overpayment as provided in North Dakota Century Code section 57-01-12.1 and subsection 3 of North Dakota Century Code section 57-38-35.1.

History: Effective November 1, 1992.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-62

STAFF COMMENT: Article 81-11 contains all new material but is not underscored so as to improve readability.

ARTICLE 81-11

MUNICIPAL WASTE SURCHARGE

Chapter
81-11-01 Municipal Waste Surcharge

CHAPTER 81-11-01
MUNICIPAL WASTE SURCHARGE

Section
81-11-01-01 Application of Sales Tax Rules to the Municipal Waste Surcharge
81-11-01-02 Definitions
81-11-01-03 Responsibility for Surcharge
81-11-01-04 Registration
81-11-01-05 Political Subdivisions Paying Commercial Rate
81-11-01-06 Exemptions From Surcharge
81-11-01-07 Exemptions From Collecting and Remitting the Surcharge

81-11-01-01. Application of sales tax rules to the municipal waste surcharge. All rules adopted in title 81-04.1 for the administration of sales tax, not in conflict with the provisions of the municipal waste surcharge law, apply to and govern the administration of the municipal waste surcharge.

History: Effective November 1, 1992.
General Authority: NDCC 23-29-07.4, 57-39.2-19
Law Implemented: NDCC 23-29-07.4, 57-39.2-19

81-11-01-02. Definitions. As used in this chapter and for the administration of the statutes relating to the municipal waste surcharge, the following definitions apply unless the context otherwise requires:

1. "Generator of the municipal waste" means the person or entity who produced or accumulated the municipal waste at the household, commercial, or multiple unit commercial location. "Generator of the municipal waste" also includes a political

subdivision that contracts with a person or entity to remove municipal waste from residences and businesses within its boundaries when the residences and businesses are not directly billed by the political subdivision.

2. "Household account" includes an account resulting from the collection of municipal waste from a farm residence.

History: Effective November 1, 1992.
General Authority: NDCC 23-29-07.4, 57-39.2-10
Law Implemented: NDCC 23-29-07.3, 23-29-07.4

81-11-01-03. **Responsibility for surcharge.** A person or political subdivision which provides a service for the collection of municipal waste is responsible for collecting and remitting the surcharge. A person or political subdivision is providing the service if the person or political subdivision directly bills the generator of the municipal waste for the collection service.

History: Effective November 1, 1992.
General Authority: NDCC 23-29-07.4, 57-39.2-10
Law Implemented: NDCC 23-29-07.3, 23-29-07.4

81-11-01-04. **Registration.** Unless otherwise directed by the tax commissioner, only the following persons and political subdivisions must register with the tax commissioner and collect and remit the surcharge:

1. Political subdivisions that directly bill the generator of the municipal waste for the collection service.

2. Persons or entities who possess a permit from the state department of health and consolidated laboratories to transport solid waste, and who directly bill or contract with a generator of the municipal waste for the collection service.

3. Landfills that receive municipal waste that has not previously been subjected to the surcharge. For example, when a landfill receives municipal waste directly from the generator of the municipal waste.

History: Effective November 1, 1992.
General Authority: NDCC 23-29-07.4, 57-39.2-10
Law Implemented: NDCC 23-29-07.3, 23-29-07.4

81-11-01-05. **Political subdivisions paying commercial rate.** In the event a political subdivision is the generator of municipal waste as defined in section 81-11-01-02, the surcharge must be calculated by

applying the commercial rate to the amount the political subdivision pays for the municipal waste collection service.

History: Effective November 1, 1992.
General Authority: NDCC 23-29-07.4, 57-39.2-10
Law Implemented: NDCC 23-29-07.3, 23-29-07.4

81-11-01-06. **Exemptions from surcharge.** The following are constitutionally exempt from the surcharge when they are the generator of the municipal waste:

1. The federal government, including its agencies and instrumentalities.

2. Native American tribal governments and enrolled members of a native American tribe, when the municipal waste is collected on a native American reservation.

History: Effective November 1, 1992.
General Authority: NDCC 23-29-07.4, 57-39.2-10
Law Implemented: NDCC 23-29-07.3, 23-29-07.4

81-11-01-07. **Exemptions from collecting and remitting the surcharge.** The following persons and entities are constitutionally exempt from collecting and remitting the surcharge:

1. The federal government, including its agencies and instrumentalities, when it is providing municipal waste collection services.

2. Landfills located on a native American reservation when the landfill is owned by a tribal government or an enrolled member of a native American tribe and which is only obtaining municipal waste from persons or entities exempt from paying the surcharge pursuant to section 81-11-01-06.

3. Native Americans providing a waste collection service if the service is being provided exclusively to native Americans on a native American reservation.

History: Effective November 1, 1992.
General Authority: NDCC 23-29-07.4, 57-39.2-10
Law Implemented: NDCC 23-29-07.3, 23-29-07.4

TITLE 89

State Water Commission

JULY 1992

STAFF COMMENT: Article 89-11 contains all new material but is not underscored so as to improve readability.

ARTICLE 89-11

DROUGHT DISASTER LIVESTOCK WATER SUPPLY PROJECT ASSISTANCE PROGRAM

Chapter
89-11-01 Drought Disaster Livestock Water Supply Project Assistance Program

CHAPTER 89-11-01
DROUGHT DISASTER LIVESTOCK WATER SUPPLY PROJECT ASSISTANCE PROGRAM

Section
89-11-01-01 Definitions
89-11-01-02 Drought Declaration Required
89-11-01-03 Applicant Eligibility
89-11-01-04 Funding - Priority - Eligible Items
89-11-01-05 Noneligible Items
89-11-01-06 Application Procedure

89-11-01-01. Definitions. As used in this chapter, unless the context or subject matter otherwise requires:

1. "Livestock producer" means an individual who produces livestock or operates a dairy farm, who normally devotes the major portion of the individual's time to the activities of farming or ranching, and who normally receives not less than fifty percent of the individual's annual gross income from farming or ranching.

2. "Water supply project" includes construction of new wells; construction of dugouts or stock dams that are spring-fed or have a high water table, pipelines, and rural water system connections; and the development of springs.

History: Effective July 1, 1992.
General Authority: NDCC 28-32-02, 61-03-13, 61-34-03
Law Implemented: NDCC 61-34-02

89-11-01-02. **Drought declaration required.** No funds may be disbursed for any water supply project unless the county in which the water supply project is to be located is a county or is adjacent to a county that has been declared by the governor to be a drought disaster area for purposes of this program, or a drought disaster area under a drought declaration that has not been rescinded.

History: Effective July 1, 1992.
General Authority: NDCC 28-32-02, 61-03-13, 61-34-03
Law Implemented: NDCC 61-34-02

89-11-01-03. **Applicant eligibility.**

1. The applicant must be a livestock producer with livestock water supply problems caused by drought.

2. The applicant must first apply for water cost-share assistance from the agricultural stabilization conservation service and must have been denied agricultural stabilization conservation service cost-share assistance.

History: Effective July 1, 1992.
General Authority: NDCC 28-32-02, 61-03-13, 61-34-03
Law Implemented: NDCC 61-34-02

89-11-01-04. **Funding - Priority - Eligible items.**

1. The state water commission shall provide funds for the program to the extent funding is available. Priority will be based on earliest date of application.

2. Cost-share assistance may only be used for water supply projects which will provide a long-term immediate solution to a drought-related water supply shortage.

3. All wells drilled with funds provided pursuant to this program must be drilled by a North Dakota certified water well contractor.

4. The applicant may receive up to fifty percent of the eligible costs of the project, but no more than three thousand five hundred dollars.

History: Effective July 1, 1992.
General Authority: NDCC 28-32-02, 61-03-13, 61-34-03
Law Implemented: NDCC 61-34-02

89-11-01-05. Noneligible items. The following projects are not eligible for funding from the drought disaster livestock water supply project assistance program.

1. A rehabilitation of an existing well.

2. A water supply project on federal or state land.

3. A dry hole drilled in an attempt to construction a water well or to locate a water source.

4. A water supply project started or completed prior to July 1, 1991.

5. Water supply project started after December 31, 1991, without prior approval of the state engineer.

6. The construction of stock dams or dugouts dependent upon runoff.

7. Projects that require repair as a result of failure to provide maintenance to an existing water source.

8. Readily removable project features of water supply projects including electric pumps, stock watering tanks, or electrical hookups, or easements.

History: Effective July 1, 1992.
General Authority: NDCC 28-32-02, 61-03-13, 61-34-03
Law Implemented: NDCC 61-34-02

89-11-01-06. Application procedure.

1. Requests for assistance must be on a form provided by the state water commission and must include:

   a. Written proof the applicant applied for agricultural stabilization conservation service cost-share assistance

and was denied such assistance including the reason for the denial.

b. An area map indicating the location of the proposed water supply project.

c. A written estimate of the costs of the proposed water supply project.

d. Verification by the applicant that the applicant is a livestock producer.

2. The state engineer shall review applications and approve or deny them. The state engineer shall, within the limits of available funding, provide assistance to those persons whose applications are approved. The applicant must agree to:

a. Complete the project within sixty days of receiving notification of approval of funding of the water supply project.

b. Provide receipt of actual expenditures or an affidavit of work completed if work is done by the applicant, or both, if applicable.

c. Grant to the state water commission or anyone authorized by the state water commission the right to enter upon the land to inspect the completed water supply project after giving reasonable notice to the applicant.

d. Indemnify and hold harmless the state of North Dakota and the state water commission, its officers, agents, employees, and members, from all claims, suits, or actions of whatsoever nature resulting from or arising out of the activities of the applicant or applicant's agents or employees under this agreement.

3. Application forms may be obtained by contacting:

North Dakota State Water Commission
900 East Boulevard
Bismarck, ND 58505
(701) 224-2750

History: Effective July 1, 1992.
General Authority: NDCC 28-32-02, 61-03-13, 61-34-03
Law Implemented: NDCC 61-34-02

TITLE 92

Workers Compensation Bureau

1500

AUGUST 1992

CHAPTER 92-01-02

92-01-02-20. Classification of employments - Premium rates. Classifications and premium rates, taking into consideration hazards and risks of different occupations, must be those classifications and premium rates contained in the ~~1991~~ 1992 edition of that publication entitled, "North Dakota Workers Compensation Bureau Rates and Classifications" which is hereby adopted by reference thereto and incorporated within this section as though set out in full herein.

Premium rates must be adjusted annually as recommended by the bureau's actuaries based upon the criteria set forth in North Dakota Century Code section 65-04-01.

The minimum premium charge for all classifications will be twenty-five dollars per year except for the following volunteer classifications:

Classification No.	
7710	Fire department, volunteer - minimum will be fifty dollars
7715	Civil defense volunteer disaster - minimum will be fifty dollars
9830	Civil air patrol, volunteer - minimum will be one hundred ten dollars
9385	Volunteer programs - minimum will be one hundred fifty dollars
9840	Vocational training and work evaluation programs, volunteer - minimum will be one hundred fifty dollars

History: Effective June 1, 1990; amended effective July 1, 1990; July 1, 1991; July 1, 1992.
General Authority: NDCC 65-02-08, 65-04-01
Law Implemented: NDCC 65-04-01

TITLE 100

Seed Arbitration Board

JULY 1992

STAFF COMMENT: Title 100 contains all new material but is not underscored so as to improve readability.

ARTICLE 100-01

GENERAL ADMINISTRATION

Chapter
100-01-01 Organization of Seed Arbitration Board

CHAPTER 100-01-01
ORGANIZATION OF SEED ARBITRATION BOARD

Section
100-01-01-01 Organization of Seed Arbitration Board

100-01-01-01. Organization of seed arbitration board.

1. History and function. The seed arbitration board was established by the legislative assembly in 1989 as a seed mediation board. It was reestablished as a seed arbitration board by the legislative assembly in 1991. Its function is to arbitrate disputes between seed labelers and customers involving seed transactions.

2. Board membership. The board consists of five members as designated in North Dakota Century Code section 4-09-03.1. Any three members constitute a quorum for the transaction of business.

3. The board shall elect a chair from among its members. The chair shall conduct all meetings held by the board and direct all other activities of the board.

4. The board shall keep accurate and correct records on all meetings, hearing, and deliberations.

5. The meetings and hearings of the board shall be held at such times and places as the chair may determine.

6. Members of the seed arbitration board may be reimbursed for expenses pursuant to North Dakota Century Code section 54-06-09 (only those state officials who are entitled by law to this reimbursement) and section 44-08-04 (all board members). The department of agriculture shall collect fees

   related to the seed arbitration board. Such fees must be used to pay necessary expenses relating to the board.

History: Effective July 1, 1992.
General Authority: NDCC 4-09-20.2, 4-09-03.1
Law Implemented: NDCC 4-02-20.2

ARTICLE 100-02

SEED ARBITRATION

Chapter
100-02-01 Seed Arbitration Process
100-02-02 Duties of the Board
100-02-03 Report of the Seed Arbitration Board
100-02-04 Fees

CHAPTER 100-02-01
SEED ARBITRATION PROCESS

Section
100-02-01-01 Seed Arbitration Process

100-02-01-01. Seed arbitration process.

1. Any seed labeler or seed customer is eligible to request seed arbitration. The request shall be made in writing to the commissioner of agriculture (Attention: North Dakota Agricultural Mediation Service Administrator, 600 East Boulevard, Bismarck, North Dakota 58505). Such request must be filed within sixty days after the alleged defect or violation becomes or reasonably should have become apparent. Upon receipt of the request, the commissioner shall submit the dispute to the chair of the seed arbitration board.

2. The seed labeler must provide anyone who alleges damage with information regarding seed arbitration and that seed arbitration is a prerequisite to any civil action. The sixty-day filing requirement does not apply where the seed labeler fails to provide such information.

3. The chair shall convene a hearing of the seed arbitration board for the purpose of gathering information from all parties to the dispute.

   a. Such initial hearing must be held within sixty days of the date on which the petition was received by the commissioner, unless a party to the dispute requests and receives, for good cause, an extension of time from the chair.

   b. The seed arbitration board may hold additional hearings of the disputants and the board as deemed appropriate by the

board, following the initial hearing and before submission of a final arbitration report.

History: Effective July 1, 1992.
General Authority: NDCC 4-09-20.2, 4-09-03.1
Law Implemented: NDCC 4-02-20.2

CHAPTER 100-02-02
DUTIES OF THE BOARD

Section
100-02-02-01 Duties of the Board

100-02-02-01. Duties of the board.

1. During the arbitration hearings, the board shall:

   a. Permit and encourage an open and meaningful discussion of all salient issues by all parties to the dispute.

   b. Advise the disputing parties of the following:

      (1) The board will act in a nonadvocacy, impartial, and neutral role.

      (2) At the end of the arbitration process, the board will make a nonbinding recommendation to resolve the dispute.

      (3) Evidence presented to the board and any findings or recommendation by the board are admissible as evidence in subsequent proceedings.

   c. Establish ground rules and behavioral guidelines which will apply during the arbitration.

2. The North Dakota rules of evidence do not apply in arbitration hearings.

3. The board may, at its discretion, call any witnesses. When so called, any fees, if charged, must be shared equally among the parties to the dispute.

4. Each party is responsible for all costs associated with presenting their case.

History: Effective July 1, 1992.
General Authority: NDCC 4-09-20.2, 4-09-03.1
Law Implemented: NDCC 4-02-20.2

CHAPTER 100-02-03
REPORT OF THE SEED ARBITRATION BOARD

Section
100-02-03-01 Report of the Seed Arbitration Board

100-02-03-01. Report of the seed arbitration board. The board shall issue a final report to the disputing parties within thirty days of the final hearing, unless otherwise determined by the board. The final report must contain a nonbinding recommendation for the resolution of the dispute.

History: Effective July 1, 1992.
General Authority: NDCC 4-09-20.2, 4-09-03.1
Law Implemented: NDCC 4-02-20.2

CHAPTER 100-02-04
FEES

Section
100-02-04-01 Fees

100-02-04-01. Fees. The party initiating the dispute shall submit an initial fee of two hundred fifty dollars to the seed arbitration board. If the cost of arbitration exceeds the initial fee, the board will determine the additional fees to be paid by any of the parties.

History: Effective July 1, 1992.
General Authority: NDCC 4-09-20.2, 4-09-03.1
Law Implemented: NDCC 4-02-20.2

TITLE 101

Real Estate Appraiser Qualifications and Ethics Board

OCTOBER 1992

STAFF COMMENT: Title 101 contains all new material but is not underscored so as to improve readability.

ARTICLE 101-01

GENERAL ADMINISTRATION

Chapter
101-01-01 Organization of the Board

CHAPTER 101-01-01
ORGANIZATION OF THE BOARD

Section
101-01-01-01 Organization and History of the Board

101-01-01-01. Organization and history of the board.

1. **History and functions.** The 1991 legislative assembly passed real estate appraiser legislation codified as North Dakota Century Code chapter 43-23.3. This legislation requires the governor to appoint a board identified as the North Dakota real estate appraiser qualifications and ethics board. The board is responsible for licensing and certifying applicants based on specific minimum requirements. The board must specifically define the minimum levels of experience, education, and testing which an applicant must meet prior to being licensed or certified. The board must issue pocket

cards and permits to qualified licensed and certified applicants, maintain a registry of names and addresses of individuals licensed and certified, discipline permittees when necessary, hold meetings, hearings, and examinations in places and at times as it designates, maintain records of board activities, and adopt rules necessary to comply with federal and state laws.

2. **Board membership.** The board consists of five members appointed by the governor. One member must represent the public, one member must represent the financial industry, and three members must be qualified real estate appraisers. At least one of the appraiser members must be experienced in the appraisal of agricultural property. Board members serve five year terms, with one term expiring each year.

3. **Administration - Executive director.** The board may contract for services necessary to carry out requirements imposed by state and federal law. This could include administrative affiliation with existing entities or contracting with independent individuals or entities. The executive director must be appointed by the board and is responsible for administering the activities of the board and providing other duties and services as authorized by the board.

4. **Inquiries.** Inquiries regarding the board may be addressed to the executive director at:

North Dakota Real Estate Appraiser Board
P.O. Box 1336
Bismarck, ND 58502-1336

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-07

ARTICLE 101-02

APPRAISER LICENSURE AND CERTIFICATION

Chapter	
101-02-01	Application and Fees for Licensure and Certification
101-02-02	Definitions, Criteria, and Qualifications
101-02-03	Character
101-02-04	Renewal

CHAPTER 101-02-01
APPLICATION AND FEES FOR LICENSURE AND CERTIFICATION

Section	
101-02-01-01	Application to Take the Examination
101-02-01-02	Application for Licensure or Certification
101-02-01-03	Filing Fees
101-02-01-04	Payment of License and Certificate Fees
101-02-01-05	Replacement License or Certificate Fees

101-02-01-01. Application to take the examination. Any person who wishes to file an application to take the examination to qualify as a licensed or certified real property appraiser may obtain the required form upon request from the appraisal board.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-07

101-02-01-02. Application for licensure or certification. A person who wishes to file an application for a permit to be an apprentice real property appraiser, a transitionally licensed real property appraiser, a licensed real property appraiser, or a certified general real property appraiser may obtain the required form from the appraisal board.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-05

101-02-01-03. Filing fees. The following annual fees must be charged:

1.	Apprentice real property appraiser permit	$200
2.	Licensed real property appraiser permit (including the transitionally licensed real property appraiser permit)	200
3.	Certified general real property appraiser permit	200
4.	Inactive status	200

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-20
Law Implemented: NDCC 43-23.3-05

101-02-01-04. Payment of license and certificate fees. Checks given the board in payment of real estate appraiser license and certificate fees which are returned unpaid may be considered cause for license or certificate denial, suspension, or revocation.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-03, 43-23.3-20

101-02-01-05. Replacement license or certificate fee. A licensee or certificate permittee may, by filing a prescribed form and paying a five dollar fee to the board, obtain a duplicate real estate appraiser license or certificate or pocket card to replace an original license certificate or pocket card which has been lost, damaged, or destroyed, or if the name of the licensee or certificate permittee has been lawfully changed.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03, 43-23.3-20
Law Implemented: NDCC 43-23.3-20

CHAPTER 101-02-02
DEFINITIONS, CRITERIA, AND QUALIFICATIONS

Section	
101-02-02-01	Statutory Definitions
101-02-02-02	Appraiser Permit Definitions, Criteria, and Qualifications
101-02-02-03	Apprentice Real Property Appraiser
101-02-02-04	Transitionally Licensed Real Property Appraiser
101-02-02-05	Licensed Real Property Appraiser
101-02-02-06	Certified General Real Property Appraiser
101-02-02-07	Inactive Status

101-02-02-01. Statutory definitions. Unless otherwise defined, or made inappropriate by context, all terms defined in North Dakota Century Code chapter 43-23.3 have the same meanings in this chapter.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-03

101-02-02-02. Appraiser permit definitions, criteria, and qualifications. To apply for and maintain any appraiser permit an individual must:

1. Be at least eighteen years of age;

2. Have a high school education or its equivalent;

3. Possess good character; and

4. Pass the appropriate examinations. All applicants for permits of apprentice real property appraiser, transitionally licensed real property appraiser, licensed real property appraiser, and certified general real property appraiser agree to follow the uniform standards of professional appraisal practice (USPAP) and must satisfy the qualification requirements listed in chapter 101-02-02.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-08, 43-23.3-18

101-02-02-03. Apprentice real property appraiser.

1. **Definition.** An apprentice real property appraiser permit must be issued to an individual who successfully meets all of the North Dakota appraisal requirements for such a permit.

2. **Property appraisal limitations.** An apprentice real property appraiser permit is considered the entry level (training ground level) for a North Dakota real property appraiser. The apprentice real property appraiser permittee may assist either a licensed or a certified general real property appraiser in appraisal work, provided the licensed or certified general real property appraiser accepts full responsibility for the appraisal performed.

3. **Prerequisite requirements - Education, examination, and experience.** The apprentice real property appraiser must have successfully completed at least a fifteen-hour class covering the uniform standards of professional appraisal practice. No other appraisal or appraisal-related education prerequisite is required for the apprentice real property appraiser. No past appraisal experience is required.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-03, 43-23.3-06, 43-23.3-08, 43-23.3-09

101-02-02-04. Transitionally licensed real property appraiser.

1. **Definition.** A transitionally licensed real property appraiser permit must be issued to an individual who successfully meets all of the North Dakota appraisal requirements for such a permit.

2. **Property appraisal limitations.** A transitionally licensed real property appraiser may appraise the same property types and is subject to the same limitations as the licensed real property appraiser.

3. **Prerequisite requirements - Education, examination, and experience.** The transitionally licensed real property appraiser must have successfully completed the appraisal board endorsed uniform licensing examination or its equivalent, must have successfully completed at least a fifteen-hour class covering the uniform standards of professional appraisal practice, and meet one of the two remaining requirements (either the education or the experience requirement) needed by a licensed real property appraiser. The education and experience requirements are:

   a. Seventy-five hours of credible education, which must include coverage of uniform standards of professional appraisal practice; or

   b. Two thousand hours (two hundred forty points) of credible real estate appraisal experience. The point system awards points based on the number of appraisals performed by the

individual, the types of appraisals performed, and the types of properties appraised.

The transitionally licensed real property appraiser must successfully complete the remaining criteria on or before January 1, 1994, or the applicant will be automatically reclassified as an apprentice real property appraiser.

4. **Sunset clause provision.** The North Dakota appraisal board will issue a permit for a transitional license. The permit will have a definite sunset clause whereby this level will be abolished after the first two years, following full implementation of the state law. The transitional license level will be abolished on January 1, 1994.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03, 43-23.3-09
Law Implemented: NDCC 43-23.3-03, 43-23.3-06, 43-23.3-07, 43-23.3-08, 43-23.3-18

101-02-02-05. Licensed real property appraiser.

1. **Definitions.** A licensed real property appraiser permit must be issued to an individual who successfully meets all of the North Dakota appraisal requirements for such a permit.

2. **Property appraisal limitations.** All appraisals for transactions not requiring the services of a certified general real property appraiser may be prepared by a licensed real property appraiser.

3. **Prerequisite requirements - Education and examination.** A licensed real property appraiser must have successfully completed the appraisal board endorsed uniform licensing examination or its equivalent. A licensed real property appraiser must have successfully completed seventy-five classroom hours of education related to real estate appraisal which must include coverage of the uniform standards of professional appraisal practice.

   a. A classroom hour is defined as fifty minutes out of each sixty-minute segment.

   b. Credit toward the classroom hour requirement may only be granted where the length of the educational offering is at least fifteen hours, and the individual successfully completes an examination pertinent to that educational offering.

   c. Credit for the classroom requirement may be obtained from the following:

(1) Colleges or universities;

(2) Community or junior colleges;

(3) Real estate appraisal or real estate related organizations;

(4) State or federal agencies or commissions;

(5) Proprietary schools; and

(6) Other providers approved by the board.

d. Credit toward the classroom hour requirement may be awarded to teachers of appraisal courses. A teacher requesting credit for the classroom hour requirement may request credit for either the classroom hour or experience requirement, but not both.

e. There is no time limit regarding when qualifying education credit must have been obtained.

f. Various appraisal courses may be credited toward the seventy-five classroom hour education requirement. Applicants must demonstrate that their education involved substantially equivalent coverage of the topics listed below, with particular emphasis on the appraisal of one to four unit residential properties.

(1) Influences on real estate value;

(2) Legal considerations in appraisal;

(3) Types of value;

(4) Economic principles;

(5) Real estate markets and analysis;

(6) Valuation process;

(7) Property description;

(8) Highest and best use analysis;

(9) Appraisal statistical concepts;

(10) Sales comparison approach;

(11) Site value;

(12) Cost approach;

(13) Income approach:

(a) Gross rent multiplier analysis;

(b) Estimation of income and expenses; and

(c) Operating expense ratios;

(14) Valuation of partial interests; and

(15) Appraisal standards and ethics.

4. **Prerequisite requirement - Experience.** A licensed real property appraiser must have the equivalent of two thousand hours of credible appraisal experience prior to obtaining the licensing permit. If requested, documentation in the form of reports or file memoranda should be available to support the experience claimed.

a. Adequate experience will be determined on a point system.

(1) The point system awards points based on the types of appraisals performed, the types of properties appraised, and the number of appraisals performed by the individual.

(2) Types of appraisals performed include standard appraisal, review appraisal, and condemnation appraisal.

(a) A standard appraisal is the process of developing an appraisal using those methods commonly accepted by real estate appraisers as constituting the appraisal process and preparing a written appraisal report or file memorandum describing the appraisal and reporting the estimate of value.

(b) A review appraisal is the process of critically reviewing an appraisal report prepared by another appraiser and preparing a separate written report or file memorandum setting forth the results of the review process. The review appraiser reviews the report and forms an opinion as to the adequacy of the report, the appropriateness of the methods used by the appraiser, and the reasonableness of the appraiser's conclusions. A review appraiser may or may not perform a field review. A field review includes inspecting the subject and comparables to verify data, to determine the appropriateness of the comparables selected and

adjustments made, and to assist in determining the reasonableness of the value estimate.

(c) A condemnation appraisal is an appraisal of real property for condemnation purposes where a partial taking is involved and the appraiser must develop both a before taking value estimate and an after taking value estimate. The appraiser uses those methods commonly accepted by real estate appraisers as constituting the appraisal process including a field inspection and preparation of a written appraisal report or file memorandum describing the appraisal and reporting the before and after value estimates.

(3) Types of property appraised may include, but are not limited to, the following:

(a) Land may include farms of one hundred acres [40.47 hectares] or more in size, undeveloped tracts, residential multifamily sites, commercial sites, industrial sites, land in transition, etc.

(b) Residential multifamily, five-12 units may include apartments, condominiums, townhouses, and mobile home parks.

(c) Residential multifamily, thirteen plus units may include apartments, condominiums, townhouses, and mobile home parks.

(d) Commercial single-tenant may include office building, retail store, restaurant, service station, bank, day care center, etc.

(e) Commercial multitenant may include office building, shopping center, hotel, etc.

(f) Industrial may include warehouse, manufacturing plant, etc.

(g) Institutional may include rest home, nursing, home, hospital, school, church, government building, etc.

(4) Points assigned for each appraisal type are assigned by the appraisal board and are included on the application for licensure and certification. A copy of this form can be obtained by contacting the appraisal board office.

b. A total of two hundred forty points is equivalent to the two thousand-hour requirement. These two hundred forty points (two thousand hours of experience) must be obtained using at least two years of appraisal practice.

c. There is no other time limit regarding when qualifying experience may be obtained.

d. Hours may be treated as cumulative in order to achieve the necessary two thousand hours (two hundred forty points) of appraisal experience.

e. Acceptable appraisal experience includes, but is not limited to, the following:

(1) Fee and staff appraisal, ad valorem tax appraisal, review appraisal, appraisal analysis, real estate counseling (excludes related fields such as real estate lending), highest and best use analysis, feasibility analysis or study, and teaching of appraisal courses.

(2) Teachers may request credit for either the classroom hour or experience requirement, but not both.

f. The verification for the two thousand hours (two hundred forty points) of experience credit claimed by an applicant must be via affidavit on forms prescribed by the state certification or licensing board.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03, 43-23.3-09
Law Implemented: NDCC 43-23.3-03, 43-23.3-06, 43-23.3-07, 43-23.3-08, 43-23.3-09, 43-23.3-17, 43-23.3-18

101-02-02-06. Certified general real property appraiser.

1. **Definitions.** A certified general real property appraiser permit must be issued to an individual who successfully meets all of the North Dakota appraisal requirements for such a permit.

2. **Property appraisal limitations.** All transactions having a transaction value of one million dollars or more requires an appraisal prepared by a certified general real property appraiser; all transactions having a transaction value of two hundred fifty thousand dollars or more, other than those involving appraisals of one-to-four family residential properties, require an appraisal prepared by a certified general real property appraiser; and all complex one-to-four family residential property appraisals require a certified general real property appraiser if the transaction value is

two hundred fifty thousand dollars or more. The term "complex one-to-four family residential property appraisal" means an appraisal in which the property to be appraised, the form of ownership, or the market conditions are atypical.

3. **Prerequisite requirements - Education and examination.** A certified general real property appraiser must have successfully completed the appraisal board endorsed uniform state certification examination or its equivalent. A certified appraiser must have successfully completed one hundred sixty-five classroom hours of education related to real estate appraisal, which must include coverage of the uniform standards of professional appraisal practice.

   a. A classroom hour is defined as fifty minutes out of each sixty-minute segment.

   b. Credit toward the classroom hour requirement may only be granted where the length of the educational offering is at least fifteen hours, and the individual successfully completes an examination pertinent to that educational offering.

   c. Credit for the classroom requirement may be obtained from the following:

      (1) Colleges or universities;

      (2) Community or junior colleges;

      (3) Real estate appraisal or real estate related organizations;

      (4) State or federal agencies or commission;

      (5) Proprietary schools; and

      (6) Other providers approved by the state certification or licensing board.

   d. Credit towards the classroom hour requirement may be awarded to teachers of appraisal courses. A teacher requesting credit for the classroom hour requirement may request credit for either the classroom hour or experience requirement, but not both.

   e. There is no time limit regarding when qualifying education credit must have been obtained.

   f. Various appraisal courses may be credited toward the one hundred sixty-five classroom hour education requirement. Applicants must demonstrate that their education involved substantially equivalent coverage of topics listed below

with particular emphasis on the appraisal of nonresidential properties. Residential is defined as one-to-four residential units.

(1) Influence on real estate value;

(2) Legal considerations in appraisal;

(3) Types of value;

(4) Economic principles;

(5) Real estate markets and analysis;

(6) Valuation process;

(7) Property description;

(8) Highest and best use analysis;

(9) Appraisal math and statistics;

(10) Sales comparison approach:

(11) Site value;

(12) Cost approach;

(13) Income approach:

(a) Estimation of income and expenses;

(b) Operating statement ratios;

(c) Direct capitalization;

(d) Cash flow estimates;

(e) Measures of cash flow; and

(f) Discounted cash flow analysis;

(14) Valuation of partial interests;

(15) Appraisal standards and ethics; and

(16) Narrative report writing.

4. Prerequisite requirement - Experience. A certified general real property appraiser must have the equivalent of two thousand hours of credible appraisal experience prior to obtaining the certified general real property appraiser permit. If requested, experience documentation in the form of

reports or file memoranda should be available to support the experience claimed.

a. Adequate experience will be determined on a point system.

(1) The point system awards points based on the types of appraisals performed, the types of properties appraised, and the number of appraisals performed by the individual.

(2) Types of appraisals performed include standard appraisal, review appraisal, and condemnation appraisal.

(a) A standard appraisal is the process of developing an appraisal using those methods commonly accepted by real estate appraisers as constituting the appraisal process and preparing a written appraisal report or file memorandum describing the appraisal and reporting the estimate of value.

(b) A review appraisal is the process of critically reviewing an appraisal report prepared by another appraiser and preparing a separate written report or file memorandum setting forth the results of the review process. The review appraiser reviews the report and forms an opinion as to the adequacy of the report, the appropriateness of the methods used by the appraiser, and the reasonableness of the appraiser's conclusions. A review appraiser may or may not perform a field review. A field review includes inspecting the subject and comparables to verify data, to determine the appropriateness of the comparables selected and adjustments made, and to assist in determining the reasonableness of the value estimate.

(c) A condemnation appraisal is an appraisal of real property for condemnation purposes where a partial taking is involved and the appraiser must develop both a before taking value estimate and an after taking value estimate. The appraiser uses those methods commonly accepted by real estate appraisers as constituting the appraisal process including a field inspection and preparation of a written appraisal report or file memorandum describing the appraisal and reporting the before and after value estimates.

(3) Types of property appraised may include, but are not limited to, the following:

(a) Land may include farms of one hundred acres [40.47 hectares] or more in size, undeveloped tracts, residential multifamily sites, commercial sites, industrial sites, land in transition, etc.

(b) Residential multifamily, five-12 units may include apartments, condominiums, townhouses, and mobile home parks.

(c) Residential multifamily, thirteen plus units may include apartments, condominiums, townhouses, and mobile home parks.

(d) Commercial single-tenant may include office building, retail store, restaurant, service station, bank, day care center, etc.

(e) Commercial multitenant may include office building, shopping center, hotel, etc.

(f) Industrial may include warehouse, manufacturing plant, etc.

(g) Institutional may include rest home, nursing home, hospital, school, church, government building, etc.

(4) Points assigned for each appraisal type are assigned by the appraisal board and are included on the application for licensure or certification. A copy of this form can be obtained by contacting the appraisal board office.

b. A total of two hundred forty points is equivalent to two thousand-hour requirement. These two hundred forty points, (two thousand hours of experience) must be obtained using at least two years of appraisal practice.

c. There is no other time limit regarding when qualifying experience may be obtained.

d. Hours may be treated as cumulative in order to achieve the necessary two thousand hours (two hundred forty points) of appraisal experience.

e. Acceptable appraisal experience includes, but is not limited to, the following:

(1) Fee and staff appraisal, ad valorem tax appraisal, review appraisal, appraisal analysis, real estate counseling (excludes related fields such as real estate lending), highest and best use analysis,

feasibility analysis or study, and teaching of appraisal courses.

(2) Teachers may request credit for either the classroom hour or experience requirement, but not both.

f. The verification for the two thousand hours (two hundred forty points) of experience credit claimed by an applicant must be via affidavit on forms prescribed by the state certification or licensing board.

g. The applicant must have at least fifty percent (one thousand hours) of nonresidential appraisal experience. Residential is defined as one-to-four residential units.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03, 43-23.3-09
Law Implemented: NDCC 43-23.3-03, 43-23.3-06, 43-23.3-07, 43-23.3-08, 43-23.3-09, 43-23.3-17, 43-23.3-18

101-02-02-07. Inactive status.

1. A licensee or certificate permittee must be assigned by the board to inactive status upon written request to the board.

2. A licensee or certificate permittee whose appraiser license or certificate is on inactive status must be returned to active status upon making a written request to the board.

3. A licensee or certificate permittee on inactive status is not entitled to act as a state-licensed or state-certified real property appraiser; however, in order to continue to hold an appraiser license or certificate, the licensee or certificate permittee whose license or certificate is on inactive status must renew the license or certificate, by including payment of prescribed renewal fee and completion of continuing education as required by the board.

4. The board may take disciplinary action against a licensee or certificate permittee on inactive status.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-12, 43-23.3-19, 43-23.3-20

CHAPTER 101-02-03
CHARACTER

Section
101-02-03-01 Character Requirements

101-02-03-01. Character requirements.

1. At a meeting of the board following each real estate appraiser licensing or certification examination, the applicants who have passed the examination must be considered for licensing or certification. When the moral character of an applicant is in question, action by the board will be deferred until the applicant has affirmatively demonstrated that he possesses the requisite truthfulness, honesty, and integrity.

2. When the moral character of an applicant is in question, the board shall notify the applicant, and the applicant is entitled to demonstrate that individual's character and fitness for licensure or certification at a hearing before the board.

3. Notice that the applicant's moral character is in question must be in writing, sent by certified mail, return receipt requested, to the address shown upon the application. The applicant shall have sixty days from the date of receipt of this notice to request a hearing before the board. Failure to request a hearing within this time constitutes a waiver of the applicant's right to a hearing on the application for licensing or certification, and the application must be deemed denied. Nothing in this section may be interpreted to prevent an applicant from reapplying for licensure or certification.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-03

CHAPTER 101-02-04
RENEWAL

Section
101-02-04-01 License and Certificate Renewal

101-02-04-01. License and certificate renewal.

1. A holder of an appraiser license or certificate desiring the renewal of such license or certificate shall, during the month of December, apply for same in writing upon a form approved by the board and shall forward the required fee. Forms are available upon request to the board.

2. A person who, in any way, acts as a state-licensed or state-certified real property appraiser while that individual's license or certificate is expired will be subject to disciplinary action and penalties as described in North Dakota Century Code chapter 43-23.3.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-12, 43-23.3-23

ARTICLE 101-03

STANDARDS OF APPRAISAL PRACTICE

Chapter
101-03-01 Standards of Professional Practice Requirements
101-03-02 Permit - License or Certificate Display
101-03-03 Address or Name Change

CHAPTER 101-03-01
STANDARDS OF PROFESSIONAL PRACTICE REQUIREMENTS

Section
101-03-01-01 Standards of Appraisal Practice Requirements

101-03-01-01. Standards of appraisal practice requirements. Copies of the "Uniform Standards of Professional Appraisal Practice" are available upon request to the board.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-08, 43-23.3-18

CHAPTER 101-03-02
PERMIT - LICENSE OR CERTIFICATE DISPLAY

Section
101-03-02-01 Permit Disclosure Requirement
101-03-02-02 Display of Permit

101-03-02-01. Permit disclosure requirement. All permittees are required to place their permit number and permit type adjacent to the permittees signature on all appraisal-related activities.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-14

101-03-02-02. Display of permit. The real property appraiser license or certificate of a state-licensed or state-certififed real property appraiser must be prominently displayed at the appraiser's principal place of business.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-14

CHAPTER 101-03-03
ADDRESS OR NAME CHANGE

Section
101-03-03-01 Change of Name or Address

101-03-03-01. Change of name or address. All licensed and certified permittees shall notify the board in writing of each change of business address, residence address, or trade name within twenty days of said change and pay the five dollar change of address fee. The address must be sufficiently descriptive to enable the board to correspond with and locate the licensed or certified permittee.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-03
Law Implemented: NDCC 43-23.3-13

ARTICLE 101-04

CONTINUING EDUCATION

Chapter
101-04-01 Continuing Education

CHAPTER 101-04-01
CONTINUING EDUCATION

Section
101-04-01-01 Continuing Education Requirements

101-04-01-01. Continuing education requirements.

1. The board requires all licensed and certified permittees to meet a minimum level of continuing education. This minimum level has been set at thirty hours over a three-year education renewal period. The permittee may obtain the necessary thirty hours at any time during the three-year renewal period.

   a. The board requires that all continuing education must be taken in blocks of at least two hours.

   b. A classroom hour is defined as fifty minutes out of each sixty-minute segment.

   c. Credit for the classroom requirement may be obtained from the following:

      (1) Colleges or universities;

      (2) Community or junior colleges;

      (3) Real estate appraisal or real estate-related organizations;

      (4) State or federal agencies or commissions;

      (5) Proprietary schools; and

      (6) Other providers approved by the state certification or licensing board.

   d. Credit may be granted for educational offerings which are consistent with the purpose of continuing education stated

in subdivision f and cover real estate-related appraisal topics such as those listed below:

(1) Ad valorem taxation;

(2) Arbitration;

(3) Business courses related to practice of real estate appraisal;

(4) Construction estimating;

(5) Ethics and standards of professional practice;

(6) Land use planning, zoning, and taxation;

(7) Management, leasing, brokerage, timesharing;

(8) Property development;

(9) Real estate appraisal (valuations or evaluations);

(10) Real estate law;

(11) Real estate litigation;

(12) Real estate financing and investment;

(13) Real estate appraisal-related computer applications;

(14) Real estate securities and syndication; and

(15) Real property exchange.

e. Continuing education credit may also be granted for participation, other than as a student, in appraisal educational processes and programs. Examples of activities for which credit may be granted are teaching, program development, authorship of textbooks, or similar activities which are determined to be equivalent to obtaining continuing education.

f. The purpose of continuing education is to ensure that the appraiser participates in a program that maintains and increases that individual's skill, knowledge, and competency in real estate appraising.

History: Effective October 1, 1992.
General Authority: NDCC 43-23.3-12, 43-23.3-19
Law Implemented: NDCC 43-23.3