

# **NORTH DAKOTA ADMINISTRATIVE CODE**

Supplement 347

January 2013

**Prepared by the Legislative Council staff  
for the  
Administrative Rules Committee**

# TABLE OF CONTENTS

Attorney General (State Lottery)..... 1-4  
Department of Financial Institutions ..... 5-40  
Game and Fish Department ..... 41-64  
State Department of Health ..... 65-174  
Agriculture Commissioner (Pesticide Control Board) ..... 175-200  
Department of Human Services..... 201-306

**TITLE 10**  
**ATTORNEY GENERAL**



**JANUARY 2012**

**CHAPTER 10-16-06**

**10-16-06-01. Game description.** To play WILD CARD 2®, a player selects five different white numbers, between one and ~~thirty-one~~ thirty-three, and one out of sixteen card symbols (wild card) selected from the jack, queen, king, or ace of any suit. The player selects two plays for a minimum price of one dollar. A grand prize is paid on a single-payment cash pari-mutuel basis and a set prize (cash prize of ~~five~~ six thousand dollars or less) is paid on a single-payment cash basis. Draws are held every Wednesday and Saturday.

**History:** Effective February 1, 2004; amended effective April 1, 2006; January 13, 2013.

**General Authority:** NDCC 53-12.1-13

**Law Implemented:** NDCC 53-12.1-13

**10-16-06-02. Expected prize pool percentages and odds.** The minimum grand prize is ~~one~~ two hundred thousand dollars and is paid on a pari-mutuel basis. Except as provided by rule, a set prize must be paid according to these matches per play and prize amounts with these expected prize payout percentages:

<u>Matches Per Play</u>	<u>Prize</u>	<u>Prize Pool Percentage</u>		<u>Odds*</u>
		<u>Allocated to Prize</u>		
5 white + Wild Card	Grand prize	<del>36.25%</del>		<del>4:1,359,288</del>
		<u>42.23%</u>		<u>1:1,898,688</u>
5 white + no Wild Card	\$5,000	10.41%		4:90,649
	<u>\$6,000</u>	<u>8.32%</u>		<u>1:126,579</u>
4 white + Wild Card	\$500	<del>9.02%</del>	<u>6.47%</u>	<del>4:10,456</del>
				<u>1:13,562</u>
4 white + no Wild Card	<del>\$20</del> <u>\$30</u>	<del>5.41%</del>	<u>5.82%</u>	<del>4:697</del>
				<u>1:904</u>
3 white + Wild Card	\$5 <u>\$6</u>	<del>2.26%</del>	<u>2.10%</u>	<del>4:418</del>
				<u>1:502</u>
3 white + no Wild Card	\$2	<del>13.53%</del>	<u>10.48%</u>	<del>4:28</del> <u>1:33</u>

2 white + Wild Card	\$1 <del>\$2</del>	<del>3.61%</del> <u>6.05%</u>	4:8 <u>1:58</u>
1 white + Wild Card	\$1	<del>10.38%</del> <u>9.46%</u>	4:8 <u>1:19</u>
0 white + Wild Card	\$1	<del>9.13%</del> <u>9.08%</u>	4:8 <u>1:19</u>

Overall odds of winning a prize on a one dollar play are ~~4:6~~ 1:6.67.

\*Reflects the odds of winning and probable distribution of winning plays in and among each prize tier, based on the total number of possible combinations.

**History:** Effective February 1, 2004; amended effective April 1, 2006; January 13, 2013.

**General Authority:** NDCC 53-12.1-13

**Law Implemented:** NDCC 53-12.1-13

**10-16-06-04. Prize pool and payment.**

1. The prize pool for all prize categories must consist of ~~fifty-five~~ fifty-seven percent of each draw period's sales after the prize reserve account is funded.
2. The prize money allocated to the grand prize pool must be divided equally by the number of plays that win the grand prize. If the grand prize is not won in a draw, subject to any restrictions by the game group, the prize money allocated for the grand prize must roll over and be added to the grand prize pool for the next draw. A grand prize must be paid in cash in a single payment.
3. The prize pool percentage allocated to set prizes must be carried forward to the next draw if all or a portion of it is not needed to pay the set prizes awarded in the current draw.
4. The lottery may not pay a grand or set cash prize until after it receives authorization from the MUSL. The lottery may pay the prize before it receives the funds from the MUSL.

**History:** Effective February 1, 2004; amended effective April 1, 2006; April 1, 2008; January 13, 2013.

**General Authority:** NDCC 53-12.1-13

**Law Implemented:** NDCC 53-12.1-13

**TITLE 13**  
**DEPARTMENT OF FINANCIAL INSTITUTIONS**



## JANUARY 2012

### CHAPTER 13-03-01.1

**13-03-01.1-02. Communications.** All correspondence and filings forwarded to the board must be addressed to:

State Credit Union Board  
2000 Schafer Street, Suite G  
Bismarck, ND 58501-1204

Correspondence and filings may also be submitted to the attention of the board in electronic format, addressed to the following:

Fax number: 701-328-0290  
E-mail address: [dfi@nd.gov](mailto:dfi@nd.gov)

**History:** Effective October 1, 1994; amended effective May 1, 1996; December 1, 1997; January 1, 2013.

**General Authority:** NDCC 6-01-04, 28-32-02

**Law Implemented:** NDCC 6-01-01, 6-01-04, ~~28-32-05~~

**CHAPTER 13-03-02**  
**LIMITING AND RESTRICTING THE AMOUNT THAT MAY BE LOANED ON**  
**REAL PROPERTY SECURITY**

Section	
13-03-02-01	Aggregate Limited to Percent of Paid-In Shares and Deposits - Type of Lien [Repealed]
13-03-02-02	Requirements for Advancement of Money on Security of Real Property
13-03-02-03	Length of Term - Amortization - Limitation on Amount of Percent of Appraised Value
13-03-02-04	Limitation on Amount Loaned to One Member [Repealed]
13-03-02-05	Second Mortgages - Approval of Credit Union Board [Repealed]
13-03-02-06	Exemption From Restrictive Provisions
13-03-02-07	Exceptions

**13-03-02-02. Requirements for advancement of money on security of real property.** No state-chartered credit union, ~~except corporate central credit union,~~ may advance money on security of real property until the following requirements are met:

1. The mortgage has been properly signed and recorded in the office of the county recorder where the real property is located.
2. The credit union must verify that the mortgagor is the owner of the real property in fee simple and the credit union must determine the order of priority of the lien established by the mortgage.
3. For real estate loans ~~that exceed one~~ equaling two hundred fifty thousand dollars or more, a written appraisal must be obtained by from the credit union's designated appraiser. The credit union's designated appraiser must be independent of the transaction and be state-certified or licensed, or if the loan is one million dollars or more, be state-certified. The written appraisal must comply with the uniform standards of professional appraisal practices and be filed with the loan documents. For real estate loans less than ~~one~~ two hundred fifty thousand dollars, an evaluation of the property value must be well-documented, reasonably support the value assigned, and be included with the loan documents; the county's annual tax statement is acceptable for this person performing the evaluation provided the loan officer indicates, in writing, agreement with the value must be qualified to perform the evaluation and be independent of the transaction. However, this subsection does not apply to real estate loans subject to title 12, Code of Federal Regulations, part 722, promulgated by the national credit union administration board. For these loans, the credit union must comply with the federal requirements for transactions requiring a state-certified or licensed appraiser.

4. Adequate fire and tornado insurance has been obtained with a mortgage clause for the benefit of the credit union ~~in an amount equal to the amount of the outstanding liens.~~
5. A note for the amount of the loan has been signed by the mortgagor or mortgagors consistent with the terms of the mortgage.
6. ~~For real estate loans that exceed two hundred fifty thousand dollars, an abstract of title of the real property must be furnished to the credit union, at the expense of the borrower, unless an abstract of title is not prepared and, in that case, a title insurance policy is required. Within forty five days after the advancement of funds, the abstract of title, if prepared, must be updated to include the mortgage.~~

**History:** Amended effective May 1, 1982; November 1, 1985; October 1, 1994; August 1, 1998; December 1, 2002; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-02-04. Limitation on amount loaned to one member.** ~~The maximum amount that any credit union organized and operating under the laws of North Dakota, except any corporate or corporate central credit union, which is specifically exempted from the provisions of this section, shall loan on real estate security to any one member shall not exceed the amounts based on the total assets of the credit union making the loan that are provided in subsection 7 of North Dakota Century Code section 6-06-12 Repealed effective January 1, 2013.~~

**History:** ~~Amended effective January 1, 2007.~~

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06, ~~6-06-12(1)(g)~~

**13-03-02-07. Exceptions.** A credit union may make an exception to the loan-to-value limits under section 13-03-02-03 for loans from creditworthy borrowers. However, a credit union may not make such an exception if the loan would exceed one hundred fifty percent of the credit union's ~~total equity capital and reserves~~ net worth when the loan is aggregated with all other loans in excess of the loan-to-value limits.

**History:** Effective October 1, 1997; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

## CHAPTER 13-03-03

**13-03-03-01. Individual investment limitation - Total investment limitation.** No credit union organized and operating under the laws of North Dakota, ~~except any corporate or corporate central credit union, which is specifically exempted from the provisions of this section,~~ shall invest more than ten percent, in the aggregate, of the total paid in shares and deposits of the credit union in first lien, public utility, industrial, corporation, or association bonds, or notes issued by corporations located in the United States of America, unless an exemption is granted by the state credit union board. In determining whether to grant an exemption, the board shall consider the following:

1. The net worth ratio of the credit union;
2. The capital, asset quality, management, earnings, and liquidity (CAMEL) rating of the credit union;
3. The experience of the credit union's management; and
4. Other factors deemed pertinent by the board.

**History:** Amended effective December 1, 1978; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

## CHAPTER 13-03-04

**13-03-04-01. Maximum investment in fixed assets to be determined by state credit union board.** No credit union organized and operating under the laws of North Dakota, ~~except any corporate or corporate central credit union, which is specifically exempted from the provisions of this section,~~ shall invest more than six percent of assets in a credit union office building, including the lot, piece, or parcel of land on which the same is located, furniture, fixtures, and equipment, without first applying for and obtaining approval from the state credit union board.

**History:** Amended effective June 1, 1984; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

## CHAPTER 13-03-05

**13-03-05-04. Considerations for approval.** In considering the application for merger, the board shall examine and consider all relevant factors including:

1. Whether proper notification has been given to all members, unless the membership meeting has been waived by the board.
2. The comments of the members of each credit union to be merged.
- ~~3. If there is more than one potential merger partner, consideration may be given to the credit union with a more similar field of membership or in closer proximity to the merging credit union.~~
4. 3. The financial condition of the continuing credit union.

In the event that a merging credit union is a failing institution under North Dakota Century Code section 6-06-08.2, the board shall have the authority to waive any application requirements or considerations for approval otherwise mandated under rule. Additionally, if there is more than one potential merger partner for the failing institution, the board may give consideration to the credit union with a more similar field of membership or in closer proximity to the failing institution.

**History:** Effective August 1, 1993; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-36, 6-06-37, 6-06-08.2

**CHAPTER 13-03-06**  
**CREDIT UNION RESERVE FUNDS AND PROMPT CORRECTIVE ACTION**

Section

13-03-06-01	Definitions
13-03-06-02	Maintaining an Allowance for Loan and Lease Loss Account
13-03-06-03	Calculation
13-03-06-04	Prompt Corrective Action

**13-03-06-01. ~~Definition~~ Definitions.**

1. "Net worth" means the retained earnings balance of the credit union at quarter end as determined under generally accepted accounting principles. Retained earnings consist of undivided earnings, regular reserves, and any other appropriations designated by management or regulatory authorities. For low income-designated credit unions, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders, and the national credit union share insurance fund. For any credit union, net worth does not include the allowance for loan and lease loss account.
2. "Net worth ratio" means the ~~sum of the undivided earnings, the regular reserve, and other reserves, excluding the allowance for loan and lease loss account and excluding the investment valuation reserve account,~~ divided by the ~~total assets of the credit union~~ ratio of net worth of the credit union to the total assets of the credit union.
3. "Net worth restoration plan" means a plan submitted by the credit union and approved by the commissioner outlining the actions the credit union will take and timeframes for improving the credit union's capital position and becoming well-capitalized. The plan must comply with part 702 of the national credit union administration's rules and regulations.
4. "Quarterly reserve requirement" means a transfer from current quarter earnings into the regular reserve account equal to one-tenth of one percent of assets.
5. "Risk-based net worth requirement" means the level of net worth necessary given the risk level of the credit union as defined in part 702 of the national credit union administration's rules and regulations.
6. "Total assets" means quarter end asset balance, average daily balance over the calendar quarter, average month-end balances over the three

calendar months in the calendar quarter, or the average of quarter end balances of the current and preceding calendar quarters.

**History:** Amended effective January 1, 1981; August 1, 1984; June 1, 2002; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 6-01-04, ~~6-06-21.4~~

**Law Implemented:** NDCC ~~6-06-21.4~~ 6-06-08.4, 6-06-21

**13-03-06-02. Maintaining an allowance for loan and lease loss account.**

1. All credit unions operating under a charter issued by the state of North Dakota shall be required to maintain an allowance for loan and lease loss account in accordance with generally accepted accounting principles and rules of the national credit union administration. When the amounts calculated under section 13-03-06-03 exceed those required pursuant to North Dakota Century Code section 6-06-21, the allowance for loan and lease loss account will be considered inadequate, and the excess will be transferred to the allowance for loan and lease loss account through the provision for loan and lease loss expense account within thirty days as directed by the commissioner.
2. Upon application by a credit union to the state credit union board, and upon the showing of extraordinary hardship, the state credit union board may alter the allowance for loan and lease loss requirements as set forth in this chapter when in its opinion, such an alteration is necessary or desirable.

**History:** Amended effective June 1, 1979; January 1, 1981; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 6-01-04, ~~6-06-21.4~~

**Law Implemented:** NDCC ~~6-06-21.4~~ 6-06-08.4, 6-06-21

**13-03-06-03. Calculation.** The adequacy of the allowance for loan and lease loss account as required under North Dakota Century Code section 6-06-21 will be based upon an individual loan classification at each examination of the credit union performed by the commissioner under authority granted the commissioner under North Dakota Century Code section 6-06-08. The commissioner ~~of banking and financial institutions~~ may require a credit union to put aside additional reserves on loans according to the following classification formula:

1. Substandard loans - up to ten percent of the loan balance.
2. Doubtful loans - the net exposure to loss after collateral values are considered.

3. Loss loans - the net exposure to loss after collateral values are considered.

**History:** Effective January 1, 1981; amended effective June 1, 2002; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 6-01-04, ~~6-06-21.4~~

**Law Implemented:** NDCC ~~6-06-21.4~~ 6-06-08.4, 6-06-21

**13-03-06-04. Prompt corrective action.** When the credit union's net worth ratio falls below seven percent after allowing for full and fair disclosure in the allowance for loan and lease loss account, the credit union is required to meet the prompt corrective action requirements under North Dakota Century Code section 6-06-08.4 and part 702 of the national credit union administration's rules and regulations. Any required reserves to be made under prompt corrective action will be made to the regular reserve account.

**History:** Effective January 1, 1981; amended effective May 1, 1981; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 6-01-04, ~~6-06-21.4~~

**Law Implemented:** NDCC ~~6-06-21.4~~ 6-06-08.4, 6-06-21

**CHAPTER 13-03-08**  
**ADMINISTRATION OF NEGOTIABLE OR TRANSFERABLE INSTRUMENTS**  
**OF ACCOUNT**

Section

13-03-08-01	Definitions
13-03-08-02	Issuance of Negotiable or Transferable Instruments
<u>13-03-08-03</u>	<u>Credit Applications and Overdrafts</u>

**13-03-08-03. Credit applications and overdrafts.** Consistent with policies established by the board of directors, the credit committee or loan officer shall ensure that a credit application is kept on file for each borrower supporting the decision to make a loan or establish a line of credit. A credit union may advance money to a member to cover an account deficit without having a credit application from the borrower on file if the credit union has a written overdraft policy. The policy must set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses, establish a time limit not to exceed forty-five calendar days for a member either to deposit funds or obtain an approved loan from the credit union to cover each overdraft, limit the dollar amount of overdrafts the credit union will honor per member, and establish the fee and interest rate, if any, that the credit union will charge members for honoring overdrafts. All overdrafts will be reported on the credit union's financial statements in accordance with generally accepted accounting principles, and will be treated as a loan in determining compliance with subdivision g of subsection 1 of North Dakota Century Code section 6-06-12 and North Dakota Administrative Code chapter 13-03-06.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**CHAPTER 13-03-15  
BRANCHING**

Section	
13-03-15-01	Definitions
13-03-15-02	Establishment of a Branch
13-03-15-03	Location of Branch
13-03-15-04	Application to Establish a Branch
13-03-15-05	Waiver
<u>13-03-15-06</u>	<u>Notice Regarding Closing of a Branch</u>

**13-03-15-04. Application to establish a branch.**

1. A credit union wishing to establish a branch shall comply with the following:
  - a. Approval to establish the branch must be given by the board of directors of the credit union by a majority of that board;
  - b. After approval by the credit union's board of directors, application must be made to the state credit union board to establish the branch. The necessary forms for "application to establish a branch", including the business plan and the financial impact to the credit union, may be secured from the department of financial institutions;
  - c. The credit union shall, at least thirty days prior to the date of consideration by the state credit union board, cause to be published a notice in the official newspaper of the county or counties affected by the proposed branch expansion. The notice must specify the field of membership, and, if an open charter, the geographical boundaries; and
  - d. The notice must specify the time and place of the meeting of the state credit union board at which the application for establishing the branch will be acted upon. Written comments may be submitted to the board concerning the application, or a written request for an opportunity to be heard before the board may be submitted. The board may, when it believes it to be in the public interest, order a hearing to be held.
2. The state credit union board, when considering the branching of a credit union, shall consider the following:
  - a. If the branch is for an open charter, and if the application to establish the branch is accompanied by an application to expand the field of membership, the exact geographical boundaries, expressed by city, county, township, or highway boundaries, or a stated radius from the branch office, must be clearly spelled out;

- b. ~~The negative impact~~ Whether serious injury would result to any other state or federally chartered credit union in North Dakota;
- c. ~~Any expressed opposition to the branch by any other credit union in North Dakota;~~ Whether the credit union has demonstrated the ability to succeed with the branch; and
- d. ~~If the branch is for an open charter, whether the area being considered is satisfactorily served by a currently operating credit union;~~
- e. ~~The credit union must demonstrate ability to succeed with the branch; and~~
- f. d. Any other factor that the state credit union board deems pertinent.

**History:** Effective April 1, 1988; amended effective June 1, 2002; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-15-06. Notice regarding closing of a branch.** Any credit union intending to close a branch shall provide its membership and the commissioner with notice of the closing at least thirty days prior to the closing date.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

## CHAPTER 13-03-16

### 13-03-16-01. Definitions.

1. "Associated member" means any member with a shared ownership, investment or other pecuniary interest in a business or commercial endeavor with the borrower.
2. "Construction or development loan" means a financing arrangement for the purpose of acquisition of property or rights to property including land or structures with the intent of conversion into income-producing property including residential housing for rental or sale, commercial, or industrial use, or a similar use.
3. "Immediate family member" means a spouse or other family member living in the same household.
4. "Loan-to-value (LTV)" ratio means the quotient of the aggregate amount of all sums borrowed from all sources on an item of collateral divided by the market value of the collateral used to secure the loan.
5. "Member business loans" means any loan, participation loan interest, line of credit, or letter of credit (including unfunded commitments), the proceeds of which will be used for a commercial, corporate, business, investment property or venture, or agricultural purpose, except that the following may not be considered member business loans for the purposes of this section:
  - a. A loan or loans fully secured by a lien on a one to four family dwelling that is the member's primary residence.
  - b. A loan that is fully secured by shares in the credit union or deposits in other financial institutions.
  - c. A loan meeting the general definition of member business loans under this subsection and, made to a borrower or an associated member as defined in subsection 1, which, when added to other such loans to the borrower or associated member, is less than fifty thousand dollars.
  - d. A loan, the repayment of which is fully insured or fully guaranteed by, or where there is an advance commitment to purchase in full by, any agency of the federal government or of a state or any of its political subdivisions.
  - e. A loan granted by a corporate credit union operating under the provisions of part 704 of the national credit union administration rules and regulations to another credit union.

6. "Net worth" means ~~all the credit union's undivided~~ retained earnings balance of the credit union at quarter end as determined under generally accepted accounting principles. Retained earnings consist of undivided earnings, regular reserves, and any other reserves appropriations designated by management or regulatory authorities. For low income-designated credit unions, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders, and the national credit union share insurance fund. For any credit union, net worth does not include the allowance for loan and lease loss account.

**History:** Effective December 1, 1992; amended effective October 1, 1994; January 1, 2001; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

### **13-03-16-02. Requirements.**

1. **Written loan policies.** The board of directors shall adopt specific business loan policies and review them at least annually. The policies must, at a minimum, address the following:
  - a. Types of business loans that will be made;
  - b. The credit union's trade area for business loans;
  - c. Maximum amount of credit union assets, in relation to net worth, that will be invested in business loans;
  - d. Maximum amount of credit union assets, in relation to net worth, that will be invested in a given category or type of business loan;
  - e. Maximum amount of credit union assets, in relation to net worth, that will be loaned to any one member or group of associated members, subject to subsection 1 of section 13-03-16-03;
  - f. Qualifications and experience of personnel involved in making and administering business loans with a minimum of two years direct experience with this type of lending;
  - g. Analysis of the ability of the borrower to repay the loan;
  - h. Documentation supporting each request for an extension of credit or an increase in an existing loan or line of credit shall, except where the board of directors finds that such documentation requirements are not generally available for a particular type of business loan and states the reasons for those findings in the credit union's written policies, include balance sheet, cash flow analysis, income statement, tax data; leveraging; comparison

with industry averages; receipt and periodic updating of financial statements and other documentation; including tax returns;

- i. Collateral requirements, including loan-to-value ratios; determination of value, title search, and insurance requirements; steps to be taken to secure various types of collateral; and how often the value and marketability of collateral is reevaluated;
- j. Appropriate interest rates and maturities of business loans;
- k. Loan monitoring, servicing, and followup procedures, including collection procedures;
- l. Provision for periodic disclosure to the credit union's members of the number and aggregate dollar amount of member business loans; and
- m. Identification, by position, of those senior management employees prohibited by subsection 1 of section 13-03-16-06 from receiving member business loans.

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

- a. ~~Loans, except with respect to credit card line of credit programs~~ offered to nonnatural person members which are limited to routine purposes made available under such programs, must be granted on a fully secured basis by collateral as follows:
  - (1) Agricultural operating crop and livestock production loans with loan-to-value ratios up to eighty percent of projected crop production and livestock sales using current crop and livestock prices. This limitation does not apply if the agricultural operating loan is cross-collateralized with chattel or real estate if such loans do not exceed the loan-to-value ratios on chattel or real estate loans.
  - (2) ~~First and second liens~~ Liens, including chattel, real estate, and all commercial loans, for loan-to-value ratios of up to eighty percent.
  - (3) ~~First lien with a~~ The maximum loan-to-value ratio ~~in excess of for all liens must not exceed~~ eighty percent ~~shall be granted only where unless~~ the value in excess of eighty percent is covered through ~~acquisition of private mortgage insurance, or equivalent type; of insurance provided by an insurer acceptable to the credit union or insurance or guarantees by, insured, guaranteed,~~ insurance, or subject to advance commitment

to purchase by, an agency of the federal government or of a state or any of its political subdivisions, and in no event may the loan-to-value ratio exceed ninety-five percent.

- b. Loans may not be granted without the personal liability and guarantees of the principals (natural person members) except ~~where the:~~
  - (1) The borrower is a not-for-profit organization as defined by the Internal Revenue Service Code [26 U.S.C. 501];
  - (2) The borrower is a political subdivision or governmental agency or instrumentality; or
  - (3) The credit union has applied for, and has been granted, a waiver from the commissioner for the subject loan or loans.
- c. Business loans secured by a vehicle are not subject to the loan-to-value restrictions outlined in this rule, provided the vehicle is a car, van, pickup truck, or sport utility vehicle and not part of a fleet of vehicles.
- d. Unsecured loans, including credit card line of credit programs (including unfunded commitments), are authorized. The aggregate of the unsecured outstanding member business loans to any one member or group of associated members may not exceed the lesser of one hundred thousand dollars or two and one-half percent of the credit union's net worth. The aggregate of all unsecured outstanding member business loans may not exceed ten percent of the credit union's net worth. A credit union shall have the right to apply to the state credit union board for an exemption under this subsection.

**History:** Effective December 1, 1992; amended effective January 1, 2001; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

### **13-03-16-03. Loan limits.**

- 1. **Loans to one borrower.** Unless a greater amount is approved by the state credit union board, the aggregate amount of outstanding member business loans to any one member or group of associated members may not exceed fifteen percent of the credit union's net worth (~~less the allowance for loan losses account~~), or one hundred thousand dollars, whichever is higher. A credit union may lend an additional ten percent of the credit union's net worth to any one member or group of associated members if such credit is extended for seasonal advances associated with operating purposes for the production of farm products

and repayment of which is required to be made within a normal business cycle not to exceed twelve months. In no event can the credit union lend, or the state credit union board approve an exception for a credit union resulting in a loan to any one member in excess of the limitation specified in subsection 7 of North Dakota Century Code section 6-06-12. If any portion of a member business loan is secured by shares in the credit union, or deposits in another financial institution, or fully or partially insured or guaranteed by, or subject to an advance commitment to purchase by, any agency of the federal government or of a state or any of its political subdivisions, such portion may not be calculated in determining the fifteen percent limit.

2. **Exceptions.** Credit unions seeking an exception from the limits of subsection 1 or section 13-03-16-05 must present the state credit union board with, at a minimum the higher limit sought; an explanation of the need by the members to raise the limit and ability of the credit union to manage this activity; and analysis of the credit union's prior experience making member business loans; and a copy of its business lending policy. The analysis of credit union experience in making member business loans shall document the history of loan losses, loan delinquency, volume and cyclical or seasonal patterns, diversification, concentrations of credit to one borrower or group of associated borrowers in excess of fifteen percent of net worth (~~less the allowance for loan losses account~~), underwriting standards and practices, types of loans grouped by purpose and collateral and qualifications of personnel responsible for underwriting and administering member business loans. The state credit union board shall consider, in addition to the information submitted by the credit union, the historical CAMEL ratings. If the credit union does not receive notification of the action taken within ninety calendar days of the date the request was received by the state credit union board, the credit union may assume approval of the request to exceed the limit.
3. **Maturity.** Member business loans must be granted for periods consistent with the purpose, security, creditworthiness of the borrower and sound lending policies.
4. **Monitoring requirement.** ~~Credit unions with member business loans in excess of one hundred percent of net worth (less the allowance for loan losses account) shall submit the following information regarding member business loans to the national credit union administration regional director on a quarterly basis: the aggregate total of loans outstanding; the amount of loans delinquent in excess of thirty days; the balance of the allowance for member business loan losses; the aggregate total of all concentrations of credit to one borrower or group of associated borrowers in excess of fifteen percent of net worth (less the allowance for loan losses account); the total number and amount of all construction, development, or speculative loans; and any other~~

~~information pertinent to the safe and sound condition of the member business loan portfolio.~~

**History:** Effective December 1, 1992; amended effective January 1, 2001; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-16-04. Allowance for loan losses.**

- ~~1. The determination whether a member business loan will be classified as substandard, doubtful, or loss, for purposes of the valuation allowance for loan losses, will rely on factors not limited to the delinquency of the loan. Nondelinquent loans may be classified, depending on an evaluation of factors, including the adequacy of analysis and documentation.~~
- ~~2. Loans classified must be reserved as follows:~~
  - ~~a. Loss loans at one hundred percent of outstanding amount;~~
  - ~~b. Doubtful loans at fifty percent of outstanding amounts; and~~
  - ~~c. Substandard loans at ten percent of outstanding amount unless other factors, e.g., history of such loans at the credit union, indicate a greater or lesser amount is appropriate.~~

A credit union will calculate and fund its allowance for loan loss account as outlined in chapter 13-03-06. Credit unions will establish and maintain an adequate credit grading system to evaluate both the loan portfolio and the allowance for loan loss account.

**History:** Effective December 1, 1992; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

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

1. The aggregate of all such loans, excluding any portion of a loan secured by shares in the credit union, or deposits in another financial institution, or fully or partially insured or guaranteed by, or subject to an advance commitment to purchase by, any agency of the federal government or of a state or any of its political subdivisions, may not exceed fifteen percent of net worth ~~less~~. In determining the allowance aggregate balances for purposes of this limitation, a credit union may exclude any loan losses account made to finance the construction of a single-family residence if a prospective homeowner has contracted

to purchase the property and may also exclude a loan to finance the construction of one single-family residence per member-borrower or group of associated member-borrowers, irrespective of the existence of a contractual commitment from a prospective homeowner to purchase the property. However, excluded loans will still be included in determining compliance with the limits outlined in section 13-03-16-08;

2. The borrower shall have a minimum of twenty-five percent equity interest in the project being financed, the value of which is determined by the market value of the project at the time the loan is made. In determining the aggregate balances for purposes of this limitation, a credit union may exclude the first loan made to finance the construction of a single-family residence if a prospective homeowner has contracted to purchase the property and in the case of one loan to a member-borrower or group of associated member-borrowers to finance the construction of a single-family residence, irrespective of the existence of a contractual commitment from a prospective homeowner to purchase the property. The loan-to-value limits of section 13-03-16-02 will apply to the exclusions provided in this subsection; and
3. Funds for such projects must be released following onsite inspections by independent, qualified personnel in accordance with a preapproved draw schedule.

**History:** Effective December 1, 1992; amended effective January 1, 2001; October 1, 2008; January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

#### **13-03-16-06. Prohibitions.**

1. **Senior management employees.** A credit union may not make member business loans to the following:
  - a. ~~Any member of the board of directors who is~~ A compensated as such director unless the board of directors approved granting the loan and the compensated director is recused from the decisionmaking process;
  - b. The credit union's chief executive officer (typically this individual holds the title of president or treasurer/manager);
  - c. Any assistant chief executive officers (e.g., assistant president, vice president, or assistant treasurer/manager);
  - d. The chief financial officer (comptroller); or

- e. Any associated member or immediate family member of the senior management employees listed in subdivisions a through d.
2. **Equity kickers or joint ventures.** A credit union shall not grant a member business loan where a portion of the amount of income to be received by the credit union in conjunction with such loan is tied to the profit or sale of business or commercial endeavor for which the loan is made.

**History:** Effective December 1, 1992; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-16-08. Aggregate loan limit.** A credit union's aggregate limit for all outstanding member business loans, including any unfunded commitments, is the lesser of one hundred seventy-five percent of the credit union's net worth or twelve and one-quarter percent of the credit union's total assets. ~~The aggregate loan limit must include the outstanding balance of any loan portion retained as to any participation sold and must include any outstanding balance for any portion of a loan participation purchased, unless an exception has been granted under section 13-03-16-09.~~

**History:** Effective January 1, 2001; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

## CHAPTER 13-03-20

### 13-03-20-02. Authorization.

1. Subject to the provisions of this section, any state-chartered credit union may participate in making loans with eligible organizations within the limitations of the board of directors' written participation loan policies, provided:
  - a. A written master participation agreement shall be properly executed, acted upon by the state-chartered credit union's board of directors, or if the board has so delegated in its policy, the investment committee, loan committee, or senior management officials and retained in the state-chartered credit union's office. The master agreement shall include provisions for identifying, either through a document which is incorporated by reference into the master agreement, or directly in the master agreement, the participation loan or loans prior to their sale.
  - b. A state-chartered credit union may sell to or purchase from any participant the servicing of any loan in which it owns a participation interest.
2. An originating lender which is a state-chartered credit union shall:
  - a. Originate loans only to its members;
  - b. Retain an interest of at least ten percent of the face amount of each loan;
  - c. Retain the original or copies of the loan documents; and
  - d. Require the credit committee or loan officer to use the same underwriting standards for participation loans used for loans that are not being sold in a participation agreement unless there is a participation agreement in place prior to the disbursement of the loan. If a participation agreement is in place prior to disbursement, either the credit union's loan policies or the participation agreement shall address any variance from nonparticipation loan underwriting standards.
3. A participant state-chartered credit union that is not an originating lender shall:
  - a. Participate only in loans it is empowered to grant, having a participation policy in place which sets forth the loan underwriting standards prior to entering into a participation agreement;

- b. Participate in participation loans only if made to its own members or members of another participating credit union, eligible organization, or financial organization;
- c. Retain the original or a copy of the written participation loan agreement and a schedule of loans covered by the agreement; and
- d. Obtain the approval of the board of directors or investment committee, loan committee, or credit manager of the disbursement of proceeds to the originating lender.

**History:** Effective January 1, 2007; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

## CHAPTER 13-03-21

### 13-03-21-02. Authorizations.

#### 1. Purchase.

- a. A credit union may purchase, in whole or in part, within the limitations of the board of directors' written purchase policies:
  - (1) Eligible obligations of its members, originating from any source in the state of North Dakota, if either they are loans it is empowered to grant or they are refinanced with the consent of the borrowers, within sixty days after they are purchased, so that they are loans it is empowered to grant;
  - (2) Eligible obligations of a liquidating credit union's individual members, from the liquidating credit union;
  - (3) Student loans, from any source, if the purchaser is granting student loans on an ongoing basis and if the purchase will facilitate the purchasing credit union's packaging of a pool of such loans to be sold or pledged on the secondary market; and
  - (4) Real estate-secured loans, originating from any source in the state of North Dakota, if the purchaser is granting real estate-secured loans on an ongoing basis and if ~~the purchase will facilitate the purchasing credit union's packaging of a pool of such loans to~~ will be sold or pledged on to the secondary mortgage market. ~~A pool must include a substantial portion of the credit union's members' in the same manner as loans and must be sold promptly to the credit union's members, and loans sold include a substantial portion of loans to the credit union's members.~~
- b. A credit union may make purchases in accordance with this subsection provided:
  - (1) The board of directors or investment committee, loan committee, or credit manager approves the purchase; and
  - (2) A written agreement and a schedule of the eligible obligations covered by the agreement are retained in the purchaser's office; and for purchases under paragraph 2 of subdivision a, any advance written approval from the national credit union administration required by section 741.8 of national credit union administration rules and regulations is obtained before consummation of such purchase.

- c. The aggregate of the unpaid balance of eligible obligations under this subsection cannot exceed five percent of the unimpaired capital and surplus of the purchaser. The following can be excluded in calculating this five percent limitation:
- (1) Student loans purchased in accordance with paragraph 3 of subdivision a;
  - (2) Real estate loans purchased in accordance with paragraph 4 of subdivision a;
  - (3) Eligible obligations purchased in accordance with paragraph 1 of subdivision a that are refinanced by the purchaser so that it is a loan it is empowered to grant; and
  - (4) An indirect lending or indirect leasing arrangement that is classified as a loan and not the purchase of an eligible obligation because the credit union makes the final underwriting decision and the sales or lease contract is assigned to the credit union very soon after it is signed by the member and the dealer or leasing company.

2. **Sale.** A credit union may sell, in whole or in part, to any source, eligible obligations of its members, eligible obligations purchased in accordance with paragraph 2 of subdivision a of subsection 1, student loans purchased in accordance with paragraph 3 of subdivision a of subsection 1, and real estate loans purchased in accordance with paragraph 4 of subdivision a of subsection 1, within the limitations of the board of directors' written sale policies, provided:

- a. The board of directors ~~or~~ investment committee, loan committee, or credit manager approves the sale; and
- b. A written agreement and a schedule of the eligible obligations covered by the agreement are retained in the seller's office.

3. **Pledge.**

- a. A credit union may pledge, in whole or in part, to any source, eligible obligations of its members, eligible obligations purchased in accordance with paragraph 2 of subdivision a of subsection 1, student loans purchased in accordance with paragraph 3 of subdivision a of subsection 1, and real estate loan purchased in accordance with paragraph 4 of subdivision a of subsection 1, within the limitations of the board of directors written pledge policies, provided:
  - (1) The board of directors ~~or~~ investment committee, loan committee, or credit manager approves the pledge;

- (2) Copies of the original loan documents are retained; and
  - (3) A written agreement covering the pledging arrangement is retained in the office of the credit union that pledges the eligible obligations.
- b. The pledge agreement shall identify the eligible obligations covered by the agreement.
4. **Servicing.** A credit union may agree to service any eligible obligation it purchases or sells in whole or in part.
  5. **Ten percent limitation.** The total indebtedness owing to any credit union by any person, inclusive of retained and reacquired interests, shall not exceed ten percent of its unimpaired capital and surplus.

**History:** Effective January 1, 2007; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**CHAPTER 13-03-23**  
**CREDIT UNION SERVICE ORGANIZATIONS**

Section	
13-03-23-01	Authority to Invest in Credit Union Service Organizations
13-03-23-02	Definitions
13-03-23-03	Application
13-03-23-04	Hearing
13-03-23-05	Permissible Services and Activities
13-03-23-06	Limitations on Investments in <u>and Loans to</u> Credit Union Service Organizations
13-03-23-07	Conflict of Interest
13-03-23-08	Examinations

**13-03-23-02. Definitions.** Unless the context otherwise requires, terms in this chapter have the following meanings:

1. "Affiliated" means those credit unions that have either invested in or made loans to a credit union service organization.
2. "Credit union service organization" means a financial service organization created by a credit union or group of credit unions or a league service organization to provide services not available from credit unions themselves.
- ~~3. "Equity" means the total of regular reserves, investment valuation reserve, other reserves, and undivided earnings as reported on the most recent year-end call report.~~
4. ~~3.~~ "Immediate family member" means a spouse or other family member living in the same household.
4. "Net worth" means the retained earnings balance of the credit union at quarter end as determined under generally accepted accounting principles. Retained earnings consist of undivided earnings, regular reserves, and any other appropriations designated by management or regulatory authorities. For low income-designated credit unions, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders, and the national credit union share insurance fund. For any credit union, net worth does not include the allowance for loan and lease loss account.
5. "Officials or senior management employees" means members of the board of directors, supervisory committee, or credit committee; chief executive officer (typically this individual holds the title of president or treasurer or manager); any assistant chief executive officers, e.g.,

assistant president, vice president, or assistant treasurer or manager; and the chief financial officer or comptroller.

**History:** Effective January 1, 2007; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-23-03. Application.** An application to establish, make an initial investment, or increase the amount of an investment in a credit union service organization must be submitted to the ~~board~~ commissioner in writing and must contain the following:

1. A full explanation and complete documentation of the proposed credit union service organization;
2. A listing of proposed management and their qualifications;
3. A proposed business plan with financial projections for at least three years;
4. The amount of investment authority requested; and
4. 5. Any additional information as requested by the board or commissioner.

Once an application is determined to be complete by the commissioner, it must be submitted to the board for consideration. The board shall issue an order to either approve or disapprove the application. Upon notice of disapproval, the applicant has fifteen days to petition for a hearing before the board.

**History:** Effective January 1, 2007; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-23-05. Permissible services and activities.** ~~A state credit union may invest upon approval by order of the board in those credit union service organizations that provide one or more of the following services and activities:~~

1. ~~The credit union service organization may conduct the following services and activities without approval of the board, but subject to applicable state licensing requirements:~~ A state credit union, upon being granted authority under section 13-03-23-03, and complying with all applicable state licensing requirements, may invest in those credit union service organizations that provide one or more of the following services and activities:
  - a. ~~Credit card and debit card services;~~ Checking and currency services:
    - (1) Check cashing;

- (2) Coin and currency services;
- (3) Money order, savings bonds, travelers checks; and purchase and sale of United States mint commemorative coins services; and
- (4) Stored value products;
- b. Check cashing and wire transfers; Clerical, professional, and management services;
  - (1) Accounting services;
  - (2) Courier services;
  - (3) Credit analysis;
  - (4) Facsimile transmissions and copying services;
  - (5) Internal audits for credit unions;
  - (6) Locator services;
  - (7) Management and personnel training and support;
  - (8) Marketing services;
  - (9) Research services;
  - (10) Supervisory committee audits; and
  - (11) Employee leasing services;
- c. Internal audits for credit unions; Business loan origination, including the authority to buy and sell participation interests in such loans;
- d. Automated teller machine services; Consumer mortgage loan origination, including the authority to buy and sell participation interests in such loans;
- e. Electronic funds transfer transaction services;:
  - (1) Automated teller machine services;
  - (2) Credit card and debit card services;
  - (3) Data processing;

- (4) Electronic fund transfer services;
  - (5) Electronic income tax filing;
  - (6) Payment item processing;
  - (7) Wire transfer services; and
  - (8) Cyber financial services;
- f. ~~Accounting services;~~ Financial counseling services:
- (1) Developing and administering individual retirement accounts and Keogh, deferred compensation, and other personnel benefit plans;
  - (2) Estate planning;
  - (3) Financial planning and counseling;
  - (4) Income tax preparation;
  - (5) Investment counseling;
  - (6) Retirement counseling; and
  - (7) Business counseling and consultant services;
- g. ~~Data processing;~~ Fixed asset services:
- (1) Management, development, sale, or lease of fixed assets; and
  - (2) Sale, lease, or servicing of computer hardware or software;
- h. ~~Shared credit union branch (service center) operations;~~ Insurance brokerage or agency:
- (1) Agency for sale of insurance;
  - (2) Provision of vehicle warranty programs;
  - (3) Provision of group purchasing programs; and
  - (4) Real estate settlement services;
- i. ~~Sale of repossessed collateral;~~ Leasing:
- (1) Personal property; and

- (2) Real estate leasing of excess credit union service organizations property;
- j. ~~Management, development, sale or lease of fixed assets;~~ Loan support services:
  - (1) Debt collection services;
  - (2) Loan processing, servicing, and sales;
  - (3) Sale of repossessed collateral;
  - (4) Real estate settlement services;
  - (5) Purchase and servicing of nonperforming loans; and
  - (6) Referral and processing of loan applications for members whose loan applications have been denied by the credit union;
- k. ~~Sale, lease, or servicing of computer hardware or software;~~ Record retention, security, and disaster recovery services:
  - (1) Alarm-monitoring and other security services;
  - (2) Disaster recovery services;
  - (3) Microfilm, microfiche, optical and electronic imaging, and CD-ROM data storage and retrieval services;
  - (4) Provision of forms and supplies; and
  - (5) Record retention and storage;
- l. ~~Management and personnel training and support;~~ Securities brokerage services;
- m. ~~Payment item processing;~~ Shared credit union branch (service center) operations;
- n. ~~Locator services;~~ Student loan origination, including the authority to buy and sell participation interests in such loans;
- o. ~~Marketing services;~~ Travel agency services;
- p. ~~Research services;~~ Trust and trust-related services:
  - (1) Acting as administrator for prepaid legal service plans;

(2) Acting as trustee, guardian, conservator, estate administrator, or in any other fiduciary capacity; and

(3) Trust services;

~~q. Record retention and storage;~~ Real estate brokerage services;

~~r. Microfilm and microfiche services.~~ Credit union service organization investments in noncredit union service organization service providers: in connection with providing a permissible service, a credit union service organization may invest in a noncredit union service organization service provider. The amount of the credit union service organization's investment is limited to the amount necessary to participate in the service provider, or a greater amount if necessary to receive a reduced price for goods and services;

~~s. Alarm monitoring and other security services;~~ Credit card loan origination; and

~~t. Debt collection services;~~ Payroll processing services.

~~u. Credit analysis;~~

~~v. Coin and currency services;~~

~~w. Provision of forms and supplies;~~

~~x. Income tax preparation; and~~

~~y. Provision of vehicle warranty programs.~~

If a credit union service organization intends on offering any services and activities not previously authorized under an application submitted in accordance with section 13-03-23-03, the credit union shall notify the commissioner at least twenty days prior to any change of operations.

~~z. The credit union service organization may not initiate the following services and activities after December 1, 1992, without approval of the board, and subject to applicable state licensing requirements:~~

~~a. Consumer mortgage loan origination;~~

~~b. Loan processing, servicing, and sales;~~

~~c. Financial planning and counseling;~~

~~d. Retirement counseling;~~

- e. ~~Investment counseling;~~
  - f. ~~Securities brokerage services;~~
  - g. ~~Estate planning;~~
  - h. ~~Acting as administrator for prepaid legal service plans, developing, and administering individual retirement account, Keogh, deferred compensation, and other personnel benefit plans, trust services;~~
  - i. ~~Acting as trustee, guardian, conservator, estate administrator, or in any other fiduciary capacity;~~
  - j. ~~Real estate brokerage services;~~
  - k. ~~Travel agency services;~~
  - l. ~~Agency for sale of insurance; and~~
  - m. ~~Personal property leasing.~~
3. ~~2.~~ The board may ~~approve~~ issue an order approving any service or activity which is not expressly authorized in subsection 1 ~~or 2~~, ~~subject to approval by the national credit union administration.~~
3. Based upon supervisory, legal, or safety and soundness reasons, the board or commissioner may at any time limit any of the credit union service organization activities expressly listed in subsection 1 or adopted by the board under subsection 2.
4. The board in granting approval for a service or activity shall consider all relevant factors, including:
- a. Whether the credit union service organization management or staff possesses adequate expertise or skills to perform the service or activity; and
  - b. Whether the proposed activity or service is reasonably expected to be profitable.

**History:** Effective January 1, 2007; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-23-06. Limitations on investments in and loans to credit union service organizations.** The following limitations apply to state credit unions for investments in credit union service organizations:

1. A credit union may not invest in shares, stocks, or obligations of credit union service organizations in an amount exceeding ten percent of its equity net worth. The board may waive this limitation for a credit union investment in a credit union service organization existing before December 1, 1992.
2. Credit unions may not make loans to a credit union service organization in which it is affiliated in an amount exceeding ten percent of its equity net worth.
3. ~~Any credit union currently holding an investment in a credit union service organization shall apply to the board for approval to engage in any additional service or activity.~~

**History:** Effective January 1, 2007; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-06-06

**13-03-23-08. Examinations.** A credit union shall allow the commissioner or the commissioner's examiner, at the commissioner's discretion, to inspect or examine all the books or records of the credit union service organization for the purpose of determining compliance with this chapter and to determine the value of the credit union's investment or loans. In order to accomplish the foregoing, each credit union must have a written agreement in place with the credit union service organization, prior to investing in or lending to the credit union service organization, providing that the credit union service organization will:

1. Provide the department with the right to inspect or examine all records of the credit union service organization;
2. Account for all its transactions in accordance with generally accepted accounting principles;
3. Prepare quarterly financial statements and provide the credit union with a copy of these statements within forty-five days of the quarter end; and
4. Comply with applicable federal, state, and local laws.

**History:** Effective January 1, 2007; amended effective January 1, 2013.

**General Authority:** NDCC 6-01-04

**Law Implemented:** NDCC 6-01-04, 6-01-09, 6-06-06, 6-06-08



**TITLE 30**  
**GAME AND FISH DEPARTMENT**



## JANUARY 2012

### CHAPTER 30-02-02 FALCONRY

Section	
30-02-02-01	Definitions
30-02-02-02	License Requirements
30-02-02-03	Application Procedures <u>and Duration and Cost of Licenses</u>
30-02-02-04	License Conditions
30-02-02-05	Classes of Licenses
30-02-02-06	Examination
30-02-02-07	Facilities and Equipment
30-02-02-08	Waiver of Examination Requirements <u>[Repealed]</u>
30-02-02-09	Marking
30-02-02-10	Restrictions for Taking of Raptors From the Wild
<u>30-02-02-10.1</u>	<u>Restrictions on Importation - Hybrids and Nonindigenous Raptors</u>
30-02-02-11	Possession of Raptors Prior to Enactment of Rules
30-02-02-12	Release of Birds to Wild
30-02-02-13	Temporary Care by Authorized Persons
30-02-02-14	Reporting
30-02-02-15	Duration and Cost of Licenses <u>[Repealed]</u>
<u>30-02-02-15.1</u>	<u>Killing of Protected Species</u>
30-02-02-16	Other Restrictions and Provisions
<u>30-02-02-17</u>	<u>Penalties</u>

#### **30-02-02-01. Definitions. For purposes of this chapter:**

- ~~1. "Department" means the North Dakota game and fish department.~~
- ~~2. "Falconry" means the sport of taking or attempting to take quarry (any species of animal) by means of a trained raptor.~~
- ~~3. "Replacement bird" means a raptor obtained to replace one which has died in captivity, has escaped, or is released to the wild.~~
- ~~4. "Service" means the United States fish and wildlife service.~~

- ~~5. "Take" or "obtain" means to trap, capture, or acquire by means of transfer a raptor for the purposes of falconry.~~
1. "Department" means the North Dakota game and fish department.
  2. "Eyas raptors" means young raptors not capable of flight or a term for a young bird from time of its hatching until its normal departure from the nest. Also referred to as a nestling or chick.
  3. "Falconry" means the sport of taking quarry (any species of animal) by the use of trained raptors.
  4. "Hacking" is the temporary release of a raptor held for falconry to the wild so that it may learn to hunt on its own.
  5. "Hunt" or "hunting" means pursuing, taking, attempting to take, or killing any game animals, rabbits, and game birds and searching for or attempting to locate or flush any game animals, rabbits, and game birds.
  6. "Hybrid" means offspring of two distinct raptor species and any progeny of those birds.
  7. "Imprint", for the purposes of falconry, means a bird that is hand-raised in isolation from the sight of other raptors from two weeks of age until it has fledged and has identified itself with humans rather than its own species. An imprinted bird is considered to be so for its entire lifetime.
  8. "Licensee" mean a person who has been issued a valid North Dakota falconry license or a license from another state that complies with federal falconry standards.
  9. "Nonindigenous" means those raptors not listed in the most current birds of North Dakota field checklist.
  10. "Passage raptors" means first-year raptors capable of sustained flight.
  11. "Raptor" means a migratory bird of the family accipitridae, excluding bald and golden eagles, falconidae, or strigidae.
  12. "Replacement bird" means a raptor obtained to replace one which has died in captivity, has escaped, or is released to the wild.
  13. "Service" means the United States fish and wildlife service.
  14. "Sponsor" means resident master class licensees or resident general class licensees with at least three years of experience at the general class level. A sponsor may not have more than two apprentices at any one time.

15. "Take" or "obtain" means to trap, capture, or acquire by means of transfer a raptor for the purposes of falconry.
16. "Wild raptors" means an animal in its original natural state of existence, not domesticated nor cultivated, and is considered to be so for its entire life.

**History:** Amended effective December 1, 1982; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03

### **30-02-02-02. License requirements.**

1. A valid North Dakota falconry license is required before any resident may take, possess, sell, barter, or transport a raptor for falconry purposes or practice falconry in North Dakota.
2. A nonresident must have a valid ~~joint state and federal~~ falconry license issued by the state or country in which the licensee resides in order to possess or transfer a raptor for falconry purposes or practice falconry in North Dakota. ~~In addition, any nonresident licensee who wishes to practice falconry in North Dakota must purchase the appropriate North Dakota nonresident hunting licenses.~~ Nonresidents must comply with subsections 6 and 7 of section 30-02-02-04, subsection 5 of section 30-02-02-07, and sections 30-02-02-10 and 30-02-02-15.
3. Any nonresident licensee who wishes to practice falconry in North Dakota must first register on the North Dakota game and fish department website (gf.nd.gov), or through any department office, prior to participating.
4. Nonresident falconers relocating to North Dakota and in possession of a raptor must obtain a state license within one hundred twenty days.
5. If a licensee moves to a new state, tribe, or territory, within thirty days the licensee must inform both the former and the new licensing authority for the new place of residence of the address change.

Any person who violates ~~this section~~ subsection 3, 4, or 5 is guilty of a noncriminal offense and shall pay a ~~one~~ two hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03

### **30-02-02-03. Application procedures and duration and cost of licenses.**

An applicant who wishes to take, possess, sell, barter, or transport a raptor for falconry purposes, or practice falconry as a resident of North Dakota must submit an application for a falconry license to the department.

1. Application forms must be obtained from the department and will include the following information:
  1. a. Applicant's name and permanent home address.
  2. b. Applicant's birth date, social security number, and driver's license number.
  3. c. A list of number, species, age (if known), sex (if known), date of acquisition, and source of raptors already legally held in the applicant's possession.
2. Any applicant who has not possessed a resident North Dakota falconry license within the previous twelve months must also include a brief description of personal experience with the sport of falconry, if any, including the most recent license class and number of years of active experience at that level, the year of the written falconry examination, and the state, province, or country where the most recent license was held.
3. A license is valid when issued by the department and expires on June thirtieth of the third calendar year after it is issued.
4. The application and fee must be received by the department by June fifteenth of the license renewal year.
5. The fee for falconry licenses to individuals under eighteen years of age is fifty dollars.
6. The fee for falconry licenses to individuals eighteen years of age and older is one hundred fifty dollars.

~~In addition, any applicant who has not possessed a resident North Dakota falconry license within the previous twelve months must also include a brief description of personal experience with the sport of falconry, if any, including the most recent permit (license) class and number of years of active experience at that level, the date (year) of the written falconry examination, and the state, province, or country where the most recent permit was held.~~

**History:** Amended effective January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03

**30-02-02-04. License conditions.** In addition to the general conditions, every license issued shall be subject to the following special conditions:

1. ~~A licensee may transfer a raptor to another licensee if the transaction occurs entirely within North Dakota, the department has been notified in writing of such transfer, and no money or other consideration is~~

~~involved. A licensee may not purchase, sell, trade, barter, or receive any compensation for wild raptors. Wild raptors may only be gifted.~~

- ~~2.~~ A licensee may transfer a raptor to another licensee in an interstate transaction if prior written approval of the department and involved state agencies is obtained and no money or other consideration is involved in the transaction.
- ~~3.~~ 2. A licensee may purchase, sell, trade, or barter any lawfully possessed raptor that is bred in captivity under authority of a federal raptor propagation permit and banded with a numbered seamless marker metal band. All transactions of this type are subject to additional conditions specified by 50 CFR 21.30(d)(6).
- ~~4.~~ 3. A licensee may not propagate raptors without prior acquisition of a valid federal raptor propagation permit as described in 50 CFR ~~21.28(d)(9)~~ 21.30 and as required by North Dakota Century Code chapters 20.1-09 and 36-01. Raptor propagation is subject to all conditions specified by ~~50 CFR 21.30, as amended, and 50 CFR 21.28(d)(9).~~
- ~~5.~~ 4. A licensee may not take, purchase, receive, or otherwise acquire, sell, barter, transfer, or otherwise dispose of any raptor unless such licensee submits electronically a form 3-186A (migratory bird acquisition/disposition report) for each bird possessed within five days of acquisition, disposition, or death of the bird (<http://permits.fws.gov/186A>).
5. A licensee must keep copies of all electronic database submissions of each falconry raptor for five years after the disposition, transfer, loss, or death of the bird.
6. A raptor may not be possessed under authority of a falconry permit unless the licensee has a properly completed form 3-186A (migratory bird acquisition/disposition report) for each bird possessed. If a raptor is stolen, missing, or lost, the licensee must report the incident to the department and the United States fish and wildlife service regional law enforcement office within twenty-four hours.
7. All raptor species taken from the wild must be reported on form 3-186A (migratory bird acquisition/disposition report) to the issuing office within five days of taking. A raptor removed from the wild may not be banded with a seamless numbered band. Any peregrine falcon (*falco peregrinus*), gyrfalcon (*falco rusticolus*), or Harris hawk (*parabuteo unicinctus*), which are considered sensitive species, must be banded if possessed for falconry purposes, in accordance with section 30-02-02-09 and 50 CFR 21.29(h). A license or legible copies of a license must be in the licensee's immediate possession if trapping, transporting, working with, or flying falconry raptors.

- 8- ~~The loss or removal of any band must be reported to the issuing office within five working days of the loss. The lost or removed band must be replaced by a permanent, nonreusable band supplied by the service. A form 3-186A (migratory bird acquisition/disposition report) must be filed in accordance with subsection 5 reporting the loss of the band and rebanding.~~
- 9- ~~A licensee may not sell, purchase, or barter or offer to sell, purchase, or barter any raptor unless the raptor is marked on the metatarsus by a seamless, numbered band supplied by the service.~~

Any person who violates this section is guilty of a noncriminal offense and shall pay a fifty two hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03, 20.1-02-05

**Law Implemented:** NDCC 20.1-14-03; 50 CFR

### **30-02-02-05. Classes of licenses.**

#### **1. Apprentice class.**

- a. ~~A licensee~~ An individual must be at least fourteen years ~~old~~ of age to be licensed. If under eighteen years of age, a parent or legal guardian must also sign the application and is responsible for the licensee's activities.
- b. Before applying for an apprentice class license, ~~a potential~~ an applicant must first obtain a ~~willing~~ sponsor, ~~pass a written examination~~ answer correctly at least eighty percent of the questions on an examination administered by the department at the Bismarck office, and pass an equipment and facilities inspection. An apprentice licensee must have a sponsor during the entire apprenticeship.
- c. ~~Sponsors must be master class licensees or general class licensees with at least three years of experience at the general class level. A sponsor may not have more than three apprentices at any one time. An apprentice class licensee must have a sponsor during the entire apprenticeship. An apprentice must have a letter from the apprentice's sponsor and provide a copy to the department, stating that the apprentice will assist, as necessary, in:~~
  - (1) Learning about the general care of and training of raptors held for falconry;
  - (2) Learning about relevant wildlife laws and regulations; and

(3) Deciding what species of raptor is appropriate to possess while an apprentice.

- d. ~~A~~ An apprentice licensee may only possess ~~only~~ an a wild-caught American kestrel (*falco sparverius*) or a wild-caught or nonimprinted captive-bred red-tailed hawk (*buteo jamaicensis*); ~~which must be taken from the wild by the licensee as provided in 50 CFR 21.29(e)(1)(iv). A licensee may not possess more than one raptor and may not obtain more than one replacement bird during any twelve-month period.~~
- e. ~~A licensee may take raptors from the wild only during the August 25 through December 3 period. An apprentice licensee may not possess more than one raptor at any time and may not obtain more than one replacement bird during the calendar year.~~
- f. An apprentice licensee may not possess a raptor taken from the wild as a nestling.
- g. An apprentice licensee may not possess a bird that is imprinted on humans.

**2. General class.**

- a. ~~A licensee~~ An individual must be at least eighteen years ~~old~~ of age to receive a general class license.
- b. ~~A licensee~~ An applicant must have at least two years' active experience in the practice of falconry at the apprentice class level, or its equivalent, and experience must include maintaining, flying, and hunting a raptor for at least four months in each year. Falconry school programs or education may not be substituted to shorten the period of two years at the apprentice level.
- c. When an apprentice class licensee applies for a general class license, the licensee's sponsor must submit to the department a report that details the applicant's progress in falconry and qualifications and includes a recommendation for the general class license.
- d. A general licensee may not possess more than two raptors at any time and may not obtain more than two raptors for replacement birds during any ~~twelve-month period, as provided for in 50 CFR 21.29(e)(2)(iii)~~ calendar year.
- e. A general licensee may not take, transport, or possess any golden eagle; ~~a licensee may not take, transport, or possess any species listed as threatened or endangered in 50 CFR 17; but a licensee may transport or possess individuals of such species~~

~~that are captive bred, in accordance with 50 CFR 17, bald eagle, white-tailed eagle, or Stellar's sea-eagle.~~

- f. A general licensee may not take, transport, or possess any wild raptors listed as threatened or endangered in 50 CFR 17, but may transport or possess individuals of such species that are captive-bred, in accordance with 50 CFR 17.
- g. A general licensee may possess any other wild raptor species, nonindigenous, captive-bred individuals, and hybrids thereof.

### 3. **Master class.**

- a. ~~A licensee~~ An individual must have at least five years' active experience in the practice of falconry at the general class level, or its equivalent, including maintaining, flying, and hunting raptors for at least four months in each year.
- b. A master licensee may not take, transport, or possess any wild raptor species listed as endangered in 50 CFR 17, but may transport or possess individuals of such species that are captive bred, in accordance with 50 CFR 17.
- c. A master licensee may not take, in any twelve-month period, more than one raptor listed as threatened in 50 CFR 17, and then only in accordance with 50 CFR 17.
- d. A ~~Licensee~~ master licensee may not possess more than three raptors at any time and may not obtain more than two raptors ~~taken from the wild as replacements~~ for replacement birds during any ~~twelve-month period~~ calendar year.
- e. A master licensee may not take, transport, or possess any golden eagle, bald eagle, white-tailed eagle, or Stellar's sea-eagle.
- f. A master licensee may possess any other wild raptor species, nonindigenous, captive-bred individuals, and hybrids thereof.

Any person who violates this section is guilty of a noncriminal offense and shall pay a ~~fifty~~ two hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR 17; 50 CFR 21.29

### **30-02-02-06. Examination.**

- 1. Before ~~any~~ a North Dakota apprentice falconry license is issued, the applicant shall be required to answer correctly at least eighty percent

of the questions on a supervised examination provided or approved by the service and administered by the department at the Bismarck office, relating to basic biology, care and handling of raptors, literature, laws, regulations, or other appropriate subject matter. An individual has five years from the date of a successful examination to obtain the apprentice license. This requirement does not apply to license renewals under section ~~30-02-02-15~~ 30-02-02-03.

2. If a license has lapsed for less than five years, the license will be issued at the level the licensee held previously if proof of certification at that level is provided.
3. If a license has lapsed for five years or more, a licensee must correctly answer at least eighty percent of the questions on an examination administered by the department at the Bismarck office. If the licensee passes the examination, the license may be reinstated at the level previously held. The facilities must pass a facility inspection before the licensee may possess a falconry bird.
4. If the examination is failed, the applicant cannot retake the examination the same day.

Any person who violates this section is guilty of a noncriminal offense and shall pay a two hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03

#### **30-02-02-07. Facilities and equipment.**

1. Before a ~~North Dakota~~ falconry license is issued, the applicant's raptor housing facilities and falconry equipment shall be inspected ~~and certified~~ by a representative of the department ~~as meeting and must meet~~ the following standards; ~~this in this section.~~ This requirement does not apply to license renewals under section ~~30-02-02-15~~ 30-02-02-03, although each licensee's facilities and equipment ~~should be inspected at least every three years:~~ shall be open to inspection.
4. 2. **Housing facilities.** The primary consideration for raptor housing facilities whether indoors (mews) or outdoors (weathering area) is protection from the environment, predators, and undue disturbance. The applicant shall have the following facilities:
  - a. Indoor facilities (mews) shall be large enough to allow easy access for caring for the raptors housed in the facility. If more than one raptor is to be kept in the mews, the raptors shall be tethered or separated by partitions and the area for each bird shall be large enough to allow the bird to fully extend its wings. There shall

be at least one window, protected on the inside by vertical bars, spaced narrower than the width of the bird's body, and a secure door that can easily be closed. The floor of the mews shall permit easy cleaning and shall be well drained. Adequate perches shall be provided.

- b. Outdoor facilities (weathering area) shall be fenced and covered with netting or wire, or roofed to protect the birds from disturbances and attack by predators. The area shall be large enough to ensure that the birds cannot strike any obstacle when flying from the perch. Protection from excessive sun, wind, and inclement weather shall be provided for each bird. Adequate perches shall be provided.
- c. Falconry facilities may be on property owned by another person. However, the licensee must provide daily care. Regardless of location, the facilities must meet the facility standards.
- d. The licensee must submit a signed and dated statement showing that the licensee or the property owner, if facilities are not on property that the licensee owns, agrees that the falconry facilities, equipment, and raptors may be inspected without advance notice from department authorities at any reasonable hours of the day. Inspections must be in the presence of the licensee.
- e. The licensee must inform the department within five business days if the location of the facilities changes.

2- 3. **Equipment.** The following items shall be in the possession of the applicant before the applicant can obtain a license:

- a. Jesses. At least one pair of alkymer jesses or similar type constructed of pliable, high-quality leather or suitable synthetic material to be used when any raptor is flown free. Traditional one-piece jesses may be used on raptors when not being flown;
- b. Leashes and swivels. At least one flexible, weather-resistant leash and one strong swivel of acceptable falconry design;
- c. Bath container. At least one suitable container, two to six inches [5 to 15.25 centimeters] deep and wider than the length of the raptor, for drinking and bathing for each raptor;
- d. Outdoor perches. At least one weathering area perch of an acceptable design shall be provided for each raptor; and
- e. Weighing device. A reliable scale or balance suitable for weighing the raptor or raptors held and graduated to increments of not more than one-half ounce [15 grams] shall be provided.

- ~~3.~~ 4. **Maintenance.** All facilities and equipment shall be kept at or above the preceding standards at all times or license will be subject to revocation.
- ~~4.~~ 5. **Transportation – ~~Temporary holding and temporary housing.~~** ~~A raptor may be transported or held in temporary facilities which shall be provided with an adequate perch and protected from extreme temperature and excessive disturbance, for a period not to exceed thirty days.~~
- a. A licensee must be sure the birds have a suitable perch and are protected from extreme temperatures, wind, and excessive disturbance when the licensee is transporting it, using it for hunting, or is away from home with it.
  - b. A licensee may house a raptor in temporary facilities outside of the licensee's permanent facilities when not transporting or using it for hunting for no more than one hundred twenty consecutive calendar days if the bird has a suitable perch and is protected from predators, domestic animals, extreme temperatures, wind, and excessive disturbance.
  - c. With a valid falconry license, a falconer may possess and transport for falconry purposes a lawfully possessed raptor through the state. If the raptor will be flown in the state, the licensee must comply with section 30-02-02-10.
  - d. Inspections. Falconry birds, facilities, equipment, and records may be inspected during business hours on any day of the week by the department.

Any person who violates this section is guilty of a noncriminal offense and shall pay a fifty two hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03, 20.1-02-15

**Law Implemented:** NDCC 20.1-14-03

**30-02-02-08. Waiver of examination requirements.** ~~In recognition of federal falconry standards (50 CFR 21, sections 28 and 29), the department may waive the examination under section 30-02-02-06 before issuing a North Dakota falconry license to applicants showing proof of a valid falconry permit or license current within the previous two years in another state meeting standards for an examination (see section 30-02-02-06) and requirements for facilities and equipment (see section 30-02-02-07). Repealed effective January 1, 2013.~~

**History:** Amended effective January 1, 2000.

**General Authority:** NDCC ~~20.1-14-03~~

**Law Implemented:** NDCC ~~20.1-14-03; 50 CFR 21~~

**30-02-02-09. Marking.** All peregrine falcons (~~falco peregrinus~~), gyrfalcons (~~falco rusticolis~~), and Harris hawks (~~parabuteo unicinctus~~), which are considered sensitive species, must be marked in accordance with federal falconry standards 50 CFR 21.29(h) if possessed for falconry purposes:

1. Any peregrine falcon, gyrfalcon, or Harris hawk, ~~except a captive-bred raptor lawfully marked by a numbered, seamless band issued by the service, wild northern goshawk (*accipiter gentilis*), Harris's hawk (*parabuteo unicinctus*), peregrine falcon (*falco peregrinus*), or gyrfalcon (*falco rusticolus*) possessed for falconry purposes~~ must be banded only with a permanent, nonreusable, numbered band issued by the service leg band that the department will supply.
2. Any peregrine falcon, gyrfalcon, or Harris hawk possessed for falconry purposes ~~must be banded at all times. Loss or removal of any band must be reported to the issuing office within five working days of the loss and must be replaced with a permanent, nonreusable, numbered band supplied by the service. A raptor bred in captivity must be banded with a numbered seamless metal band.~~
3. ~~The alteration, counterfeiting, or defacing of a marker is prohibited except that licensees may remove the rear tab on markers and may smooth any imperfect surface provided the integrity of the marker and numbering are not affected. A raptor taken from the wild may not be banded with a numbered seamless metal band.~~
4. A raptor may be implanted with an international organization for standardization-compliant (134.2 kHz) microchip in addition to the band.
5. The alteration, counterfeiting, or defacing of a marker is prohibited except that licensees may remove the rear tab on markers and may smooth any imperfect surface provided the integrity of the marker and numbering are not affected.
6. The loss or removal of any band must be reported within five days and the licensee must request a service nonreusable band from the department. The licensee must submit the required information electronically immediately upon rebanding the raptor (<http://permits.fws.gov/186A>).
7. If a licensee documents health or injury problems for a raptor that are caused by the band, the licensee shall contact the department and request an exemption to the requirement. In that case, the licensee must keep a copy of the exemption paperwork with the licensee when transporting or flying the raptor.

Any person who violates this section is guilty of a noncriminal offense and shall pay a ~~fifty~~ two hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR 21.29

### **30-02-02-10. Restrictions for taking of raptors from the wild.**

1. Any licensee interested in obtaining a raptor for falconry purposes must submit a written request to the department indicating the species intended to be taken. The licensee must obtain permission in writing a permit from the department prior to actual taking, regardless of potential means or source of acquisition. The licensee shall have the permit in the licensee's immediate possession while conducting trapping activities. The time period for the year of take is May fifteenth to January thirty-first.
  - a. For a nestling, the request must be submitted to the department before May first of the year of take.
  - b. For passage birds, the request must be submitted to the department after August first of the year of take.
  - c. An apprentice may capture one wild raptor per calendar year.
  - d. Master or general class licensees may capture up to two wild raptors per calendar year.
  - e. Take will be issued on a first-come, first-served basis. If requests for a limited number of species arrive simultaneously, a random draw will occur.
2. ~~Upon approval of a request to take sensitive species of raptors (see section 30-02-02-09) from the wild, the department shall provide the licensee with the appropriate bands in accordance with federal falconry standards (50 CFR 21.29). Any unused bands must be returned to the department no later than thirty days following the end of the season, as specified in subsection 4.~~ Only the following species may be permitted to be taken from the wild: sharp-shinned hawk (accipiter striatus), Cooper's hawk (accipiter cooperii), northern goshawk (accipiter gentilis), red-tailed hawk (buteo jamaicensis), American kestrel (falco sparverius), merlin (falco columbarius), gyrfalcon (falco rusticolus), or prairie falcon (falco mexicanus).
3. ~~Young birds not yet capable of flight (eyases) may only be taken by a resident master or general class licensee. No more than two eyases may be taken by a licensee during any calendar year. When a properly~~

~~licensed falconer takes an eyas or eyases, at least one eyas must be left in the respective nest.~~

4. ~~3.~~ Raptors may be taken from the wild only during the following time periods, except that a marked raptor may be retrapped at any time:
  - a. ~~April 10, 15, and 20.~~
  - b. ~~a. May 26 fifteenth through July 42: fifteenth; and~~
  - c. ~~b. August 25 September first through December 31 January thirty-first.~~
5. ~~4.~~ Only Any raptor trapped over one year of age must be released, except American kestrels (falco sparverius) may be taken when over one year old, except that any raptor other than endangered or threatened species taken under a depredation (or special purpose) permit may be used for falconry by general and master falconers of age and only by apprentice licensees.
6. ~~Nonresident falconers may take raptors from the wild in North Dakota only with written authorization from the department director, only during the August 25 through December 31 period in even-numbered calendar years, and only if in possession of a current North Dakota nonresident hunting license for small game. Nonresident take of wild raptors in North Dakota is further restricted as follows:~~
  - a. ~~The total nonresident take of wild raptors in North Dakota is limited to a single written authorization allowing take of one individual raptor in any even calendar year;~~
  - b. ~~A request by a nonresident to take a wild raptor in North Dakota must be received by the department before August of the same calendar year in which a raptor is to be taken; and~~
  - c. ~~Nonresident licensees requesting to take a raptor from the wild in North Dakota must have a valid, current falconry license from a state that allows nonresident take of wild raptors for falconry purposes. A copy of the licensee's state regulations pertaining to allowance of nonresident take of wild raptors must accompany any request to take a raptor from the wild in North Dakota, along with photocopy proof of falconry licenses or permits.~~
5. Eyas raptors may only be taken by resident general or master class licensees. At least one young must be left in the nest or aerie from which a nestling is taken.
6. Any bird captured unintentionally must be released immediately.

7. Any bird injured by a licensee's trapping efforts must be reported to the department staff. The bird will not count against the licensee's allowed take or possession limit but will be deducted from the state's total take for the year.
8. Wild raptors may never be placed on a raptor propagation permit.
9. Wild raptors may be transferred to a nonresident licensee only after the bird has been used in falconry for at least two years.
10. Licensees, prior to trapping a wild raptor on public land, must contact the managing agency for special use permit requirements.
11. A raptor may not be taken at any time or in any manner that violates any law of the state, tribe, or territory on whose land the licensee is trapping.
12. If a licensee gifts a bird taken from the wild to another licensee in the same year it is captured, the bird will count as one of the raptors allowed to be taken from the wild that year by the person who captured it. It will not count as a capture by the recipient, though it will always be considered a wild bird.
13. Raptors removed from the wild for falconry are always considered "wild" raptors, no matter how long such a bird is held in captivity or whether it is transferred to another licensee or license type.
14. Licensees may not acquire raptors from wildlife rehabilitators for use in falconry. If assisting a permitted migratory bird rehabilitator to condition raptors in preparation for their release to the wild, the licensee must meet the department's wildlife rehabilitation rules and facilities standards.
15. A licensee that captures a bird marked for scientific purposes (e.g., marked with a federal bird banding laboratory aluminum band, has any other band, research marking, or has a transmitter attached) must release the bird immediately. Licensees must report the band number and all other relevant information to the federal bird banding laboratory at 1-800-327-2263 and may try to contact the researcher to inform the researcher of the location of the bird.
16. Nonresident falconers may take only passage raptors from the wild and only with written authorization from the department director, and only if in possession of a current North Dakota nonresident hunting license for small game.
  - a. The nonresident take of wild raptors shall be allowed only in even-numbered calendar years and the total take shall be a single raptor.

- b. A request by a nonresident to take a wild raptor will not be accepted by the department until after September first of the same calendar year in which a raptor is to be taken.
- c. Nonresident licensees requesting to take a raptor from the wild must have a valid falconry license from a state that allows nonresident take of wild raptors for falconry purposes. A copy of the licensee's state regulations pertaining to allowance of nonresident take of wild raptors must accompany any request to take a raptor from the wild, along with photocopy proof of the falconry license.
- d. The fee for a nonresident permit to take a wild raptor is five hundred dollars.

~~Any person who violates this section is guilty of a noncriminal offense and shall pay a two hundred dollar fee.~~

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR 21.29

**30-02-02-10.1. Restrictions on importation - Hybrids and nonindigenous raptors.**

1. Licensees must comply with state board of animal health regulations before importing any raptor, including hybrids, nonindigenous, captive-bred, or wild raptor from another state, territory, or country into North Dakota.
2. The licensee shall provide a copy of all documents, permits, and other statements required by the state board of animal health to the department's veterinarian.
3. When flown free, a hybrid raptor must have at least two attached working radio transmitters and a nonindigenous raptor must have at least one attached working radio transmitter.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR 21.29

**30-02-02-11. Possession of raptors prior to enactment of rules.**

1. ~~A person~~ An individual who possesses a lawfully acquired raptor before equal to or less than the number and species allowed under current rules and prior to the enactment of these regulations and ~~who fails to meet the~~ meets all previous license requirements shall be allowed to retain the raptors but must comply with new regulations within two years

~~except as allowed under subsection 2. All such birds shall be identified with markers supplied by the service and cannot be replaced if death, loss, release, or escape occurs.~~

2. ~~A person~~ An individual who possesses extra raptors ~~before~~ prior to the enactment of these rules in excess of the number currently allowed under the ~~person's~~ individual's class license shall be allowed to retain the extra raptors. ~~All such birds shall be identified with markers supplied by the service and no~~ No replacement can occur, ~~nor may any~~ or additional raptor ~~be~~ obtained until the number in possession is at least one less than the total number currently authorized ~~by the class of license held by the licensee.~~

Any person who violates this section is guilty of a noncriminal offense and shall pay a two hundred dollar fee.

**History:** Amended effective January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03

~~**30-02-02-12. Release of birds to wild.** A falconry licenseholder shall obtain written authorization from the department before any species not indigenous to North Dakota is intentionally released to the wild, at which time the marker from the released bird shall be removed and surrendered to the department. The marker from an intentionally released bird which is indigenous to North Dakota shall also be removed and surrendered to the department. A standard federal bird band shall be attached to such birds by the state or service-authorized federal bird bander whenever possible.~~

1. Hybrids of any kind, nonindigenous birds, imprinted wild raptors, and captive-bred birds may not be intentionally released to the wild at any time. Any release not reported within twenty-four hours will be deemed intentional.
2. Only wild raptors trapped in North Dakota may be released in North Dakota.
3. A bird may not be retrapped after release.
4. Raptors taken from the wild may be released back to the wild only at an appropriate time of year and an appropriate location, as approved by the department. The falconry band must be removed prior to release and the release of the bird must be reported in the electronic database.
5. Hacking of hybrids and raptors nonindigenous to North Dakota is not allowed. Intentional hacking back to the wild is not allowed.

Any person who violates this section is guilty of a noncriminal offense and shall pay a ~~seventy-five~~ two hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR

**30-02-02-13. Temporary care by authorized persons.** ~~A raptor possessed under authority of a falconry license may be temporarily held by a person other than the licensee for maintenance and care for a period not to exceed thirty days, only if the person providing temporary care is otherwise authorized to possess raptors. The raptor must be accompanied at all times by a properly completed form 3-186A (migratory bird acquisition/disposition report) designating the permittee as the possessor of record and by a signed, dated statement from the permittee authorizing the temporary possession.~~

1. Another falconry licensee may care for a raptor or raptors at either licensee's facilities for up to one hundred twenty consecutive calendar days. The licensee providing care must have a signed and dated statement authorizing the temporary possession, plus a copy of United States fish and wildlife service form 3-186A that shows the possessor of each of the raptors. The statement must include information about the time period for which the licensee will keep the raptors, and about what the licensee is allowed to do with the raptors. If the person caring for the raptors holds the appropriate level falconry license, the licensee caring for the raptors may fly the raptors in whatever way authorized, including hunting. This care of raptors may be extended indefinitely in extenuating circumstances, such as illness, military service, or a family emergency. The department may consider such instances on a case-by-case basis.
2. An individual who does not have a falconry license may care for falconry birds a licensee possesses for up to forty-five consecutive calendar days. The raptors must remain in the licensee's facilities and the individual caring for the raptors may not fly them for any reason. This care of the raptors may be extended indefinitely in extenuating circumstances, such as illness, military service, or a family emergency. The department may consider such instances on a case-by-case basis.

Any person who violates this section is guilty of a noncriminal offense and shall pay a two hundred dollar fee.

**History:** Amended effective January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR

**30-02-02-14. Reporting.** ~~During July of each license renewal year, a licensee shall submit a falconry report to the department. A report shall contain the~~

following: The department will periodically require surveys detailing hunting activity for the year or any other falconry-related information requested by the department.

- ~~1. A listing of all raptors in possession on June thirtieth of the year in which the report is filed by species, marker number if marker required (see subsection 8 of section 30-02-02-04 and section 30-02-02-09), sex (if known), age (if known), and date and where acquired;~~
- ~~2. A listing of all raptors obtained since the previous report or license application, but no longer possessed, by species, marker number if marker required (see subsection 8 of section 30-02-02-04 and section 30-02-02-09), sex (if known), age (if known), date received and date relinquished, where obtained, and to whom or how it was relinquished, whether by escape, death, or release; and~~
- ~~3. Any other information required by the department.~~

Any person who violates this section is guilty of a noncriminal offense and shall pay a fifty one hundred dollar fee.

**History:** Amended effective April 1, 1986; January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR

~~**30-02-02-15. Duration and cost of licenses.** A license or the renewal of a license is valid when issued by the department and expires on June thirtieth of the third calendar year after it is issued. The triannual fee for falconry licenses (all classes) is fifty dollars. Repealed effective January 1, 2013.~~

~~**History:** Amended effective January 1, 2000.~~

~~**General Authority:** NDCC 20.1-14-03~~

~~**Law Implemented:** NDCC 20.1-14-03~~

#### **30-02-02-15.1. Killing of protected species.**

1. It is unlawful to hunt protected wildlife species except when properly licensed for the species being hunted and during an open season and as described by the governor's proclamation. Any licensee whose falconry raptor kills harmless wild birds or game birds as allowed by the governor's proclamation that is out of season or of the wrong species or sex shall leave the dead wildlife where it lies, except that the raptor may feed upon the dead wildlife before leaving the site of the kill. The licensee shall report the kill to the department within twenty-four hours. Kills not reported within twenty-four hours will be deemed a violation.
2. In practicing falconry, licensees must ensure that their activities do not cause the take of federally listed threatened or endangered wildlife. "Take" under the Endangered Species Act means "to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage

in any such conduct" (Endangered Species Act § 3(19) [16 U.S.C. 1532(19)]. "Harass" means any act that may injure wildlife by disrupting normal behavior, including breeding, feeding, or sheltering, and harm or an act that actually kills or injures wildlife [50 CFR 17.3]. To obtain information about threatened or endangered species contact the United States fish and wildlife service ecological services field office in Bismarck.

3. A licensee must report a take of any federally listed threatened or endangered species within twenty-four hours to the United States fish and wildlife service ecological services field office in Bismarck.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03; 50 CFR 21.29

### **30-02-02-16. Other restrictions and provisions.**

1. Feathers that are molted or those feathers from birds held in captivity that die may be retained and exchanged by licensees only for imping (replacing a damaged feather with a molted feather) purposes. Feathers may not be bought, sold, or bartered between licensees. Feathers not kept for imping must be destroyed (burned or buried) or the feathers may be donated to a person or institution with a valid permit to have them.
2. ~~It is unlawful to intentionally loose raptors against protected wildlife species except when explicitly open to hunting by governor's proclamation. Any licensee whose hunting raptor accidentally kills wildlife that is out of season or of the wrong species or sex shall leave the dead wildlife where it lies, except that the raptor may feed upon the dead wildlife before leaving the site of the kill. The carcasses of falconry birds that die must be burned, buried, or otherwise destroyed within ten days of the death of the bird or after final examination by a veterinarian to determine cause of death.~~
3. The department may request that any master class licensee voluntarily serve, for an indefinite period, as a representative to administer examinations under section 30-02-02-06, to conduct inspections of facilities and equipment (see section 30-02-02-07), and to provide general counsel on falconry issues.
4. A general or master licensee may conduct conservation education activities but no live wild raptors held under authority of a falconry license may be used in the presentation. The licensee may not be paid for the presentation. The presentation must address conservation education, including the biology, ecological roles, and conservation needs of raptors and other migratory birds, and general rules and regulations of falconry. The licensee is responsible for all liability

associated with conservation education programs the licensee undertakes.

5. A licensee may allow photography, filming, or other such uses of captive-bred falconry raptors to make movies or other sources of information on the practice of falconry or on the biology, ecological roles, and conservation needs of raptors and other migratory birds, though the licensee may not be paid for doing so and no live wild raptors held under authority of a falconry license may be used.
  - a. A licensee may not use falconry raptors to make movies or commercials or in other commercial ventures that are not related to falconry.
  - b. A licensee may not use falconry raptors for entertainment; advertisements; promotion or endorsement of any products, merchandise, goods, services, meetings, or fairs; or as a representation of any business, company, corporation, or other organization.
6. Any licensed falconer wishing to use the falconer's captive-bred birds for abatement for commercial purposes must send a written request to the department and will be evaluated on a case-by-case basis. The licensee must possess a special purpose abatement permit from the service. Monetary compensation may not be accepted by falconers conducting abatement activities.
7. A surviving spouse, executor, administrator, or other legal representative of a deceased falconry licensee may transfer any bird held by the licensee to another authorized licensee within ninety days of the death of the falconry licensee. After ninety days, disposition of a bird held under the license is at the discretion of the department.
8. A visitor to the United States and practicing falconry in North Dakota must comply with the same restrictions for nonresident falconers and obtain the appropriate nonresident hunting licenses. The visitor may use any bird the visitor possesses legally in the visitor's country of residence, provided import of that species to the United States is not prohibited, and that proper importation permits to bring a raptor into the United States and North Dakota have been obtained. When flown free, any bird brought into this country must have two attached working radio transmitters.
9. A visitor to the United States may qualify for a temporary North Dakota falconry license appropriate for the visitor's experience. The visitor must answer correctly at least eighty percent of the questions on an examination administered by the department at the Bismarck office, and pass an equipment and facilities inspection. A holder of a temporary license may not take a bird from the wild to use in falconry.

The temporary license fee shall be the same as for falconry licenses under section 30-02-02-03.

Any person who violates this section is guilty of a noncriminal offense and shall pay a two hundred dollar fee.

**History:** Amended effective January 1, 2000; January 1, 2013.

**General Authority:** NDCC 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03

**30-02-02-17. Penalties.** Violation of any rule not designated as having a noncriminal penalty is considered a criminal violation as established in North Dakota Century Code title 20.1.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 20.1-02-04(22), 20.1-02-05(22), 20.1-14-03

**Law Implemented:** NDCC 20.1-14-03

**TITLE 33**  
**STATE DEPARTMENT OF HEALTH**



## JANUARY 2012

### CHAPTER 33-15-01

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

1. "Act" means North Dakota Century Code chapter 23-25.
2. "Air contaminant" means any solid, liquid, gas, or odorous substance or any combination thereof emitted to the ambient air.
3. "Air pollution" means the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or may be injurious to human health, welfare, or property or animal or plant life, or which unreasonably interferes with the enjoyment of life or property.
4. "Ambient air" means the surrounding outside air.
5. "ASME" means the American society of mechanical engineers.
6. "Coal conversion facility" means any of the following:
  - a. An electrical generating plant, and all additions thereto, which processes or converts coal from its natural form into electrical power and which has at least one single electrical energy generation unit with a generator nameplate capacity of twenty-five megawatts or more.
  - b. A plant, and all additions thereto, which processes or converts coal from its natural form into a form substantially different in chemical or physical properties, including coal gasification, coal liquefaction, and the manufacture of fertilizer and other products and which uses or is designed to use over five hundred thousand tons of coal per year.

- C. A coal beneficiation plant, and all additions thereto, which improve the physical, environmental, or combustion qualities of coal and are built in conjunction with a facility defined in subdivision a or b.
- 7. "Control equipment" means any device or contrivance which prevents or reduces emissions.
- 8. "Department" means the North Dakota state department of health.
- 9. "Emission" means a release of air contaminants into the ambient air.
- 10. "Excess emissions" means the release of an air contaminant into the ambient air in excess of an applicable emission limit or emission standard specified in this article or a permit issued pursuant to this article.
- 11. "Existing" means equipment, machines, devices, articles, contrivances, or installations which are in being on or before July 1, 1970, unless specifically designated within this article; except that any existing equipment, machine, device, contrivance, or installation which is altered, repaired, or rebuilt after July 1, 1970, must be reclassified as "new" if such alteration, rebuilding, or repair results in the emission of an additional or greater amount of air contaminants.
- 12. "Federally enforceable" means all limitations and conditions which are enforceable by the administrator of the United States environmental protection agency, including those requirements developed pursuant to title 40, Code of Federal Regulations, parts 60 and 61, requirements within any applicable state implementation plan, any permit requirements established pursuant to title 40, Code of Federal Regulations, 52.21 or under regulations approved pursuant to title 40, Code of Federal Regulations, part 51, subpart I, including operating permits issued under a United States environmental protection agency-approved program that is incorporated into the state implementation plan and expressly requires adherence to any permit issued under such program.
- 13. "Fuel burning equipment" means any furnace, boiler apparatus, stack, or appurtenances thereto used in the process of burning fuel or other combustible material for the primary purpose of producing heat or power by indirect heat transfer.
- 14. "Fugitive emissions" means solid airborne particulate matter, fumes, gases, mist, smoke, odorous matter, vapors, or any combination thereof generated incidental to an operation process procedure or emitted from any source other than through a well-defined stack or chimney.
- 15. "Garbage" means putrescible animal and vegetable wastes resulting from the handling, preparation, cooking, and consumption of food,

including wastes from markets, storage facilities, handling, and sale of produce and other food products.

16. "Hazardous waste" has the same meaning as given by chapter 33-24-02.
17. "Heat input" means the aggregate heat content of all fuels whose products of combustion pass through a stack or stacks. The heat input value to be used shall be the equipment manufacturer's or designer's guaranteed maximum input, whichever is greater.
18. "Incinerator" means any article, machine, equipment, device, contrivance, structure, or part of a structure used for the destruction of garbage, rubbish, or other wastes by burning or to process salvageable material by burning.
19. "Industrial waste" means solid waste that is not a hazardous waste regulated under North Dakota Century Code chapter 23-20.3, generated from the combustion or gasification of municipal waste and from industrial and manufacturing processes. The term does not include municipal waste or special waste.
20. "Inhalable particulate matter" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers.
21. "Installation" means any property, real or personal, including, but not limited to, processing equipment, manufacturing equipment, fuel burning equipment, incinerators, or any other equipment, or construction, capable of creating or causing emissions.
22. "Multiple chamber incinerator" means any article, machine, equipment, contrivance, structure, or part of a structure used to burn combustible refuse, consisting of two or more refractory lined combustion furnaces in series physically separated by refractory walls, interconnected by gas passage ports or ducts and employing adequate parameters necessary for maximum combustion of the material to be burned.
23. "Municipal waste" means solid waste that includes garbage, refuse, and trash generated by households, motels, hotels, and recreation facilities, by public and private facilities, and by commercial, wholesale, and private and retail businesses. The term does not include special waste or industrial waste.
24. "New" means equipment, machines, devices, articles, contrivances, or installations built or installed on or after July 1, 1970, unless specifically designated within this article, and installations existing at said stated time which are later altered, repaired, or rebuilt and result in the emission of an additional or greater amount of air contaminants.

25. "Opacity" means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.
26. "Open burning" means the burning of any matter in such a manner that the products of combustion resulting from the burning are emitted directly into the ambient air without passing through an adequate stack, duct, or chimney.
27. "Particulate matter" means any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than one hundred micrometers.
28. "Particulate matter emissions" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air.
29. "Person" means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this state, any other state or political subdivision or agency thereof and any legal successor, representative agent, or agency of the foregoing.
30. "Pesticide" includes:
  - a. Any agent, substance, or mixture of substances intended to prevent, destroy, control, or mitigate any insect, rodent, nematode, predatory animal, snail, slug, bacterium, weed, and any other form of plant or animal life, fungus, or virus, that may infect or be detrimental to persons, vegetation, crops, animals, structures, or households or be present in any environment or which the department may declare to be a pest, except those bacteria, fungi, protozoa, or viruses on or in living man or other animals;
  - b. Any agent, substance, or mixture of substances intended to be used as a plant regulator, defoliant, or desiccant; and
  - c. Any other similar substance so designated by the department, including herbicides, insecticides, fungicides, nematocides, molluscicides, rodenticides, lampreycides, plant regulators, gametocides, post-harvest decay preventatives, and antioxidants.
31. "Petroleum refinery" means an installation that is engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of petroleum, or through the redistillation, cracking, or reforming of unfinished petroleum derivatives.
32. "PM<sub>2.5</sub>" means particulate matter with an aerodynamic diameter less than or equal to a nominal two and five-tenths micrometers.

33. "PM<sub>10</sub>" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers.
34. "PM<sub>10</sub> emissions" means finely divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air.
35. "Pipeline quality natural gas" means natural gas that contains two grains, or less, of sulfur per one hundred standard cubic feet [2.83 cubic meters].
36. "Premises" means any property, piece of land or real estate, or building.
37. "Process weight" means the total weight of all materials introduced into any specific process which may cause emissions. Solid fuels charged will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not.
38. "Process weight rate" means the rate established as follows:
  - a. For continuous or longrun steady state operations, the total process weight for the entire period of continuous operation or for a typical portion thereof, divided by the number of hours of such period or portion thereof.
  - b. For cyclical or batch operations, the total process weight for a period that covers a complete operation or an integral number of cycles, divided by the hours of actual process operation during such a period. If the nature of any process or operation or the design of any equipment is such as to permit more than one interpretation of this definition, the interpretation that results in the minimum value for allowable emission shall apply.
39. "Radioactive waste" means solid waste containing radioactive material and subject to the requirements of article 33-10.
40. "Refuse" means any municipal waste, trade waste, rubbish, or garbage, exclusive of industrial waste, special waste, radioactive waste, hazardous waste, and infectious waste.
41. "Rubbish" means nonputrescible solid wastes consisting of both combustible and noncombustible wastes. Combustible rubbish includes paper, rags, cartons, wood, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, cans, dust, metal furniture, and like materials which will not burn at ordinary incinerator temperatures (one thousand six hundred to one thousand eight hundred degrees Fahrenheit [1144 degrees Kelvin to 1255 degrees Kelvin]).

42. "Salvage operation" means any operation conducted in whole or in part for the salvaging or reclaiming of any product or material.
43. "Smoke" means small gasborne particles resulting from incomplete combustion, consisting predominantly, but not exclusively, of carbon, ash, and other combustible material, that form a visible plume in the air.
44. "Source" means any property, real or personal, or person contributing to air pollution.
45. "Source operation" means the last operation preceding emission which operation:
  - a. Results in the separation of the air contaminant from the process materials or in the conversion of the process materials into air contaminants, as in the case of combustion fuel; and
  - b. Is not an air pollution abatement operation.
46. "Special waste" means solid waste that is not a hazardous waste regulated under North Dakota Century Code chapter 23-20.3 and includes waste generated from energy conversion facilities; waste from crude oil and natural gas exploration and production; waste from mineral and or mining, beneficiation, and extraction; and waste generated by surface coal mining operations. The term does not include municipal waste or industrial waste.
47. "Stack or chimney" means any flue, conduit, or duct arranged to conduct emissions.
48. "Standard conditions" means a dry gas temperature of sixty-eight degrees Fahrenheit [293 degrees Kelvin] and a gas pressure of fourteen and seven-tenths pounds per square inch absolute [101.3 kilopascals].
49. "Submerged fill pipe" means any fill pipe the discharge opening of which is entirely submerged when the liquid level is six inches [15.24 centimeters] above the bottom of the tank; or when applied to a tank which is loaded from the side, means any fill pipe the discharge opening of which is entirely submerged when the liquid level is one and one-half times the fill pipe diameter in inches [centimeters] above the bottom of the tank.
50. "Trade waste" means solid, liquid, or gaseous waste material resulting from construction or the conduct of any business, trade, or industry, or any demolition operation, including wood, wood containing preservatives, plastics, cartons, grease, oil, chemicals, and cinders.

51. "Trash" means refuse commonly generated by food warehouses, wholesalers, and retailers which is comprised only of nonrecyclable paper, paper products, cartons, cardboard, wood, wood scraps, and floor sweepings and other similar materials. Trash may not contain more than five percent by volume of each of the following: plastics, animal and vegetable materials, or rubber and rubber scraps. Trash must be free of grease, oil, pesticides, yard waste, scrap tires, infectious waste, and similar substances.
52. "Volatile organic compounds" means the definition of volatile organic compounds in 40 Code of Federal Regulations 51.100(s) as it exists on ~~July 2, 2010~~ January 1, 2012, which is incorporated by reference.
53. "Waste classification" means the seven classifications of waste as defined by the incinerator institute of America and American society of mechanical engineers.

**History:** Amended effective October 1, 1987; January 1, 1989; June 1, 1990; June 1, 1992; March 1, 1994; December 1, 1994; August 1, 1995; January 1, 1996; September 1, 1997; September 1, 1998; June 1, 2001; March 1, 2003; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03

**33-15-01-05. Abbreviations.** The abbreviations used in this article have the following meanings:

A	- ampere
A.S.T.M.	- American Society for Testing and Materials
Btu	- British thermal unit
°C	- degree Celsius (centigrade)
cal	- calorie
CdS	- cadmium sulfide
cfm	- cubic feet per minute
CFR	- code of federal regulations
cu ft	- cubic feet
CO	- carbon monoxide
CO <sub>2</sub>	- carbon dioxide
dcf	- dry cubic feet
dcm	- dry cubic meter
dscf	- dry cubic feet at standard conditions
dscm	- dry cubic meter at standard conditions
eq	- equivalents

°F	- degree Fahrenheit
ft	- feet
g	- gram
gal	- gallon
g eq	- gram equivalents
gr	- grain
hr	- hour
HCl	- hydrochloric acid
Hg	- mercury
H <sub>2</sub> O	- water
H <sub>2</sub> S	- hydrogen sulfide
H <sub>2</sub> SO <sub>4</sub>	- sulfuric acid
Hz	- hertz
in.	- inch
j	- joule
°K	- degree Kelvin
k	- 1,000
kg	- kilogram
l	- liter
lpm	- liter per minute
lb	- pound
m	- meter
m <sup>3</sup>	- cubic meter
meq	- milliequivalent
min	- minute
mg	- milligram - 10 <sup>-3</sup> gram
Mg	- megagram - 10 <sup>6</sup> gram
ml	- milliliter - 10 <sup>-3</sup> liter
mm	- millimeter - 10 <sup>-3</sup> meter
mol	- mole
mol.wt.	- molecular weight
mV	- millivolt
N <sub>2</sub>	- nitrogen
N	- newton
ng	- nanogram - 10 <sup>-9</sup> gram
nm	- nanometer - 10 <sup>-9</sup> meter

NO	- nitric oxide
NO <sub>2</sub>	- nitrogen dioxide
NO <sub>x</sub>	- nitrogen oxides
O <sub>2</sub>	- oxygen
Pa	- pascal
PM	- particulate matter
PM <sub>2.5</sub>	- particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers
PM <sub>10</sub>	- particulate matter with an aerodynamic diameter $\leq$ <u>less than or equal to</u> 10 micrometers
ppb	- parts per billion
ppm	- parts per million
psia	- pounds per square inch absolute
psig	- pounds per square inch gauge
°R	- degree Rankine
s-sec	- second
scf	- cubic feet at standard conditions
scfh	- cubic feet per hour at standard conditions
scm	- cubic meters at standard conditions
scmh	- cubic meters per hour at standard conditions
SO <sub>2</sub>	- sulfur dioxide
SO <sub>3</sub>	- sulfur trioxide
SO <sub>x</sub>	- sulfur oxides
sq ft	- square feet
std	- at standard conditions
TSP	- total suspended particulate
µg	- microgram - 10 <sup>-6</sup> gram
V	- volt
W	- watt
Ω	- ohm

**History:** Amended effective January 1, 1989; January 1, 2007; April 1, 2009; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03

**33-15-01-13. Shutdown and malfunction of an installation - Requirement for notification.**

1. **Maintenance shutdowns.** In the case of shutdown of air pollution control equipment for necessary scheduled maintenance, the intent to shut down such equipment shall be reported to the department at least twenty-four hours prior to the planned shutdown provided that the air contaminating source will be operated while the control equipment is not in service. Such prior notice shall include the following:
  - a. Identification of the specific facility to be taken out of service as well as its location and permit number.
  - b. The expected length of time that the air pollution control equipment will be out of service.
  - c. The nature and estimated quantity of emissions of air pollutants likely to be emitted during the shutdown period.
  - d. Measures such as the use of off-shift labor and equipment that will be taken to minimize the length of the shutdown period.
  - e. The reasons that it would be impossible or impractical to shut down the source operation during the maintenance period.
  - f. Nothing in this subsection shall in any manner be construed as authorizing or legalizing the emission of air contaminants in excess of the rate allowed by this article or a permit issued pursuant to this article.
  
2. **Malfunctions.**
  - a. When a malfunction in any installation occurs that can be expected to last longer than twenty-four hours and cause the emission of air contaminants in violation of this article or other applicable rules and regulations, the person responsible for such installation shall notify the department of such malfunction as soon as possible during normal working hours. The notification must contain a statement giving all pertinent facts, including the estimated duration of the breakdown. The department shall be notified when the condition causing the malfunction has been corrected.
  - b. Immediate notification to the department is required for any malfunction that would threaten health or welfare, or pose an imminent danger. During normal working hours the department can be contacted at 701-328-5188. After hours the department can be contacted through the twenty-four-hour state radio emergency number 1-800-472-2121. If calling from out of state, the twenty-four-hour number is 701-328-9921.

C. Unavoidable malfunction. The owner or operator of a source who believes any excess emissions resulted from an unavoidable malfunction shall submit a written report to the department which includes evidence that:

- (1) The excess emissions were caused by a sudden, unavoidable breakdown of technology that was beyond the reasonable control of the owner or operator.
- (2) The excess emissions could not have been avoided by better operation and maintenance, did not stem from an activity or event that could have been foreseen and avoided or planned for.
- (3) To the extent practicable, the source maintained and operated the air pollution control equipment and process equipment in a manner consistent with good practice for minimizing emissions, including minimizing any bypass emissions.
- (4) Any necessary repairs were made as quickly as practicable, using off-shift labor and overtime as needed and possible.
- (5) All practicable steps were taken to minimize the potential impact of the excess emissions on ambient air quality.
- (6) The excess emissions are not part of a recurring pattern that may have been caused by inadequate operation or maintenance or inadequate design of the malfunctioning equipment.

The report shall be submitted within thirty days of the end of the calendar quarter in which the malfunction occurred or within thirty days of a written request by the department, whichever is sooner.

The burden of proof is on the owner or operator of the source to provide sufficient information to demonstrate that an unavoidable equipment malfunction occurred. The department may elect not to pursue enforcement action after considering whether excess emissions resulted from an unavoidable equipment malfunction. The department will evaluate, on a case-by-case basis, the information submitted by the owner or operator to determine whether to pursue enforcement action.

3. **Continuous emission monitoring system failures.** When a failure of a continuous emission monitoring system occurs, an alternative method for measuring or estimating emissions must be undertaken as soon as possible. The owner or operator of a source that uses an alternative method shall have the burden of demonstrating that the method is

accurate. Timely repair of the emission monitoring system must be made. The provisions of this subsection do not apply to sources that are subject to monitoring requirements in chapter 33-15-21.

**History:** Amended effective October 1, 1987; January 1, 1989; June 1, 1992; September 1, 1997; January 1, 2007; April 1, 2009; January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04

**Law Implemented:** NDCC 23-25-03, 23-25-04

**CHAPTER 33-15-03**  
**RESTRICTION OF EMISSION OF VISIBLE AIR CONTAMINANTS**

Section	
33-15-03-01	Restrictions Applicable to Existing Installations
33-15-03-02	Restrictions Applicable to New Installations and All Incinerators
33-15-03-03	Restrictions Applicable to Fugitive Emissions
33-15-03-03.1	Restrictions Applicable to Flares
33-15-03-04	Exceptions
33-15-03-05	Method of Measurement

**33-15-03-02. Restrictions applicable to new installations and all incinerators.** No person may discharge into the ambient air from any single source of emission whatsoever any air contaminant which exhibits an opacity greater than twenty percent except that a maximum of forty percent opacity is permissible for not more than one six-minute period per hour.

**History:** Amended effective October 1, 1987.

**General Authority:** NDCC 23-25-03, 28-32-02

**Law Implemented:** NDCC 23-25-03

**33-15-03-04. Exceptions.** The provisions of sections 33-15-03-01, 33-15-03-02, 33-15-03-03, and 33-15-03-03.1 shall not apply in the following circumstances:

1. Where the presence of uncombined water is the only reason for failure of an emission to meet the requirements.
2. When smoke is emitted for the purpose of training or research when approved by the department, including training schools for firefighting personnel.
3. Where an applicable opacity standard is established for a specific source.
4. ~~Where the limits specified in this article cannot be met because of operations or processes such as, but not limited to, oil field service and drilling operations, but only so long as it is not technically feasible to meet said specifications. [Reserved]~~
5. Where fugitive emissions are caused by agricultural activities related to the normal operations of a farm. However, agricultural practices such as tilling of land, application of fertilizers, harvesting of crops, and other

activities shall be managed in such a manner as to minimize dust from becoming airborne.

**History:** Amended effective February 1, 1982; January 1, 2013.

**General Authority:** NDCC 23-25-03, 28-32-02

**Law Implemented:** NDCC 23-25-03

## CHAPTER 33-15-05

### 33-15-05-01. Restriction of emission of particulate matter from industrial processes.

#### 1. General provisions.

- a. This section applies to any operation, process, or activity from which particulate matter is emitted except the burning of fuel for indirect heating in which the products of combustion do not come into direct contact with process materials, the burning of refuse, and the processing of salvable material by burning.
- b. The process weight rate per hour referred to in this section shall be based upon the normal operation maximum capacity of the equipment, and if such normal maximum capacity should be increased by process or equipment changes, the new normal maximum capacity shall be used as the process weight in determining the allowable emissions.

#### 2. Emission limitations. No person shall cause, suffer, allow, or permit the emission of particulate matter in any one hour from any source in excess of the amount shown in table 3 for the process weight allocated to such source.

##### a. Exceptions.

- (1) ~~Temporary operational breakdowns or cleaning of air pollution equipment for any process are permitted provided the owner or operator immediately advises the department of the circumstances and outlines an acceptable corrective program and provided such operations do not cause an immediate public health hazard.~~ [Reserved]
- (2) The department may prescribe air quality control requirements that are more restrictive and more extensive than provided in subsection 2 if the particulate matter emitted is a radioactive, toxic, or deleterious substance which may affect human health or well-being or that would cause significant damage to animal or plant life.
- (3) Any existing emission source which has particulate collection equipment with a collection efficiency of ninety-nine and seven-tenths percent or more by weight shall be considered as meeting the provisions of subsection 2. The efficiency of the particulate collection equipment shall be determined as outlined in section 33-15-05-04 with the process being served by the particulate collection equipment being run at normal operation maximum capacity.

- (4) Any portable emission source, not operated at the same premise for more than six months, shall be considered as meeting the provisions of subsection 2 if the source stack or stacks are equipped with particulate collection efficiency of eighty-five percent or more by weight as determined in paragraph 3, and all of the following conditions are met:
  - (a) The source must not be located within a city.
  - (b) The source must not be located within one-half mile [.80 kilometers] of any occupied residence, and within one mile [1.61 kilometers] of the source there shall be no more than two occupied residences.
  - (c) The source must not be located within one-quarter mile [.40 kilometers] of any highway or public road.
  
- b. Grievance procedure. If any party is aggrieved by the department's decision as referenced in paragraph 2 of subdivision a, that party may request a hearing before the department to review such decision. Such hearing must be conducted according to article 33-22 and North Dakota Century Code chapter 28-32. If a hearing is requested, the requirements of paragraph 2 of subdivision a are not effective until ordered by the department at the conclusion of the hearing process.

Table 3. Maximum Allowable Rates of Emission of Particulate Matter from Industrial Processes

English		Metric	
Process Weight Rate (p)	Allowable Emission Rate (E)	Process Weight Rate (p)	Allowable Emission Rate (E)
tons/hr	lb/hr	metric tons/hr	kg/hr
0.05	0.551	0.045	0.25
0.25	1.62	0.23	0.74
0.50	2.58	0.45	1.16
2.50	7.58	2.27	3.43
5.00	12.05	4.54	5.46
10.00	19.18	9.07	8.67
25.00	35.43	22.68	16.03
50.00	44.58	45.36	20.21
250.00	60.96	226.80	27.65
500.00	68.96	453.59	31.29
1000.00	77.59	907.19	35.21
2500.00	90.06	2267.96	40.87

Interpolation of the data in this table for process weight rates up to 30 tons/hr [27.21 metric tons/hr] shall be accomplished by the use of the equations:

$$E = 4.10 p^{0.67} \text{ (English units)}$$

$$E = 1.98 p^{0.67} \text{ (Metric units)}$$

and interpolation and extrapolation of the data for process weight rates in excess of 30 tons/hr [27.21 metric tons/hr] shall be accomplished by the use of the equations:

$$E = 55.0 p^{0.11} - 40 \text{ (English units)}$$

$$E = 25.25 p^{0.11} - 18.2 \text{ (Metric units)}$$

where E = allowable emission rate in lb/hr [kg/hr] and p = process weight rate in tons/hr [metric tons/hr].

**History:** Amended effective October 1, 1987; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03, 23-25-08

**33-15-05-04. Methods of measurement.**

1. The reference methods in appendix A to chapter 33-15-12, its replacement or other methods, as approved by the department shall be used to determine compliance with sections 33-15-05-01 and 33-15-05-02 as follows:
  - a. Method 1 for selection of sampling site and sample traverses.
  - b. Method 2 for determination of stack gas velocity and volumetric flow rate.
  - c. Method 3 for gas analysis.
  - d. Method 4 for determination of moisture in the stack gas.
  - e. Method 5 for concentration of particulate matter and the associated moisture content. The sampling time for each run shall be at least sixty minutes and the minimum sampling volume shall be thirty dry cubic feet at standard conditions [0.85 dry cubic meter at standard conditions] except that smaller sampling times or volumes when necessitated by process variables or other factors may be approved by the department.
    - (1) For each run using method 5 for fuel burning equipment, the emissions expressed in pounds per million British thermal units [nanograms per joule] shall be determined by the following procedures:

$$E = CF_d \left( \frac{20.9}{20.9 - \%O_2} \right) \quad \text{or} \quad E = CF_c \left( \frac{100}{\%CO_2} \right)$$

where:

- (a) E = pollutant emission, lb/million Btu [ng/j].
- (b) C = pollutant concentration, lb/dscf [ng/dscm].
- (c) %O<sub>2</sub> = oxygen content by volume, dry basis.
- (d) %CO<sub>2</sub> = carbon dioxide content by volume, dry basis.

The percent oxygen and percent carbon dioxide shall be determined by using the integrated or grab sampling and analysis procedures of method 3, 3A, 3B, or 3C, as appropriate, by traversing the duct at the same sampling locations used for each run of method 5.

(e)  $F_d$  and  $F_c$  = factors as listed in method 19 appendix A of chapter 33-15-12.

(2) For each run using method 5 for industrial processes, the emission rate expressed in pounds per hour shall be determined by the equation  $\text{lb/hr} = (Q_s) (c)$  where:

$Q_s$  = volumetric flow rate of the total effluent in dscf/hr and

$c$  = particulate concentration in lb/dscf.

2. The heat content of fuels shall be determined in accordance with A.S.T.M. methods D2015-66(72) (solid fuels), D240-64(73) (liquid fuels), or D1826-64(70) (gaseous fuels), as applicable.
3. The determination of particulate matter emissions with an aerodynamic diameter less than or equal to ten micrometers [ $\text{PM}_{10}$ ] and particulate matter emissions with an aerodynamic diameter less than or equal to two and one-half micrometers [ $\text{PM}_{2.5}$ ] must be made in accordance with the methods established in 40 Code of Federal Regulations, part 51, appendix M, as applicable.

**History:** Amended effective October 1, 1987; June 1, 1992; June 1, 2001; March 1, 2003; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03

## CHAPTER 33-15-12

**33-15-12-01.1. Scope.** Except as noted below the title of the subpart, the subparts and appendices of title 40, Code of Federal Regulations, part 60, as they exist on ~~July 2, 2010~~ January 1, 2012, which are listed under section 33-15-12-02 are incorporated into this chapter by reference. Any changes to the standards of performance are listed below the title of the standard.

**History:** Effective June 1, 1992; amended effective December 1, 1994; January 1, 1996; September 1, 1997; September 1, 1998; June 1, 2001; March 1, 2003; February 1, 2005; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03

### **33-15-12-02. Standards of performance.**

Subpart A - General provisions.

\*60.2. The definition of administrator is deleted and replaced with the following:

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

Subpart C - Emission guidelines and compliance times.

Subpart Cc - Emissions guidelines and compliance times for municipal solid waste landfills.

Designated facilities to which this subpart applies shall comply with the requirements for state plan approval in 40 CFR parts 60.33c, 60.34c, and 60.35c, except that quarterly surface monitoring for methane under part 60.34c shall only be required during the second, third, and fourth quarters of the calendar year.

Designated facilities under this subpart shall:

1. Submit a final control plan for department review and approval within twelve months of the date of the United States environmental protection agency's approval of this rule, or within twelve months of becoming subject to this rule, whichever occurs later.
2. Award contracts for control systems/process modification within twenty-four months of the date of the United States environmental protection agency's approval of this rule, or within twenty-four months of becoming subject to the rule, whichever occurs later.

3. Initiate onsite construction or installation of the air pollution control device or process changes within twenty-seven months of the date of the United States environmental protection agency's approval of this rule, or within twenty-seven months of becoming subject to the rule, whichever occurs later.
4. Complete onsite construction or installation of the air pollution control device or devices or process changes within twenty-nine months of the United States environmental protection agency's approval of this rule, or within twenty-nine months of becoming subject to the rule, whichever is later.
5. Conduct the initial performance test within one hundred eighty days of the installation of the collection and control equipment. A notice of intent to conduct the performance test must be submitted to the department at least thirty days prior to the test.
6. Be in final compliance within thirty months of the United States environmental protection agency's approval of this rule, or within thirty months of becoming subject to the rule, whichever is later.

Subpart Ce - Emission guidelines and compliance times for hospital/medical/infectious waste incinerators.

Except as noted below, designated facilities to which this rule applies shall comply with the minimum requirements for state plan approval listed in subpart Ce.

\*60.39e(a) is deleted in its entirety.

\*60.39e(b) is deleted in its entirety and replaced with the following:

- (b) Except as provided in paragraphs c and d of this section, designated facilities shall comply with all requirements of this subpart within one year of the United States environmental protection agency's approval of the state plan for hospital/medical/infectious waste incinerators regardless of whether a designated facility is identified in the state plan. Owners or operators of designated facilities who will cease operation of their incinerator to comply with this rule shall notify the department of their intention within six months of state plan approval.

\*60.39e(c) is deleted in its entirety and replaced with the following:

- (c) Owners or operators of designated facilities planning to install the necessary air pollution control equipment to comply with the applicable requirements may petition the department for an extension of the compliance time of up to three years after the United States environmental protection agency's approval of the

state plan, but not later than September 16, 2002, for the emission guidelines promulgated on September 15, 1997, and not later than October 6, 2014, for the emission guidelines promulgated on October 6, 2009, provided the facility owner or operator complies with the following:

1. Submits a petition to the department for site specific operating parameters under 40 CFR 60.56c(i) of subpart Ec within thirty months of approval of the state plan and sixty days prior to the performance test.
2. Provides proof to the department of a contract for obtaining services of an architectural or engineering firm or architectural and engineering firm regarding the air pollution control device within nine months of state plan approval.
3. Submits design drawings to the department of the air pollution control device within twelve months of state plan approval.
4. Submits to the department a copy of the purchase order or other documentation indicating an order has been placed for the major components of the air pollution control device within sixteen months after state plan approval.
5. Submits to the department the schedule for delivery of the major components of the air pollution control device within twenty months after state plan approval.
6. Begins initiation of site preparation for installation of the air pollution control device within twenty-two months after state plan approval.
7. Begins initiation of installation of the air pollution control device within twenty-five months after state plan approval.
8. Starts up the air pollution control device within twenty-eight months after state plan approval.
9. Notifies the department of the performance test thirty days prior to the test.
10. Conducts the performance test within one hundred eighty days of the installation of the air pollution control device.
11. Submits a performance test report which demonstrates compliance within thirty-six months of state plan approval.

\*60.39e(d) is deleted in its entirety and replaced with the following:

1. Designated facilities petitioning for an extension of the compliance time in paragraph b of this section shall, within six months after the United States environmental protection agency's approval of the state plan, submit:
  - i. Documentation of the analyses undertaken to support the need for more than one year to comply, including an explanation of why up to three years after United States environmental protection agency approval of the state plan is sufficient to comply with this subpart while one year is not. The documentation shall also include an evaluation of the option to transport the waste offsite to a commercial medical waste treatment and disposal facility on a temporary or permanent basis; and
  - ii. Documentation of measurable and enforceable incremental steps of progress to be taken toward compliance with this subpart.
2. The department shall review any petitions for the extension of compliance times within thirty days of receipt of a complete petition and make a decision regarding approval or denial. The department shall notify the petitioner in writing of its decision within forty-five days of the receipt of the petition. All extension approvals must include incremental steps of progress. For those sources planning on installing air pollution control equipment to comply with this subpart, the incremental steps of progress included in 40 CFR 60.39e(c) shall be included as conditions of approval of the extension.
3. Owners or operators of facilities which received an extension to the compliance time in this subpart shall be in compliance with the applicable requirements on or before the date three years after United States environmental protection agency approval of the state plan but not later than September 16, 2002, for the emission guidelines promulgated on September 15, 1997. For the amended emission guidelines published on October 6, 2009, compliance with the applicable requirements shall be attained on or before the date three years after United States environmental protection agency approval of the amended state plan but not later than October 6, 2014.

\*60.39e(f) is deleted in its entirety.

After the compliance dates specified in this subpart, an owner or operator of a facility to which this subpart applies shall not operate any such unit in violation of this subpart.

Subpart D - Standards of performance for fossil-fuel fired steam generators for which construction is commenced after August 17, 1971.

Subpart Da - Standards of performance for electric utility steam generating units for which construction is commenced after September 18, 1978.

\*The limits and other requirements for mercury are deleted.

Subpart Db - Standards of performance for industrial-commercial-institutional steam generating units.

Subpart Dc - Standards of performance for small industrial-commercial-institutional steam generating units.

Subpart E - Standards of performance for incinerators.

Subpart Ea - Standards of performance for municipal waste combustors for which construction is commenced after December 20, 1989, and on or before September 20, 1994.

Subpart Ec - Standards of performance for hospital/medical/infectious waste incinerators for which construction is commenced after June 20, 1996.

Subpart F - Standards of performance for portland cement plants.

Subpart G - Standards of performance for nitric acid plants.

Subpart H - Standards of performance for sulfuric acid plants.

Subpart I - Standards of performance for hot mix asphalt facilities.

Subpart J - Standards of performance for petroleum refineries.

Subpart Ja - Standards of performance for petroleum refineries for which construction, reconstruction, or modification commenced after May 14, 2007.

Those portions of the subpart that have been stayed are not adopted.

Subpart K - Standards of performance for storage vessels for petroleum liquids for which construction, reconstruction, or modification commenced after June 11, 1973, and prior to May 19, 1978.

\*60.110(c) is deleted in its entirety and replaced with the following:

- (c) Any facility under part 60.110(a) that commenced construction, reconstruction, or modification after July 1, 1970, and prior to May 19, 1978, is subject to the requirements of this subpart.

Subpart Ka - Standards of performance for storage vessels for petroleum liquids for which construction, reconstruction, or modification commenced after May 18, 1978, and prior to July 23, 1984.

Subpart Kb - Standards of performance for volatile organic liquid storage vessels (including petroleum liquid storage vessels) for which construction, reconstruction, or modification commenced after July 23, 1984.

Subpart O - Standards of performance for sewage treatment plants.

Subpart T - Standards of performance for the phosphate fertilizer industry: wet-process phosphoric acid plants.

Subpart U - Standards of performance for the phosphate fertilizer industry: superphosphoric acid plants.

Subpart V - Standards of performance for the phosphate fertilizer industry: diammonium phosphate plants.

Subpart W - Standards of performance for the phosphate fertilizer industry: triple superphosphate plants.

Subpart X - Standards of performance for the phosphate fertilizer industry: granular triple superphosphate storage facilities.

Subpart Y - Standards of performance for coal preparation plants.

Subpart Z - Standards of performance for ferroalloy production facilities.

Subpart AA - Standards of performance for steel plants: electric arc furnaces: constructed after October 21, 1974, and before August 17, 1983.

Subpart AAa - Standards of performance for steel plants: electric arc furnaces and argon-oxygen decarburization vessels constructed after August 17, 1983.

Subpart CC - Standards of performance for glass manufacturing plants.

Subpart DD - Standards of performance for grain elevators.

Subpart EE - Standards of performance for surface coatings of metal furniture.

Subpart FF - [Reserved]

Subpart GG - Standards of performance for stationary gas turbines.

Subpart HH - Standards of performance for lime manufacturing plants.

Subpart KK - Standards of performance for lead-acid battery manufacturing plants.

Subpart LL - Standards of performance for metallic mineral processing plants.

Subpart MM - Standards of performance for automobile and light-duty truck surface coating operations.

Subpart NN - Standards of performance for phosphate rock plants.

Subpart PP - Standards of performance for ammonium sulfate manufacture.

Subpart QQ - Standards of performance for the graphic arts industry: publication rotogravure printing.

Subpart RR - Standards of performance for pressure-sensitive tape and label surface coating operations.

Subpart SS - Standards of performance for industrial surface coating: large appliances.

Subpart TT - Standards of performance for metal coil surface coating.

Subpart UU - Standards of performance for asphalt processing and asphalt roofing manufacture.

Subpart VV - Standards of performance for equipment leaks of volatile organic compound (VOC) emissions in the synthetic organic chemicals manufacturing industry.

Subpart VVa - Standards of performance for equipment leaks of VOC in the synthetic organic chemicals manufacturing industry for which construction, reconstruction, or modification commenced after November 7, 2006.

Subpart WW - Standards of performance for the beverage can surface coating industry.

Subpart XX - Standards of performance for bulk gasoline terminals.

Subpart AAA - Standards of performance for new residential wood heaters.

Subpart BBB - Standards of performance for the rubber tire manufacturing industry.

Subpart CCC - [Reserved]

Subpart DDD - Standards of performance for volatile organic compound (VOC) emissions for the polymer manufacturing industry.

Subpart EEE - [Reserved]

Subpart FFF - Standards of performance for flexible vinyl and urethane coating and printing.

Subpart GGG - Standards of performance for equipment leaks of volatile organic compound (VOC) emissions in petroleum refineries.

Subpart GGGa - Standards of performance for equipment leaks of VOC in petroleum refineries for which construction, reconstruction, or modification commenced after November 7, 2006.

Those portions of the subpart that are stayed are not adopted.

Subpart HHH - Standards of performance for synthetic fiber production facilities.

Subpart III - Standards of performance for volatile organic compound (VOC) emissions from the synthetic organic chemical manufacturing industry (SOCMI) air oxidation unit processes.

Subpart JJJ - Standards of performance for petroleum drycleaners.

Subpart KKK - Standards of performance for equipment leaks of volatile organic compound (VOC) emissions from onshore natural gas processing plants.

Subpart LLL - Standards of performance for onshore natural gas processing; SO<sub>2</sub> emissions.

Subpart MMM - [Reserved]

Subpart NNN - Standards of performance for volatile organic compound (VOC) emissions from synthetic organic chemical manufacturing industry (SOCMI) distillation operations.

Subpart OOO - Standards of performance for nonmetallic mineral processing plants.

Subpart PPP - Standards of performance for wool fiberglass insulation manufacturing plants.

Subpart QQQ - Standards of performance for volatile organic compound (VOC) emissions from petroleum refinery wastewater systems.

Subpart RRR - Standards of performance for volatile organic compound (VOC) emissions from synthetic organic chemical manufacturing industry (SOCMI) reactor processes.

Subpart SSS - Standards of performance for magnetic tape coating facilities.

Subpart TTT - Standards of performance for industrial surface coating: surface coating of plastic parts for business machines.

Subpart UUU - Standards of performance for calciners and dryers in mineral industries.

Subpart VVV - Standards of performance for polymeric coating of supporting substrates facilities.

Subpart WWW - Standards of performance for municipal solid waste landfills.

Subpart AAAA - Standards of performance for small municipal waste combustion units for which construction is commenced after August 30, 1999, or for which modification or reconstruction is commenced after June 6, 2001.

Subpart CCCC - Standards of performance for commercial and industrial solid waste incineration units for which construction is commenced after November 30, 1999, or for which modification or reconstruction is commenced on or after June 1, 2001.

Subpart DDDD - Emission guidelines and compliance times for commercial and industrial solid waste incinerator units that commenced construction on or before November 30, 1999.

Except as provided below, designated facilities to which this rule applies shall comply with 40 CFR 60.2575 through 60.2875, including tables 1 through 5.

In the rule, you means the owner or operator of a commercial or industrial solid waste incineration unit.

Table 1 of the rule is deleted and replaced with the following:

Table 1 to Subpart DDDD - Model Rule Increments of Progress and Compliance Schedules	
Comply with these increments of progress	By these dates
Increment 1 - Submit final control plan .....	One year after EPA approval of the state plan or December 1, 2004, whichever comes first.
Increment 2 - Final compliance .....	Three years after EPA approval of the state plan or December 1, 2005, whichever comes first.

Subpart GGGG - [Reserved]

Subpart IIII - Standards of performance for stationary compression ignition internal combustion engines.

Subpart JJJJ - Standards of performance for stationary sparks ignition internal combustion engines.

Subpart KKKK - Standards of performance for stationary combustion turbines.

Appendix A - Test methods.

Appendix B - Performance specifications.

Appendix C - Determination of emission rate changes.

Appendix D - Required emission inventory information.

Appendix E - [Reserved]

Appendix F - Quality assurance procedures.

Appendix I - Removable label and owner's manual.

**History:** Effective June 1, 1992; amended effective March 1, 1994; December 1, 1994; January 1, 1996; September 1, 1997; September 1, 1998; June 1, 2001; March 1, 2003; February 1, 2005; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03

## CHAPTER 33-15-14

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

#### 1. Permit to construct required.

- a. No construction, installation, or establishment of a new stationary source within a source category designated in section 33-15-14-01 may be commenced unless the owner or operator thereof shall file an application for, and receive, a permit to construct in accordance with this chapter.
- b. The initiation of activities that are exempt from the definition of construction, installation, or establishment in section 33-15-14-01.1, prior to obtaining a permit to construct, are at the owner's or operator's own risk. These activities have no impact on the department's decision to issue a permit to construct. The initiation or completion of such activities conveys no rights to a permit to construct under this section.
- c. General permits. The department may issue a general permit to construct covering numerous similar sources which are not subject to permitting requirements under chapter 33-15-13 or 33-15-15 or subpart B of section 33-15-22-03. Any general permit shall comply with all requirements applicable to other permits to construct and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the department shall grant the conditions and terms of the general permit. Sources that would qualify for a general permit must apply to the department for coverage under the terms of the general permit or apply for an individual permit to construct. Without repeating the public participation procedures under subsection 6 of section 33-15-14-02, the department may grant a source's request for authorization to construct under the general permit.

#### 2. Application for permit to construct.

- a. Application for a permit to construct a new installation or source must be made by the owner or operator thereof on forms furnished by the department.
- b. A separate application is required for each new installation or source subject to this chapter.
- c. Each application must be signed by the applicant, which signature shall constitute an agreement that the applicant will assume responsibility for the construction or operation of the new installation or source in accordance with this article and will

notify the department, in writing, of the startup of operation of such source.

**3. Alterations to source.**

- a. The addition to or enlargement of or replacement of or alteration in any stationary source, already existing, which is undertaken pursuant to an approved compliance schedule for the reduction of emissions therefrom, shall be exempt from the requirements of this section.
- b. Any physical change in, or change in the method of operation of, a stationary source already existing which increases or may increase the emission rate or increase the ambient concentration by an amount greater than that specified in subdivision a of subsection 5 of any pollutant for which an ambient air quality standard has been promulgated under this article or which results in the emission of any such pollutant not previously emitted must be considered to be construction, installation, or establishment of a new source, except that:
  - (1) Routine maintenance, repair, and replacement may not be considered a physical change.
  - (2) The following may not be considered a change in the method of operation:
    - (a) An increase in the production rate, if such increase does not exceed the operating design capacity of the source and it is not limited by a permit condition.
    - (b) An increase in the hours of operation if it is not limited by a permit condition.
    - (c) Changes from one operating scenario to another provided the alternative operating scenarios are identified and approved in a permit to operate.
    - (d) Trading of emissions within a facility provided:
      - [1] These trades have been identified and approved in a permit to operate; and
      - [2] The total facility emissions do not exceed the facility emissions cap established in the permit to operate.

- (e) Trading and utilizing acid rain allowances provided compliance is maintained with all other applicable requirements.
  - C. Any owner or operator of a source who requests an increase in the allowable sulfur dioxide emission rate for the source pursuant to section 33-15-02-07 shall demonstrate through a dispersion modeling analysis that the revised allowable emissions will not cause or contribute to a violation of the national ambient air quality standards for sulfur oxides (sulfur dioxide) or the prevention of significant deterioration increments for sulfur dioxide. The owner or operator shall also demonstrate that the revised allowable emission rate will not violate any other requirement of this article or the Federal Clean Air Act. Requests for emission limit changes shall be subject to review by the public and the environmental protection agency in accordance with subsection 6.
4. **Submission of plans - Deficiencies in application.** As part of an application for a permit to construct, the department may require the submission of plans, specifications, siting information, emission information, descriptions and drawings showing the design of the installation or source, the manner in which it will be operated and controlled, the emissions expected from it, and the effects on ambient air quality. Any additional information, plans, specifications, evidence, or documentation that the department may require must be furnished upon request. Within twenty days of the receipt of the application, the department shall advise the owner or operator of the proposed source of any deficiencies in the application. In the event of a deficiency, the date of receipt of the application is the date upon which all requested information is received.
- a. Determination of the effects on ambient air quality as may be required under this section must be based on the applicable requirements specified in the "Guideline on Air Quality Models (Revised)" (United States environmental protection agency, office of air quality planning and standards, Research Triangle Park, North Carolina 27711) as supplemented by the "North Dakota Guideline for Air Quality Modeling Analyses" (North Dakota state department of health, division of air quality). These documents are incorporated by reference.
  - b. When an air quality impact model specified in the documents incorporated by reference in subdivision a is inappropriate, the model may be modified or another model substituted provided:
    - (1) Any modified or nonguideline model must be subject to notice and opportunity for public comment under subsection 6.

- (2) The applicant must provide to the department adequate information to evaluate the applicability of the modified or nonguideline model. Such information must include, but is not limited to, methods like those outlined in the "Interim Procedures for Evaluating Air Quality Models (Revised)" (United States environmental protection agency, office of air quality planning and standards, Research Triangle Park, North Carolina 27709).
- (3) Written approval from the department must be obtained for any modification or substitution.
- (4) Written approval from the United States environmental protection agency must be obtained for any modification or substitution prior to the granting of a permit under this chapter.

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

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

<u>Contaminant</u>	<u>Averaging Time (hours)</u>				
	Annual ( $\mu\text{g}/\text{m}^3$ )	24 ( $\mu\text{g}/\text{m}^3$ )	8 ( $\mu\text{g}/\text{m}^3$ )	3 ( $\mu\text{g}/\text{m}^3$ )	1 ( $\mu\text{g}/\text{m}^3$ )
SO <sub>2</sub>	1.0	5		25	<del>25</del> <u>7.8</u>
PM <sub>10</sub>	<del>4.0</del>	5			
NO <sub>2</sub>	1.0				<del>25</del> <u>7.5</u>
CO			500		2000
<u>PM<sub>2.5</sub></u>	<u>0.3</u>	<u>1.2</u>			

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

**6. Public participation - Final action on application.**

- a. The following source categories are subject to the public participation procedures under this subsection:
  - (1) Those affected facilities designated under chapter 33-15-13.
  - (2) New sources that will be required to obtain a permit to operate under section 33-15-14-06.
  - (3) Modifications to an existing facility which will increase the potential to emit from the facility by the following amounts:
    - (a) One hundred tons [90.72 metric tons] per year or more of particulate matter, sulfur dioxide, nitrogen oxides, hydrogen sulfide, carbon monoxide, or volatile organic compounds;
    - (b) Ten tons [9.07 metric tons] per year or more of any contaminant listed under section 112(b) of the Federal Clean Air Act; or
    - (c) Twenty-five tons [22.68 metric tons] per year or more of any combination of contaminants listed under section 112(b) of the Federal Clean Air Act.
  - (4) Sources which the department has determined to have a major impact on air quality.
  - (5) Those for which a request for a public comment period has been received from the public.
  - (6) Sources for which a significant degree of public interest exists regarding air quality issues.
  - (7) Those sources which request a federally enforceable permit which limits their potential to emit.
- b. With respect to the permit to construct application, the department shall:
  - (1) Within ninety days of receipt of a complete application, make a preliminary determination concerning issuance of a permit to construct.
  - (2) Within ninety days of the receipt of the complete application, make available in at least one location in the county or counties in which the proposed project is to be located, a copy of its preliminary determinations and copies of or

a summary of the information considered in making such preliminary determinations.

- (3) Publish notice to the public by prominent advertisement, within ninety days of the receipt of the complete application, in the region affected, of the opportunity for written comment on the preliminary determinations. The public notice must include the proposed location of the source.
- (4) Within ninety days of the receipt of the complete application, deliver a copy of the notice to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: the chief executive of the city and county; any comprehensive regional land use planning agency; and any state, federal land manager, or Indian governing body whose lands will be significantly affected by the source's emissions.
- (5) Within ninety days of receipt of a complete application, provide a copy of the proposed permit and all information considered in the development of the permit and the public notice to the regional administrator of the United States environmental protection agency.
- (6) Allow thirty days for public comment.
- (7) Consider all public comments properly received, in making the final decision on the application.
- (8) Allow the applicant to submit written responses to public comments received by the department. The applicant's responses must be submitted to the department within twenty days of the close of the public comment period.
- (9) Take final action on the application within thirty days of the applicant's response to the public comments.
- (10) Provide a copy of the final permit, if issued, to the applicant, the regional administrator of the United States environmental protection agency, and anyone who requests a copy.

c. For those sources subject to the requirements of chapter 33-15-15, the public participation procedures under section 33-15-15-01.2 shall be followed.

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

permit and notify the applicant, in writing, of the denial to issue a permit to construct.

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

8. **Issuance of permit to construct.** If, after review of all information received, including public comment with respect to any proposed project, the department makes the determination of subdivision a or b of subsection 5 in the affirmative, the department shall issue a permit to construct. The permit may provide for conditions of operation as provided in subsection 9.
9. **Permit to construct - Conditions.** The department may impose any reasonable conditions upon a permit to construct, including conditions concerning:
  - a. Sampling, testing, and monitoring of the facilities or the ambient air or both.
  - b. Trial operation and performance testing.
  - c. Prevention and abatement of nuisance conditions caused by operation of the facility.
  - d. Recordkeeping and reporting.
  - e. Compliance with applicable rules and regulations in accordance with a compliance schedule.
  - f. Limitation on hours of operation, production rate, processing rate, or fuel usage when necessary to assure compliance with this article.

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

10. **Scope.**
  - a. The issuance of a permit to construct for any source does not affect the responsibility of an owner or operator to comply with applicable portions of a control strategy affecting the source.
  - b. A permit to construct shall become invalid if construction is not commenced within eighteen months after receipt of such permit, if construction is discontinued for a period of eighteen months or more; or if construction is not completed within a reasonable

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

11. **Transfer of permit to construct.** To ensure the responsible owners or operators, or both, are identified, the holder of a permit to construct may not transfer such permit without prior approval of the department.
12. **[Reserved]**
13. **Exemptions.** A permit to construct is not required for the following stationary sources provided there is no federal requirement for a permit or approval for construction or operation.
  - a. Maintenance, structural changes, or minor repair of process equipment, fuel burning equipment, control equipment, or incinerators which do not change capacity of such process equipment, fuel burning equipment, control equipment, or incinerators and which do not involve any change in the quality, nature, or quantity of emissions therefrom.
  - b. Fossil fuel burning equipment, other than smokehouse generators, which meet all of the following criteria:
    - (1) The heat input per unit does not exceed ten million British thermal units per hour.
    - (2) The total aggregate heat input from all equipment does not exceed ten million British thermal units per hour.
    - (3) The actual emissions, as defined in chapter 33-15-15, from all equipment do not exceed twenty-five tons [22.67 metric tons] per year of any air contaminant and the potential to emit any air contaminant for which an ambient air quality standard has been promulgated in chapter 33-15-02 is less than one hundred tons [90.68 metric tons] per year.
  - c.
    - (1) Any single internal combustion engine with less than five hundred brake horsepower, or multiple engines with a combined brake horsepower rating less than five hundred brake horsepower.

- (2) Any single internal combustion engine with a maximum rating of less than one thousand brake horsepower, or multiple engines with a combined brake horsepower rating of less than one thousand brake horsepower, and which operates a total of five hundred hours or less in a rolling twelve-month period.
  - (3) Any internal combustion engine, or multiple engines at the same facility, with a total combined actual emission rate of five tons [4.54 metric tons] per year or less of any air contaminant for which an ambient air quality standard has been promulgated in section 33-15-02-04.
  - (4) The exemptions listed in paragraphs 1, 2, and 3 do not apply to engines that are a utility unit as defined in section 33-15-21-08.1 ~~or are subject to a standard under chapter 33-15-22.~~
- d. Bench scale laboratory equipment used exclusively for chemical or physical analysis or experimentation.
  - e. Portable brazing, soldering, or welding equipment.
  - f. The following equipment:
    - (1) Comfort air-conditioners or comfort ventilating systems which are not designed and not intended to be used to remove emissions generated by or released from specific units or equipment.
    - (2) Water cooling towers and water cooling ponds unless used for evaporative cooling of process water, or for evaporative cooling of water from barometric jets or barometric condensers or used in conjunction with an installation requiring a permit.
    - (3) Equipment used exclusively for steam cleaning.
    - (4) Porcelain enameling furnaces or porcelain enameling drying ovens.
    - (5) Unheated solvent dispensing containers or unheated solvent rinsing containers of sixty gallons [227.12 liters] capacity or less.
    - (6) Equipment used for hydraulic or hydrostatic testing.
  - g. The following equipment or any exhaust system or collector serving exclusively such equipment:

- (1) Blast cleaning equipment using a suspension of abrasive in water.
- (2) Bakery ovens if the products are edible and intended for human consumption.
- (3) Kilns for firing ceramic ware, heated exclusively by gaseous fuels, singly or in combinations, and electricity.
- (4) Confection cookers if the products are edible and intended for human consumption.
- (5) Drop hammers or hydraulic presses for forging or metalworking.
- (6) Diecasting machines.
- (7) Photographic process equipment through which an image is reproduced upon material through the use of sensitized radiant energy.
- (8) Equipment for drilling, carving, cutting, routing, turning, sawing, planing, spindle sanding, or disc sanding of wood or wood products, which is located within a facility that does not vent to the outside air.
- (9) Equipment for surface preparation of metals by use of aqueous solutions, except for acid solutions.
- (10) Equipment for washing or drying products fabricated from metal or glass; provided, that no volatile organic materials are used in the process and that no oil or solid fuel is burned.
- (11) Laundry dryers, extractors, or tumblers for fabrics cleaned with only water solutions of bleach or detergents.

h. Natural draft hoods or natural draft ventilators.

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

- (1) Dipping operations for coating objects with oils, waxes, or greases, if no organic solvents are used.
- (2) Dipping operations for applying coatings of natural or synthetic resins which contain no organic solvents.
- (3) Storage of butane, propane, or liquefied petroleum or natural gas.

- (4) Storage of lubricating oils.
- (5) Storage of petroleum liquids except those containers, reservoirs, or tanks subject to the requirements of chapter 33-15-12.
- j. Gaseous fuel-fired or electrically heated furnaces for heat treating glass or metals, the use of which does not involve molten materials.
- k. Crucible furnaces, pot furnaces, or induction furnaces, with a capacity of one thousand pounds [453.59 kilograms] or less each, unless otherwise noted, in which no sweating or distilling is conducted, nor any fluxing conducted utilizing chloride, fluoride, or ammonium compounds, and from which only the following metals are poured or in which only the following metals are held in a molten state:
  - (1) Aluminum or any alloy containing over fifty percent aluminum; provided, that no gaseous chlorine compounds, chlorine, aluminum chloride, or aluminum fluoride are used.
  - (2) Magnesium or any alloy containing over fifty percent magnesium.
  - (3) Lead or any alloy containing over fifty percent lead, in a furnace with a capacity of five hundred fifty pounds [249.48 kilograms] or less.
  - (4) Tin or any alloy containing over fifty percent tin.
  - (5) Zinc or any alloy containing over fifty percent zinc.
  - (6) Copper.
  - (7) Precious metals.
- l. Open burning activities within the scope of section 33-15-04-02.
- m. Flares used to indicate some danger to the public.
- n. Sources or alterations to a source which are of minor significance as determined by the department.
- o. Oil and gas production facilities as defined in chapter 33-15-20 which are not a major source as defined in section 33-15-14-06.

14. **Performance and emission testing.**

- a. Emission tests or performance tests or both shall be conducted by the owner or operator of a facility and data reduced in accordance with the applicable procedure, limitations, standards, and test methods established by this article. Such tests must be conducted under the owner's or operator's permit to construct, and such permit is subject to the faithful completion of the test in accordance with this article.
- b. All dates and periods of trial operation for the purpose of performance or emission testing pursuant to a permit to construct must be approved in advance by the department. Trial operation shall cease if the department determines, on the basis of the test results, that continued operation will result in the violation of this article. Upon completion of any test conducted under a permit to construct, the department may order the cessation of the operation of the tested equipment or facility until such time as a permit to operate has been issued by the department.
- c. Upon review of the performance data resulting from any test, the department may require the installation of such additional control equipment as will bring the facility into compliance with this article.
- d. Nothing in this article may be construed to prevent the department from conducting any test upon its own initiative, or from requiring the owner or operator to conduct any test at such time as the department may determine.

15. **Responsibility to comply.**

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

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

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

18. **Extensions of time.** The department may extend any of the time periods specified in subsections 4, 5, and 6 upon notification of the applicant by the department.
19. **Amendment of permits.** The department may, when the public interest requires or when necessary to ensure the accuracy of the permit, modify any condition or information contained in the permit to construct. Modification shall be made only upon the department's own motion and the procedure shall, at a minimum, conform to any requirements of federal and state law. In the event that the modification would be a major modification as defined in chapter 33-15-15, the department shall follow the procedures established in chapter 33-15-15. For those of concern to the public, the department will provide:
  - a. Reasonable notice to the public, in the area to be affected, of the opportunity for comment on the proposed modification, and the opportunity for a public hearing, upon request, as well as written public comment.
  - b. A minimum of a thirty-day period for written public comment, with the opportunity for a public hearing during that thirty-day period, upon request.
  - c. Consideration by the department of all comments received in its order for modification.

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

**History:** Amended effective March 1, 1980; February 1, 1982; October 1, 1987; June 1, 1990; March 1, 1994; August 1, 1995; September 1, 1997; September 1, 1998; June 1, 2001; March 1, 2003; February 1, 2005; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04, 23-25-04.1, 23-25-04.2

**Law Implemented:** NDCC 23-25-04, 23-25-04.1, 23-25-04.2

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

1. **Definitions.** For purposes of this section:
  - a. "Affected source" means any source that includes one or more affected units.

- b. "Affected state" means any state that is contiguous to North Dakota whose air quality may be affected by a source subject to a proposed title V permit, permit modification, or permit renewal or which is within fifty miles [80.47 kilometers] of the permitted source.
- c. "Affected unit" means a unit that is subject to any acid rain emissions reduction requirement or acid rain emissions limitation under title IV of the Federal Clean Air Act.
- d. "Alternative operating scenario (AOS)" means a scenario authorized in a title V permit that involves a change at the title V source for a particular emissions unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.
- e. "Applicable requirement" means all of the following as they apply to emissions units at a source that is subject to requirements of this section (including requirements that have been promulgated or approved by the United States environmental protection agency through rulemaking at the time of issuance but have future-effective compliance dates):
  - (1) Any standard or other requirement provided for in the North Dakota state implementation plan approved or promulgated by the United States environmental protection agency through rulemaking under title I of the Federal Clean Air Act that implements the relevant requirements of the Federal Clean Air Act, including any revisions to that plan.
  - (2) Any term or condition of any permit to construct issued pursuant to this chapter.
  - (3) Any standard or other requirement under section 111 including section 111(d) of the Federal Clean Air Act.
  - (4) Any standard or other requirement under section 112 of the Federal Clean Air Act including any requirement concerning accident prevention under section 112(r)(7) of the Federal Clean Air Act.
  - (5) Any standard or other requirement of the acid rain program under title IV of the Federal Clean Air Act.
  - (6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Federal Clean Air Act.

- (7) Any standard or other requirement governing solid waste incineration, under section 129 of the Federal Clean Air Act.
  - (8) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Federal Clean Air Act.
  - (9) Any standard or other requirement for tank vessels under section 183(f) of the Federal Clean Air Act.
  - (10) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Federal Clean Air Act.
  - (11) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Federal Clean Air Act, unless the administrator of the United States environmental protection agency has determined that such requirements need not be contained in a title V permit.
  - (12) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Federal Clean Air Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Federal Clean Air Act.
- f. "Approved replicable methodology (ARM)" means title V permit terms that:
- (1) Specify a protocol which is consistent with and implements an applicable requirement, or requirement of this section, such that the protocol is based on sound scientific or mathematical principles, or both, and provides reproducible results using the same inputs; and
  - (2) Require the results of that protocol to be recorded and used for assuring compliance with such applicable requirement, any other applicable requirement implicated by implementation of the approved replicable methodology, or requirement of this section, including where an approved replicable methodology is used for determining applicability of a specific requirement to a particular change.
9. "Designated representative" means a responsible natural person authorized by the owners and operators of an affected source and of all affected units at the source, as evidenced by a certificate of representation submitted in accordance with subpart B of 40 CFR 72, to represent and legally bind each owner and operator, as a

matter of federal law, in matters pertaining to the acid rain program. Whenever the term "responsible official" is used in this section, or in any other regulations implementing title V of the Federal Clean Air Act, it shall be deemed to refer to the "designated representative" with regard to all matters under the acid rain program.

- h. "Draft permit" means the version of a permit for which the department offers public participation or affected state review.
- i. "Emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the title V permit to operate, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.
- j. "Emissions allowable under the permit" means a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.
- k. "Emissions unit" means any part or activity of a stationary source that emits or has the potential to emit any regulated air contaminant or any contaminant listed under section 112(b) of the Federal Clean Air Act. This term does not alter or affect the definition of unit for purposes of title IV of the Federal Clean Air Act.
- l. "Environmental protection agency" or the "administrator" means the administrator of the United States environmental protection agency or the administrator's designee.
- m. "Federal Clean Air Act" means the Federal Clean Air Act, as amended [42 U.S.C. 7401 et seq.].
- n. "Final permit" means the version of a title V permit issued by the department that has completed all review procedures required in this section.
- o. "Fugitive emissions" are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

- p. "General permit" means a title V permit to operate that meets the requirements of subdivision d of subsection 5.
- q. "Major source" means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph 1 or 2. For the purposes of defining "major source", a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the contaminant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same major group (i.e., all have the same two-digit code) as described in the standard industrial classification manual, 1987.
- (1) A major source under section 112 of the Federal Clean Air Act, which is defined as:
    - (a) For contaminants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, ten tons [9.07 metric tons] per year (tpy) or more of any hazardous air contaminant which has been listed pursuant to section 112(b) of the Federal Clean Air Act, twenty-five tons [22.67 metric tons] per year or more of any combination of such hazardous air contaminants, or such lesser quantity as the administrator of the United States environmental protection agency may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources.
    - (b) For radionuclides, "major source" shall have the meaning specified by the administrator of the United States environmental protection agency by rule.
  - (2) A major stationary source of air contaminants, that directly emits or has the potential to emit, one hundred tons [90.68 metric tons] per year or more of any air contaminant subject to regulation (including any major source of fugitive emissions of any such contaminant, as determined by rule by the administrator of the United States environmental

protection agency). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of this section, unless the source belongs to one of the following categories of stationary source:

- (a) Coal cleaning plants (with thermal dryers).
- (b) Kraft pulp mills.
- (c) Portland cement plants.
- (d) Primary zinc smelters.
- (e) Iron and steel mills.
- (f) Primary aluminum ore reduction plants.
- (g) Primary copper smelters.
- (h) Municipal incinerators capable of charging more than two hundred fifty tons [226.80 metric tons] of refuse per day.
- (i) Hydrofluoric, sulfuric, or nitric acid plants.
- (j) Petroleum refineries.
- (k) Lime plants.
- (l) Phosphate rock processing plants.
- (m) Coke oven batteries.
- (n) Sulfur recovery plants.
- (o) Carbon black plants (furnace process).
- (p) Primary lead smelters.
- (q) Fuel conversion plants.
- (r) Sintering plants.
- (s) Secondary metal production plants.
- (t) Chemical process plants.

- (u) Fossil-fuel boilers (or combination thereof) totaling more than two hundred fifty million British thermal units per hour heat input.
  - (v) Petroleum storage and transfer units with a total storage capacity exceeding three hundred thousand barrels.
  - (w) Taconite ore processing plants.
  - (x) Glass fiber processing plants.
  - (y) Charcoal production plants.
  - (z) Fossil-fuel-fired steam electric plants of more than two hundred fifty million British thermal units per hour heat input.
  - (aa) 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.
- f. "Permit modification" means a revision to a title V permit that meets the requirements of subdivision e of subsection 6.
  - s. "Permit program costs" means all reasonable (direct and indirect) costs required to develop and administer a permit program, under this section (whether such costs are incurred by the department or other state or local agencies that do not issue permits directly, but that support permit issuance or administration).
  - t. "Permit revision" means any permit modification or administrative permit amendment.
  - u. "Potential to emit" means the maximum capacity of a stationary source to emit any air contaminant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air contaminant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the administrator of the United States environmental protection agency and the department.
  - v. "Proposed permit" means the version of a permit that the department proposes to issue and forwards to the administrator of the United States environmental protection agency for review.
  - w. "Regulated air contaminant" means the following:

- (1) Nitrogen oxides or any volatile organic compounds.
- (2) Any contaminant for which a national ambient air quality standard has been promulgated.
- (3) Any contaminant that is subject to any standard promulgated under section 111 of the Federal Clean Air Act.
- (4) Any class I or II substance subject to a standard promulgated under or established by title VI of the Federal Clean Air Act.
- (5) Any contaminant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Federal Clean Air Act, including sections 112(g), (j), and (r) of the Federal Clean Air Act, including the following:
  - (a) Any contaminant subject to requirements under section 112(j) of the Federal Clean Air Act. If the administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Federal Clean Air Act, any contaminant for which a subject source would be major shall be considered to be regulated on the date eighteen months after the applicable date established pursuant to section 112(e) of the Federal Clean Air Act; and
  - (b) Any contaminant for which the requirements of section 112(g)(2) of the Federal Clean Air Act have been met, but only with respect to the individual source subject to section 112(g)(2) of the Federal Clean Air Act requirement.

x. "Regulated contaminant" for fee calculation, which is used only for chapter 33-15-23, means any "regulated air contaminant" except the following:

- (1) Carbon monoxide.
- (2) Any contaminant that is a regulated air contaminant solely because it is a class I or II substance subject to a standard promulgated under or established by title VI of the Federal Clean Air Act.
- (3) Any contaminant that is a regulated air contaminant solely because it is subject to a standard or regulation under section 112(r) of the Federal Clean Air Act.
- (4) Greenhouse gases.

- Y. "Renewal" means the process by which a permit is reissued at the end of its term.
- Z. "Responsible official" means one of the following:
  - (1) For a corporation: a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decisionmaking functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:
    - (a) The facilities employ more than two hundred fifty persons or have gross annual sales or expenditures exceeding twenty-five million dollars (in second quarter 1980 dollars).
    - (b) The delegation of authority to such representatives is approved in advance by the department.
  - (2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.
  - (3) For a municipality, state, federal, or other public agency: either a principal executive officer or ranking elected official. For the purposes of this section, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of the United States environmental protection agency).
  - (4) For affected sources:
    - (a) The designated representative insofar as actions, standards, requirements, or prohibitions under title IV of the Federal Clean Air Act or the regulations promulgated thereunder are concerned.
    - (b) The designated representative for any other purposes under this section.
- aa. "Section 502(b)(10) changes" are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

- bb. "Stationary source" means any building, structure, facility, or installation that emits or may emit any regulated air contaminant or any contaminant listed under section 112(b) of the Federal Clean Air Act.
- cc. "Subject to regulation" means, for any air contaminant, that the air contaminant is subject to either a provision in the Federal Clean Air Act, or a nationally applicable regulation codified by the administrator of the United States environmental protection agency in title 40, Code of Federal Regulations, chapter I, subchapter C, that requires actual control of the quantity of emissions of that air contaminant, and that such a control requirement has taken effect and is operative to control, limit, or restrict the quantity of emissions of that air contaminant release from the regulated activity. Except that:
- (1) Greenhouse gases, the air contaminant defined in 40 Code of Federal Regulations 86.1818-12(a) as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the greenhouse gases emissions are at a stationary source emitting or having the potential to emit one hundred thousand tons per year carbon dioxide equivalent emissions.
  - (2) The term tons per year carbon dioxide equivalent emissions shall represent an amount of greenhouse gases emitted, and shall be computed by multiplying the mass amount of emissions (tons per year), for each of the six greenhouse gases in the contaminant greenhouse gases, by the gas's associated global warming potential published at 40 Code of Federal Regulations, part 98, subpart A, table A-1 - global warming potentials, and summing the resultant value for each to compute a tons per year carbon dioxide equivalent. For purposes of this paragraph, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of nonfossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, byproducts, residues, and waste from agriculture, forestry, and related industries as well as the nonfossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of nonfossilized and biodegradable organic material).
- dd. "Title V permit to operate or permit" (unless the context suggests otherwise) means any permit or group of permits covering a source

that is subject to this section that is issued, renewed, amended, or revised pursuant to this section.

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

## 2. **Applicability.**

- a. This section is applicable to the following sources:

- (1) Any major source.
- (2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Federal Clean Air Act.
- (3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Federal Clean Air Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of the Federal Clean Air Act.
- (4) Any affected source.
- (5) Any source in a source category designated by the administrator of the United States environmental protection agency.

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

- (1) All sources listed in subdivision a that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Federal Clean Air Act, are exempt from the obligation to obtain a title V permit until such time as the administrator of the United States environmental protection agency completes a rulemaking to determine how the program should be structured for nonmajor sources and the appropriateness of any permanent exemptions.
- (2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or 112 of the Federal Clean Air Act after July 21, 1992, those the administrator of the United States environmental protection agency determines to be exempt from the requirement to obtain a title V source permit at the time that the new standard is promulgated.

- (3) Any source listed as exempt from the requirement to obtain a permit under this section may opt to apply for a title V permit. Sources that are exempted by paragraphs 1 and 2 and which do not opt to apply for a title V permit to operate are subject to the requirements of section 33-15-14-03.
    - (4) The following source categories are exempted from the obligation to obtain a permit under this section.
      - (a) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR 60, subpart AAA - standards of performance for new residential wood heaters.
      - (b) All sources and source categories that would be required to obtain a permit solely because they are subject to 40 CFR 61, subpart M - national emission standard for hazardous air pollutants for asbestos, section 61.145, standard for demolition and renovation.
  - c. For major sources, the department will include in the permit all applicable requirements for all relevant emissions units in the major source.

For any nonmajor source subject to the requirements of this section, the department will include in the permit all applicable requirements applicable to the emissions units that cause the source to be subject to this section.
  - d. Fugitive emissions from a source subject to the requirements of this section shall be included in the permit application and the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.
3. **Scope.** Nothing within this section shall relieve the owner or operator of a source of the requirement to obtain a permit to construct under section 33-15-14-02 or to comply with any other applicable standard or requirement of this article.
  4. **Permit applications.**
    - a. **Duty to apply.** For each title V source, the owner or operator shall submit a timely and complete permit application in accordance with this subdivision.
      - (1) **Timely application.**

- (a) A timely application for a source applying for a title V permit for the first time is one that is submitted within one year of the source becoming subject to this section.
  - (b) Title V sources required to meet the requirements under section 112(g) of the Federal Clean Air Act, or to have a permit to construct under section 33-15-14-02, shall file a complete application to obtain the title V permit or permit revision within twelve months after commencing operation. Where an existing title V permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation.
  - (c) For purposes of permit renewal, a timely application is one that is submitted at least six months, but not more than eighteen months, prior to the date of permit expiration.
- (2) Complete application. To be deemed complete, an application must provide all information required pursuant to subdivision c, except that applications for a permit revision need supply such information only if it is related to the proposed change. Information required under subdivision c must be sufficient to evaluate the subject source and its application and to determine all applicable requirements. A responsible official must certify the submitted information consistent with subdivision d. Unless the department determines that an application is not complete within sixty days of receipt of the application, such application shall be deemed to be complete, except as otherwise provided in paragraph 3 of subdivision a of subsection 6. If, while processing an application that has been determined or deemed to be complete, the department determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response. The source's ability to operate without a permit, as set forth in subdivision b of subsection 6, shall be in effect from the date the application is determined or deemed to be complete until the final permit is issued, provided that the applicant submits any requested additional information by the deadline specified by the department.
- (3) Confidential information. If a source has submitted information to the department under a claim of confidentiality, the source must also submit a copy of such information directly to the administrator of the United States

environmental protection agency when directed to do so by the department.

- b. Duty to supplement or correct application. Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.
- c. Standard application form and required information. All applications for a title V permit to operate shall be made on forms supplied by the department. Information as described below for each emissions unit at a title V source shall be included in the application. Detailed information for emissions units or activities that have the potential to emit less than the following quantities of air contaminants (insignificant units or activities) need not be included in permit applications:

Particulate: 2 tons [1.81 metric tons] per year

Inhalable particulate: 2 tons [1.81 metric tons] per year

Sulfur dioxide: 2 tons [1.81 metric tons] per year

Hydrogen sulfide: 2 tons [1.81 metric tons] per year

Carbon monoxide: 2 tons [1.81 metric tons] per year

Nitrogen oxides: 2 tons [1.81 metric tons] per year

Ozone: 2 tons [1.81 metric tons] per year

Reduced sulfur compounds: 2 tons [1.81 metric tons] per year

Volatile organic compounds: 2 tons [1.81 metric tons]

All other regulated contaminants including those in section 112(b) of the Federal Clean Air Act: 0.5 tons [0.45 metric tons] per year.

Where a contaminant could be placed in more than one category, the smallest emission level applies.

However, for insignificant activities or emissions units, a list of such activities or units must be included in the application. An applicant may not omit information needed to determine the applicability of,

or to impose, any applicable requirement, or to evaluate the fee amount required under section 33-15-23-04. The application, shall, as a minimum, include the elements specified below:

- (1) Identifying information, including company name and address (or plant name and address if different from the company name), owner's name and agent, and telephone number and names of plant site manager or contact.
- (2) A description of the source's processes and products (by Standard Industrial Classification Code) including those associated with any proposed alternative operating scenario identified by the source.
- (3) The following emissions-related information:
  - (a) All emissions of contaminants for which the source is major, and all emissions of regulated air contaminants. A permit application shall describe all emissions of regulated air contaminants emitted from any emissions unit, except when such units are exempted under this subdivision.
  - (b) Identification and description of all points of emissions described in subparagraph a in sufficient detail to establish the basis for fees and applicability of requirements of the Federal Clean Air Act and this article.
  - (c) Emissions rates in tons per year and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method. For emissions units subject to an annual emissions cap, tons per year can be reported as part of the aggregate emissions associated with the cap, except where more specific information is needed, including where necessary to determine or assure compliance with, or both, an applicable requirement.
  - (d) Fuels, fuel use, raw materials, production rates, and operating schedules.
  - (e) Identification and description of air pollution control equipment and compliance monitoring devices or activities.
  - (f) Limitations on source operation affecting emissions or any work practice standards, when applicable, for all regulated contaminants.

- (g) Other information required by any applicable requirement including information related to stack height limitations developed pursuant to chapter 33-15-18.
  - (h) Calculations on which the information in subparagraphs a through g is based.
- (4) The following air pollution control requirements:
  - (a) Citation and description of all applicable requirements; and
  - (b) Description of or reference to any applicable test method for determining compliance with each applicable requirement.
- (5) Other specific information that may be necessary to implement and enforce other applicable requirements of the Federal Clean Air Act or of this article or to determine the applicability of such requirements.
- (6) An explanation of any proposed exemptions from otherwise applicable requirements.
- (7) Additional information as determined to be necessary by the department to define proposed alternative operating scenarios identified by the source pursuant to paragraph 9 of subdivision a of subsection 5 of section 33-15-14-06 or to define permit terms and conditions implementing any alternative operating scenario under paragraph 9 of subdivision a of subsection 5 of section 33-15-14-06 or implementing paragraph 2 of subdivision b of subsection 6 of section 33-15-14-06, paragraph 3 of subdivision b of subsection 6 of section 33-15-14-06, paragraph 8 of subdivision a of subsection 5 of section 33-15-14-06, or paragraph 10 of subdivision a of subsection 5 of section 33-15-14-06. The permit application shall include documentation demonstrating that the source has obtained all authorizations required under the applicable requirements relevant to any proposed alternative operating scenarios, or a certification that the source has submitted all relevant materials to the department for obtaining such authorizations.
- (8) A compliance plan for all title V sources that contains all the following:
  - (a) A description of the compliance status of the source with respect to all applicable requirements.

(b) A description as follows:

- [1] For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.
- [2] For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.
- [3] For requirements for which the source is not in compliance at the time of permit issuance, a narrative description of how the source will achieve compliance with such requirements.
- [4] For applicable requirements associated with a proposed alternative operating scenario, a statement that the source will meet such requirements upon implementation of the alternative operating scenario. If a proposed alternative operating scenario would implicate an applicable requirement that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

(c) A compliance schedule as follows:

- [1] For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.
- [2] For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term shall satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.
- [3] A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures,

including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

[4] For applicable requirements associated with a proposed alternative operating scenario, a statement that the source will meet such requirements upon implementation of the alternative operating scenario. If a proposed alternative operating scenario would implicate an applicable requirement that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term will satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.

(d) A schedule for submission of certified progress reports no less frequently than every six months for sources required to have a schedule of compliance to remedy a violation.

(e) The compliance plan content requirements specified in this paragraph shall apply and be included in the acid rain portion of a compliance plan for an affected source, except as specifically superseded by regulations promulgated under title IV of the Federal Clean Air Act with regard to the schedule and method or methods the source will use to achieve compliance with the acid rain emissions limitations.

(9) Requirements for compliance certification, including the following:

(a) A certification of compliance with all applicable requirements by a responsible official consistent

with subdivision d and section 114(a)(3) of the Federal Clean Air Act;

- (b) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods;
- (c) A schedule for submission of compliance certifications during the permit term, to be submitted annually, or more frequently if specified by the underlying applicable requirement; and
- (d) A statement indicating the source's compliance status with any applicable enhanced monitoring and compliance certification requirements of the Federal Clean Air Act.

(10) The use of nationally standardized forms for acid rain portions of permit applications and compliance plans, as required by regulations promulgated under title IV of the Federal Clean Air Act.

- d. Any application form, report, or compliance certification submitted pursuant to these rules shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this section shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

## 5. **Permit content.**

- a. Standard permit requirements. Each permit issued under this section shall include, as a minimum, the following elements:
  - (1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. Such requirements and limitations may include approved replicable methodologies identified by the source in its title V permit application as approved by the department, provided that no approved replicable methodology shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this section or circumvent any applicable requirement that would apply as a result of implementing the approved replicable methodology.

- (a) The permit must specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.
  - (b) The permit must state that, if an applicable requirement of the Federal Clean Air Act is more stringent than an applicable requirement of regulations promulgated under title IV of the Federal Clean Air Act, both provisions shall be incorporated into the permit and shall be enforceable by the administrator of the United States environmental protection agency and the department.
  - (c) If the state implementation plan allows a determination of an alternative emissions limit at a title V source, equivalent to that contained in the plan, to be made in the permit issuance, renewal, or significant modification process, and the department elects to use such process, any permit containing such equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.
- (2) Permit duration. Each title V permit to operate shall expire upon the fifth anniversary of its issuance.
- (3) Monitoring and related recordkeeping and reporting requirements.
- (a) Each permit shall contain the following requirements with respect to monitoring:
    - [1] All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including subsection 10 and any procedures and methods promulgated pursuant to sections 504(b) or 114(a)(3) of the Federal Clean Air Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

- [2] If the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to subparagraph c. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this item; and
  - [3] As necessary, requirements concerning the use, maintenance, and, if appropriate, installation of monitoring equipment or methods.
- (b) With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require, if applicable, the following:
- [1] Records of required monitoring information that include the following:
    - [a] The date, place as defined in the permit, and time of sampling or measurements;
    - [b] The dates analyses were performed;
    - [c] The company or entity that performed the analyses;
    - [d] The analytical techniques or methods used;
    - [e] The results of such analyses; and
    - [f] The operating conditions as existing at the time of sampling or measurement;
  - [2] Retention of records of all required monitoring data and support information for a period of at least five years from the date of the monitoring sample, measurement, report, or application. Support information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring

instrumentation, and copies of all reports required by the permit.

- (c) With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:
  - [1] Submittal of reports of any required monitoring at least every six months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with subdivision d of subsection 4.
  - [2] Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The department shall define "prompt" in the permit consistent with chapter 33-15-01 and the applicable requirements.
- (4) A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under title IV of the Federal Clean Air Act or the regulations promulgated thereunder.
  - (a) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to title IV of the Federal Clean Air Act, or the regulations promulgated thereunder, provided that such increases do not require a permit revision under any other applicable requirement.
  - (b) No limit shall be placed on the number of allowances held by the source. The source may not, however, use allowances as a defense to noncompliance with any other applicable requirement.
  - (c) Any such allowance shall be accounted for according to the procedures established in regulations promulgated under title IV of the Federal Clean Air Act.
- (5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.
- (6) Provisions stating the following:

- (a) The permittee must comply with all conditions of the title V permit. Any permit noncompliance constitutes a violation of the Federal Clean Air Act and this article and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.
  - (b) It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.
  - (c) The permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.
  - (d) The permit does not convey any property rights of any sort, or any exclusive privilege.
  - (e) The permittee must furnish to the department, within a reasonable time, any information that the department may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. Upon request, the permittee must also furnish to the department copies of records required to be kept by the permit or, for information claimed to be confidential, the permittee must also furnish such records directly to the administrator of the United States environmental protection agency along with a claim of confidentiality.
- (7) A provision to ensure that the source pays fees to the department consistent with the fee schedule in chapter 33-15-23.
- (8) Emissions trading. No permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit and the state implementation plan.
- (9) Terms and conditions for reasonably anticipated alternative operating scenarios identified by the source in its application as approved by the department. Such terms and conditions:

- (a) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the alternative operating scenario under which it is operating;
  - (b) Shall extend the permit shield described in subdivision f to all terms and conditions under each such alternative operating scenario; and
  - (c) Must ensure that the terms and conditions of each such alternative scenario meet all applicable requirements and the requirements of this section. The department shall not approve a proposed alternative operating scenario into the title V permit until the source has obtained all authorizations required under any applicable requirement relevant to that alternative operating scenario.
- (10) Terms and conditions, if the permit applicant requests them, for the trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements, including the state implementation plan, provide for trading such increases and decreases without a case-by-case approval of each emissions trade. Such terms and conditions:
- (a) Shall include all terms required under subdivisions a and c to determine compliance;
  - (b) Shall extend the permit shield described in subdivision f to all terms and conditions that allow such increases and decreases in emissions; and
  - (c) Must meet all applicable requirements and requirements of this section.
- (11) If a permit applicant requests it, the department shall issue permits that contain terms and conditions, including all terms required under subdivisions a and c to determine compliance, allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally enforceable emissions cap that is established in the permit independent of otherwise applicable requirements provided the changes in emissions are not modifications under title I of the Federal Clean Air Act and the changes do not exceed the emissions allowable under the permit. The permit applicant shall include in its application proposed replicable procedures and permit

terms that ensure the emissions trades are quantifiable and enforceable. The department shall not be required to include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall also require compliance with all applicable requirements. The permittee shall supply written notification at least seven days prior to the change to the department and the administrator of the United States environmental protection agency and shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit. The permit shield described in subdivision f shall extend to terms and conditions that allow such increases and decreases in emissions.

b. Federally enforceable requirements.

- (1) All terms and conditions in a title V permit, including any provisions designed to limit a source's potential to emit, are enforceable by the administrator of the United States environmental protection agency and citizens under the Federal Clean Air Act.
- (2) Notwithstanding paragraph 1, the department shall specifically designate as not being federally enforceable under the Federal Clean Air Act any terms and conditions included in the permit that are not required under the Federal Clean Air Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of subsections 6 and 7, or of this subsection, other than those contained in this subdivision.

c. Compliance requirements. All title V permits shall contain the following elements with respect to compliance:

- (1) Consistent with paragraph 3 of subdivision a, compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. Any document, including reports, required by a title V permit shall contain a certification by a responsible official that meets the requirements of subdivision d of subsection 4.
- (2) Inspection and entry requirements that require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow the department or an authorized representative to perform the following:

- (a) Enter upon the permittee's premises where a title V source is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;
  - (b) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;
  - (c) Inspect at reasonable times any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and
  - (d) As authorized by the Federal Clean Air Act and this article, sample or monitor at reasonable times substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.
- (3) A schedule of compliance consistent with paragraph 8 of subdivision c of subsection 4.
- (4) Progress reports consistent with an applicable schedule of compliance and paragraph 8 of subdivision c of subsection 4 to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the department. Such progress reports shall contain the following:
- (a) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones, or compliance were achieved; and
  - (b) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.
- (5) Requirements for compliance certification with terms and conditions contained in the permit, including emissions limitations, standards, or work practices. Permits shall include each of the following:
- (a) The frequency, which is annually or such more frequent periods as specified in the applicable requirement or by the department, of submissions of compliance certifications;

- (b) In accordance with paragraph 3 of subdivision a, a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices. The means for monitoring shall be contained in applicable requirements or United States environmental protection agency guidance;
- (c) A requirement that the compliance certification include all of the following (provided that the identification of applicable information may cross-reference the permit or previous reports, as applicable):
  - [1] The identification of each term or condition of the permit that is the basis of the certification;
  - [2] The identification of the methods or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph 3 of subdivision a;
  - [3] The status of compliance with the terms and conditions of the permit for the period covered by the certification, including whether compliance during the period was continuous or intermittent. The certification shall be based on the method or means designated in item 2. The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under subsection 10 occurred; and
  - [4] Such other facts as the department may require to determine the compliance status of the source;
- (d) A requirement that all compliance certifications be submitted to the administrator of the United States environmental protection agency as well as to the department; and
- (e) Such additional requirements as may be specified pursuant to sections 114(a)(3) and 504(b) of the Federal Clean Air Act.

(6) Such other provisions as the department may require.

d. General permits.

(1) The department may, after notice and opportunity for public participation provided under subdivision h of subsection 6, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other title V permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the department shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of subdivision f, the source shall be subject to enforcement action for operation without a title V permit to operate if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in regulations promulgated under title IV of the Federal Clean Air Act. The department is not required to issue a general permit in lieu of individual title V permits.

(2) Title V sources that would qualify for a general permit must apply to the department for coverage under the terms of the general permit or must apply for a title V permit to operate consistent with subsection 4. The department may, in the general permit, provide for applications which deviate from the requirements of subsection 4, provided that such applications meet the requirements of title V of the Federal Clean Air Act, and include all information necessary to determine qualification for, and to assure compliance with, the general permit. Without repeating the public participation procedures required under subdivision h of subsection 6, the department may grant a source's request for authorization to operate under a general permit, but such a grant shall not be a final permit action for purposes of judicial review.

e. Temporary sources. The department may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. The operation must be temporary and involve at least one change of location during the term of the permit. No affected source shall be permitted as a temporary source. Permits for temporary sources shall include the following:

(1) Conditions that will assure compliance with all applicable requirements at all authorized locations;

- (2) Requirements that the owner or operator notify the department at least ten days in advance of each change in location; and
  - (3) Conditions that assure compliance with all other provisions of this section.
- f. Permit shield.
- (1) Except as provided in this section, upon written request by the applicant, the department shall include in a title V permit to operate a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirement as of the date of permit issuance, provided that:
    - (a) Such applicable requirements are included and are specifically identified in the permit; or
    - (b) The department, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.
  - (2) A title V permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.
  - (3) Nothing in this subdivision or in any title V permit shall alter or affect the following:
    - (a) The provisions of section 303 of the Federal Clean Air Act (emergency orders), including the authority of the administrator of the United States environmental protection agency under that section;
    - (b) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;
    - (c) The applicable requirements of the acid rain program, consistent with section 408(a) of the Federal Clean Air Act; or
    - (d) The ability of the United States environmental protection agency to obtain information from a source pursuant to section 114 of the Federal Clean Air Act.
- g. Emergency provision.

- (1) An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emissions limitation under the title V permit to operate, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.
- (2) Effect of an emergency. An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emissions limitations if the conditions of paragraph 3 are met.
- (3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:
  - (a) An emergency occurred and that the permittee can identify the causes of the emergency;
  - (b) The permitted facility was at the time being properly operated;
  - (c) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emissions standards, or other requirements in the permit; and
  - (d) The permittee submitted notice of the emergency to the department within one working day of the time when emissions limitations were exceeded due to the emergency. This notice fulfills the requirement of item 2 of subparagraph c of paragraph 3 of subdivision a. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.
- (4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.
- (5) This provision is in addition to any emergency or upset provision contained in any applicable requirement and the malfunction notification required under subdivision b of

subsection 2 of section 33-15-01-13 when a threat to health and welfare would exist.

**6. Permit issuance, renewal, reopenings, and revisions.**

a. Action on application.

- (1) A permit, permit modification, or permit renewal may be issued only if all of the following conditions have been met:
  - (a) The department has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under subdivision d of subsection 5;
  - (b) Except for modifications qualifying for minor permit modification procedures under paragraphs 1 and 2 of subdivision e, the department has complied with the requirements for public participation under subdivision h;
  - (c) The department has complied with the requirements for notifying and responding to affected states under subdivision b of subsection 7;
  - (d) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this section; and
  - (e) The administrator of the United States environmental protection agency has received a copy of the proposed permit and any notices required under subdivisions a and b of subsection 7, and has not objected to issuance of the permit under subdivision c of subsection 7 within the time period specified therein.
- (2) Except for applications received during the initial transitional period described in 40 CFR 70.4(b)(11) or under regulations promulgated under title IV or title V of the Federal Clean Air Act for the permitting of affected sources under the acid rain program, the department shall take final action on each permit application, including a request for permit modification or renewal, within eighteen months after receiving a complete application.
- (3) The department shall provide notice to the applicant of whether the application is complete. Unless the department requests additional information or otherwise

notifies the applicant of incompleteness within sixty days of receipt of an application, the application shall be deemed complete. For modifications processed through the minor permit modification procedures, in paragraphs 1 and 2 of subdivision e, a completeness determination is not required.

- (4) The department shall provide a statement that sets forth the legal and factual basis for the draft permit conditions, including references to the applicable statutory or regulatory provisions. The department shall send this statement to the United States environmental protection agency and to any other person who requests it.
- (5) The submittal of a complete application shall not affect the requirement that any source have a permit to construct under section 33-15-14-02.

b. Requirement for a permit.

- (1) Except as provided in the following sentence, paragraphs 2 and 3, subparagraph e of paragraph 1 of subdivision e, and subparagraph e of paragraph 2 of subdivision e, no title V source may operate after the time that it is required to submit a timely and complete application under this section, except in compliance with a permit issued under this section. If a title V source submits a timely and complete application for permit issuance, including for renewal, the source's failure to have a title V permit is not a violation of this section until the department takes final action on the permit application, except as noted in this subsection. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to paragraph 3 of subdivision a, and as required by paragraph 2 of subdivision a of subsection 4, the applicant fails to submit by the deadline specified in writing by the department any additional information identified as being needed to process the application. For timely and complete renewal applications for which the department has failed to issue or deny the renewal permit before the expiration date of the previous permit, all the terms and conditions of the permit, including the permit shield that was granted pursuant to subdivision f of subsection 5 shall remain in effect until the renewal permit has been issued or denied.
- (2) A permit revision is not required for section 502(b)(10) changes provided:

- (a) The changes are not modifications under chapters 33-15-12, 33-15-13, and 33-15-15 or title I of the Federal Clean Air Act.
- (b) The changes do not exceed the emissions allowable under the title V permit whether expressed therein as a rate of emissions or in terms of total emissions.
- (c) A permit to construct under section 33-15-14-02 has been issued, if required.
- (d) The facility provides the department and the administrator of the United States environmental protection agency with written notification at least seven days in advance of the proposed change. The written notification shall include a description of each change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

The permit shield described in subdivision f of subsection 5 shall not apply to any change made pursuant to this paragraph.

- (3) A permit revision is not required for changes that are not addressed or prohibited by the permit provided:
  - (a) Each such change shall meet all applicable requirements and shall not violate any existing permit term or condition.
  - (b) The source must provide contemporaneous written notice to the department and the administrator of the United States environmental protection agency of each such change, except for changes that qualify as insignificant under the provisions of subdivision c of subsection 4. Such written notice shall describe each such change, including the date, any change in emissions, contaminants emitted, and any applicable requirement that would apply as a result of the change.
  - (c) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air contaminant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

- (d) The changes are not subject to any requirements under title IV of the Federal Clean Air Act.
- (e) The changes are not modifications under chapters 33-15-12, 33-15-13, and 33-15-15 or any provision of title I of the Federal Clean Air Act.
- (f) A permit to construct under section 33-15-14-02 has been issued, if required.

The permit shield described in subdivision f of subsection 5 shall not apply to any change made pursuant to this paragraph.

c. Permit renewal and expiration.

- (1) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected state and the United States environmental protection agency review, that apply to initial permit issuance; and
- (2) Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with subdivision b of subsection 6 and subparagraph c of paragraph 1 of subdivision a of subsection 4.

d. Administrative permit amendments.

- (1) An "administrative permit amendment" is a permit revision that:
  - (a) Corrects typographical errors;
  - (b) Identifies a change in the name, address, or telephone number of any person identified in the permit, or provides a similar minor administrative change at the source;
  - (c) Requires more frequent monitoring or reporting by the permittee;
  - (d) Allows for a change in ownership or operational control of a source if the department determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the department;

- (e) Incorporates into the title V permit the requirements from a permit to construct, provided that the permit to construct review procedure is substantially equivalent to the requirements of subsections 6 and 7 that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in subsection 5; or
  - (f) Incorporates any other type of change which the administrator of the United States environmental protection agency has approved as being an administrative permit amendment as part of the approved title V operating permit program.
- (2) Administrative permit amendments for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Federal Clean Air Act.
- (3) Administrative permit amendment procedures. An administrative permit amendment may be made by the department consistent with the following:
- (a) The department shall take no more than sixty days from receipt of a request for an administrative permit amendment to take final action on such request, and may incorporate such changes without providing notice to the public or affected states provided that it designates any such permit revisions as having been made pursuant to this subdivision.
  - (b) The department shall submit a copy of the revised permit to the administrator of the United States environmental protection agency.
  - (c) The source may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request provided a permit to construct under section 33-15-14-02 has been issued, if required.
- (4) The department may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in subdivision f of subsection 5 for administrative permit amendments made pursuant to subparagraph e of paragraph 1 of subdivision d which meet the relevant requirements of subsections 5, 6, and 7 for significant permit modifications.

e. Permit modification. A permit modification is any revision to a title V permit that cannot be accomplished under the provisions for administrative permit amendments under subdivision d. A permit modification for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Federal Clean Air Act.

(1) Minor permit modification procedures.

(a) Criteria.

[1] Minor permit modification procedures may be used only for those permit modifications that:

[a] Do not violate any applicable requirement;

[b] Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

[c] Do not require or change a case-by-case determination of an emissions limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

[d] Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include a federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I of the Federal Clean Air Act; and an alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Federal Clean Air Act;

[e] Are not modifications under chapters 33-15-12, 33-15-13, and 33-15-15 or any provision of title I of the Federal Clean Air Act; and

[f] Are not required to be processed as a significant modification.

[2] Notwithstanding item 1 and subparagraph a of paragraph 2 of subdivision e, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in the state implementation plan, or in applicable requirements promulgated by the United States environmental protection agency.

(b) Application. An application requesting the use of minor permit modification procedures shall meet the requirements of subdivision c of subsection 4 and shall include the following:

[1] A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

[2] The source's suggested draft permit;

[3] Certification by a responsible official, consistent with subdivision d of subsection 4, that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

[4] Completed forms for the department to use to notify the administrator of the United States environmental protection agency and affected states as required under subsection 7.

(c) United States environmental protection agency and affected state notification. Within five working days of receipt of a complete permit modification application, the department shall notify the administrator of the United States environmental protection agency and affected states of the requested permit modification. The department shall promptly send any notice required under paragraph 2 of subdivision b of subsection 7 to the administrator of the United States environmental protection agency.

- (d) Timetable for issuance. The department may not issue a final permit modification until after the United States environmental protection agency forty-five-day review period or until the United States environmental protection agency has notified the department that the United States environmental protection agency will not object to issuance of the permit modification, whichever is first, although the department can approve the permit modification prior to that time. Within ninety days of the department's receipt of an application under minor permit modification procedures or fifteen days after the end of the administrator's forty-five-day review period under subdivision c of subsection 7, whichever is later, the department shall:
- [1] Issue the permit modification as proposed;
  - [2] Deny the permit modification application;
  - [3] Determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or
  - [4] Revise the draft permit modification and transmit to the administrator the new proposed permit modification as required by subdivision a of subsection 7.
- (e) Source's ability to make change. A source may make the change proposed in its minor permit modification application only after it files such application and the department approves the change in writing. If the department allows the source to make the proposed change prior to taking action specified in items 1, 2, and 3 of subparagraph d, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions it seeks to modify. However, if the source fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.
- (f) The permit shield under subdivision f of subsection 5 shall not extend to minor permit modifications.

- (2) Group processing of minor permit modifications. Consistent with this paragraph, the department may modify the procedure outlined in paragraph 1 to process groups of a source's applications for certain modifications eligible for minor permit modification processing.
- (a) Criteria. Group processing of modifications may be used only for those permit modifications:
- [1] That meet the criteria for minor permit modification procedures under item 1 of subparagraph a of paragraph 1 of subdivision e; and
  - [2] That collectively are below the threshold level which is ten percent of the emissions allowed by the permit for the emissions unit for which the change is requested, twenty percent of the applicable definition of major source in subsection 1, or five tons [4.54 metric tons] per year, whichever is least.
- (b) Application. An application requesting the use of group processing procedures shall meet the requirements of subdivision c of subsection 4 and shall include the following:
- [1] A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs.
  - [2] The source's suggested draft permit.
  - [3] Certification by a responsible official, consistent with subdivision d of subsection 4, that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.
  - [4] A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under item 2 of subparagraph a of paragraph 2 of subdivision e.
  - [5] Certification, consistent with subdivision d of subsection 4, that the source has notified the

United States environmental protection agency of the proposed modification. Such notification need only contain a brief description of the requested modification.

[6] Completed forms for the department to use to notify the administrator of the United States environmental protection agency and affected states as required under subsection 7.

(c) United States environmental protection agency and affected state notification. On a quarterly basis or within five business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under item 2 of subparagraph a of paragraph 2 of subdivision e, whichever is earlier, the department shall meet its obligation under paragraph 1 of subdivision a of subsection 7 and paragraph 1 of subdivision b of subsection 7 to notify the administrator of the United States environmental protection agency and affected states of the requested permit modifications. The department shall send any notice required under paragraph 2 of subdivision b of subsection 7 to the administrator of the United States environmental protection agency.

(d) Timetable for issuance. The provisions of subparagraph d of paragraph 1 of subdivision e shall apply to modifications eligible for group processing, except that the department shall take one of the actions specified in items 1 through 4 of subparagraph d of paragraph 1 of subdivision e within one hundred eighty days of receipt of the application or fifteen days after the end of the administrator's forty-five-day review period under subdivision c of subsection 7, whichever is later.

(e) Source's ability to make change. The provisions of subparagraph e of paragraph 1 apply to modifications eligible for group processing.

(f) The permit shield under subdivision f of subsection 5 shall not extend to group processing of minor permit modifications.

(3) Significant modification procedures.

- (a) Criteria. Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. Every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from making changes consistent with this subsection that would render existing permit compliance terms and conditions irrelevant.
  - (b) Significant permit modifications shall meet all requirements of this section, including those for applications, public participation, review by affected states, and review by the United States environmental protection agency, as they apply to permit issuance and permit renewal. The department shall complete review of significant permit modifications within nine months after receipt of a complete application.
- f. Reopening for cause.
  - (1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:
    - (a) Additional applicable requirements under the Federal Clean Air Act become applicable to a major title V source with a remaining permit term of three or more years. Such a reopening shall be completed not later than eighteen months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended.
    - (b) Additional requirements, including excess emissions requirements, become applicable to an affected source under title IV of the Federal Clean Air Act or the regulations promulgated thereunder. Upon approval by the administrator of the United States environmental protection agency, excess emissions offset plans shall be deemed to be incorporated into the permit.
    - (c) The department or the United States environmental protection agency determines that the permit contains

a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(d) The administrator of the United States environmental protection agency or the department determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists. Such reopening shall be made as expeditiously as practicable.

(3) Reopenings under paragraph 1 shall not be initiated before a notice of such intent is provided to the title V source by the department at least thirty days in advance of the date that the permit is to be reopened, except that the department may provide a shorter time period in the case of an emergency.

9. Reopenings for cause by the United States environmental protection agency.

(1) If the administrator of the United States environmental protection agency finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to subdivision f, within ninety days after receipt of such notification, the department shall forward to the United States environmental protection agency a proposed determination of termination, modification, or revocation and reissuance, as appropriate.

(2) The administrator of the United States environmental protection agency will review the proposed determination from the department within ninety days of receipt.

(3) The department shall have ninety days from receipt of the United States environmental protection agency objection to resolve any objection that the United States environmental protection agency makes and to terminate, modify, or revoke and reissue the permit in accordance with the administrator's objection.

(4) If the department fails to submit a proposed determination or fails to resolve any objection, the administrator of the United States environmental protection agency will terminate, modify, or revoke and reissue the permit after taking the following actions:

- (a) Providing at least thirty days' notice to the permittee in writing of the reasons for any such action.
  - (b) Providing the permittee an opportunity for comment on the administrator's proposed action and an opportunity for a hearing.
- h. Public participation. Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall be subject to procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:
  - (1) Notice shall be given by publication in a newspaper of general circulation in the area where the source is located or in a state publication designed to give general public notice; to persons on a mailing list developed by the department, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public;
  - (2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the department; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, and all other materials available to the department that are relevant to the permit decision; a brief description of the comment procedures required by this subsection; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing, unless a hearing has already been scheduled;
  - (3) The department shall provide such notice and opportunity for participation by affected states as is provided for by subsection 7;
  - (4) The department shall provide at least thirty days for public comment and shall give notice of any public hearing at least thirty days in advance of the hearing; and
  - (5) The department shall keep a record of the commenters and also of the issues raised during the public participation process. These records shall be available to the public.

**7. Permit review by the United States environmental protection agency and affected states.**

a. Transmission of information to the administrator.

- (1) The department shall provide a copy of each permit application including any application for a permit modification (including the compliance plan), to the administrator of the United States environmental protection agency except that the applicant shall provide such information directly to the administrator of the United States environmental protection agency when directed to do so by the department. The department shall provide a copy of each proposed permit and each final title V permit to operate to the administrator of the United States environmental protection agency. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with the United States environmental protection agency's national data base management system.
- (2) The department may waive the requirements of paragraph 1 and paragraph 1 of subdivision b for any category of sources (including any class, type, or size within such category) other than major sources upon approval by the administrator of the United States environmental protection agency.
- (3) The department shall keep these records for at least five years.

b. Review by affected states.

- (1) The department shall give notice of each draft permit to any affected state on or before the time that the notice to the public under subdivision h of subsection 6 is given, except to the extent paragraphs 1 and 2 of subdivision e of subsection 6 require the timing of the notice to be different.
- (2) As part of the submittal of the proposed permit to the administrator of the United States environmental protection agency (or as soon as possible after the submittal for minor permit modification procedures allowed under paragraphs 1 and 2 of subdivision e of subsection 6) the department shall notify the administrator of the United States environmental protection agency and any affected state in writing of any refusal by the department to accept all recommendations for the proposed permit that the affected state submitted during the public or affected state review period. The notice shall include the department's reasons for not accepting any such recommendation. The department is not required to

accept recommendations that are not based on applicable requirements or the requirements of this section.

- c. United States environmental protection agency objection. No permit for which an application must be transmitted to the administrator of the United States environmental protection agency under subdivision a shall be issued if the administrator of the United States environmental protection agency objects to its issuance in writing within forty-five days of receipt of the proposed permit and all necessary supporting information.
- d. Public petitions to the administrator of the United States environmental protection agency. If the administrator of the United States environmental protection agency does not object in writing under subdivision c, any person may petition the administrator of the United States environmental protection agency within sixty days after the expiration of the administrator's forty-five-day review period to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in subdivision h of subsection 6, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the administrator of the United States environmental protection agency objects to the permit as a result of a petition filed under this subdivision, the department shall not issue the permit until the United States environmental protection agency's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the forty-five-day review period and prior to the United States environmental protection agency's objection. If the department has issued a permit prior to receipt of the United States environmental protection agency's objection under this subdivision, the department may thereafter issue only a revised permit that satisfies the United States environmental protection agency's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.
- e. Prohibition on default issuance. The department shall issue no title V permit to operate, including a permit renewal or modification, until affected states and the United States environmental protection agency have had an opportunity to review the proposed permit as required under this subsection.

**8. Judicial review of title V permit to operate decisions.**

- a. The applicant, any person who participated in the department's public participation process, and any other person who could

obtain judicial review under North Dakota Century Code section 28-32-42 may obtain judicial review provided such appeal is filed in accordance with North Dakota Century Code section 28-32-42 within thirty days after notice of the final permit action.

- b. The department's failure to take final action on an application for a permit, permit renewal, or permit revision within the timeframes referenced in this section shall be appealable in accordance with North Dakota Century Code section 28-32-42 within thirty days after expiration of the applicable timeframes.
  - c. In accordance with North Dakota Century Code chapter 28-32, the mechanisms outlined in this subsection shall be the exclusive means for judicial review of permit decisions referenced in this section.
  - d. Solely for the purpose of obtaining judicial review in state court, final permit action shall include the failure of the department to take final action on an application for a permit, permit renewal, or permit revision within the timeframes referenced in this section.
  - e. Failure to take final action within ninety days of receipt of an application requesting minor permit modification procedures (or one hundred eighty days for modifications subject to group processing requirements) shall be considered final action and subject to judicial review in state court.
9. **Enforcement.** The department may suspend, revoke, or terminate a permit for violations of this article, violation of any permit condition or for failure to respond to a notice of violation or any order issued pursuant to this article. A permit to operate which has been revoked or terminated pursuant to this article must be surrendered forthwith to the department. No person may operate or cause the operation of a source if the department denies, terminates, revokes, or suspends a permit to operate.
10. **Compliance assurance monitoring.** Except as noted below, title 40, Code of Federal Regulations, part 64 compliance assurance monitoring, as it exists on July 2, 2010, is incorporated by reference.
- a. "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.
  - b. "Part 70 permit" means a title V permit to operate.

C. "Permitting authority" means the department.

**History:** Effective March 1, 1994; amended effective December 1, 1994; August 1, 1995; January 1, 1996; September 1, 1997; September 1, 1998; March 1, 2003; February 1, 2005; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04, 23-25-04.1

**Law Implemented:** NDCC 23-25-03, 23-25-04, 23-25-04.1, 23-25-10

## CHAPTER 33-15-15

**33-15-15-01.2. Scope.** The provisions of 40 Code of Federal Regulations part 52, section 21, paragraphs (a)(2) through (e), (h) through (r), (v), (w), (aa), and (bb) as they exist on ~~July 2, 2010~~ January 1, 2012, are incorporated by reference into this chapter. This includes revisions to the rules that were published as a final rule in the Federal Register by this date but had not been published in the Code of Federal Regulations yet. Any changes or additions to the provisions are listed below the affected paragraph.

For purposes of this chapter, administrator means the department except for those duties that cannot be delegated by the United States environmental protection agency. For those duties listed below, or any others that cannot be delegated, administrator means the administrator of the United States environmental protection agency:

- (b)(17) - Definition of federally enforceable.
- (b)(37)(i) - Definition of repowering.
- (b)(43) - Definition of prevention of significant deterioration.
- (b)(48)(ii)(c) - Definition of baseline actual emissions.
- (b)(50)(i) - Definition of regulated NSR pollutant.
- (1)(2) - Air quality models.
- (p)(2) - Consultation with the federal land manager.

For purposes of this chapter, permit or approval to construct means a permit to construct. The procedures for obtaining a permit to construct are specified in section 33-15-14-02 and this chapter. When there is a conflict in the requirements between this chapter and section 33-15-14-02, the requirements of this chapter shall apply.

For purposes of this chapter, the term "40 CFR 52.21" is replaced with "this chapter".

40 CFR 52.21(b)(2)(iii)(a)	The following is deleted: Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (cc).
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40 CFR 52.21(b)(3)(iii)(a)	The words "the administrator or other reviewing authority" are replaced with "the department or the administrator of the United States environmental protection agency".
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40 CFR  
52.21(b)(14)

The following is added:

- (v) The department shall provide a list of baseline dates for each contaminant for each baseline area.

40 CFR  
52.21(b)(15)

The following is added:

- (iv) 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).

40 CFR  
52.21(b)(22)

The following is added:

Designating an application complete for purposes of permit processing does not preclude the department from requesting or accepting any additional information.

40 CFR  
52.21(b)(29)

The following is added:

This term does not include effects on integral vistas.

40 CFR  
52.21(b)(30)

The term section 51.100(s) of this chapter is deleted and replaced with "40 CFR 51.100(s)".

40 CFR  
52.21(b)(43)

The paragraph is deleted in its entirety and replaced with the following:

Prevention of significant deterioration (PSD) program means a major source preconstruction permit program administered by the department that has been approved by the administrator of the United States environmental protection agency and incorporated into the state implementation plan pursuant to 40 CFR 51.166 to implement the requirements of that section. Any permit issued by the department under the program is a major NSR permit.

40 CFR  
52.21(b)(48)(ii)

The following words are deleted: "by the administrator for a permit required under this section or".

40 CFR  
52.21(b)(49)

The following words are deleted "administrator in subchapter C of this chapter" and replaced with the following:

Administrator of the United States environmental protection agency in title 40, Code of Federal Regulations, chapter I subchapter C.

40 CFR 52.21(b)(49)(i)	"§ 86.181-12(a) of this chapter" is deleted and replaced with: 40 CFR 86.1818-12(a).
40 CFR 52.21(b)(49)(ii)(a)	"Table A-1 to subpart A of part 98 of this chapter" is deleted and replaced with the following: 40 CFR 98, subpart A, table A-1.
<u>40 CFR 52.21(b)(50)(i)(c)</u>	<u>This paragraph is deleted in its entirety and replaced with the following:</u>  <u>Nitrogen oxides are a precursor to PM<sub>2.5</sub> in all attainment and unclassifiable areas.</u>
<u>40 CFR 52.21(b)(50)(i)(d)</u>	<u>This paragraph is deleted in its entirety and replaced with the following:</u>  <u>Volatile organic compounds are not a precursor to PM<sub>2.5</sub> in any attainment or unclassifiable areas.</u>
40 CFR 52.21(b)(51)	The paragraph is deleted in its entirety and replaced with the following:  Reviewing authority means the department.
<del>40 CFR 52.21(b)(50)(i)(e)</del>	<del>This paragraph is deleted in its entirety and replaced with the following:</del>  <del>Nitrogen oxides are a precursor to PM<sub>2.5</sub> in all attainment and unclassifiable areas.</del>
<del>40 CFR 52.21(b)(50)(i)(d)</del>	<del>This paragraph is deleted in its entirety and replaced with the following:</del>  <del>Volatile organic compounds are not a precursor to PM<sub>2.5</sub> in any attainment or unclassifiable areas.</del>
40 CFR 52.21(b)(53)	This paragraph is deleted in its entirety and replaced with the following:  Lowest achievable emission rate (LAER) has the meaning given in 40 CFR 51.165(a)(1)(xiii) which is incorporated by reference.
40 CFR 52.21(b)(54)	This paragraph is deleted in its entirety and replaced with the following:  Reasonably available control technology (RACT) has the meaning given in 40 CFR 51.100(o) which is incorporated by reference.
40 CFR 52.21(b)(58)	This paragraph is deleted in its entirety.
40 CFR 52.21(d)	The paragraph is deleted and replaced with the following:

~~No concentration of a contaminant shall exceed the ambient air quality standards in chapter 33-15-02 for those areas subject to regulation under this article and the national ambient air quality standards in all other areas of the United States. No concentration of a contaminant shall exceed:~~

~~(1) The concentration permitted under the national primary and secondary ambient air quality standards.~~

~~(2) The concentration permitted by the ambient air quality standards in chapter 33-15-02.~~

40 CFR 52.21(e)

The following is added:

(5) The class I areas in North Dakota are the Theodore Roosevelt National Park - north and south units and the Theodore Roosevelt Elkhorn Ranch Site in Billings County - and the Lostwood National Wilderness Area in Burke County.

40 CFR 52.21(h)

The paragraph is deleted and replaced with the following:

The stack height of any source subject to this chapter must meet the requirements of chapter 33-15-18.

40 CFR 52.21(i)

The following subparagraphs are added:

(11) 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.

(12) 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.

40 CFR  
52.21(k)(1)

This subparagraph is deleted and replaced with the following:

- (1) ~~Any ambient air quality standard in chapter 33-15-02 for those areas subject to regulation under this article and the national ambient air quality standards in all other areas of the United States; or Any national ambient air quality standard or any standard in chapter 33-15-02.~~

40 CFR  
52.21(l)(1)

This subparagraph is deleted and replaced with the following:

All estimates of ambient concentrations required under this chapter shall be based on applicable air quality models, technical data bases (including quality assured air quality monitoring results), and other requirements specified in appendix w of 40 CFR 51 ("guideline on air quality models" as it exists on ~~July 2, 2010~~ January 1, 2012) as supplemented by the ~~"North Dakota guideline for air quality modeling analyses"~~. These documents are incorporated by reference department guidance. Technical inputs for these models shall be based upon credible technical data approved in advance by the department. In making such determinations, the department shall review such technical data to determine whether it is representative of actual source, meteorological, topographical, or local air quality circumstances.

40 CFR  
52.21(m)(3)

"Appendix B to part 58 of this chapter" is replaced with 40 CFR 58, appendix B.

40 CFR  
52.21(p)(6)

"paragraph (q)(4)" is replaced with "paragraph (p)(4)" and "(q)(7)" is replaced with "(p)(7)".

40 CFR  
52.21(p)(7)

"paragraph (q)(7)" is replaced with "paragraph (p)(7)".

40 CFR  
52.21(p)(8)

"paragraphs (q)(5) or (6)" is replaced with "paragraphs (p)(5) or (6)".

40 CFR 52.21(p)

The following is added:

- (9) Notice to the United States environmental protection agency. The department shall transmit to the administrator of the United States environmental protection agency through the 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.

40 CFR 52.21(q)

This paragraph is deleted and replaced with the following:

9. Public participation.

- (1) 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.
- (2) With respect to a completed application, the department shall:
  - (a) Within one year after receipt, make a preliminary determination whether the source should be approved, approved with conditions, or disapproved pursuant to the requirements of this chapter.
  - (b) 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.
  - (c) 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. The department shall allow at least thirty days for public comment.
  - (d) Send a copy of the notice required in subparagraph c to the applicant, the United States environmental protection agency administrator, and to officials and agencies having cognizance over the location where the source or modification will be situated as follows: 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.

- (e) 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.
- (f) Consider all public comments submitted in writing within a time specified in the public notice required in subparagraph c and all comments received at any public hearing conducted pursuant to subparagraph e in making its final decision on the approvability of the application. No later than thirty 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 may extend the time to respond to comments based on a written request by the applicant. 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.
- (g) Make a final determination whether the source should be approved, approved with conditions, or disapproved pursuant to the requirements of this chapter.
- (h) 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.

40 CFR 52.21(r)(2)

The following is added:

In cases of major construction projects involving long lead times and substantial financial commitments, the department may provide by a condition to the permit to construct a time period greater than eighteen months when such time extension is supported by sufficient documentation by the applicant.

40 CFR 52.21(v)(1)

This subparagraph is deleted and replaced with the following:

- (1) An owner or operator of any proposed major stationary source or major modification may request the department to approve a system of innovative control technology.

40 CFR  
52.21(v)(2)(iv)(a)

This subitem is deleted and replaced with the following:

- (a) Cause or contribute to a violation of an applicable national ambient air quality standard or any ambient air quality standard in chapter 33-15-02 ~~for those areas subject to regulation under this article and the national ambient air quality standards in all other areas of the United States;~~ or

40 CFR  
52.21(w)(1)

This subparagraph is deleted and replaced with the following:

- (1) Any permit issued under this chapter or a prior version of this chapter shall remain in effect, unless and until it expires under 40 CFR 52.21(r) or is rescinded.

40 CFR  
52.21(aa)(15)

This paragraph is deleted in its entirety

**History:** Effective February 1, 2005; amended effective April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04.1

**Law Implemented:** NDCC 23-25-03, 23-25-04.1

## CHAPTER 33-15-17

**33-15-17-02. Restriction of fugitive particulate emissions.** No person shall emit or cause to be emitted into the ambient air from any source of fugitive emissions as specified in section 33-15-17-01 any particulate matter which:

1. [Reserved]
2. Exceed the ambient air quality standards of chapter 33-15-02 at or beyond the property line of the source.
3. Exceed the prevention of significant deterioration of air quality increments of chapter 33-15-15 at or beyond the property line of the source for sources subject to chapter 33-15-15.
4. Exceed the restrictions on the emission of visible air contaminants of chapter 33-15-03, at or beyond the property line of the source, except as provided in section 33-15-03-04.
5. Would have an adverse impact on visibility, as defined in chapter 33-15-19, on any class I federal area.
6. ~~Agricultural activities related to the normal operations of a farm shall be exempt from the requirements of this section. However, agricultural practices such as tilling of land, application of fertilizers, and the harvesting of crops shall be managed in such a manner as to minimize dust from becoming airborne.~~

**History:** Amended effective January 1, 1996; January 1, 2007; January 1, 2013.

**General Authority:** NDCC 23-25-03, 28-32-02

**Law Implemented:** NDCC 23-25-03

## CHAPTER 33-15-21

**33-15-21-08.1. Permits.** The provisions of title 40, Code of Federal Regulations, part 72 and its appendices, as they exist on ~~July 2, 2010~~ January 1, 2012, for purposes of implementing an acid rain program that meets the requirements of title IV of the federal Clean Air Act, are incorporated into this chapter by reference. The term "administrator" means the department except for those duties that cannot be delegated to the department. For those duties that cannot be delegated, "administrator" means the administrator of the United States environmental protection agency. If the provisions or requirements of title 40, Code of Federal Regulations, part 72, conflict with or are not included in section 33-15-14-06, the provisions of part 72 shall apply and take precedence.

**History:** Effective June 1, 2001; amended effective March 1, 2003; February 1, 2005; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-01-04.1

**Law Implemented:** NDCC 23-25-03, 23-25-04, 23-25-04.1

### **33-15-21-09. Continuous emissions monitoring.**

1. **General.** The monitoring, recordkeeping, and reporting of sulfur dioxide, nitrogen oxides, and carbon dioxide emissions, volumetric flow, and opacity data from affected units under the acid rain program shall be conducted in accordance with title 40, Code of Federal Regulations, part 75. Title 40, Code of Federal Regulations, part 75 and its appendices, as they exist on ~~July 2, 2010~~ January 1, 2012, are incorporated by reference.
2. **Exceptions.** Those portions of title 40, Code of Federal Regulations, part 75, that are controlled and administered completely by the United States environmental protection agency will not be enforced by the state. This should not be construed as precluding the United States environmental protection agency from exercising its statutory authority under the Clean Air Act, as amended, or an affected source from complying with the authority or the requirements of the federal acid rain program.

**History:** Effective December 1, 1994; amended effective June 1, 2001; March 1, 2003; February 1, 2005; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03, 23-25-04, 23-25-04.1

**33-15-21-10. Acid rain nitrogen oxides emission reduction program.**

Title 40, Code of Federal Regulations, part 76 and its appendices, as they exist on ~~July 2, 2010~~ January 1, 2012, are incorporated into this chapter by reference.

**History:** Effective April 1, 1998; amended effective June 1, 2001; March 1, 2003; February 1, 2005; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-01-04.1, 23-25-03

## CHAPTER 33-15-22

**33-15-22-01. Scope.** The subparts and appendices of title 40, Code of Federal Regulations, part 63, as they exist on ~~July 2, 2010~~ January 1, 2012, which are listed in section 33-15-22-03 are incorporated into this chapter by reference. Any changes to an emissions standard are listed below the title of the standard.

**History:** Effective December 1, 1994; amended effective August 1, 1995; January 1, 1996; September 1, 1997; April 1, 1998; September 1, 1998; June 1, 2001; March 1, 2003; February 1, 2005; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03

### **33-15-22-03. Emissions standards.**

Subpart A - General provisions.

Subpart B - Requirements for control technology determinations for major sources in accordance with Federal Clean Air Act sections 112(g) and 112(j).

\*Sections 63.42(a) and 63.42(b) are deleted in their entirety.

Subpart C - List of hazardous air pollutants, petitions process, lesser quantity designations, and source category list.

Subpart D - Regulations governing compliance extensions for early reductions of hazardous air pollutants.

Subpart F - National emissions standards for organic hazardous air pollutants from the synthetic organic chemical manufacturing industry.

Subpart G - National emissions standards for organic hazardous air pollutants from synthetic organic chemical manufacturing industry for process vents, storage vessels, transfer operations, and wastewater.

Subpart H - National emissions standards for organic hazardous air pollutants for equipment leaks.

Subpart I - National emissions standards for organic hazardous air pollutants for certain processes subject to the negotiated regulation for equipment leaks.

Subpart M - National perchloroethylene air emissions standards for drycleaning facilities.

Subpart N - National emissions standards for chromium emissions from hard and decorative chromium electroplating and chromium anodizing tanks.

Subpart O - Ethylene oxide emissions standards for sterilization facilities.

Subpart Q - National emissions standards for hazardous air pollutants for industrial process cooling towers.

Subpart R - National emissions standards for gasoline distribution facilities (bulk gasoline terminals and pipeline breakout stations).

Subpart T - National emissions standards for halogenated solvent cleaning.

Appendix A to subpart T - Test of solvent cleaning procedures.

Appendix B to subpart T - General provisions applicability to subpart T.

Subpart CC - National emissions standards for hazardous air pollutants from petroleum refineries.

Subpart GG - National emissions standards for aerospace manufacturing and rework facilities.

Subpart HH - National emissions standards for hazardous air pollutants from oil and natural gas production facilities.

\* Only the requirements that are applicable to major sources of hazardous air pollutants are adopted.

Subpart JJ - National emissions standards for wood furniture manufacturing operations.

Subpart KK - National emissions standards for the printing and publishing industry.

Table 1 to subpart KK - Applicability of general provisions to subpart KK.

Appendix A to subpart KK - Data quality objective and lower confidence limit approaches for alternative capture efficiency protocols and test methods.

Subpart OO - National emissions standards for tanks - Level 1.

Subpart PP - National emissions standards for containers.

Subpart QQ - National emissions standards for surface impoundments.

Subpart RR - National emissions standards for individual drain systems.

Subpart SS - National emissions standards for closed vent systems, control devices, recovery devices, and routing to a fuel gas system or a process.

Subpart TT - National emissions standards for equipment leaks - Control level 1.

Subpart UU - National emissions standards for equipment leaks - Control level 2 standards.

Subpart VV - National emissions standards for oil-water separators and organic water separators.

Subpart WW - National emissions standards for storage vessels (tanks) - Control level 2.

Subpart YY - National emissions standards for hazardous air pollutants for source categories: generic maximum achievable control technology standards.

Subpart HHH - National emissions standards for hazardous air pollutants from natural gas transmission and storage facilities.

Subpart RRR - National emission standards for hazardous air pollutants for secondary aluminum production.

Table 1 to Subpart RRR - Emission standards for new and existing affected sources.

Table 2 to Subpart RRR - Summary of operating requirements for new and existing affected sources and emission units.

Table 3 to Subpart RRR - Summary of monitoring requirements for new and existing affected sources and emission units.

Appendix A to Subpart RRR - General provisions applicability to subpart RRR.

Subpart UUU - National emission standards for hazardous air pollutants for petroleum refineries: catalytic cracking units, catalytic reforming units, and sulfur recovery units.

Subpart AAAA - National emission standards for hazardous air pollutants: municipal solid waste landfills.

Subpart CCCC - National emission standards for hazardous air pollutants: manufacturing of nutritional yeast.

Subpart EEEE - National emission standards for hazardous air pollutants: organic liquids distribution (nongasoline).

Subpart FFFF - National emission standards for hazardous air pollutants: miscellaneous organic chemical manufacturing.

Subpart GGGG - National emission standards for hazardous air pollutants: solvent extraction for vegetable oil production.

Subpart MMMM - National emission standards for hazardous air pollutants for surface coating of miscellaneous metal parts and products.

Subpart VVVV - National emission standards for hazardous air pollutants for boat manufacturing.

Subpart WWWW - National emissions standards for hazardous air pollutants: reinforced plastics composites production.

Subpart YYYY - National emission standards for hazardous air pollutants for stationary combustion turbines.

Subpart ZZZZ - National emission standards for hazardous air pollutants for stationary reciprocating internal combustion engines.

\*Only the requirements that are applicable to major sources of hazardous air pollutants are adopted.

Subpart GGGGG - National emission standards for hazardous air pollutants: site remediation.

Appendix A to part 63 - Test methods.

Appendix B to part 63 - Sources defined for early reduction provisions.

Appendix C to part 63 - Determination of the fraction biodegraded ( $f_{bio}$ ) in a biological treatment unit.

Appendix D to part 63 - Alternative validation procedure for environmental protection agency waste and wastewater methods.

Authority: 42 U.S.C. 7401 et seq.

**History:** Effective December 1, 1994; amended effective August 1, 1995; January 1, 1996; September 1, 1997; April 1, 1998; September 1, 1998; June 1, 2001; March 1, 2003; February 1, 2005; January 1, 2007; April 1, 2009; April 1, 2011; January 1, 2013.

**General Authority:** NDCC 23-25-03

**Law Implemented:** NDCC 23-25-03

## CHAPTER 33-15-23 FEES

Section	
33-15-23-01	Definitions
33-15-23-02	Permit to Construct Fees
33-15-23-03	Minor Source Permit to Operate Fees
33-15-23-04	Major Source Permit to Operate Fees
33-15-23-05	Phase I Substitution Units
<u>33-15-23-06</u>	<u>Oil and Gas Well Production Facilities</u>

**33-15-23-02. Permit to construct fees.** Any person constructing, installing, or establishing a new stationary source or altering an existing source which requires a permit to construct under subsections 1 and 3 of section 33-15-14-02 is required to pay a permit to construct application filing fee and a permit to construct processing fee to the state department of health.

1. **Application fee.** A nonrefundable filing fee of one hundred fifty dollars must be submitted with the permit application.
2. **Processing fee.** The applicant shall pay a processing fee based on actual processing costs, including computer data processing costs, incurred by the department for all sources which would involve a major analysis the cost of which would exceed one hundred fifty dollars as determined by the department. The following procedures and criteria will be utilized in establishing the fee:
  - a. A record of all permit to construct application processing costs incurred must be maintained by the department.
  - b. Upon request, the department, in consultation with the applicant, will prepare an estimate of the processing fee and the billing schedule that will be utilized in processing the application. If the applicant chooses, the applicant may withdraw the application at this point without paying any processing fees.
  - c. ~~After final determinations on the application have been made, a final statement~~ Statements will be sent to the applicant containing the ~~remaining~~ actual processing costs incurred by the department.
  - d. The applicant must pay the processing fee regardless of whether a permit to construct is issued, denied, or withdrawn.

- e. Any source that initiates operation under a permit to construct prior to receiving a permit to operate is subject to the fees outlined in section 33-15-23-03 or 33-15-23-04, whichever is applicable.

**History:** Effective August 1, 1995; amended effective January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04.2

**Law Implemented:** NDCC 23-25-03, 23-25-04.2

**33-15-23-03. Minor source permit to operate fees.**

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

<u>Classification</u>	<u>Annual Fee (\$)</u>
Designated	300
Monitor (CEMS or Ambient Site)	600/CEMS or Site
Other	100
State and local government	0
Exempt	0

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

- Designated: A source that is designated for scheduled inspections.
- Monitor: A charge in addition to the annual fee for any source operating a continuous emission monitor system (CEMS) or an ambient monitoring site.
- Other: As designated by the department.
- State and local government: Any installation owned by the state of North Dakota or a local government.
- Exempt: As designated by the department.

2. The following activities conducted by the department are not included in the annual costs and will be charged to affected sources based on the actual costs incurred by the department:
  - a. Observation of source or performance specification testing, or both.
  - b. Audits of source operated ambient air monitoring networks.

An accounting of the actual costs incurred under this subsection must accompany the notice of the annual permit fee.

3. Annual emissions are derived using representative source test data, "compilation of air pollution emission factors (AP-42)" or other reliable data.
4. The classification of "other" and "exempt" shall be designated by the department on a case-by-case basis.
5. The department shall send a notice, identifying the amount of the annual permit fee, to the owner or operator of each affected source. The fee is due within sixty days following the date of such notice.

**History:** Effective August 1, 1995; amended effective April 1, 2009; January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04.2

**Law Implemented:** NDCC 23-25-04.2

**33-15-23-04. Major source permit to operate fees.**

1. The owner or operator of each installation that meets the applicability requirements of subsection 2 of section 33-15-14-06 shall pay an annual fee. The fee is determined by the actual annual emissions of regulated contaminants. Fugitive emissions will be included in the fee calculation for sources that are required to count them when determining applicability under section 33-15-14-06.
2. Effective January 1, 2005, the annual fee shall be assessed at a rate of twenty-five dollars per ton of emissions of each regulated contaminant identified in section 112(b) of the Federal Clean Air Act. All other regulated contaminants will be assessed a fee at a rate of twelve dollars per ton. The minimum fee will be five hundred dollars per source.
3. In determining the amount due, that portion of any regulated contaminant which is emitted in excess of four thousand tons [3628.74 metric tons] per year will be exempt from the fee calculation.
4. Each boiler with a heat input greater than two hundred fifty million British thermal units per hour will be assessed fees on an individual basis and independent of the fees associated with the rest of the installation. The four thousand ton [3628.74 metric ton] per year cap referenced in subsection 3 is applied to each boiler.
5. Any state-owned or local government-owned facility is exempt from the fee.
6. The fee calculation must be based upon actual annual emissions from the previous calendar year.

7. The fee must be calculated independently for each installation, facility, source, or unit which has been issued a separate permit to operate.
8. The fee rates and the limits established under subsection 2 may be adjusted on an annual basis to account for any increase in the consumer price index published by the department of labor, as of the close of the twelve-month period ending on August thirty-first of each calendar year.
- ~~9. Any source issued a general permit under section 33-15-14-06 is subject to the minor source permit to operate fees under section 33-15-23-03.~~
- ~~40.~~ 9. Any source that qualifies as a "small business" under section 507 of the Federal Clean Air Act may petition the department to reduce or exempt any fee required under this section. Sufficient documentation of the petitioner's financial status must be submitted with the request to allow the department to evaluate the request.
- ~~44.~~ 10. The department shall send a notice, identifying the amount of the annual permit fee, to the owner or operator of each affected source. The fee is due within sixty days following the date of such notice.
11. Greenhouse gases are exempt from the fees in this section.

**History:** Effective August 1, 1995; amended effective February 1, 2005; January 1, 2007; April 1, 2009; January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04.2

**Law Implemented:** NDCC 23-25-03, 23-25-04.2

**33-15-23-06. Oil and gas well production facilities.** The owner or operator of an oil and gas well production facility that is required to register the facility in accordance with section 33-15-20-02 shall pay a nonrefundable filing fee of one hundred fifty dollars per well. The filing fee must be submitted with the registration form.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 23-25-03, 23-25-04.2

**Law Implemented:** NDCC 23-25-03, 23-25-04.2



**TITLE 60**  
**PESTICIDE CONTROL BOARD**



**JANUARY 2012**

**ARTICLE 60-03**

**PESTICIDES**

Chapter	
60-03-01	Pesticide <del>Sale</del> , Distribution, <u>Handling</u> , and Use
60-03-02	Minor Use Pesticide Fund [Repealed]
60-03-03	Worker Protection Standard

**CHAPTER 60-03-01**  
**PESTICIDE ~~SALE~~, DISTRIBUTION, HANDLING, AND USE**

Section	
60-03-01-01	Scope [ <u>Repealed</u> ]
60-03-01-02	Definitions
60-03-01-03	Restricted Use Pesticides [ <u>Repealed</u> ]
60-03-01-04	Prohibited Pesticides [Reserved]
60-03-01-05	<del>Categories</del> <u>Classes of Certification Commercial Applicator, Public Applicator, and Dealer Certifications</u>
60-03-01-05.1	Commercial <del>or</del> <u>Applicator</u> , Public Applicator, and Dealer <u>Certifications</u>
60-03-01-05.2	Private Applicator Certification
60-03-01-05.3	Pesticide Certification Examination - Cheating
60-03-01-05.4	Certification Denial
60-03-01-06	Pesticide Mixing, <del>Loading</del> <u>Filling</u> , and Application - Storage - Transportation - Disposal
60-03-01-07	Recordkeeping - <del>Dealers and Commercial or, Public and Custom Applicators,</del> and Private Applicators <u>and Dealers</u>
60-03-01-07.1	Report of Loss Records [ <u>Repealed</u> ]
60-03-01-08	Unlawful Acts [Repealed]
60-03-01-09	Reports of Pesticide <del>Accidents</del> <u>Incidents</u>
60-03-01-10	<del>Labeling and Relabeling of Bulk Pesticides</del> <u>Identifying Information for Pesticide Mixtures, Custom Blends, and Bulk Containers</u>
60-03-01-11	Storage and Transportation of Bulk Pesticides

<u>60-03-01-11.1</u>	<u>Adoption of the Environmental Protection Agency Pesticide Container Regulations</u>
<u>60-03-01-11.2</u>	<u>Permanent Containment Area - Construction - Inspection - Maintenance - Recordkeeping Requirements</u>
60-03-01-12	<del>Packaging and Repackaging Requirements for Liquid or Dry Bulk Pesticides</del>
60-03-01-13	Prohibitions

**60-03-01-01. Scope.** ~~This chapter is promulgated pursuant to North Dakota Century Code chapter 4-35 and shall apply to any sale, distribution, or use of pesticides within this state. This chapter shall be applied in conjunction with North Dakota Century Code chapter 4-35.~~ Repealed effective January 1, 2013.

**General Authority:** ~~NDCC 28-32-02~~

**Law Implemented:** ~~NDCC 4-35-06~~

**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. ~~"Act" means the North Dakota Pesticide Act.~~ "Agricultural plants" means any plants grown or maintained for commercial or research purposes.
2. "Board" means the North Dakota pesticide control board created pursuant to North Dakota Century Code section 4-35-02.
3. ~~"Broadcast" means any intentional application of a pesticide over an area, such as a lawn, field, room, crawl space, or other such surface.~~
4. ~~3.~~ "Bulk pesticide" means any volume of pesticide that is intended to be repackaged, can be accurately ~~metered~~ measured, and can be transported or held in an individual container.
5. ~~4.~~ "Bulk pesticide facility" means any ~~area, location, tract of land, building, structure, or premises~~ place used for the handling to handle or storage ~~of~~ store bulk pesticides.
6. ~~5.~~ "Certification" means recognition by the board or its designee that a person is competent and thus authorized ~~to use or supervise the use of restricted use pesticides.~~ as a:
  - a. Certified private applicator to use or supervise the use of restricted use pesticides in noncommercial settings.
  - b. Certified commercial applicator to use a restricted use pesticide or supervise the use of a general use pesticide in commercial settings.

- ~~c.~~ Certified public applicator to use a restricted use pesticide or supervise the use of a general use pesticide in settings that do not require maintaining proof of financial responsibility.
- ~~d.~~ Certified dealer to distribute restricted use pesticides.
- ~~7.~~ 6. "Commissioner" means the North Dakota agriculture commissioner.
- ~~8.~~ 7. "Compensation" means monetary payment for a specific service.
- ~~9.~~ 8. "Competent" means ~~properly~~ qualified to perform functions associated with pesticide applications, the degree of ~~capability~~ competency required being directly related to the nature of the activity and the associated responsibility, including receiving proper training to know and understand the pesticide label, the product name and application rate to be applied, proper application techniques, recordkeeping requirements, ~~identifying workplace hazards~~, worker protection standards, and emergency response and being able to identify workplace hazards.
- ~~10.~~ 9. "Custom blend" means any diluted mixture of pesticide prepared by a dealer to the specifications of the end-user and not held in inventory.
- ~~11.~~ 10. "End-use labeling" means the written, printed, or graphic matter on, ~~or~~ attached to, or accompanying the pesticide or device or any of its containers or wrappers.
- ~~12.~~ 11. "End-user" means the person who applies the pesticide.
- ~~13.~~ 12. "FIFRA" means the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, as codified and amended at 7 U.S.C. 136-136y.
13. "Fumigant pesticide" means a chemical compound whose pesticidal action occurs in a gaseous state.
14. "General use pesticide" means any pesticide formulation which is not classified for restricted use ~~by the board.~~
15. "Handling" means the mixing, loading, application, repackaging, storage, transportation, distribution, sale, purchase, or disposal of pesticides.
16. "Mixture" means any ~~diluted combination of~~ pesticide combined with fertilizer, seed, or other ~~medium~~ substance.
17. "Mobile container" means a container used to transport pesticides.
18. "Operational area" means ~~a permanent containment area where pesticides are transferred, loaded, unloaded, mixed, repackaged, or~~

~~refilled; where pesticides are cleaned or rinsed from containers; or application, handling, storage, or transportation equipment.;~~

a. An area within a permanent containment area where pesticides are transferred, loaded, unloaded, mixed, repackaged, or refilled; or

b. An area where pesticides are rinsed from a container.

19. "Permanent containment area" means:

a. An aboveground pad or dike constructed of impervious material, such as sealed concrete, stainless steel, or other material as approved by the ~~department of agriculture;~~ registrant, unless the commissioner approves or requires material other than that approved by the registrant; or

b. ~~Bermed, curbed, sloped,~~ An area that has a berm or curb or is otherwise designed to contain spills, leaks, releases, or other discharges that are generated during the may occur while handling of pesticides or pesticide-containing materials;.

~~c. Does not have a drain which exits the containment area; and~~

~~d. All seams and cracks must be sealed to prevent leakage.~~

20. "Pesticide-containing material" means:

a. Any container of a pesticide product that has not been triple-rinsed or the equivalent of triple-rinsed;

b. Any rinsate that is derived from a pesticide container, pesticide application equipment, or equipment washing;

c. Any material that is used to collect or contain excess or spilled pesticide or rinsate;

d. Any mixture of pesticide and diluent such as wash water, rinse water, or rainwater; or

e. Material that is generated as a result of contact with or utilization of a pesticide in an application, containment, recovery, reuse, or treatment system. The term does not include personal protective equipment that contains pesticide residue.

21. "Pesticide-producing establishment" means any site where a pesticide is manufactured, packaged, repackaged, prepared, processed, labeled, relabeled, or held for distribution.

22. "Registrant" means the person holding the pesticide product registration under North Dakota Century Code chapter 19-18.
- ~~22.~~ 23. "Repackaging" means the transfer of a pesticide in an unaltered state from a container into a designated or dedicated refillable container for the purpose of distribution.
- ~~23.~~ "Rinsate" means a dilute mixture of pesticide obtained by rinsing pesticide containers or from rinsing the inside and outside of spray equipment.
24. "Spill kit" means a portable kit or other equipment that is designed to recover, minimize, contain, or absorb ~~spills, leaks, releases, or other discharges of pesticides.~~ A spill kit must include the following:
- a. Enough absorbent material, or any combination of absorbent pads, pillows, or tubes sufficient to absorb five gallons [18.93 liters] of liquid;
  - b. One or more impervious containers with a combined minimum capacity of ten gallons [37.85 liters]; and
  - c. Adequate tools to collect and place pesticide-contaminated material in containers.
25. "Under the direct supervision" means the act or process whereby the application of a pesticide is made by a competent person acting under the instructions and control of a certified applicator who is responsible for the actions of that person and who is available if and when needed, even though the certified applicator is not physically present at the time and place the pesticide is applied. The certified applicator must be able to physically arrive at the location of a supervised applicator within thirty minutes.
26. "Use of a pesticide" means ~~the loading, mixing, filling application equipment, applying, storing, transporting, distribution~~ distributing, and disposing of a pesticide.
27. "Use of a pesticide in a manner inconsistent with its labeling" means ~~to use~~ using any pesticide in a manner that is not permitted by the ~~label~~ labeling, except that the term does not apply to any of the following:
- a. Applying a pesticide at any dosage, concentration, or frequency that is less than that specified on the label, unless the ~~label~~ labeling specifically prohibits deviation from the specified dosage, concentration, or frequency.

- b. Applying a pesticide against any target pest that is not specified on the ~~label~~ labeling if the application is to the crop, animal, or site that is specified on the label.
- c. Employing any method of application that is not prohibited by the ~~label~~ labeling unless the label specifically states that the product may be applied only by the methods specified on the labeling.
- d. Mixing a pesticide or pesticides with a fertilizer when the ~~label~~ labeling does not prohibit such mixture.
- e. Any use of a pesticide that is in compliance with section 5, 18, or 24 of the Federal Insecticide, Fungicide, and Rodenticide Act of 1947 [Pub. L. 104-170; Stat. 7 U.S.C. 136 et seq.].

**History:** Amended effective April 15, 1985; October 1, 1990; July 1, 1992; March 1, 2003; July 1, 2004; January 1, 2013.

**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 commissioner.~~ Repealed effective January 1, 2013.

**History:** ~~Effective August 1, 1978; amended effective February 1, 1982; October 1, 1990; July 1, 1992; July 1, 2004.~~

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06

**60-03-01-05. Categories Classes of certification commercial applicator, public applicator, and dealer certifications.** ~~Applicators may apply for A commercial applicator, public applicator, or dealer certificate may be issued to individuals who pass a core certification examination and who have obtained certification in one or more of the following eategories classes:~~

1. **Agricultural pest control (plant and animal).** This ~~eategory~~ class authorizes the ~~application or sale~~ use of pesticides intended for agricultural crop land, grasslands, ~~and noncrop lands.~~ This also includes the use of pesticides on animals and animal facilities, and noncrop lands, including natural areas, fallow, nonproducing agricultural lands, and mines.
2. **Seed treatment.** This ~~eategory~~ class authorizes the ~~application or sale~~ use of pesticides ~~on~~ intended for agricultural crop seeds, other seeds, and vegetative seed stocks.
3. **Fumigation Commodity and structural fumigation.** This ~~eategory~~ class includes ~~controlling pests in stored and transported agricultural crops;~~

~~grain milling equipment, and storage facilities.~~ class authorizes the use of fumigant pesticides intended for raw agricultural commodities, processed foods, nonfood commodities, transport vessels, commodity processing facilities, and commodity storage structures.

4. **Ornamental and turf pest control.** This category ~~includes~~ class authorizes the use of pesticides to control pests in the production and maintenance of intended for producing and maintaining ornamental trees, shrubs, flowers, and turf.
5. **Greenhouse.** This category ~~includes~~ class authorizes the use of pesticides to control pests in a greenhouse intended for greenhouses.
6. **Right of way.** This category ~~includes~~ class authorizes the use of pesticides to control pests in the maintenance of public roads, electric powerlines in parking lots and rights of way for roads, powerlines, telecommunication lines, pipelines, and railways, right of ways, parking lots, or and in other similar areas.
7. **Public health pest control.** This category ~~includes state, federal, or other~~ class authorizes the use of pesticides by government employees, ~~or~~ applicators working under government contract, ~~using pesticides in public health programs for the management and control of pests having medical and or other persons for public health impacts purposes.~~
8. **Research and demonstration pest control.** This category ~~includes~~ class authorizes the use of pesticides by individuals ~~who demonstrate or apply pesticides for the purpose of education and or research.~~ These would include county agents, ~~extension specialists,~~ state, federal, and commercial employees, plus other persons conducting research or demonstrating the proper application of restricted use pesticides.
9. **Home, industrial, and institutional pest control.** This category ~~includes commercial applicators using~~ class authorizes the use of pesticides in, on, or around food-handling establishments, human dwellings, public or private institutions, warehouses, grain elevators, and any other structures or adjacent area, for the control of pests.
10. **Wood preservatives.** This category ~~includes commercial applicators who apply and treat with wood preservatives to preserve and protect wood, posts, and various~~ class authorizes the use of pesticides intended to preserve lumber products ~~from pests.~~
11. **Vertebrate.** This category ~~includes commercial applicators who use~~ class authorizes the use of pesticides for the intended to control of certain pest vertebrate pests, such as rodents, certain predators, and bats not in or around structures.

12. ~~Metam-sodium.~~ Sewer root control. This category includes commercial applicators who use or sell the restricted use pesticide metam-sodium (sodium N-methyldithiocarbamate dihydrate) for the purpose of controlling class authorizes the use of pesticides intended to control tree or other plant roots infesting sewer systems.

**History:** Amended effective February 1, 1982; October 1, 1990; November 1, 1991; March 1, 1996; August 1, 2000; March 1, 2003; January 1, 2013.

**General Authority:** NDCC 4-35-06, ~~4-35-12~~

**Law Implemented:** NDCC 4-35-06, 4-35-08, 4-35-09, 4-35-12, 4-35-14

**60-03-01-05.1. Commercial ~~or applicator,~~ public applicator, and dealer certifications.**

1. A commercial ~~or applicator,~~ public applicator, or dealer, ~~or commercial applicator and dealer~~ certificate shall be issued in accordance with North Dakota Century Code section ~~4-35-09 or 4-35-12 or sections 4-35-09 and 4-35-12 respectively,~~ only to those persons who successfully complete the certification examination established by the board, and who pay the certification fee: only to persons who:
2. The board shall establish a certification examination which shall be administered by any North Dakota state university extension designate in accordance with North Dakota Century Code section ~~4-35-09 or 4-35-12.~~ The examination shall be given by the North Dakota state university extension designate only to those persons who:
  - a. Are eighteen years of age or older;
  - b. Complete an application on forms and in the manner required by the board or its designee; ~~and~~
  - c. Demonstrate competence in the application, use, ~~and handling of pesticides;~~ and
  - d. Pay the costs of training and education and any other fees.
3. 2. Commercial ~~or applicator,~~ public applicator, ~~or applicator,~~ and dealer ~~or commercial applicator and dealer~~ certificates shall expire on April first following the third anniversary of the year of certification or recertification. Every commercially certified A person shall holding these certificates may be recertified by an approved attending a board-approved seminar or an approved by passing a board-approved examination, or both if required by the board, at least every third year.
3. A person holding a commercial applicator, public applicator, or dealer certificate who is unable to complete recertification requirements due to active duty military service may apply for an extension of the person's certification status for a time period not to extend beyond April first of

the year following the person's return from active duty. The application must be in writing and accompanied by a certified copy of military orders or other trustworthy proof showing the date on which active duty military service began and ended. The board has discretion whether to grant the application.

4. A person holding an aerial core commercial or aerial core public applicator certificate shall attend a professional aerial applicators' support system (PAASS) program or other board-approved program at least once every three years. Proof of attendance at a PAASS program or other board-approved program must be received by the North Dakota state university extension service before recertification is issued.
4. ~~5.~~ Any person who fails an examination may retake ~~such examination~~ it after three or more days.
5. ~~6.~~ All commercial ~~or~~ and public applicators must be certified, under section 60-03-01-05, in proper category of application ~~the class that applies to how they use pesticides.~~
6. ~~7.~~ All dealers must be certified, under section 60-03-01-05, in the proper category of the labels ~~class that applies to the pesticides they distribute.~~
7. ~~8.~~ If ~~the a~~ a pesticide is labeled for more than one target pest, ~~the a~~ a dealer only needs to be certified in one of the ~~categories~~ applicable classes.
9. The board designates the North Dakota state university extension service to provide training, administer testing, and issue certifications under this section.

**History:** Effective March 1, 2003; amended effective July 1, 2004; January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC ~~4-03-09~~ 4-35-08, 4-35-09, 4-35-10, 4-35-12, 4-35-14

#### **60-03-01-05.2. Private applicator certification.**

1. A private applicator certification shall be issued ~~in accordance with North Dakota Century Code section 4-35-14~~ only to those persons who:
  - a. Are eighteen years of age or older;
  - b. Complete an application on forms and in the manner required by the board or its designee; ~~and~~
  - c. Demonstrate competence in the ~~application~~ use of pesticides; ~~and~~
  - d. Pay the costs of training and education and any other fees.

2. The board designates the North Dakota state university extension service to provide training, administer testing, and issue ~~certification to competent private applicators~~ certifications under this section. An individual seeking certification as a private applicator may demonstrate competence by:
  - a. Attending ~~an approved~~ a board-approved educational seminar, signing of a certificate of attendance, and passing a written examination administered by the board or its designee;
  - b. Completing a course of self-instruction and passing a written examination administered by the board or its designee; or
  - c. Passing the dealer, public applicator, or commercial applicator certification examination and submitting the passing grade to the board or its designee.
3. ~~Persons~~ Certified private applicators purchasing, storing, or applying restricted use ~~grain fumigants must be commercially trained and fumigant pesticides intended for use on agricultural commodities and in grain storage structures~~ must pass a board-approved commodity and structural fumigation examination. ~~At the option of the applicant upon successfully passing the examination, the certificate issued will be for either private or commercial application of restricted use fumigants.~~ The fee for the private and commercial fumigation certification will be set by the North Dakota state university extension service.
4. Certified private applicators purchasing, storing, or applying restricted use fumigant pesticides for burrowing pest control must pass a board-approved vertebrate examination. The fee for the private vertebrate certification will be set by the North Dakota state university extension service.
4. ~~5.~~ Every private applicator shall be recertified by attending an approved seminar or by taking an approved examination at least every third year. A certified private applicator must be recertified by attending ~~an approved~~ a board-approved seminar or by ~~taking an approved~~ passing a board-approved examination, or both if required by the board, at least every third year.
6. A person holding a private applicator certificate who is unable to complete recertification requirements due to active duty military service may apply for an extension of the person's certification status for a time period not to extend beyond April first of the year following the person's return from active duty. The application must be in writing and accompanied by a certified copy of military orders or other trustworthy proof showing the date on which active duty military service began and ended. The board has discretion whether to grant the application.

- ~~5.~~ 7. Any person who fails an examination may retake such examination after three or more days. No more than three examinations may be given before requiring attendance at another initial training course.
8. The board designates the North Dakota state university extension service to provide training, administer testing, and issue certifications under this section.

**History:** Effective March 1, 2003; amended effective July 1, 2004; January 1, 2013.

**General Authority:** NDCC 4-35-06, ~~4-35-12~~

**Law Implemented:** NDCC 4-35-08, 4-35-14

### **60-03-01-05.3. Pesticide certification examination - Cheating.**

1. An individual who seeks certification under section 60-03-01-05.1 or 60-03-01-05.2 may not, while taking a written examination, give or receive information or assistance to or from any other person, utilize the assistance of any electronic device capable of storing data, or consult any written materials unless expressly authorized in advance by the board or its designee. The written examination and any other writings made during the examination period must be provided to the board or its designee at the end of the examination period.
2. Cheating by an applicant in applying for or taking the examination may result in the invalidating of examination grades, expulsion from the examination room, disqualification from taking the examination for a specified period of time, and other penalties the board may impose. When the board believes that cheating has occurred, the applicant or certified individual must be given notice and an opportunity to be heard pursuant to North Dakota Century Code chapter 28-32 before imposing any penalties.

**History:** Effective July 1, 2004; amended effective January 1, 2013.

**General Authority:** NDCC 4-35-06, ~~4-35-12~~

**Law Implemented:** NDCC 4-35-08, 4-35-09, 4-35-12, 4-35-14

### **60-03-01-05.4. Certification denial.**

1. The board, or its designee, may refuse to issue a pesticide certification, including an applicant for reciprocal certification under North Dakota Century Code section 4-35-18, to an individual who has had that individual's certification suspended or revoked in the past three years in any state or province or to an individual that has committed a documented violation of FIFRA or the pesticide regulations of any state, provincial, or tribal authority within the last three years.

2. The board, or its designee, may require an additional demonstration of applicator qualification if the applicator has had a license suspended or revoked or has otherwise had a history of pesticide violations.

**History:** Effective July 1, 2004; amended effective January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-08, 4-35-09, 4-35-12, 4-35-14, 4-35-18

**60-03-01-06. Pesticide mixing, ~~loading~~ filling, and application - Storage - Transportation - Disposal.**

**1. Mixing, ~~loading~~ filling, and application.**

- a. All pesticides ~~shall~~ must be used in accordance with the ~~label~~ labeling.
- b. Pesticide applications ~~shall~~ must be made in a manner that prevents off-target discharges of pesticides.
- c. Pesticide application ~~or loading~~ equipment or equipment used to fill application equipment that is designed to draw water from surface water ~~shall~~ must have a properly functioning antisiphoning device attached to the inlet hose.
- d. Applications ~~shall~~ must not occur when the atmospheric conditions favor the off-target drift of pesticides or prevent the proper deposition of pesticides to the target area.
- e. Pesticides ~~shall~~ must be applied in a manner that minimizes the exposure to animals. Unless permitted by the labeling, an applicator shall take all reasonable precautions ~~that will~~ to prevent a pesticide from being applied if unprotected persons are present within the application site or are present in adjacent areas when off-target drift may occur.
- f. Pesticide applicators and persons assisting with an application shall follow all safety precautions as specified on the ~~container~~ label labeling.
- g. All equipment used in pesticide mixing, ~~loading~~, filling application equipment, and application must be operationally sound and properly calibrated to prevent adverse effects on the environment.
- h. Any commercial or public applicator who mixes, ~~loads~~, fills application equipment, or otherwise uses pesticides shall have immediate access to a spill kit at the ~~loading~~ filling site, ~~containing not less than two buckets, absorptive pillows, or another system for containing leaking nozzles or a pesticide spill.~~ The spill kit

requirement does not apply to a person ~~who uses single containers of pre-mixed,~~ using only ready-to-use pesticides.

- i. ~~The product labels~~ labeling, a legible reproduction of the ~~labels~~ labeling, or a specimen ~~label~~ labeling of the pesticides ~~that are~~ being applied must be at the application site during the ~~time of~~ application. Aerial applicators must have ~~a label~~ the labeling available at the ~~loading~~ filling site.

## 2. Storage.

- a. All pesticides, except bulk pesticides, ~~shall~~ must be stored in their original container and in accordance with ~~label~~ labeling recommendations. All ~~labels~~ labeling of stored pesticides ~~shall~~ must be plainly visible. All pesticide containers must have a proper label affixed to them.
- b. All pesticides ~~shall~~ must be stored in dry, well-ventilated spaces, and in a manner that will not endanger humans, animals, or the environment, nor contaminate food ~~or~~ feed, seed, or any goods intended for consumer distribution, through a release or escape of pesticide products.
- c. If a storage area contains a floor drain, it must be sealed or self-contained.
- d. Pesticide storage areas containing products intended for distribution or use by commercial or public applicators and dealers must be marked at all entrances. Storage areas containing only hard surface disinfectants are exempt from this requirement.
- e. Label-specific safety equipment for all pesticides stored must be available at the immediate storage site.
- f. ~~Pesticides shall~~ Stored pesticides must be secured in a manner ~~to prevent that prevents~~ children, unauthorized persons, or animals from gaining entry or access to ~~the stored pesticides~~ them. Security of a pesticide storage area is achieved when normal points of access are closed and locked while unattended and the structural integrity of the area prevents access by other than normal means.

## 3. Transportation.

- a. All pesticides, except bulk pesticides, ~~shall~~ must 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~~ must 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. Pesticides in an unattended transport vehicle must be secured to prevent children, unauthorized persons, or animals from gaining access.
- e. ~~d.~~ Equipment contaminated ~~in the transportation of~~ while transporting pesticides ~~shall~~ must be cleaned and decontaminated prior to any other use.

4. **Disposal.**

- a. Empty pesticide containers ~~shall~~ must be stored in accordance with label recommendations and in a manner ~~which~~ that will not endanger humans, animals, or the environment.
- b. Empty nonreturnable pesticide containers ~~shall~~ must be triple-rinsed or the equivalent on the day of their use. Secondary use of such containers ~~which~~ that would endanger humans, animals, or the environment is prohibited.
- c. Pesticide containers ~~shall~~ must be disposed of in accordance with ~~label~~ labeling directions and in a manner ~~which~~ that will not endanger humans, animals, or the environment.

**History:** Amended effective April 15, 1985; October 1, 1990; July 1, 1992; May 1, 1994; March 1, 1996; March 1, 2003; July 1, 2004; January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-20

**60-03-01-07. Recordkeeping - ~~Dealers and commercial or Commercial, public, and custom private applicators and private applicators dealers.~~**

1. **Dealers.** Every pesticide dealer shall keep separate, accurate, and complete records of all of the dealer's purchases and sales of restricted use pesticides and all pesticides used under section 18 (emergency exemption) and section 24-c (special local needs) of FIFRA. Dealers shall positively identify all purchasers of restricted use pesticides using any trustworthy proof of identification. If a restricted use pesticide is to be delivered to a person other than the certified applicator making the purchase, the dealer must have a completed and signed authorization to receive restricted use pesticides form on file for the purchaser for the current year. The records ~~shall~~ must include the following for each pesticide purchased or sold:
  - a. Purchases.

- (1) Dealer's name and address.
- (2) Pesticide trade name and environmental protection agency registration number, if available.
- (3) Quantity of pesticide.
- (4) Date pesticide was shipped or received.
- (5) ~~Distributor's name~~ (Name of the person from whom the pesticide was received).

b. Sales.

- (1) Dealer's name and address and identification of the person making the sale.
- (2) Name, address, certification number, and signature of ~~private or commercial~~ the certified applicator making the purchase.
- (3) Date of sale.
- (4) Trade name ~~or common name~~ and ~~quantity of pesticide sold~~ environmental protection agency registration number, if available.
- ~~(5)~~ (5) Quantity of pesticide.
- ~~(5)~~ (6) Running Accurate inventory by product.
- ~~(6)~~ (7) Certification category class and expiration date of the certification.
- ~~(7)~~ (8) Intended application site or intended crop for all pesticides used under section 18 of FIFRA.
- ~~(8)~~ (9) Dealers shall positively identify all purchasers of restricted use pesticide products.

2. **Commercial or public applicators.** Commercial ~~or~~ and public applicators shall keep a record of all pesticide applications and of the use or disposal of all pesticide rinsate. The record must be made within twenty-four hours of the pesticide application or the use or disposal of the pesticide rinsate. A copy of the ~~records~~ record must be provided to the applicator's client or as soon as possible, not to exceed thirty days, unless the applicator must have has on file a signed letter giving the applicator permission to keep the records for the client from the client waiving the right to receive a copy. The record ~~shall~~ must include for each application:

- a. Name and address of the person for whom the pesticide was applied.
  - b. Legal description of the land, grain bin identification, railcar number, or other description of where the pesticide was applied.
  - c. Pest or pests controlled.
  - d. ~~Starting~~ Start and completion time of the pesticide ~~was applied~~ application (month, day, year, and hour).
  - e. Person who supplied the pesticide that was applied, if other than the person making the application or that person's employer.
  - f. Specific trade name ~~of the pesticide applied~~ and environmental protection agency registration number of the pesticide that was applied.
  - g. Direction and estimated velocity of the wind and the estimated temperature of the outdoor air at the time the pesticide was applied. This requirement shall not apply to seed treatment applications or if a bait is used to attract the pest or pests or if the application is made indoors.
  - h. Amount of pesticide used, including:
    - (1) Pounds [kilograms] or gallons [liters] per acre [.40 hectare] of formulated product.
    - ~~(2) Percentage or pounds [kilograms] of active ingredient.~~
    - ~~(3)~~ (2) Pounds [kilograms] or gallons [liters] of tank mix applied per acre [.40 hectare].
  - i. Specific crops, commodities, and total acreage [hectarage] or other common identifying unit of measure to which the pesticide was applied.
  - j. Description of equipment used in application.
  - k. ~~Certification~~ Signature and number of applicator, if any, ~~and signature.~~
  - l. Right-of-way applicators must record weather conditions and geographic location in two-hour increments.
3. **Private applicators.** Private applicators shall keep a record of all restricted use, ~~section 18 exemptions, and special local needs~~ pesticide applications. The record must be made within twenty-four hours of the

pesticide application or the use or disposal of the pesticide rinsate. The ~~records~~ record must include for each application:

- a. Legal description of the land, grain bin identification ~~for fumigant or grain protectant applications~~, or other description of where the pesticide was applied.
- b. ~~Time~~ State and completion time of the pesticide ~~was applied~~ application (month, day, year, and hour ~~of the day~~).
- c. Specific trade name ~~of the pesticide applied~~ and environmental protection agency registration number of the restricted use pesticide that was applied.
- d. Amount of pesticide used, including:
  - (1) Pounds [kilograms] or gallons [liters] per acre [.40 hectare] of formulated product.
  - (2) ~~Total amount~~ Pounds [kilograms] or gallons [liters] of ~~chemical~~ tank mix applied per acre [.40 hectare].
- e. Specific crops, commodities, and total acreage [hectare] or other common identifying unit of measure to which the pesticide was applied.
- f. ~~Certification~~ Signature and certification number of applicator, if any; ~~and applicator signature~~.

~~Records made pursuant to this section shall be completed and made available for inspection on the day the pesticide is applied.~~

**History:** Amended effective October 1, 1990; May 1, 1994; March 1, 1996; March 1, 2003; July 1, 2004; January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-16

**60-03-01-07.1. Report of loss records.** ~~Any applicator receiving alleged pesticide damage claims shall notify the claimant, by certified mail, return receipt requested, of the verified report of loss notification required by North Dakota Century Code sections 4-35-21.1, 4-35-21.4, and 4-35-21.5 and shall retain the return receipts and a photocopy of the notice for a period of three years. Repealed effective January 1, 2013.~~

**History:** ~~Effective July 1, 2004.~~

**General Authority:** ~~NDCC 4-35-21~~

**Law Implemented:** ~~NDCC 4-35-21, 4-35-21.1, 4-35-21.2~~

**60-03-01-09. Reports of pesticide accidents incidents.** Any person who is involved in or causes a pesticide ~~accident~~ incident that ~~results~~ could result in adverse effects ~~on~~ to humans, animals, or the environment ~~shall file a~~ must report ~~it~~ to the commissioner. The report must be made within twenty-four hours after the ~~accident~~ incident. The report may be filed by letter, ~~telephone,~~ or electronic mail at the address or number identified in subsection 4 of section 60-01-01-01. A telephone report is acceptable if followed within twenty-four hours by a letter or electronic mail report. The report must contain:

1. The specific trade name of the pesticide.
2. The amount of pesticide or tank mix; or both.
3. The location of the ~~pesticide accident~~ incident.
4. The time of ~~accident~~ the incident (month, day, year, and hour).
5. The direction and estimated velocity of the wind and estimated temperature at the time of the ~~accident~~ incident, if outdoors.
6. Actions taken to remedy the adverse effects on humans, animals, and the environment.
7. The name of and contact information for the person making the report.

**History:** Effective February 1, 1982; amended effective March 1, 1996; March 1, 2003; January 1, 2013.

**General Authority:** NDCC ~~4-35-21~~ 4-35-06

**Law Implemented:** NDCC ~~4-35-21~~ 4-35-06

**60-03-01-10. Labeling and relabeling of bulk pesticides Identifying information for pesticide mixtures, custom blends, and bulk containers.**

1. Any person ~~that~~ who produces a mixture of any quantity of pesticide, to be applied by another person, ~~and holds the mixture in inventory,~~ must have an environmental protection agency establishment number.

The person making the mixture must supply the person applying the mixture with end-use labeling for each pesticide in the mixture. The end-use labeling must ~~have the facilities~~ include the environmental protection agency establishment number printed on it of the facility that supplied the mixture.

2. The environmental protection agency establishment number ~~and of the facility that supplied the pesticide,~~ end-use labeling, and the business name and physical address of the facility where the bulk storage container resides must be attached to bulk pesticide storage tanks containers.

3. The environmental protection agency establishment number of the facility that supplied the pesticide, end-use labeling, and quantity of pesticide ~~repackaged~~ must accompany or be attached to the mobile bulk pesticide container.
4. Any person ~~that~~ who 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~~ where the blend leaves that person's control. No environmental protection agency establishment number is required for the blending facilities.

**History:** Effective April 15, 1985; amended effective October 1, 1990; July 1, 1992; May 1, 1994; January 1, 1997; March 1, 2003; January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-15, 4-35-20

#### **60-03-01-11. Storage and transportation of bulk pesticides.**

1. ~~The transportation~~ Transporting and ~~storage of all storing~~ bulk pesticides must ~~be in compliance~~ comply with the manufacturer's requirements.
2. ~~The transportation of~~ Transporting bulk pesticides must ~~meet~~ comply with all applicable ~~standards of state and United States department of~~ transportation rules and regulations.
3. A bulk pesticide storage container must be made of materials approved by the registrant 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~~ label and labeling. The commissioner may approve or require materials other than those approved by the registrant.
4. A bulk storage container and loading areas must be constructed and located on a site in a manner so that pesticides will not contaminate the environment, such as streams and water supplies.
5. A permanent bulk storage container 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 or while unattended.
6. A bulk pesticide storage container that is going to be refilled with a different pesticide must be cleaned and rinsed according to both the ~~repackager's~~ facility's and manufacturer's agreed-upon written instructions and all former labeling must be removed.

- ~~7. An outdoor permanent containment area must be constructed of sufficient size and material so as to contain any spilled or discharged materials. Minimum containment capacity shall be one hundred twenty-five percent of the single largest bulk pesticide storage container, or sufficient to recover and contain a volume of a four-inch rainfall, whichever is greater.~~
- ~~8. An indoor permanent containment area located within an enclosed structure must be constructed of sufficient size and material to contain any spilled or discharged materials, and approved by the pesticide registrant. Minimum containment capacity shall be one hundred ten percent of the single largest bulk pesticide storage container.~~

**History:** Effective March 1, 2003; amended effective July 1, 2004; January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-15

**60-03-01-11.1. Adoption of the environmental protection agency pesticide container regulations.** The environmental protection agency pesticide container regulations effective as of August 17, 2011, as provided under title 40, Code of Federal Regulations, part 165 subparts A, B, C, and D, are hereby adopted by the board and incorporated by reference and made part of this title. Copies of title 40, Code of Federal Regulations, part 165 subparts A, B, C, and D, are available upon request by contacting the board at its inquiry address listed in section 60-01-01-01.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-15

**60-03-01-11.2. Permanent containment area - Construction - Inspection - Maintenance - Recordkeeping requirements.**

1. An outdoor permanent containment area must be constructed of sufficient size and material so as to contain any spilled or discharged materials. Minimum containment capacity must be one hundred twenty-five percent of the single largest bulk pesticide storage container, or sufficient to recover and contain a volume of a four-inch rainfall, whichever is greater.
2. An indoor permanent containment area located within an enclosed structure must be constructed of sufficient size and material to contain any spilled or discharged materials, and approved by the pesticide registrant. Minimum containment capacity must be one hundred ten percent of the single largest bulk pesticide storage container.
3. A permanent containment area must not have a drain that exits the containment area.

4. A permanent containment area must be constructed to provide protection of appurtenances (hoses, pumps, valves, pipes, etc.) and stationary pesticide containers against damage from operating personnel and moving equipment.
5. Appurtenances, discharge outlets, or gravity drains must not be configured through the base or wall of the permanent containment structure, except for direct connections between adjacent structures. The configuration of appurtenances must allow easy observation of discharges.
6. Inspections of permanent containment areas, bulk pesticide containers within containment areas, and appurtenances must be completed at least monthly during periods when pesticides are being stored or dispensed.
7. Initial repairs on any damage, cracks, or gaps in permanent containment areas and bulk pesticide containers must begin within twenty-four hours from when the problem is noticed. Completed repairs using materials approved by the registrant of the pesticides stored in the containment area or bulk pesticide container must be made within a reasonable time, taking into account factors such as the weather and the availability of cleanup materials, trained staff, and equipment. Additional pesticides must not be stored in the permanent containment area or bulk pesticide container until repairs are completed.
8. Records of inspection and maintenance for permanent containment areas and for bulk pesticide containers and their appurtenances must be kept for three years and must including the following:
  - a. Name of the individual conducting the inspection or maintenance;
  - b. Date the inspection or maintenance was conducted;
  - c. A description of the conditions found during the inspection; and
  - d. Specific maintenance performed.

**History:** Effective January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-15

**60-03-01-12. ~~Packaging and repackaging~~ Repackaging requirements for ~~liquid or dry~~ bulk pesticides.**

1. A person must obtain a repackaging agreement from the registrant prior to repackaging ~~liquid or dry~~ bulk pesticides.

2. ~~Must~~ Repackaging must be performed at a facility with an environmental protection agency establishment number.
3. ~~Must~~ Repackaging must use meters or scales, or both, compatible with the pesticide being repackaged.
4. ~~Must~~ Repackaging must be done in a permanent containment area with a primary shutoff valve or switch within immediate reach of the person who is ~~engaged in the repackaging operation~~.
5. ~~An operational~~ The repackaging area must be kept clean of clutter and not used as a storage area for items not immediately used for repackaging.
6. A spill kit must be located within fifty feet of an operational area.
7. ~~Clean~~ During repackaging, clean up of any spilled discharged pesticide or pesticide-containing materials must be performed immediately after the occurrence and reported according to local, state, and federal guidelines.
8. ~~A~~ During repackaging, a discharged pesticide or pesticide-containing material must be contained either by the permanent containment area itself, mitigated using a spill kit, or drained, pumped, or transferred to an additional impermeable, aboveground holding tank or reservoir until utilized or disposed of in compliance with applicable local, state, and federal laws. The holding tank or reservoir must be suitably constructed to prevent the release of pesticides or pesticide-containing materials to the environment.

**History:** Effective March 1, 2003; amended effective January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-15, 4-35-20

**60-03-01-13. Prohibitions.** No person may:

1. ~~Package or repackage~~ Repackaging into a container unless the container is capable of holding, in undivided quantities, the capacity as specified by the environmental protection agency.
2. Hold in inventory a mixture or custom blend of any quantity of pesticide, but rather, after producing a mixture or custom blend, it must be promptly delivered to the person requesting it.
- 2: ~~3.~~ Place bulk pesticide storage containers underground.
- 3: ~~4.~~ Repackage into improperly labeled containers ~~is prohibited.~~

4. 5. Repackage into containers not designated as ~~reusable~~ refillable by the registrant and container manufacturer ~~is prohibited~~.

**History:** Effective March 1, 2003; amended effective January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06, 4-35-15, 4-35-20

## CHAPTER 60-03-03

**60-03-03-03. Adoption of worker protection standard.** The environmental protection agency worker protection standard regulations effective as of ~~July 1, 2003~~ December 12, 2008, as provided under title 40, Code of Federal Regulations, part 170, ~~but excluding sections 40 CFR 170.104, 170.130, 170.135, 170.203, and 170.230,~~ are hereby adopted by the board and incorporated by reference and made a part of this title. Copies of title 40, Code of Federal Regulations, part 170, are available upon request by contacting the board at its inquiry address listed in section 60-01-01-01.

**History:** Effective July 1, 2004; amended effective January 1, 2013.

**General Authority:** NDCC 4-35-06

**Law Implemented:** NDCC 4-35-06

**TITLE 75**  
**DEPARTMENT OF HUMAN SERVICES**



**JANUARY 2012**

**CHAPTER 75-03-07.1  
SELF-DECLARATION PROVIDERS EARLY CHILDHOOD SERVICES**

Section	
75-03-07.1-00	Definitions
75-03-07.1-01	Fees [Repealed]
75-03-07.1-02	Self-Declaration Standards - Application
75-03-07.1-03	Smoke-Free Environment [Repealed]
75-03-07.1-04	<del>Self-Declaration Restricted to One Per Residence -</del> Nontransferability of Self-Declaration and Emergency Designee
75-03-07.1-05	Appeals
75-03-07.1-06	Denial or Revocation of Self-Declaration Document
75-03-07.1-07	Minimum Sanitation Requirements
75-03-07.1-08	Infant Care
75-03-07.1-09	Minimum Requirements for the Care of Children With Special Needs
75-03-07.1-10	Correction of Violations
75-03-07.1-11	Fiscal Sanctions

**75-03-07.1-02. Self-declaration standards - Application.**

1. An applicant for a self-declaration document shall submit the application to the authorized agent in the county in which the applicant proposes to provide early childhood services. An application, including a department-approved authorization for background check for household members age twelve and older, an emergency designee, and an applicant, must be made in the form and manner prescribed by the department. The application must include the following sworn statement:

I am not required by North Dakota state law (Chapter 50-11.1) to be licensed to provide early childhood services.

2. A provisional self-declaration document may be issued:

- a. The director of a regional human service center, or the director's designee, in consultation with the department, may issue a provisional self-declaration document although the applicant or self-declaration holder fails to, or is unable to, comply with all applicable standards and rules of the department.
- b. A provisional self-declaration document must:
  - (1) State that the self-declaration holder has failed to comply with all applicable standards and rules of the department;
  - (2) State the items of noncompliance;
  - (3) Expire at a set date, not to exceed six months from the date of issuance; and
  - (4) Be exchanged for an unrestricted self-declaration document, which bears an expiration date of one year from the date of issuance of the provisional self-declaration document, after the applicant or operator demonstrates compliance, satisfactory to the department, with all applicable standards and rules.
- c. The department may issue a provisional self-declaration document only to an applicant or provider who has waived, in writing:
  - (1) The right to a written statement of charges as to the reasons for the denial of an unrestricted self-declaration document; and
  - (2) The right to an administrative hearing, in the manner provided in North Dakota Century Code chapter 28-32, concerning the nonissuance of an unrestricted self-declaration document, either at the time of application or during the period of operation under a provisional self-declaration document.
- d. Any provisional self-declaration document issued must be accompanied by a written statement of violations signed by the director of the regional human service center or the director's designee and must be acknowledged in writing by the provider.
- e. Subject to the exceptions contained in this section, a provisional self-declaration document entitles the holder to all rights and privileges afforded the holder of an unrestricted self-declaration document.
- f. The provider shall display prominently the provisional self-declaration document and agreement.

- g. The provider shall provide parents written notice that the provider is operating on a provisional self-declaration document and the basis for the provisional self-declaration document.
3. An applicant for a self-declaration document shall be directly responsible for the care, supervision, and guidance of the child or children; shall comply with the following standards; and shall certify:
    - a. That the applicant:
      - (1) Is at least eighteen years of age;
      - (2) Shall provide an environment that is physically and socially adequate for the children; and that the applicant is an adult of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care;
      - (3) Shall devote adequate time and attention to the children in the applicant's care;
      - (4) Shall provide food of sufficient quantity and nutritious quality in accordance with the United States department of agriculture standards which satisfies the dietary needs of the children while in the applicant's care;
      - (5) Shall provide proper care and protection for children in the applicant's care;
      - (6) May not use or be under the influence of, and will not allow any household member or staff member to use or be under the influence of any illegal drugs or alcoholic beverages while caring for children;
      - (7) May not leave children without supervision;
      - (8) Shall verify that the child has received all immunizations appropriate for the child's age, as prescribed by the state department of health, or have on file a document stating that the child is medically exempt or exempt from immunizations based on religious, philosophical, or moral beliefs, unless the child is a drop-in or school-age child;
      - (9) Shall report immediately, as a mandated reporter, suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
      - (10) Shall provide a variety of games, toys, books, crafts, and other activities and materials to enhance the child's

intellectual and social development and to broaden the child's life experience. Each provider shall have enough play materials and equipment so that at any one time each child in attendance may be involved individually or as a group;

- (11) Shall ensure a current health assessment or a health assessment statement completed by the parent is obtained at the time of initial enrollment of the child, which must indicate any special precautions for diet, medication, or activity. This assessment must be completed annually; ~~and~~
  - (12) Shall ensure a child information form completed by the parent is obtained at the time of initial enrollment of the child and annually thereafter; and
  - (13) Has completed a department-approved basic child care course.
- b. That discipline will be constructive or educational in nature and may include diversion, separation from the problem situation, talking with the child about the situation, praising appropriate behavior, or gentle physical restraint such as holding. A child may not be subjected to physical harm or humiliation. Disregard of any of the following disciplinary rules or any disciplinary measure resulting in physical or emotional injury or neglect or abuse to any child is grounds for denial or revocation of a self-declaration document.
- (1) A child may not be kicked, punched, spanked, shaken, pinched, bitten, roughly handled, struck, mechanically restrained, or physically maltreated by the provider, staff member, household member, or any other adult in the residence.
  - (2) Authority to discipline may not be delegated to or be administered by children.
  - (3) Separation, when used as discipline, must be appropriate to the child's development and circumstances, and the child must be in a safe, lighted, well-ventilated room within sight or hearing range of an adult. A child may not be isolated in a locked room or closet.
  - (4) A child may not be punished for lapses in toilet training.
  - (5) A provider may not use verbal abuse or make derogatory remarks about the child, or the child's family, race, or religion when addressing a child or in the presence of a child.

- (6) A provider may not use profane, threatening, unduly loud, or abusive language in the presence of a child.
  - (7) A provider may not force-feed a child or coerce a child to eat unless medically prescribed and administered under a medical provider's care.
  - (8) A provider may not use deprivation of snacks or meals as a form of discipline or punishment.
  - (9) A provider may not force a child to ingest substances that would cause pain or discomfort, for example, placing soap in a child's mouth to deter the child from biting other children.
  - (10) A provider may not withhold active play from a child as a form of discipline or punishment, beyond a brief period of separation.
- c. That a working smoke detector is properly installed and in good working order on each floor used by children.
  - d. That a fire extinguisher that is inspected annually is properly installed, is in good working order, and is located in the area used for child care.
  - e. That a working telephone is located in the location used for child care. Emergency numbers for parents and first responders must be posted.
  - f. When transportation is provided by a provider, children must be protected by adequate supervision and safety precautions.
    - (1) Drivers must be eighteen years of age or older and must comply with all relevant federal, state, and local laws, including child restraint laws.
    - (2) A child must not be left unattended in a vehicle.
- 4. Potential hazards, such as guns, household cleaning chemicals, uninsulated wires, medicines, noncovered electrical outlets, poisonous plants, and open stairways must not be accessible to children. Guns and ammunition must be kept in separate locked storage, or trigger locks must be used. Other weapons and dangerous sporting equipment, such as bows and arrows, must not be accessible to children.
  - 5. If the physical, cognitive, social, or emotional health capabilities of an applicant or provider appear to be questionable, the department may require that the individual present evidence of capability to provide the

required care based on a formal evaluation. The department is not responsible for costs of any required evaluation.

6. A self-declaration document is only effective for one year.

**History:** Effective June 1, 1995; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-07, 50-11.1-08, 50-11.1-16, 50-11.1-17

**75-03-07.1-04. ~~Self-declaration restricted to one~~ One per residence - Nontransferability of self-declaration and emergency designee.**

1. The department may not authorize more than one in-home registration, self-declaration, or license per residence. A residence means real property that is typically used as a single family dwelling. ~~This applies to new self-declarations issued on or after January 1, 2011. Existing providers~~ A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this provision subsection until January 1, 2016, after which time all providers will be subject to the requirements of this subsection.
2. The applicant shall identify one emergency designee for the self-declaration at the time of the application. The emergency designee must be at least eighteen years old and must be approved by the department.
3. The provider shall be on the premises supervising the children at all times when children are present, except in situations during which the emergency designee is providing care.
4. The self-declaration is nontransferable to another residence.

**History:** Effective June 1, 1995; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-16, 50-11.1-17

**75-03-07.1-06. Denial or revocation of self-declaration document.**

1. The right to provide early childhood services is dependent upon the applicant's or provider's continuing compliance with the terms of the application as listed in section 75-03-07.1-02.
2. A fraudulent or untrue representation is grounds for revocation or denial.

3. a. The applicant, self-declaration provider, emergency designee, staff members, and household members may not have been found guilty of, pled guilty to, or pled no contest to:
    - (1) An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-17, assaults - threats - coercion - harassment; 12.1-18, kidnapping; or 12.1-27.2, sexual performances by children; or in North Dakota Century Code section 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-07, sexual assault; 12.1-22-01, robbery; 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; or 14-09-22, abuse or neglect of a child;
    - (2) An offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the offenses identified in paragraph 1; or
    - (3) An offense, other than an offense identified in paragraph 1 or 2, if the department determines that the individual has not been sufficiently rehabilitated. An offender's completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation.
  - b. The department has determined that the offenses enumerated in paragraphs 1 and 2 of subdivision a have a direct bearing on the applicant's, provider's, emergency designee's, or staff member's ability to serve the public in a capacity as a provider, emergency designee, or staff member.
  - c. In the case of misdemeanor simple assault described in North Dakota Century Code section 12.1-17-01, or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine that the individual has been sufficiently rehabilitated if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.
4. If the department determines that a criminal history record check, as described in North Dakota Century Code section 50-11.1-06.2,

is appropriate, the department may excuse a person from providing fingerprints if usable prints have not been obtained after two sets of prints have been submitted and rejected. If a person is excused from providing fingerprints, the department may conduct statewide criminal history record investigation in any state in which the person lived during the eleven years preceding the signed authorization for the background check.

5. A provider shall ensure safe care for the children receiving services in the provider's residence. If a services-required decision made under North Dakota Century Code chapter 50-25.1 exists indicating that a child has been abused or neglected by an applicant, provider, emergency designee, staff member, or household member, that decision has a direct bearing on the applicant's or provider's ability to serve the public in a capacity involving the provision of child care, and the application or self-declaration document may be denied or revoked.
  - a. If a services-required determination under North Dakota Century Code chapter 50-25.1 and under chapter 75-03-19 exists indicating that any child has been abused or neglected by the applicant, provider, emergency designee, staff member, or household member, the applicant or provider shall furnish information to the department, from which the department can determine the applicant's, provider's, or staff member's ability to provide care that is free of abuse or neglect. The department shall furnish the determination of ability to the applicant or provider and to the director of the regional human service center or the director's designee for consideration and action on the application or self-declaration document.
  - b. Each applicant, provider, emergency designee, and staff member shall complete a department-approved authorization for background check form no later than the first day of employment.
  - c. Household members over the age of twelve ~~must~~ shall complete a department-approved authorization for background check form at the time of application or upon obtaining residence at the location of the child care.

**History:** Effective June 1, 1995; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08, 50-11.1-09

**Law Implemented:** NDCC 50-11.1-06.2, 50-11.1-08, 50-11.1-09, 50-11.1-16, 50-11.1-17

#### **75-03-07.1-08. Infant care.**

1. **Environment and interactions.**

- a. A provider serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
- b. The provider shall ensure that each infant receives positive stimulation and verbal interaction such as being held, rocked, talked with, or sung to.
- c. The provider shall respond to comfort an infant's or toddler's physical and emotional distress:
  - (1) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
  - (2) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.
- d. The provider shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, and uncluttered area.
- e. The provider shall take children outdoors or to other areas within the child care for a part of each day to provide some change of physical surroundings and to interact with other children.
- f. The provider shall ensure that infants are not shaken or jostled.
- g. The provider shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
- h. The provider shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.

## 2. **Feeding.**

- a. The provider shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed by the infant's parent or medical provider.
- b. The provider shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. The provider shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider.

- c. The provider shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.
- d. The provider shall ensure that frozen breast milk is thawed under cool running tap water or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
- e. The provider shall ensure that an infant is not fed by propping a bottle.
- f. The provider shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
- g. The provider shall be within sight and hearing range of an infant during the infant's feeding or eating process.

### **3. Diapering.**

- a. The provider shall ensure that there is a designated cleanable diapering area, located separately from food preparation and serving areas in the child care if children requiring diapering are in care.
- b. The provider shall ensure that diapers are changed promptly when needed and in a sanitary manner.
- c. Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.
- d. The provider shall ensure that soiled or wet diapers are stored in a sanitary, covered container separate from other garbage and waste until removed from the child care.

### **4. Sleeping.**

- a. The provider shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.
- b. The provider shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.

- c. The provider shall ensure that if an infant falls asleep while not in a crib or portable crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- d. Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- e. The provider shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib, except for when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant in the crib or portable crib while the infant is sleeping or preparing to sleep.
- f. The provider shall ensure that mattresses and sheets are properly fitted. The provider shall ensure that sheets and mattress pads are changed whenever they become soiled or wet, when cribs are used by different infants, or at least weekly.
- ~~g. The provider shall ensure that each infant has an individual infant blanket or infant sleep sack.~~
- ~~h. The provider shall ensure that toys or objects hung over an infant crib or portable crib must be held securely and be of size and weight that would not injure an infant if the toy or object accidentally falls or if the infant pulls on the object.~~
- ~~i. g. The provider shall check on sleeping infants regularly or have a monitor in the room with sleeping infants.~~

**History:** Effective January 1, 2011; amended effective January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-08, 50-11.1-16, 50-11.1-17

#### **75-03-07.1-10. Correction of violations.**

1. A provider shall correct violations noted in a correction order within the following times:
  - a. For a violation of paragraphs subsection 23 of North Dakota Century Code section 50-11.1-02, North Dakota Century Code section 50-11.1-02.2, paragraph 5 and or 7 of subdivision a of subsection 3 of section 75-03-07.1-02, subdivision b of subsection 3 of section 75-03-07.1-02, and or subsection 4 of section 75-03-07.1-02, within twenty-four hours.

- b. For a violation of subdivision g or h of subsection 1 of North Dakota Century Code section 50-11.1-17 or all other deficiencies of chapter 75-03-07.1, within twenty days.
2. All periods of correction begin on the date of the receipt of the correction order by the provider.
3. The regional supervisor of early childhood services may grant an extension of additional time to correct violations, up to a period of one-half the original allowable time allotted. An extension may be granted upon application by the provider and a showing that the need for the extension is created by unforeseeable circumstances and the provider has diligently pursued the correction of the violation.
4. The provider shall furnish a written notice to the authorized agent upon completion of the required corrective action. The correction order remains in effect until the authorized agent confirms the corrections have been made.
5. The provider shall notify the parent of each child receiving care at the residence and each staff member how to report a complaint or suspected rule violation.
6. Within three business days of the receipt of the correction order, the provider shall notify the parents of each child receiving care by this provider that a correction order has been issued. In addition to providing notice to the parent of each child, the provider also must post the correction order in a conspicuous location within the residence until the violation has been corrected or five days, whichever is longer.
7. A provider who has been issued a correction order must be reinspected at the end of the period allowed for correction. If, upon reinspection, it is determined that the provider has not corrected a violation identified in the correction order, a notice of noncompliance with the correction order must be mailed by certified mail to the provider. The notice must specify the violations not corrected and the penalties assessed in accordance with North Dakota Century Code section 50-11.1-07.5.

**History:** Effective January 1, 2011; amended effective January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-07, 50-11.1-07.1, 50-11.1-07.2, 50-11.1-08

#### **75-03-07.1-11. Fiscal sanctions.**

1. The department shall assess a fiscal sanction of twenty-five dollars per day for each violation of subdivisions North Dakota Century Code chapter 50-11.1; subdivision b, c, d, and or e of subsection 3 of section 75-03-07.1-02; or subsection 4 of section 75-03-07.1-02 for each day

that the provider has not verified correction, after the allowable time for correction of violations ends.

2. The department shall assess fiscal sanction of five dollars per day for each violation of any other provision of this chapter for each day that the provider has not verified correction, after the allowable time for correction of violations ends.

**History:** Effective January 1, 2011; amended effective January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-07.4, 50-11.1-07.5, 50-11.1-08

**CHAPTER 75-03-08  
FAMILY CHILD CARE EARLY CHILDHOOD SERVICES**

Section	
75-03-08-01	Purpose [Repealed]
75-03-08-02	Authority and Objective [Repealed]
75-03-08-03	Definitions
75-03-08-04	Effect of Licensing and Display of License
75-03-08-05	Denial or Revocation of License
75-03-08-05.1	Family Child Care License <u>[Repealed]</u>
75-03-08-06	Provisional License
75-03-08-06.1	Restricted License
75-03-08-07	Application for and Nontransferability of Family Child Care License
75-03-08-08	Family Child Care Homes Registered Prior to Effective Date [Repealed]
75-03-08-08.1	Duties of the Provider
75-03-08-09	Staffing Requirements
75-03-08-10	Minimum Qualifications of Providers
75-03-08-11	[Reserved]
75-03-08-12	Minimum Qualifications for All Staff Members Responsible for Caring for or Teaching Children
75-03-08-12.1	Minimum Qualifications of Volunteers
75-03-08-13	Minimum Health Requirements for All Applicants, Providers, and Staff Members Responsible for Caring for or Teaching Children
75-03-08-14	Minimum Requirements of the Facility
75-03-08-15	Minimum Standards for Provision of Transportation
75-03-08-16	Minimum Emergency Evacuation and Disaster Plan
75-03-08-17	[Reserved]
75-03-08-18	[Reserved]
75-03-08-19	Admission Procedures
75-03-08-20	Program Requirements
75-03-08-21	Minimum Standards for Food and Nutrition
75-03-08-21.1	Minimum Sanitation and Safety Requirements
75-03-08-22	Records
75-03-08-23	Discipline - Punishment Prohibited
75-03-08-24	Specialized Types of Care and Minimum Requirements
75-03-08-25	Minimum Requirements for Care of Children With Special Needs
75-03-08-26	[Reserved]
75-03-08-27	Effect of Conviction on Licensure and Employment
75-03-08-28	Child Abuse and Neglect Decisions
75-03-08-29	Correction of Violations
75-03-08-30	Fiscal Sanctions
75-03-08-31	Appeals

**75-03-08-05.1. Family child care license.** ~~The right to operate a licensed family child care is dependent upon continuing compliance with the applicable~~

~~provisions of North Dakota Century Code chapter 50-11.1 and the applicable standards contained in this chapter. Repealed effective January 1, 2013.~~

**History:** Effective January 1, 1999; amended effective January 1, 2011.

**General Authority:** ~~NDCC 50-11.1-08~~

**Law Implemented:** ~~NDCC 50-11.1-04, 50-11.1-07~~

**75-03-08-07. Application for and nontransferability of family child care license.**

1. An application for a license must be submitted to the authorized agent in the county in which the family child care is located. Application must be made in the form and manner prescribed by the department.
2. The license is nontransferable and valid only for the premises indicated on the license. A new application for a license must be filed upon change of provider or location.
3. The department may not issue more than one ~~child-care in-home registration, self-declaration, or~~ license per residence. A residence means real property that is typically used as a single family dwelling. ~~This applies to licenses issued on or after January 1, 2011. Existing operators~~ A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this provision subsection until January 1, 2016, after which time all operators will be subject to the requirements of this subsection.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-03, 50-11.1-04, 50-11.1-06.2, 50-11.1-07, 50-11.1-08

**75-03-08-08.1. Duties of the provider.**

1. A provider shall maintain, whenever services are provided, at least one staff member who:
  - a. Is certified in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other similar cardiopulmonary resuscitation training programs approved by the department; and
  - b. Is certified or trained in a department-approved program to provide first aid.

2. Substitute staff are exempt from the requirements of subsection 1. If a provider utilizes a substitute or emergency designee who is not certified in cardiopulmonary resuscitation or first aid when no other staff member who is certified is on duty, the provider shall notify the parents of the date and time that the substitute or emergency designee will be caring for the children.
3. The provider shall have an adult staff member responsible for caring for or teaching children present in the family child care at all times to supervise staff members under the age of eighteen and children in care.
4. A staff member may not at any time place a child in an environment that would be harmful or dangerous to the child's physical, cognitive, social, or emotional health.
5. The provider shall report to the authorized agent within twenty-four hours:
  - a. A death or serious accident or illness requiring hospitalization of a child while in the care of the family child care or attributable to care received in the family child care;
  - b. An injury to any child which occurs while the child is in the care of the family child care and which requires medical treatment;
  - c. Poisonings or errors in the administration of medication;
  - d. Closures or relocations of child care programs due to emergencies; and
  - e. Fire that occurs or explosions that occur in or on the premises of the family child care.
- ~~6. The provider shall develop and ensure compliance with a written policy and procedure for accountability when a normally unaccompanied child fails to arrive for the program.~~
- ~~7.~~ 6. The provider shall be present in the family child care no less than sixty percent of the time when children are in care.
- ~~8.~~ 7. The provider, as a mandatory reporter, shall report any suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03.
- ~~9.~~ 8. The provider shall select an emergency designee.
- ~~10.~~ 9. The provider shall maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the family child care.

- ~~44.~~ 10. The provider must be an adult of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care.
- ~~42.~~ 11. The provider shall ensure safe care for the children under supervision. Supervision means a staff member responsible for caring for or teaching children being within sight or hearing range of an infant, toddler, or preschooler at all times so that the staff member is capable of intervening to protect the health and safety of the child. For the school-age child, it means a staff member responsible for caring for or teaching children being available for assistance and care so the child's health and safety is protected.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-08-09. Staffing requirements.**

- 1. Staffing requirements are established by the number of children physically in care at the family child care at any given time, rather than total enrollment.
- ~~4.~~ ~~A provider may provide care to no more than a total of four children if all are under age twenty-four months.~~
- ~~2.~~ ~~A provider providing care to five or more children may provide care to no more than three children under age twenty-four months.~~
- ~~3.~~ 2. If a child with special needs is admitted to the program, the child's developmental age level must be used in determining the number of children for which care may be provided.
- ~~4.~~ 3. Children using the family child care for a McGruff safe house, a block house, or a certified safe house program during an emergency are not counted under this section.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-02.1, 50-11.1-04, 50-11.1-08

**75-03-08-19. Admission procedures.**

- 1. The provider shall request a preadmission visit with the child and the child's parents to acquaint the child and the parent with the family child care and its surroundings, the other children, and the provider.

2. The provider shall inform parents about the child care program, places and times of special activities outside the family child care, policies, and emergency procedures, and shall discuss information concerning the child to identify and accommodate the child's needs. Written policies must include:
  - ~~a.~~ An explanation of how accidents and illnesses ~~may~~ will be ~~dealt~~ with ~~must be provided,~~ as well as handled;
  - ~~b.~~ The methods of discipline and developmentally appropriate discipline and guidance techniques that are to be used;
  - ~~c.~~ The process for a parent or staff member to report a complaint, a suspected licensing violation, or suspected child abuse or neglect;
  - ~~d.~~ Hiring practices and personnel policies for staff members;
  - ~~e.~~ Informing parents that they may request daily reports for their child, including details regarding eating, napping, and diapering;
  - ~~f.~~ Procedure for accountability when a child fails to arrive as expected at the child care; and
  - ~~g.~~ Transportation procedures, if the provider provides transportation.
3. The provider shall notify parents of the payment rates and the time of payment.
4. The provider shall provide parents with unlimited access and opportunities to observe their children at any time their children are in care. This does not prohibit a provider from locking the doors of the family child care while children are in care.
5. The provider shall verify the identification of the child through official documentation such as a certified birth certificate, certified school records, passport, or any other documentary evidence the provider considers appropriate proof of identity and shall comply with North Dakota Century Code section 12-60-26.
6. The provider shall ~~inform parents that they may request daily reports for their child, including details regarding eating, napping, and diapering~~ ensure that children do not depart from the child care premises unsupervised, except when the parent and provider consent that an unsupervised departure is safe and appropriate for the age and development of the child. The provider shall obtain written parental consent for the child to leave the child care premises unsupervised, which must specify the activity, time the child is leaving and length

of time the child will be gone, method of transportation, and parental responsibility for the child once the child leaves the child care premises.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-08

**75-03-08-24. Specialized types of care and minimum requirements.**

**1. Infant care.**

**a. Environment and interactions.**

- (1) A provider serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
- (2) The provider shall ensure that each infant receives positive stimulation and verbal interaction with a staff member responsible for caring for or teaching children, such as being held, rocked, talked with, or sung to.
- (3) The staff members responsible for caring for or teaching children or emergency designee shall respond promptly to comfort an infant's or toddler's physical and emotional distress:
  - (a) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
  - (b) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.
- (4) The provider shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, and uncluttered area.
- (5) Staff members responsible for caring for or teaching children shall take children outdoors or to other areas within the family child care for a part of each day to provide some change of physical surroundings and to interact with other children.
- (6) The provider shall ensure that infants are not shaken or jostled.

- (7) The provider shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
- (8) The provider shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.

b. Feeding.

- (1) The provider shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed by the infant's parent or medical provider.
- (2) The provider shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. Staff members shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider.
- (3) The provider shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.
- (4) The provider shall ensure that frozen breast milk is thawed under cool running tap water, or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
- (5) The provider shall ensure that an infant is not fed by propping a bottle.
- (6) The provider shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
- (7) The provider shall ensure that a staff member responsible for caring for or teaching children is within sight and hearing range of an infant during the infant's feeding or eating process.

c. Diapering.

- (1) The provider shall ensure that there is a designated cleanable diapering area, located separately from food preparation and

serving areas in the family child care, if children requiring diapering are in care.

- (2) The provider shall ensure that diapers are changed promptly when needed and in a sanitary manner.
- (3) Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.
- (4) The provider shall ensure that soiled or wet diapers are stored in a sanitary, covered container separate from other garbage and waste until removed from the family child care.

d. Sleeping.

- (1) The provider shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.
- (2) The provider shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.
- (3) The provider shall ensure that if an infant falls asleep while not in a crib or portable crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- (4) Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- (5) The provider shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib, except for when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant in the crib or portable crib while the infant is sleeping or preparing to sleep.
- (6) The provider shall ensure that mattresses and sheets are properly fitted. The provider shall ensure that sheets and mattress pads are changed whenever they become soiled or wet, when cribs are used by different infants, or at least weekly.

- ~~(7)~~ The provider shall ensure that each infant has an individual infant blanket or infant sleep sack.
- ~~(8)~~ The provider shall ensure that toys or objects hung over an infant crib or portable crib must be held securely and be of size and weight that would not injure an infant if the toy or object accidentally falls or if the infant pulls on the object.
- ~~(9)~~ (7) The provider shall check on sleeping infants regularly or have a monitor in the room with the sleeping infant.

## 2. Night care.

- a. Any family child care offering night care shall provide program modifications for the needs of children and their parents during the night.
- b. In consultation with parents, special attention must be given by the staff member responsible for caring for or teaching children to provide a transition into this type of care, appropriate to the child's needs.
- c. The provider shall encourage parents to leave their children in care or pick them up before and after their normal sleeping period when practical, to ensure minimal disturbance of the child during sleep, with consideration given to the parents' work schedule.
- d. The provider shall ensure that children under the age of six are supervised directly when bathing.
- e. The provider shall ensure that comfortable beds, cots, or cribs, complete with a mattress or pad, are available and the provider shall ensure:
  - (1) Pillows and mattresses have clean coverings.
  - (2) Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.
  - (3) If beds are used by different children, sheets and pillowcases are laundered before use by other children.
  - (4) Each bed or cot has sufficient blankets available.

- f. The provider shall require each child in night care to have night clothing and a toothbrush marked for identification.

**History:** Effective January 1, 2011; amended effective January 1, 2013.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

#### **75-03-08-28. Child abuse and neglect decisions.**

1. A provider shall ensure safe care for the children receiving services in the provider's family child care. If a services-required decision made under North Dakota Century Code chapter 50-25.1 exists, indicating that a child has been abused or neglected by an applicant, provider, emergency designee, staff member, or household member, that decision has a direct bearing on the applicant's or provider's ability to serve the public in a capacity involving the provision of child care, and the application or license may be denied or revoked. If a services-required determination under North Dakota Century Code chapter 50-25.1 and under chapter 75-03-19 exists, indicating that any child has been abused or neglected by the applicant, provider, emergency designee, staff member, or household member, the applicant or provider shall furnish information satisfactory to the department, from which the department can determine the applicant's, provider's, or staff member's ability to provide care that is free of abuse and neglect. The department shall furnish the determination of current ability to the applicant or provider and to the regional director of the human service center or the director's designee for consideration and action on the application or license.
2. Each applicant, provider, emergency designee, and staff member in the family child care shall complete a department-approved authorization for background check form no later than the first day of employment.
3. Household members over the age of twelve ~~must~~ shall complete a department-approved authorization for background check form at the time of application, relicensure, or upon obtaining residence at the location of the family child care.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-08-29. Correction of violations.**

1. A provider shall correct violations noted in a correction order within the following times:

- a. For a violation of subsection 8 of North Dakota Century Code section 50-11.1-02, North Dakota Century Code section 50-11.1-02.2, section 75-03-08-04 or 75-03-08-09, subsections subsection 2, 7, and 10 or 9 of section 75-03-08-14, or section 75-03-08-23, or subsection 1 of section 75-03-08-24, within twenty-four hours.
  - b. For a violation that requires an inspection by a state fire marshal or local fire department authority pursuant to section 75-03-08-14, within sixty days.
  - c. For a violation that requires substantial building remodeling, construction, or change, within sixty days.
  - d. For all other violations, within twenty days.
2. All periods for correction begin on the date of receipt of the correction order by the provider.
  3. The regional supervisor of early childhood services may grant an extension of additional time to correct violations, up to a period of one-half the original allowable time allotted. An extension may be granted upon application by the provider and a showing that the need for the extension is created by unforeseeable circumstances and the provider has diligently pursued the correction of the violation.
  4. The provider shall furnish a written notice to the authorized agent upon completion of the required corrective action. The correction order remains in effect until the authorized agent confirms the corrections have been made.
  5. Within three business days of the receipt of the correction order, the provider shall notify the parents of each child receiving care at the family child care that a correction order has been issued. In addition to providing notice to the parent of each child, the provider also shall post the correction order in a conspicuous location within the family child care until the violation has been corrected or for five days, whichever is longer.
  - ~~6. The provider shall inform the parent of each child receiving care at the family child care and each staff member how to report a complaint or suspected licensing violation.~~
  - ~~7.~~ 6. A family child care program that has been issued a correction order must be reinspected at the end of the period allowed for correction. If, upon reinspection, it is determined that the program has not corrected a violation identified in the correction order, a notice of noncompliance with the correction order must be mailed by certified mail to the program. The notice must specify the violations not corrected and the

penalties assessed in accordance with North Dakota Century Code section 50-11.1-07.5.

8. 7. If a family child care program receives more than one correction order in a single year, the provider may be referred by the department for consulting services to assist the provider in maintaining compliance and to avoid future corrective action.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.1, 50-11.1-07.2, 50-11.1-07.3

**75-03-08-30. Fiscal sanctions.**

1. The department shall assess a fiscal sanction of twenty-five dollars per day for each violation of ~~subsections~~ North Dakota Century Code chapter 50-11.1; section 75-03-08-09; subsection 1, 2, and or 9 of section 75-03-08-14; ~~subsection 3 of section 75-03-08-21.1;~~ or section 75-03-08-23, 75-03-08-27, or 75-03-08-28 for each day that the provider has not verified correction, after the allowable time for correction of violations ends.
2. The department shall assess a fiscal sanction of fifteen dollars per day for each violation of ~~section 75-03-08-09; subsections~~ subsection 8 and or 10 of section 75-03-08-14; ~~or~~ or subsection 13 of section 75-03-08-21.1 for each day that the provider has not verified correction, after the allowable time for correction of violations ends.
3. The department shall assess a fiscal sanction of five dollars per day for each violation of any other provision of this chapter for each day that the provider has not verified correction, after the allowable time for correction of violations ends.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-07.4, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.4, 50-11.1-08

## CHAPTER 75-03-09

### 75-03-09-07. Application for and nontransferability of group child care license.

1. An application for license must be submitted to the authorized agent. Application must be made in the form and manner prescribed by the department.
2. A license issued under this chapter is nontransferable and valid only for the premises indicated on the license.
3. An application for a new license must be filed upon change of provider or location.
4. The department may not issue more than one ~~child care in-home registration, self-declaration, or~~ license per residence. A residence means real property that is typically used as a single family dwelling. ~~This applies to new licenses issued on or after January 1, 2011. Existing operators~~ A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this provision subsection until January 1, 2016, after which time all operators will be subject to the requirements of this subsection.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-03, 50-11.1-04, 50-11.1-06.2, 50-11.1-07, 50-11.1-08

### 75-03-09-08. Duties of group child care provider.

1. The provider of a group child care is responsible for compliance with requirements set forth in the standards and North Dakota Century Code chapter 50-11.1. The provider shall:
  - a. Establish the child care program;
  - b. Apply for a license for the group child care;
  - c. Possess knowledge or experience in management and interpersonal relationships;
  - d. Formulate written policies and procedures for the operation of the group child care; Policies must include:

- (1) An explanation of how accidents and illnesses will be handled;
- (2) The methods of developmentally appropriate discipline and guidance techniques that are to be used;
- (3) The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;
- (4) Hiring practices and personnel policies for staff members;
- (5) Informing parents that they may request daily reports for their child, including details regarding eating, napping, and diapering;
- (6) Procedure for accountability when a child fails to arrive as expected at the child care; and
- (7) Transportation procedures, if the provider provides transportation;

- e. Notify the authorized agent of any major changes in the operation or in the ownership of the group child care, including staff member changes;
- f. Maintain records of enrollment, attendance, health, and other required records;
- g. Select an emergency designee;
- h. Maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the group child care;
- i. Ensure the group child care is sufficiently staffed at all times to meet the child and staff ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
- j. Ensure preadmission visits for children and their parents are offered so the facility's program, fees, operating policies, and procedures can be viewed and discussed, including:
  - (1) ~~An explanation of how accidents and illnesses may be handled;~~
  - (2) ~~The methods of developmentally appropriate discipline and guidance techniques that are to be used;~~

- ~~(3) The process for reporting a complaint, a suspected licensing violation, and suspected child abuse or neglect;~~
- ~~(4) Hiring practices and personnel policies for staff members; and~~
- ~~(5) Informing parents that they may request daily reports for their child, including details regarding eating, napping, and diapering;~~
- k. Ensure that there are signed written agreements with the parents of each child that specify the fees to be paid, methods of payment, and policies regarding delinquency of fees;
- l. Provide parents, upon request, with progress reports on their children, and provide unlimited opportunities for parents to observe their children while in care. Providing unlimited access does not prohibit a group child care from locking its doors while children are in care;
- m. Provide parents with the name of the group child care provider, the group child care supervisor, staff members, and the emergency designee;
- n. Report, as a mandatory reporter, any suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
- ~~o. Develop and ensure compliance with a written policy and procedure for accountability when a normally unaccompanied child fails to arrive as expected at the group child care; and~~
- ~~p. o. Ensure, whenever services are provided, that at least one staff member, on duty meets current certification requirements in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other cardiopulmonary resuscitation training programs approved by the department, and is certified or trained in a department-approved program to provide first aid. Substitute staff are exempt from this requirement. If a provider utilizes a substitute or emergency designee who is not certified in cardiopulmonary resuscitation or first aid when no other staff member who is certified is on duty, the provider shall notify the parents of the date and time that the substitute or emergency designee will be caring for the children; and~~
- p. Ensure that children do not depart from the child care premises unsupervised, except when the parent and provider consent that an unsupervised departure is safe and appropriate for the age

and development of the child. The provider shall obtain written parental consent for the child to leave the child care premises unsupervised, which must specify the activity, time the child is leaving and length of time the child will be gone, method of transportation, and parental responsibility for the child once the child leaves the child care premises.

2. If the provider is also the group child care supervisor, the provider shall also meet the qualifications of the supervisor in section 75-03-09-10.
3. The provider shall report to the authorized agent within twenty-four hours:
  - a. A death or serious accident or illness requiring hospitalization of a child while in the care of the group child care or attributable to care received in the group child care;
  - b. An injury to any child which occurs while the child is in the care of the group child care and which requires medical treatment;
  - c. Poisonings or errors in the administering of medication;
  - d. Closures or relocations of child care programs due to emergencies; and
  - e. Fire that occurs and explosions that occur in or on the premises of the group child care.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-09-09. Staffing requirements.**

1. The number of staff members and their responsibilities must reflect program requirements, individual differences in the needs of the children enrolled, and may permit flexible groupings, if necessary.
2. a. A provider may provide early childhood services for no more than seven children at any one time, which includes no more than three children under twenty-four months of age. A provider may also provide early childhood services to two additional school-age children during the three hours immediately before and after the schoolday and all day, except for Saturday and Sunday, when school is not in session during the official school year; or

b. The A provider may elect to staff according to the following minimum ratio of staff members responsible for caring for or teaching children to children in group child care must be:

- a. (1) If all children in care are For children less younger than eighteen months of age, one staff member may care for four children, a ratio of .25 in decimal form is assigned;
- b. (2) If all children in care are For children eighteen months of age to thirty-six months of age, one staff member may care for five children, a ratio of .20 in decimal form is assigned;
- c. (3) If all children in care are For children thirty-six months of age to four years of age, one staff member may care for seven children, a ratio of .14 in decimal form is assigned;
- d. (4) If all children in care are For children four years of age to five years of age, one staff member may care for ten children, a ratio of .10 in decimal form is assigned;
- e. (5) If all children in care are For children five years of age to six years of age, one staff member may care for twelve children, a ratio of .08 in decimal form is assigned;
- f. (6) If all children in care are For children six years to twelve years of age, one staff member may care for eighteen children, a ratio of .05 in decimal form is assigned; and
- g. (7) If children in care are of mixed age categories, the staff to child ratio is calculated in accordance with subsection 6. When there is a mixed-aged group, the number of children in each age category is multiplied by the corresponding ratio number, converted to decimal form, and carried to the nearest hundredth. To determine the number of staff members responsible for caring for or teaching children necessary at any given time, numbers of staff members for all age categories are added, and any fractional staff member count is then rounded to the next highest whole number whenever the fractional staff member count amounts to thirty-five hundredths or more. If lower than thirty-five hundredths, the fractional amount is dropped. No more than four children under the age of eighteen months per staff member are allowed in any mixed-aged group.

3. A provider licensed for at least two years may apply for a waiver of the required ratio, not to exceed .25 decimal point. The department shall consider demonstration of need, health and safety of children, age of children, number of children, and licensing history of the provider in determining whether to approve the application for a waiver. The

department may deny an application for waiver and may revoke a waiver granted under this subsection. The decision to deny or revoke a waiver is not an appealable decision. The department shall review each waiver granted under this subsection at least every twelve months to determine if the circumstances which led to granting the waiver continue to exist.

- ~~3.~~ 4. The provider of a group child care shall ensure that the group child care is sufficiently staffed at all times to meet the child and staff ratios for children in attendance, and that no more children than the licensed capacity are served at one time.
- ~~4.~~ 5. If a child with special needs is admitted to the group child care, the child's developmental age level must be used in determining the number of children for which care can be provided.
- ~~5.~~ 6. The provider shall ensure that children with special needs requiring more than usual care and supervision have adequate care and supervision provided to them without adversely affecting care provided to the remaining children in the group child care.
- ~~6.~~ 7. ~~When there is a mixed-age group, the number of children in each age category is multiplied by the corresponding ratio number, converted to decimal form, and carried to the nearest hundredth. To determine the number of staff members responsible for caring for or teaching children necessary at any given time, numbers of staff members for all age categories are added, and any fractional staff member count is then rounded to the next highest whole number whenever the fractional staff member count amounts to thirty-five hundredths or more. If lower than thirty-five hundredths, the fractional amount is dropped.~~
7. Children using the group child care for a McGruff safe house, a block house, or a certified safe house program during an emergency are not counted under this section.

**History:** Effective December 1, 1981; amended effective July 1, 1984; January 1, 1987; January 1, 1989; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-02.1, 50-11.1-04, 50-11.1-08

#### **75-03-09-10. Minimum qualifications of group child care supervisor.**

1. A group child care supervisor must be an adult of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care.
2. The group child care supervisor shall meet at least one of the following qualifications, in addition to those set out in subsection 1:

- a. A bachelor's degree in the field of early childhood education or child development;
  - b. ~~A bachelor's~~ An associate's degree with at least ~~twelve semester hours or fifteen quarter hours~~ in child development, child psychology, or directly related fields; one of the following:
    - (1) Eight semester hours or twelve quarter hours in early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - ~~e.~~ An associate of arts degree in the field of early childhood development;
  - ~~d.~~ c. Current certification as a child development associate or ~~similar status~~ successful completion of a department-approved diploma program with emphasis in early childhood or child care;
  - ~~e.~~ d. Certification from a Montessori teacher training program;
  - f. e. At least one year of exclusive experience as a self-declaration holder or licensed child care provider with positive references from at least two parents whose children were in the provider's care;
  - ~~g.~~ f. A high school degree or equivalency with certification of completion in a secondary occupational child care program and at least one year of exclusive experience working with young children, with references from at least two individuals who either had their children in the group child care supervisor's care or instructed the group child care supervisor in child care programming; or
  - ~~h.~~ g. A minimum of one year of exclusive experience providing care to three or more children, with positive references from at least two parents whose children were in the group child care supervisor's care or a center director or teacher who observed the group child care supervisor's care of children first hand.
3. The group child care supervisor shall:
- a. Have current certification in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other similar cardiopulmonary resuscitation training programs approved by the department; and

- b. Be certified or trained in a department-approved program to provide first aid.
4. The group child care supervisor shall certify completion of a minimum of ten hours of department-approved training related to child care annually. The ten hours of training in the first year following initial licensure must include a department-approved basic child care course taken during the first three months of employment.
5. The group child care supervisor must be present in the group child care no less than sixty percent of the time when children are in care.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-09-14. Minimum requirements for facility.**

1. The provider shall ensure that the group child care is properly lighted. If the lighting of the group child care appears questionable, the department or authorized agent may require the provider to obtain additional lights.
2. The provider shall ensure that safe and comfortable arrangements for naps for enrolled children are provided.
  - a. The provider may allow a child to sleep or rest on the floor only when the floor is carpeted or padded, warm, free from drafts, and when each child has an individual blanket or sleeping mat.
  - b. The provider shall ensure that aisles between cots and cribs are a minimum space of two feet [58.42 centimeters] and are kept free of all obstructions while cots and cribs are occupied.
  - c. The provider shall ensure that there is a room available, separate from the nap room, where an individual child can go for supervised play if the child is unable to nap, so as not to disrupt the other children's rest.
  - d. The provider shall ensure that a child who is in care between the hours of eight p.m. and six a.m. has an individual sleeping place.
3. Water supply:

- a. The provider shall ensure that the group child care has a drinking supply from a community water system or from a source tested and approved by the state department of health.
  - b. The group child care must have hot and cold running water. The water in the faucets used by children must not exceed one hundred twenty degrees Fahrenheit [49.2 degrees Celsius].
4. Toilet and sink facilities:
- a. The provider shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff.
  - b. Toilets must be located in rooms separate from those used for cooking, eating, and sleeping. A minimum of one ~~sink and one~~ flush toilet must be provided for each fifteen children, excluding those children who are not toilet trained. Two toilets must be provided for each sixteen to eighteen children, excluding those children who are not toilet trained.
  - c. The provider shall provide child-sized toilet adapters, training chairs, or potty chairs for use by children who require them. Training chairs must be emptied promptly and thoroughly cleaned and sanitized after each use.
  - d. The provider shall provide at least one handwashing sink per toilet room facility or diapering area. The provider shall provide sanitary hand-drying equipment, individually designated cloth towels, or paper towels near handwashing sinks.
  - e. The provider shall provide safe step stools to allow standard-size toilets and sinks to be used by the children or the provider shall ensure the availability of child-size toilets and sinks.
5. The operator of a group child care not on a municipal or public water supply or wastewater disposal system shall ensure the group child care's sewage and wastewater system has been approved by the state department of health.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-09-24. Specialized types of care and minimum requirements.**

1. Infant care.

- a. Environment and interactions.
  - (1) A group child care serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
  - (2) The provider shall ensure that each infant receives positive stimulation and verbal interaction with a staff member responsible for caring for or teaching children, or emergency designee, such as being held, rocked, talked with, or sung to.
  - (3) The staff members responsible for caring for or teaching children, or emergency designee, shall respond promptly to comfort an infant's or toddler's physical and emotional distress.
    - (a) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
    - (b) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.
  - (4) The provider shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, and uncluttered area.
  - (5) Staff members responsible for caring for or teaching children shall take children outdoors or to other areas within the group child care for a part of each day to provide some change of physical surroundings and to interact with other children.
  - (6) The provider shall ensure that infants are not shaken or jostled.
  - (7) The provider shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
  - (8) The provider shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.
- b. Feeding.

- (1) The provider shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed by the infant's parent or medical provider.
- (2) The provider shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. Staff members shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider.
- (3) The provider shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.
- (4) The provider shall ensure that frozen breast milk is thawed under cool running tap water or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
- (5) The provider shall ensure that an infant is not fed by propping a bottle.
- (6) The provider shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
- (7) The provider shall ensure that a staff member responsible for caring for or teaching children is within sight and hearing range of an infant during the infant's feeding or eating process.

c. Diapering.

- (1) The provider shall ensure that there is a designated cleanable diapering area, located separately from food preparation and serving areas in the group child care if children requiring diapering are in care.
- (2) The provider shall ensure that diapers are changed promptly when needed and in a sanitary manner.
- (3) Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.
- (4) The provider shall ensure that soiled or wet diapers are stored in a sanitary, covered container separate from other garbage and waste until removed from the group child care.

d. Sleeping.

- (1) The provider shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.
- (2) The provider shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.
- (3) The provider shall ensure that if an infant falls asleep while not in a crib or portable crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- (4) Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- (5) The provider shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib, except for when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant in the crib or portable crib while an infant is sleeping or preparing to sleep.
- (6) The provider shall ensure that mattresses and sheets are properly fitted. The provider shall ensure that sheets and mattress pads are changed whenever they become soiled or wet, when cribs are used by different infants, or at least weekly.
- ~~(7) The provider shall ensure that each infant has an individual infant blanket or infant sleep sack.~~
- ~~(8) The provider shall ensure that toys or objects hung over an infant crib or portable crib must be held securely and be of size and weight that would not injure an infant if the toy or object accidentally falls or if the infant pulls on the object.~~
- ~~(9)~~ (7) The provider shall check on sleeping infants regularly or have a monitor in the room with the sleeping infant.

2. Night care.

- a. Any group child care offering night care shall provide program modifications for the needs of children and their parents during the night.
  - b. In consultation with parents, special attention must be given by the staff member responsible for caring for or teaching children to provide a transition into this type of care, appropriate to the child's needs.
  - c. The provider shall encourage parents to leave their children in care or pick them up before and after their normal sleeping period when practical, to ensure minimal disturbance of the child during sleep, with consideration given to the parents' work schedule.
  - d. The provider shall ensure that children under the age of six are supervised directly when bathing.
  - e. The provider shall ensure that comfortable beds, cots, or cribs, complete with a mattress or pad, are available and the provider shall ensure:
    - (1) Pillows and mattresses have clean coverings.
    - (2) Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, at least weekly.
    - (3) If beds are used by different children, sheets and pillowcases are laundered before use by other children.
    - (4) Each bed or cot has sufficient blankets available.
  - f. The provider shall require each child in night care to have night clothing and a toothbrush marked for identification.
  - g. For a group child care not operating out of an occupied private residence, staff members responsible for caring for or teaching children must be awake and within hearing range during sleeping hours to provide for the needs of children and to respond to an emergency.
3. Drop-in group child care.
- a. If a group child care serves drop-in children, schoolchildren, or before-school and afterschool children, the group child care must be sufficiently staffed to effectively handle admission records and explain the policies and procedures of the program and to maintain the proper staff member to child ratio.

- b. The provider shall ensure that the program reflects the individual needs of the children who are provided drop-in care.
  - c. The provider shall ensure that records secured comply with all enrollment requirements contained in section 75-03-09-22, except the immunization verification record requirement.
  - d. The provider shall ensure that admittance procedures provide for a period of individual attention for the child to acquaint the child with the group child care, its equipment, and the staff members.
  - e. A group child care may not receive drop-in care or part-time children who, when added to the children in regular attendance, cause the group child care to exceed the total number of children for which the group child care is licensed.
4. A provider shall ensure that a group child care serving only drop-in care children complies with this chapter but is exempt from the following provisions:
- a. ~~Subsection~~ Subsections 4 and 5 of section 75-03-09-20, subsections 6 and 7 of section 75-03-09-21, subdivision f of subsection subsections 2 and 3 of section 75-03-09-22, and subsection 1 of section 75-03-09-25.
  - b. A group child care serving only drop-in care children is exempt from the outdoor space requirements.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

**75-03-09-28. Child abuse and neglect decisions.**

- 1. A provider shall ensure safe care for the children receiving services in the provider's group child care. If a services-required decision made under North Dakota Century Code chapter 50-25.1 exists, indicating that a child has been abused or neglected by an applicant, provider, emergency designee, staff member, or household member, that decision has a direct bearing on the applicant's or provider's ability to serve the public in a capacity involving the provision of child care and the application or license may be denied or revoked. If a services-required determination under North Dakota Century Code chapter 50-25.1 and under chapter 75-03-19 exists indicating that any child has been abused or neglected by the applicant, provider, emergency designee, staff member, or household member, the applicant or provider shall furnish information satisfactory to the

department, from which the department can determine the applicant's, provider's, emergency designee's, or staff member's ability to provide care that is free of abuse and neglect. The department shall furnish the determination of current ability to the applicant or provider and to the regional director of the human service center or the director's designee for consideration and action on the group child care application or license.

2. Each applicant, provider, emergency designee, and staff member in the group child care shall complete a department-approved authorization for background check form no later than the first day of employment.
3. Household members over the age of twelve ~~must~~ shall complete a department-approved authorization for background check form at the time of application or relicensure or upon obtaining residence at the location of the group child care.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-09-29. Correction of violations.**

1. Within three business days of the receipt of the correction order, the provider shall notify the parents of each child receiving care at the group child care that a correction order has been issued. In addition to providing notice to the parent of each child, the provider shall post the correction order in a conspicuous location within the facility until the violation has been corrected or for five days, whichever is longer.
2. Violations noted in a correction order must be corrected:
  - a. For a violation of North Dakota Century Code section 50-11.1-02.2; section 75-03-09-04; subdivision i of subsection 1 of section 75-03-09-08; section 75-03-09-09, section 75-03-09-23; subsection 3, 6, 9, or 10 of section 75-03-09-18, and subsections 6 and 10 of section 75-03-09-18; section 75-03-09-23; or subsection 1 of section 75-03-09-24, within twenty-four hours;
  - b. For a violation requiring the hiring of a group child care supervisor with those qualifications set forth in section 75-03-09-10, within sixty days;
  - c. For a violation that requires an inspection by a state fire marshal or local fire department authority pursuant to section 75-03-09-17, within sixty days;

- d. For a violation that requires substantial building remodeling, construction, or change, within sixty days; and
  - e. For all other violations, within twenty days.
3. All periods for correction begin on the date of receipt of the correction order by the provider.
  4. The regional supervisor of early childhood services may grant an extension of additional time to correct violations, up to a period of one-half the original allowable time allotted. An extension may be granted upon application by the provider and a showing that the need for the extension is created by unforeseeable circumstances and the provider has diligently pursued the correction of the violation.
  5. The provider shall furnish written notice to the authorized agent upon completion of the required corrective action. The correction order remains in effect until the authorized agent confirms the corrections have been made.
  6. At the end of the period allowed for correction, the department or its authorized agent shall reinspect a group child care that has been issued a correction order. If, upon reinspection, it is determined that the group child care has not corrected a violation identified in the correction order, the department or its authorized agent shall mail a notice of noncompliance with the correction order by certified mail to the group child care. The notice must specify the violations not corrected and the penalties assessed in accordance with North Dakota Century Code section 50-11.1-07.5.
  7. If a group child care receives more than one correction order in a single year, the department or its authorized agent may refer the group child care for consulting services to assist the provider in maintaining compliance and to avoid future corrective action.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.1, 50-11.1-07.2, 50-11.1-07.3

**75-03-09-30. Fiscal sanctions.**

1. The department shall assess a fiscal sanction of twenty-five dollars per day for each violation of North Dakota Century Code chapter 50-11.1; subdivision g i of subsection 1 of section 75-03-09-08, ~~subsection 2 of section 75-03-09-09, section or 75-03-09-17, subsections 7, 10, and 14; subsection 6, 9, or 13 of section 75-03-09-18; or section 75-03-09-19,~~

~~and section 75-03-09-23, 75-03-09-27, or 75-03-09-28,~~ for each day that the provider has not verified correction after the allowable time for correction of violations ends.

2. The department shall assess a fiscal sanction of fifteen dollars per day for each violation of subsection 2 of section 75-03-09-10; section 75-03-09-12; subsection 2 ~~and subdivisions or subdivision b and or~~ d of subsection 4 of section 75-03-09-14; section 75-03-09-15; ~~subsections;~~ subsection 3, 5, 8, 9 ~~10,~~ and or 12 of section 75-03-09-18; ~~subsections;~~ subsection 2 ~~and or~~ 4 of section 75-03-09-20; subsection 1 of section 75-03-09-21, ~~and subsections;~~ or subsection 1 ~~and or~~ 3 of section 75-03-09-24, for each day that the provider has not verified correction, after the allowable time for correction of violations ends.
3. The department shall assess a fiscal sanction of five dollars per day for each violation of any other provision of this chapter for each day that the provider has not verified correction after the allowable time for correction of violations ends.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.4, 50-11.1-08

## CHAPTER 75-03-10

**75-03-10-07. Application for and nontransferability of child care center license.** An application for a license must be submitted to the authorized agent.

1. An applicant shall submit an application for a license to the authorized agent. Application must be made in the form and manner prescribed by the department.
2. A license issued under this chapter is nontransferable and is valid only for the premises that are indicated on the license.
3. An application for a new license must be filed by the operator upon change of operator or location.
4. The department may not issue more than one ~~child care in-home registration, self-declaration, or~~ license per residence. A residence means real property that is typically used as a single family dwelling. ~~This applies to new licenses issued on or after January 1, 2011. Existing operators~~ A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this provision subsection until January 1, 2016, after which time all operators will be subject to the requirements of this subsection.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-03, 50-11.1-04, 50-11.1-06.2, 50-11.1-07, 50-11.1-08

**75-03-10-08. Staffing and group size requirements.**

1. The number of staff members and their responsibilities must reflect program requirements and individual differences in the needs of the children enrolled, and may permit mixed-age groups, if necessary. Service personnel engaged in housekeeping and food preparation may not be counted in the child to staff ratio for periods of time when they are engaged in housekeeping or food preparation.
2. a. The operator shall ensure that the center is sufficiently staffed at all times to meet the child to staff ratios for children in attendance and that no more children than the licensed capacity are served at one time. The minimum ratio of staff members responsible for

caring for or teaching children to children in child care centers and maximum group size of children must be:

- a. ~~(1)~~ ~~If all children in care are~~ For children less than eighteen months of age, one staff member may care for four children, a ratio of .25 in decimal form, with a maximum group size of eight children ~~with two staff members~~;
  - b. ~~(2)~~ ~~If all children in care are~~ For children eighteen months of age to thirty-six months of age, one staff member may care for five children, a ratio of .20 in decimal form, with a maximum group size of ten children ~~with two staff members~~;
  - c. ~~(3)~~ ~~If all children in care are~~ For children three years of age to four years of age, one staff member may care for seven children, a ratio of .14 in decimal form, with a maximum group size of fourteen children ~~with two staff members~~;
  - d. ~~(4)~~ ~~If all children in care are~~ For children four years of age to five years of age, one staff member may care for ten children, a ratio of .10 in decimal form, with a maximum group size of twenty children ~~with two staff members~~;
  - e. ~~(5)~~ ~~If all children in care are~~ For children five years of age to six years of age, one staff member may care for twelve children, a ratio of .08 in decimal form, with a maximum group size of twenty-four children ~~with two staff members~~; and
  - f. ~~(6)~~ ~~If all children in care are~~ For children six years to twelve years of age, one staff member may care for ~~eighteen~~ twenty children, a ratio of .05 in decimal form, with a maximum group size of ~~thirty-six~~ forty children ~~with two staff members~~.
- b. The provisions in ~~this subsection~~ subdivision a relating to maximum group size do not apply to operators licensed prior to January 1, 1999, if those operators are otherwise qualified to operate a child care center. Any operator who discontinues operation of the child care center under a valid license or who fails to renew the operator's license upon its expiration will not be exempt subsequently from the requirements relating to maximum group size. The exemption for operators licensed prior to January 1, 1999, will end on January 1, 2015, after which time all operators will be subject to the requirements of this subsection.
- c. When there are mixed-age groups in the same room, the operator shall ensure:
- (1) The maximum group size is consistent with the:

- (a) Age of the majority of the children; or
  - (b) Highest number of children in the youngest age group;
  - (2) When children age zero to eighteen months are in the mixed-age group, the maximum group size does not exceed eight children;
  - (3) The mixed-age group does not exceed the acceptable ratio pursuant to subdivision d of subsection 2 of section 75-03-10-08 and the maximum number of children per staff member pursuant to subdivision a of subsection 2 of section 75-03-10-08; and
  - (4) If the mixed-age group contains the maximum number of children per staff member pursuant to subdivision a of subsection 2 of section 75-03-10-08, the mixed-age group may only contain additional older children.
- d. When there is a mixed-age group, the number of children in each age category is multiplied by the corresponding ratio number, converted to decimal form, and carried to the nearest hundredth. To determine the number of staff members responsible for caring for or teaching children necessary at any given time, numbers of staff members for all age categories are added, and any fractional staff member count is then rounded to the next highest whole number whenever the fractional staff member count amounts to thirty-five hundredths or more. If lower than thirty-five hundredths, the fractional amount is dropped.
- 3. If a child with special needs is admitted to the child care center, the child's developmental age level must be used to determine into which age group the child should be placed for determining child to staff ratios.
  - 4. The operator shall ensure that a child with special needs requiring more than usual care and supervision has adequate care and supervision without adversely affecting care provided to the other children in the child care center.
  - 5. ~~When there are mixed-age groups in the same room, the group size must be consistent with the age of the majority of the children when no children age zero to eighteen months are in the group. When children age zero to eighteen months are in the mixed-age group, the group size may not exceed eight children.~~
  - 6. ~~When there is a mixed-age group, the number of children in each age category is multiplied by the corresponding ratio number, converted to decimal form, and carried to the nearest hundredth. To determine the number of staff members responsible for caring for or teaching children~~

~~necessary at any given time, numbers of staff members for all age categories are added, and any fractional staff member count is then rounded to the next highest whole number whenever the fractional staff member count amounts to thirty-five hundredths or more. If lower than thirty-five hundredths, the fractional amount is dropped.~~

- ~~7.~~ 5. Children using the child care center for a McGruff safe house, a block house, or a certified safe house program during an emergency are not counted under this section.
  
6. An operator licensed for at least two years may apply for a waiver of the required ratio and maximum group size, not to exceed .25 decimal point per group. The department shall consider demonstration of need, health and safety of children, age of children, number of children, and licensing history of the operator in determining whether to approve the application for a waiver. The department may deny an application for waiver and may revoke a waiver granted under this subsection. The decision to deny or revoke a waiver is not an appealable decision. The department shall review each waiver granted under this subsection at least every twelve months to determine if the circumstances which led to granting the waiver continue to exist.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-02.1, 50-11.1-04, 50-11.1-08

**75-03-10-09. Duties of child care center operator.** The operator is responsible for compliance with the requirements set forth in this chapter and North Dakota Century Code chapter 50-11.1. The operator shall:

1. Designate a qualified director and shall delegate appropriate duties to the director:
  - a. The operator shall ensure that the director or a designated acting director is present at the center at least sixty percent of the time when the center is open;
  - b. The operator shall ensure that the individual designated as an acting director for an ongoing period of more than thirty days meets the qualifications of a director; and
  - c. The operator shall ensure that when the director and acting director are not present at the center, a person who meets the qualifications of a supervisor is on duty;
  
2. Apply for a license for the child care center;

3. Provide an environment that is physically and socially adequate for children;
4. Notify the authorized agent of any major changes in the operation, ownership, or governing body of the child care center, including staff member changes;
5. Ensure that liability insurance is carried to insure against bodily injury and property damage for the child care center;
6. Formulate written policies and procedures for the operation of the child care center ~~relating to~~. Policies must include:
  - a. Hiring practices and personnel policies for staff members;
  - b. Methods for obtaining references and employment histories of staff members;
  - c. Methods of conducting staff member performance evaluations;
  - d. Children's activities, care, and enrollment; ~~and~~
  - e. The responsibilities and rights of staff members and parents;
  - f. An explanation of how accidents and illnesses will be handled;
  - g. The methods of developmentally appropriate discipline and guidance techniques that are to be used;
  - h. The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;
  - i. The care and safeguarding of personal belongings brought to the child care center by a child or by another on a child's behalf;
  - j. Procedures for accountability when a child fails to arrive as expected at the child care; and
  - k. Transportation procedures, if the operator provides transportation;
7. Maintain records of enrollment, attendance, health, and other required records;
8. Select an emergency designee;
9. Maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the child care center;

10. Ensure that parents of enrolled children and other interested parties are informed of the goals, policies, procedures, and content of the child care center's program, including:
  - ~~a. An explanation of how the center will handle accidents and illnesses;~~
  - ~~b. The methods of developmentally appropriate discipline and guidance techniques to be used;~~
  - ~~c. The process for reporting a complaint, a suspected licensing violation, and suspected child abuse or neglect; and~~
  - ~~d. Hiring practices and personnel policies for staff members;~~
11. Ensure that parents of enrolled children:
  - a. Are advised of the center's service fees, operating policies and procedures, location, and the name, address, and telephone number of the operator and the director;
  - b. Receive written notice of the effective date, duration, scope, and impact of any significant changes in the center's services; and
  - c. Receive notice that they may request written daily reports for their child, including details regarding eating, napping, and diapering;
12. Ensure that the center is sufficiently staffed at all times to meet the child to staff ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
13. Ensure that the child care center has sufficient qualified staff members available to substitute for regularly assigned staff who are sick, on leave, or otherwise unable to be on duty;
14. Ensure that there are signed written agreements with the parents of each child that specify the fees to be paid, methods of payment, and policies regarding delinquency of fees;
- ~~15. Ensure that written policies are established which address provision of emergency medical care, the care of a child with special needs when a child with special needs is in care, and the treatment of illness and accident;~~
- ~~16. Ensure that written policies are established concerning the care and safeguarding of personal belongings brought to the child care center by a child or by another on the child's behalf;~~

- ~~47.~~ 15. Provide parents with unlimited access and opportunities for parents to observe their children while in care, and provide parents with regular opportunities to meet with staff members responsible for caring for or teaching children before and during enrollment to discuss their children's needs. Providing unlimited access does not prohibit a child care center from locking its doors while children are in care;
- ~~48.~~ 16. Provide parents, upon request, with progress reports on their children;
- ~~49.~~ 17. Report immediately, as a mandatory reporter, suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
- ~~20.~~ 18. Ensure, whenever services are provided, that at least one staff member, emergency designee, or substitute staff is on duty who meets the current certification requirements in cardiopulmonary resuscitation by the American heart association, American red cross, or other department-approved cardiopulmonary resuscitation training programs approved by the department, and is certified or trained in a department-approved program to provide first aid;
- ~~21.~~ ~~Develop and ensure compliance with a written policy and procedure for accountability when a normally unaccompanied child fails to arrive as expected at the child care center;~~
- ~~22.~~ 19. Ensure that staff members responsible for caring for or teaching children under the age of eighteen are supervised by an adult staff member;
- ~~23.~~ 20. Meet the qualifications of the director set forth in section 75-03-10-10, if the operator is also the director; ~~and~~
- ~~24.~~ 21. Report to the authorized agent within twenty-four hours:
- a. A death or a serious accident or illness requiring hospitalization of a child while in the care of the child care center or attributable to care received in the child care center;
  - b. An injury to any child which occurs while the child is in the care of the child care center and which requires medical treatment;
  - c. Poisonings or errors in the administering of medication;
  - d. Closures or relocations of child care programs due to emergencies; and
  - e. Fire that occurs or explosions that occur in or on the premises of the child care center; and
22. Ensure that children do not depart from the child care premises unsupervised, except when the parent and provider consent that

an unsupervised departure is safe and appropriate for the age and development of the child. The provider shall obtain written parental consent for the child to leave the child care premises unsupervised, which must specify the activity, time the child is leaving and length of time the child will be gone, method of transportation, and parental responsibility for the child once the child leaves the child care premises.

**History:** Effective December 1, 1981; amended effective July 1, 1984; January 1, 1987; September 1, 1990; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-10-10. Minimum qualifications of child care center director.** A director shall:

1. Be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care;
2. Possess knowledge or experience in management and interpersonal relationships;
3. Hold at least one of the following qualifications, in addition to those set out in subsection 1:
  - a. A bachelor's degree in the field of early childhood education or child development;
  - b. A bachelor's degree with ~~at least twenty-four semester hours or thirty quarter hours in child development, child psychology, or directly related fields,~~ with at least six months of experience in a child care center or similar setting; and one of the following:
    - (1) Eight semester hours or twelve quarter hours in early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - c. An ~~associate of arts~~ associate's degree in the field of early childhood education or child development with at least six months of experience in a child care center or similar setting;
  - d. An associate's degree with at least one year of experience in a child care center or similar setting and one of the following:

- (1) Eight semester hours or twelve quarter hours in early childhood education or child development;
  - (2) One hundred twenty hours of department-approved early childhood training; or
  - (3) A director's credential approved by the department;
- d. e. A teaching certificate in elementary education with at least six months of experience in a child care center or similar setting;
- e. f. A current certification as a child development associate or ~~a similar status~~ successful completion of a department-approved diploma program with emphasis in early childhood or child care, with at least one year of experience in a child care center or similar setting; or
- f. ~~A bachelor's degree with at least twelve semester hours or fifteen quarter hours in child development, child psychology, or directly related fields, with at least one year of experience in a child care center or similar setting; or~~
- g. Certification from a Montessori teacher training program with at least one year of experience in a Montessori school, child care center, or similar setting and at least one of the following:
- (1) ~~twelve~~ Eight semester hours or ~~fifteen~~ twelve quarter hours in child development, ~~child psychology,~~ or early childhood education, ~~or related fields; and~~
  - (2) One hundred twenty hours of department-approved early childhood training; or
  - (3) A director's credential approved by the department; and
4. Certify annual completion of a minimum of thirteen hours of department-approved training related to child care.

**History:** Effective December 1, 1981; amended effective January 1, 1987; September 1, 1990; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-10-11.1. Minimum qualifications of child care center supervisor.**

A supervisor shall:

1. Be an adult of good physical, cognitive, social, and emotional health and shall use mature judgment when making decisions impacting the quality of child care;
2. Have a demonstrated ability in working with children;
3. Hold at least one of the following qualifications:
  - a. An associate degree in the field of early childhood development;
  - b. Current certification as a child development associate or successful completion of a department-approved diploma program with an emphasis in early childhood or child care;
  - c. Certification from a Montessori teacher training program; or
  - d. A high school diploma or high school equivalency with at least one year of experience in a child care or similar setting;
4. Possess knowledge and experience in building and maintaining interpersonal relationships;
- ~~5. Meet current certification requirements in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other cardiopulmonary resuscitation training programs approved by the department;~~
- ~~6. Be certified or trained in a department-approved program to provide first aid;~~
- ~~7. 5.~~ Successfully complete a department-approved basic child care course within the first three months of employment; and
- ~~8. 6.~~ Successfully complete a minimum of thirteen hours of department-approved training related to child care.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-10-18. Minimum sanitation and safety requirements.**

1. The operator shall ensure that the state department of health conducts an annual inspection. The operator shall correct any code violations noted by the health inspector and shall file reports of the inspections and corrections made with the authorized agent.

2. The operator shall ensure that the child care center bathroom sinks, toilets, tables, chairs, and floors are cleaned daily.
- ~~3.~~ 3. Cots and mats must be designated individually, and cleaned and sanitized at least weekly. If different children use the same cots or mats, they must be cleaned thoroughly and sanitized between each use. The operator shall ensure that aisles between cots, cribs, and portable cribs are a minimum space of two feet [58.42 centimeters] and are kept free of all obstructions while cots, cribs, and portable cribs are occupied. The operator shall provide separate storage for personal blankets or coverings.
- ~~3.~~ 4. The operator shall ensure that the child care center's building, grounds, and equipment are located, cleaned, and maintained to protect the health and safety of children. The operator shall establish routine maintenance and cleaning procedures to protect the health of the children and the staff members.
- ~~4.~~ 5. Staff members and children shall wash their hands, according to recommendations by the federal centers for disease control and prevention, before preparing or serving meals, after diapering, after using toilet facilities, and after any other procedure that may involve contact with bodily fluids. Hand soap and sanitary hand-drying equipment, single-use cloth towels, or paper towels must be available at each sink.
- ~~5.~~ 6. The operator shall ensure that indoor and outdoor equipment, toys, and supplies are safe, strong, nontoxic, and in good repair. The operator shall ensure that all toys and equipment are kept clean and in sanitary condition. Books and other toys are not readily cleanable must be sanitized as much as possible without damaging the integrity or educational value of the item.
- ~~6.~~ 7. The operator shall ensure that the child care center ground areas are free from accumulations of refuse, standing water, unprotected wells, debris, flammable material, and other health and safety hazards.
- ~~7.~~ 8. The operator shall ensure that the garbage stored outside is kept away from areas used by children and is kept in containers with lids. Open burning is not permitted. The operator shall keep indoor garbage in covered containers. The operator may allow paper waste to be kept in open waste containers.
- ~~8.~~ 9. The operator shall ensure that exterior play areas in close proximity to busy streets and other unsafe areas are contained or fenced, or have natural barriers to restrict children from those unsafe areas. Outdoor play areas must be inspected daily for hazards and necessary maintenance.

- ~~9.~~ 10. The operator shall ensure that potential hazards, such as noncovered electrical outlets, guns, household cleaning chemicals, uninsulated wires, medicines, and poisonous plants are not accessible to children. The operator shall keep guns and ammunition in locked storage, each separate from the other, or shall use trigger locks. The operator shall ensure other weapons and dangerous sporting equipment, such as bows and arrows, are not accessible to children.
- ~~40.~~ 11. The operator shall ensure that indoor floors and steps are not slippery and do not have splinters. The operator shall ensure that steps and walkways are kept free from accumulations of water, ice, snow, or debris.
- ~~44.~~ 12. The operator shall ensure that elevated areas, including stairs and porches, have railings and safety gates where necessary to prevent falls.
- ~~42.~~ 13. The operator shall take steps to keep the child care center free of insects and rodents. Chemicals for insect and rodent control may not be applied in areas accessible to children when children are present in the child care center. Insect repellent may be applied outdoors on children with written parental permission.
- ~~43.~~ 14. The operator shall ensure that exit doorways and pathways are not blocked.
- ~~44.~~ 15. If the center is providing care to children in wheelchairs, the operator shall ensure doors have sufficient width and construction to accommodate any children in wheelchairs who are receiving care at the child care center.
- ~~45.~~ 16. The operator shall ensure that light bulbs in areas used by children are properly shielded or shatterproof.
- ~~46.~~ 17. The operator shall ensure that combustible materials are kept away from light bulbs and other heat sources.
- ~~47.~~ 18. The operator shall ensure adequate heating, ventilation, humidity, and lighting for the comfort and protection of the health of the children. All heating devices must be approved by the local fire authorities. During the heating season when the child care center is occupied by children, the room temperature may not be less than sixty-five degrees Fahrenheit [18 degrees Celsius] and not more than seventy-five degrees Fahrenheit [24 degrees Celsius] .
- ~~48.~~ 19. The operator shall ensure that all child care center buildings erected before January 1, 1970, which contain painted surfaces in a peeling, flaking, chipped, or chewed condition in any area where children may be present, have painted surfaces repainted or shall submit

evidence that the paints or finishes do not contain hazardous levels of lead-bearing substances. For purposes of this chapter, "hazardous levels of lead-bearing substances" means any paint, varnish, lacquer, putty, plaster, or similar coating of structural material which contains lead or its compounds in excess of seven-tenths of one milligram per square centimeter, or in excess of five-tenths of one percent in the dried film or coating, when measured by a lead-detecting instrument approved by the state department of health.

~~49:~~ 20. The operator shall ensure that personal items including combs, pacifiers, and toothbrushes are individually identified and stored in a sanitary manner.

~~20:~~ 21. Pets and animals.

- a. The operator shall ensure that only small pets that are contained in an aquarium or other approved enclosed container, cats, and dogs are present in areas occupied by children. Wire cages are not approved containers. Other indoor pets and animals must be restricted by a solid barrier and must not be accessible to children. The department may restrict any pet or animal from the premises that may pose a risk to children or may approve additional pets that do not pose a health or safety risk to children.
- b. The operator shall ensure that animals are maintained in good health and appropriately immunized. Pet immunizations must be documented with a current certificate from a veterinarian.
- c. The operator shall ensure parents are aware of the presence of pets and animals in the child care center.
- d. The operator shall notify parents immediately if a child is bitten or scratched and skin is broken.
- e. A staff member responsible for caring for or teaching children shall supervise closely all contact between pets or animals and children. The staff member shall remove the pet or animal immediately if the pet or animal shows signs of distress or the child shows signs of treating the pet or animal inappropriately.
- f. The operator shall ensure that pets, pet feeding dishes, cages, and litter boxes are not present in any food preparation, food storage, or serving areas. The operator shall ensure that pet and animal feeding dishes and litter boxes are not placed in areas accessible to children.
- g. The operator shall ensure that indoor and outdoor areas accessible to children are free of animal excrement.

h. The operator shall ensure that the child care center is in compliance with all applicable state and local ordinances regarding the number, type, and health status of pets or animals.

~~24.~~ 22. Staff members responsible for caring for or teaching children shall strictly supervise wading pools used by the child care center and shall empty, clean, and sanitize wading pools daily.

~~22.~~ 23. All swimming pools used by children must be approved annually by the local health unit.

~~23.~~ 24. Water supply:

a. The operator shall ensure that the child care center has a drinking supply from an approved community water system or from a source tested and approved annually by the state department of health.

b. Drinking water must be easily accessible to the children and must be provided by either an angle-jet drinking fountain with mouthguard or by a running water supply with individual, single-serve drinking cups.

c. The child care center must have hot and cold running water. The water in the faucets used by children may not exceed one hundred twenty degrees Fahrenheit [49.2 degrees Celsius].

~~24.~~ 25. Toilet and sink facilities:

a. The operator shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff members.

b. Toilets must be located in rooms separated from those used for cooking, eating, and sleeping. A minimum of one ~~sink and one~~ flush toilet must be provided for each fifteen children, excluding those children who are not toilet trained.

c. The operator shall ensure that separate restrooms are provided for boys and girls six years of age and over, and partitions are installed to separate toilets in these restrooms.

d. The operator shall provide child-sized toilet adapters, training chairs, or potty chairs for use by children who require them. Training chairs must be emptied promptly and thoroughly cleaned and sanitized after each use.

e. The operator shall provide at least one handwashing sink per toilet room facility or diapering area. ~~The operator shall ensure that~~

~~sanitary hand-drying equipment, single-use cloth towels, or paper towels are available near handwashing sinks.~~

- f. The operator shall provide safe step stools to allow children to use standard-size toilets and sinks or the operator shall ensure the availability of child-size toilets and sinks.

~~25.~~ 26. The operator of a child care center not on a municipal or public water supply or wastewater disposal system shall ensure the child care center's sewage and wastewater system has been approved by the state department of health.

~~26.~~ 27. Laundry:

- a. If the child care center provides laundry service for common use linens, towels, or blankets, it shall have adequate space and equipment for safe and effective operation.
- b. The operator shall ensure that soiled linens are placed in closed containers or hampers during storage and transportation.
- c. The operator shall ensure that in all new or extensively remodeled child care centers, the handling, sorting, or washing of soiled linens or blankets takes place in a designated area that is separated by a permanent partition from food preparation, serving, and kitchen areas.
- d. The operator shall ensure that in an existing child care center where physical separation of laundry and kitchen areas is impractical, procedures are developed that prohibit the washing or transportation of laundry while meals are being prepared or served.
- e. The operator shall ensure that sorting of laundry is not allowed in food preparation, serving, or kitchen areas.
- f. If the child care center provides laundry service for common use linens, towels, or blankets, or if different children's clothing, towels, or blankets are laundered together, the operator shall ensure that water temperature must be greater than one hundred forty degrees Fahrenheit [60 degrees Celsius].
- g. The operator shall ensure that if the water temperature is less than one hundred forty degrees Fahrenheit [60 degrees Celsius], bleach or sanitizer is used in the laundry process during the rinse cycle or

the center shall use a clothes dryer that reaches a temperature of at least one hundred forty degrees Fahrenheit [60 degrees Celsius].

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-10-24. Specialized types of care and minimum requirements.**

1. Infant care.

a. Environment and interactions.

- (1) A child care center serving children from birth to twelve months shall provide an environment which protects the children from physical harm.
- (2) The operator shall ensure that each infant receives positive stimulation and verbal interaction with a staff member responsible for caring for or teaching children or emergency designee such as the staff member or emergency designee holding, rocking, talking with, or singing to the child.
- (3) A staff member shall respond to comfort an infant's or toddler's physical and emotional distress:
  - (a) Especially when indicated by crying or due to conditions such as hunger, fatigue, wet or soiled diapers, fear, teething, or illness; and
  - (b) Through positive actions such as feeding, diapering, holding, touching, smiling, talking, singing, or eye contact.
- (4) The operator shall ensure that infants have frequent and extended opportunities during each day for freedom of movement, including creeping or crawling in a safe, clean, open, uncluttered area.
- (5) Staff members responsible for caring for or teaching children shall take children outdoors or to other areas within the child care center for a part of each day to provide children with some change of physical surroundings and to allow them to interact with other children.

- (6) The operator shall ensure that low chairs and tables, high chairs with trays, or other age-appropriate seating systems are provided for mealtime for infants no longer being held for feeding. High chairs, if used, must have a wide base and a safety strap.
- (7) The operator shall ensure that infants are not shaken or jostled.
- (8) The operator shall ensure that thermometers, pacifiers, teething toys, and similar objects are cleaned and sanitized between uses. Pacifiers may not be shared.

b. Feeding.

- (1) The operator shall ensure that infants are provided developmentally appropriate nutritious foods. Only breast milk or iron-fortified infant formula may be fed to infants less than six months of age, unless otherwise instructed in writing by the infant's parent or medical provider.
- (2) The operator shall ensure that infants are fed only the specific brand of iron-fortified infant formula requested by the parent. Staff members shall use brand-specific mixing instructions unless alternative mixing instructions are directed by a child's medical provider.
- (3) The operator shall ensure that mixed formula that has been unrefrigerated more than one hour is discarded.
- (4) The operator shall ensure that frozen breast milk is thawed under cool running tap water, or in the refrigerator in amounts needed. Unused, thawed breast milk must be discarded or given to the parent within twenty-four hours.
- (5) The operator shall ensure that an infant is not fed by propping the bottle.
- (6) The operator shall ensure that cereal and other nonliquids or suspensions are only fed to an infant through a bottle on the written orders of the child's medical provider.
- (7) The operator shall ensure that staff members responsible for caring for or teaching children, emergency designee, or substitute staff are within sight and hearing range of an infant during the infant's feeding or eating process.

c. Diapering.

- (1) The operator shall ensure that there is a designated cleanable diapering area, located separately from food preparation and serving areas in the child care center if children requiring diapering are in care.
- (2) The operator shall ensure that diapers are changed promptly and in a sanitary manner when needed.
- (3) Diapers must be changed on a nonporous surface area which must be cleaned and disinfected after each diapering.
- (4) The operator shall ensure that soiled or wet diapers are stored in a sanitary, covered container, separate from other garbage and waste until removed from the child care center.

d. Sleeping.

- (1) The operator shall ensure that infants are placed on their back initially when sleeping to lower the risk of sudden infant death syndrome, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise. The infant's face must remain uncovered when sleeping.
- (2) The operator shall ensure that infants sleep in a crib with a firm mattress or in a portable crib with the manufacturer's pad that meets consumer product safety commission standards.
- (3) The operator shall ensure that if an infant falls asleep while not in a crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise or portable crib, the infant must be moved immediately to a crib or portable crib, unless the infant's parent has provided a note from the infant's medical provider specifying otherwise.
- (4) Water beds, adult beds, sofas, pillows, soft mattresses, and other soft surfaces are prohibited as infant sleeping surfaces.
- (5) The operator shall ensure that all items are removed from and that no toys or objects are hung over or attached to the crib or portable crib, except for when an infant is sleeping or preparing to sleep. With written parental permission, the provider may place one individual infant blanket or sleep sack, a pacifier, and a security item that does not pose a risk of suffocation to the infant. The infant's face must remain uncovered when sleeping in the crib or portable crib while the infant is sleeping or preparing to sleep.
- (6) The operator shall ensure that mattresses and sheets are properly fitted. The operator shall ensure that sheets and

mattress pads are changed whenever they become soiled or wet, when used by different infants, or at least weekly.

~~(7)~~ The operator shall ensure that each infant has an individual infant blanket or infant sleep sack.

~~(8)~~ The operator shall ensure that toys or objects hung over an infant crib or portable crib are secured and are of size and weight that would not injure an infant if the toy or object accidentally falls or if the infant pulls on the object.

~~(9)~~ (7) The operator shall ensure that a staff member responsible for caring for or teaching children checks on sleeping infants regularly or that a monitor is in the room with the infants.

e. The operator shall ensure that parents of each infant receive a written daily report detailing the infant's sleeping and eating processes for the day, and the infant's diapering schedule for the day.

## 2. Night care.

a. Any child care center offering night care shall provide program modifications for the needs of children and their parents during the night.

b. In consultation with parents, attention must be given by the staff member responsible for caring for or teaching children to provide a transition into this type of care appropriate to the child's needs.

c. The operator shall encourage parents to leave their children in care and pick them up before and after their normal sleeping period when practical, to ensure minimal disturbance of the child during sleep, with consideration given to the parent's work schedule.

d. The operator shall ensure that children under the age of six are supervised when bathing.

e. The operator shall ensure that comfortable beds, cots, or cribs, complete with a mattress or pad, are available and shall ensure:

(1) Pillows and mattresses have clean coverings;

(2) Sheets and pillowcases are changed as often as necessary for cleanliness and hygiene, but at least weekly. If beds are used by different children, sheets and pillowcases are laundered before use by other children; and

(3) Each bed or cot has sufficient blankets available.

- f. The operator shall require each child in night care to have night clothing and a toothbrush marked for identification.
  - g. The operator shall ensure that during sleeping hours, staff members are awake and within hearing range to provide for the needs of children and to respond to an emergency.
3. Drop-in child care.
- a. If a child care center serves drop-in children, schoolchildren, or before-school and afterschool children, the child care center must be sufficiently staffed to effectively handle admission records and explain the policies and procedures of the program and to maintain the proper staff member to child ratio.
  - b. The operator shall ensure that the program reflects the individual needs of the children who are provided drop-in care.
  - c. The operator shall ensure that admission records comply with all enrollment requirements contained in section 75-03-10-22, except the immunization verification record requirement.
  - d. The operator shall ensure that admittance procedures provide for a period of individual attention for the child to acquaint the child with the child care center, its equipment, and the staff members.
  - e. A child care center may not receive drop-in care or part-time children who, when added to the children in regular attendance, cause the child care center to exceed the total number of children for which the child care center is licensed.
4. An operator shall ensure that a child care center serving only drop-in care children complies with this chapter, but is exempt from the following provisions:
- a. The maximum group size requirements listed in section 75-03-10-08;
  - b. Subsections 5, 9, 12, 13, 14, and 15, and 19 of section 75-03-10-20; subsections 6 and 7 of section 75-03-10-21; subdivision f of subsection 2 of section 75-03-10-22; and subsection 1 of section 75-03-10-25; and
  - ~~b.~~ c. A child care center serving only drop-in care children is exempt from the outdoor space requirements.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules

Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

**75-03-10-28. Child abuse and neglect decisions.** An operator shall ensure safe care for the children receiving services in the child care center.

1. If a services-required decision made under North Dakota Century Code chapter 50-25.1 exists, indicating that a child has been abused or neglected by an applicant, operator, director, supervisor, emergency designee, substitute staff member, or staff member, that decision has a direct bearing on the applicant's or operator's ability to serve the public in a capacity involving the provisions of child care and the application or license may be denied or revoked. If a services-required determination under North Dakota Century Code chapter 50-25.1 and under chapter 75-03-19 exists indicating that any child has been abused or neglected by the applicant, operator, director, supervisor, emergency designee, substitute staff member, or staff member, the applicant or operator shall furnish information satisfactory to the department, from which the department can determine the applicant's, operator's, director's, supervisor's, emergency designee's, substitute staff member's, or staff member's ability to provide care that is free of abuse and neglect. The department shall furnish the determination of current ability to the applicant or operator and to the director of the regional human service center or the director's designee for consideration and action on the application or license.
2. Each applicant, operator, director, supervisor, emergency designee, substitute staff member, and staff member shall complete a department-approved authorization for background check form no later than the first day of employment.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-10-29. Correction of violations.**

1. Within three business days of the receipt of the correction order, the operator shall notify the parents of each child receiving care at the child care center that a correction order has been issued. In addition to providing notice to the parent of each child, the operator shall post the correction order in a conspicuous location within the child care center until the violation has been corrected or for five days, whichever is longer.

2. Violations noted in a correction order must be corrected:
  - a. For a violation of North Dakota Century Code section 50-11.1-02.2; section 75-03-10-04 or 75-03-10-08; subsection 12 of section 75-03-10-09; ~~subsections~~ subsection 3 and, 6, 9, or 10 of section 75-03-10-18; ~~and~~; section 75-03-10-23; or subsection 1 of section 75-03-10-24, within twenty-four hours;
  - b. For a violation requiring the hiring of a child care supervisor with those qualifications set forth in section 75-03-10-11.1, or a child care center director with those qualifications set forth in section 75-03-10-10, within sixty days;
  - c. For a violation that requires an inspection by a state fire marshal or local fire department authority pursuant to section 75-03-10-17, within sixty days;
  - d. For a violation that requires substantial building remodeling, construction, or change, within sixty days; and
  - e. For all other violations, within twenty days.
3. All periods for correction begin on the date of receipt of the correction order by the operator.
4. The regional supervisor of early childhood services may grant an extension of additional time to correct violations, up to a period of one-half the original allowable time allotted. An extension may be granted upon application by the operator and a showing that the need for the extension is created by unforeseeable circumstances and the operator has diligently pursued the correction of the violations.
5. The operator shall furnish a written notice to the authorized agent upon completion of the required corrective action. The correction order remains in effect until the authorized agent confirms that the corrections have been made.
6. At the end of the period allowed for correction, the department or its authorized agent shall reinspect a child care center that has been issued a correction order. If, upon reinspection, the department or its authorized agent determines that the child care center has not corrected a violation identified in the correction order, the department or its authorized agent shall mail a notice of noncompliance with the correction order by certified mail to the child care center. The notice must specify the violations not corrected and the penalties assessed in accordance with North Dakota Century Code section 50-11.1-07.5.
7. If a child care center receives more than one correction order in a single year, the operator may be referred by the department for consulting

services to assist the operator in maintaining compliance and to avoid future corrective action.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.1, 50-11.1-07.2, 50-11.1-07.3

### **75-03-10-30. Fiscal sanctions.**

1. The department shall assess a fiscal sanction of twenty-five dollars per day for each violation of North Dakota Century Code chapter 50-11.1; subsection 2 of section 75-03-10-08; subsection 12 of section 75-03-10-09; section 75-03-10-17; subsections subsection 6, 9, and or 13 of section 75-03-10-18; subsection 2 of or section 75-03-10-19; section, 75-03-10-23; and section, 75-03-10-27, or 75-03-10-28, for each day that the operator has not verified correction after the allowable time for correction of violations ends.
2. The department shall assess a fiscal sanction of fifteen dollars per day for each violation of section 75-03-10-10; ~~section, 75-03-10-12, or 75-03-10-15; subsections subsection 2, 3, 4, 7, 8, 11, or 19, and or~~ subdivision e of subsection 24 of section 75-03-10-18; ~~subsection 4 of section 75-03-10-19; subsections subsection 3, 8, and or 19 of~~ section 75-03-10-20; and ~~or~~ subdivision a of subsection 1 of section 75-03-10-24, for each day that the operator has not verified correction after the allowable time for correction of violations ends.
3. The department shall assess a fiscal sanction of five dollars per day for each violation of any other provision of this chapter, for each day that the operator has not verified correction after the allowable time for correction of violations ends.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.4, 50-11.1-08

## CHAPTER 75-03-11

### 75-03-11-07. Application for and nontransferability of preschool license.

1. An applicant shall submit an application for a license to the authorized agent. Application must be made in the form and manner prescribed by the department.
2. A license issued under this chapter is nontransferable and valid only for the premises indicated on the license. An application for a new license must be filed upon change of operator or location.
3. The department may not issue more than one ~~child-care~~ in-home registration, self-declaration, or license per residence. A residence means real property that is typically used as a single family dwelling. ~~This applies to new licenses issued on or after January 1, 2011. Existing operators~~ A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this provision subsection until January 1, 2016, after which time all operators will be subject to the requirements of this subsection.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-03, 50-11.1-04, 50-11.1-06.2, 50-11.1-07, 50-11.1-08

**75-03-11-08. Duties of preschool operator.** The operator of a preschool is responsible for compliance with the requirements set forth in this chapter and North Dakota Century Code chapter 50-11.1. The operator shall:

1. Designate a qualified director, delegate appropriate duties to the director, and shall:
  - a. Ensure that the preschool director or designated acting director is present at the preschool at least sixty percent of the time that the preschool is open; ~~and~~
  - b. Ensure that the individual designated as an acting director for an ongoing period of more than thirty days meets the qualifications of a preschool director; and

- c. Ensure that the individual designated as a teacher for more than thirty-two hours per month meets the qualifications of a preschool teacher;
2. Apply for a license for the preschool;
  3. Possess knowledge or experience in management and interpersonal relations;
  4. Notify the authorized agent of any major changes in the operation or in the ownership or governing body of the preschool, including staff member changes;
  5. Ensure that liability insurance against bodily injury and property damage for the preschool is carried;
  6. Formulate written policies and procedures for the operations of the preschool ~~relating to:~~ Policies must include:
    - a. Hiring practices and personnel policies for staff members;
    - b. Methods for obtaining references and employment histories of staff members;
    - c. Methods of conducting staff member performance evaluations;
    - d. Children's activities, care, and enrollment; ~~and~~
    - e. The responsibilities and rights of staff members and parents;
    - f. An explanation of how accidents and illnesses will be handled;
    - g. The methods of developmentally appropriate discipline and guidance techniques that are to be used;
    - h. The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;
    - i. The care and safeguarding of personal belongings brought to the child care center by a child or by another on a child's behalf;
    - j. Procedure for accountability when a child fails to arrive as expected at the preschool; and
    - k. Transportation procedures, if the operator provides transportation;

7. Maintain records of enrollment, attendance, health, financial, and other required records;
8. Be responsible for all preschool staff members, teachers, preschool assistants, substitute staff members, emergency designees, volunteers, or others who provide services in the preschool;
9. Report immediately, as a mandatory reporter, any suspected child abuse or neglect as required by North Dakota Century Code section 50-25.1-03;
10. Maintain necessary information to verify staff members' qualifications and to ensure safe care for the children in the preschool;
11. Ensure preadmission visits for children and their parents are offered so the preschool's program, fees, operating policies, and procedures can be viewed and discussed, including:
  - ~~a. An explanation of how accidents and illnesses may be handled;~~
  - ~~b. The methods of developmentally appropriate discipline and guidance techniques to be used; and~~
  - ~~c. The process for reporting a complaint, a suspected licensing violation, and suspected child abuse or neglect;~~
12. Ensure that there are signed written agreements with the parents of each child which specify the fees to be paid, methods of payments, and policies regarding delinquency of fees;
13. Ensure the preschool is sufficiently staffed at all times to meet the child and staff member ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
- ~~14. Ensure that written policies are established concerning the care and safeguarding of personal belongings brought to the preschool by children or others on their behalf;~~
- ~~45.~~ 14. Provide parents, upon request, with progress reports on their children and provide unlimited opportunities for parents to observe their children while in care;
- ~~46.~~ 15. Provide parents with the name of the preschool operator, the director, teachers, preschool assistants, staff members, substitute staff members, and the emergency designee;
- ~~17. Develop and ensure compliance with a written policy and procedure for accountability when a normally unaccompanied child fails to arrive as expected at the preschool;~~

- ~~48.~~ 16. Ensure, whenever services are provided, that at least one staff member, substitute staff member, or emergency designee, is on duty who meets current certification requirements in basic cardiopulmonary resuscitation that meets the requirements of the American heart association, American red cross, or other cardiopulmonary resuscitation training programs approved by the department and is certified or trained in a department-approved program to provide first aid;
- ~~49.~~ 17. Meet the qualifications of the director set forth in section ~~75-03-11-28~~ 75-03-11-08.1 if the operator is also the director; ~~and~~
- ~~20.~~ 18. Report to the authorized agent within twenty-four hours:
- a. A death or serious accident or illness requiring hospitalization of a child while in the care of the preschool or attributable to care received in the preschool;
  - b. An injury to any child which occurs while the child is in the care of the preschool which requires medical treatment;
  - c. Poisonings or errors in the administering of medication;
  - d. Closures or relocations due to emergencies; and
  - e. Fire that occurs or explosions that occur in or on the premises of the preschool; and
19. Ensure that children do not depart from the child care premises unsupervised, except when the parent and provider consent that an unsupervised departure is safe and appropriate for the age and development of the child. The provider shall obtain written parental consent for the child to leave the child care premises unsupervised, which must specify the activity, time the child is leaving and length of time the child will be gone, method of transportation, and parental responsibility for the child once the child leaves the child care premises.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11-08.1. Minimum qualifications of a preschool director.**

1. A preschool director shall be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care.

2. The director shall hold at least one of the following qualifications, in addition to those set out in subsection 1:
- a. A bachelor's degree in the field of early childhood education with eight or more weeks of supervised student teaching experience in a preschool or similar setting;
  - b. A bachelor's degree with ~~at least twenty-four quarter hours or sixteen semester hours in child development, child psychology, or directly related fields,~~ with at least six months of experience in a preschool or similar setting; and one of the following:
    - (1) Eight semester hours or twelve quarter hours in early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - c. An associate degree in the field of early childhood education or child development with at least six months of experience in a preschool or similar setting;
  - d. An associate's degree with at least one year of experience in a preschool or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours in early childhood education or child development;
    - (2) One hundred twenty hours of department-approved early childhood training; or
    - (3) A director's credential approved by the department;
  - d. e. Current certification as a child development associate or similar status, with at least one year of experience in a preschool or similar setting; or
  - e. ~~A bachelor's degree with at least eight semester hours or twelve quarter hours in child development, child psychology, or directly related fields, with at least one year of experience in a preschool or similar setting; or~~

- f. Certification from a Montessori teacher training program with at least one year of experience in a Montessori school, preschool, or similar setting.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11-08.2. Minimum qualifications of a preschool teacher.** A teacher shall:

1. Be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care and early childhood education.
2. Hold at least one of the following qualifications:
  - a. A bachelor's degree with at least eight semester hours or twelve quarter hours in early childhood education or child development; child psychology, or directly related fields;
  - b. A teaching certificate in elementary education or kindergarten endorsement;
  - c. An ~~associate~~ associate's degree in the field of early childhood education or child development;
  - d. An associate's degree with at least one year of experience in a preschool or similar setting and one of the following:
    - (1) Eight semester hours or twelve quarter hours in early childhood education or child development; or
    - (2) One hundred twenty hours of department-approved early childhood training;
  - d. ~~e.~~ e. Current certification as a child development associate or similar status; or
  - e. ~~f.~~ f. Certification from a Montessori teacher training program.

3. Meet the qualifications of the director and perform the function of a director as defined in section 75-03-11-08.1, if the teacher is also the director.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11-14. Minimum requirements for facility.**

1. The preschool must be properly lighted. If the lighting of the preschool appears questionable, the department may require the operator to obtain additional lights so that a minimum of sixty-five foot-candles of light is used in the areas generally used for children's activities.
2. Water supply.
  - a. The operator shall ensure that the preschool has a drinking water supply from an approved community water system or from a source tested and approved annually by the state department of health;
  - b. Drinking water must be easily accessible to the children and must be provided by either an angle-jet drinking fountain with mouthguard or by a running water supply with individual single-service drinking cups; and
  - c. The preschool must have hot and cold running water. The water in the faucets used by children must not exceed one hundred twenty degrees Fahrenheit [49.2 degrees Celsius].
3. Toilet and sink facilities:
  - a. The operator shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff members;
  - b. The operator shall provide a minimum of ~~one sink and~~ one flush toilet for each fifteen children, excluding those children who are not toilet trained;
  - c. The operator shall provide at least one handwashing sink per toilet room facility; and
  - d. The operator shall provide hand soap, sanitary hand-drying equipment, single-use cloth towels, or paper towels near handwashing sinks.
4. The operator of a preschool not on a municipal or public water supply or wastewater disposal system shall ensure the preschool's sewage

and wastewater system has been approved by the state department of health.

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11-19. Minimum requirements regarding space.**

1. Each preschool shall provide adequate indoor and outdoor space for the daily activities of all children for the licensed capacity of the preschool.
2. Adequate space must include a minimum of thirty-five square feet [3.25 square meters] of indoor space per child ~~and a minimum of seventy-five square feet [6.97 square meters] of outdoor play space per child.~~ Indoor space considered must exclude bathrooms, pantries, passageways leading to outdoor exits, areas occupied by furniture or appliances that children should not play on or under, and space children are not permitted to occupy. ~~If available outdoor play space does not accommodate the licensed capacity of the preschool, the total appropriate outdoor play space available must be no less than the number of children in the largest class or group of the preschool multiplied by seventy-five square feet [6.97 square meters]. The operator shall prepare a written schedule of outdoor playtime which limits use of the play area to its capacity, giving each class or group an opportunity to play outdoors daily.~~

**History:** Effective December 1, 1981; amended effective January 1, 1987; July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11-20. Program requirements.**

1. A preschool must have a written curriculum which describes the program's philosophy, goals, objectives, and a program evaluation process.
  - a. The curriculum must promote cognitive, social, emotional, and physical growth of children in care.
  - b. The curriculum must be based on the developmental levels and needs of children enrolled.

C. The curriculum must provide for daily outdoor play.

2. The director shall exchange information with parents concerning the program, its activities, and the adjustment of the child to the program.
3. Each child's cultural and ethnic background and primary language or dialect must be respected by the staff members.
4. The director or teacher shall design a written daily plan of program activities for the children enrolled in the program.

**History:** Effective December 1, 1981; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-08

**75-03-11-28. Child abuse and neglect determinations.** An operator shall ensure safe care for the children receiving services in the preschool.

1. If a services-required decision made under North Dakota Century Code chapter 50-25.1 exists, indicating that a child has been abused or neglected by any applicant, operator, director, teacher, assistant, staff member, substitute staff member, or emergency designee, it has a direct bearing on the applicant's or operator's ability to serve the public in a capacity involving the provision of child care and the application or license may be denied or revoked. If a services-required determination under North Dakota Century Code chapter 50-25.1 and under chapter 75-03-19 exists indicating that any child has been abused or neglected by the applicant, operator, director, teacher, assistant, staff member, substitute staff member, or emergency designee, the applicant or operator shall furnish information satisfactory to the department, from which the department can determine the applicant's, operator's, director's, teacher's, assistant's, staff member's, substitute staff member's, or emergency designee's ability to provide care that is free of abuse and neglect. The department shall furnish the determination of current ability to the applicant or operator and to the director of the regional human service center or the director's designee for consideration and action on the preschool application or license.
2. Each applicant, operator, director, teacher, assistant, staff member, substitute staff member, and emergency designee shall complete a department-approved authorization for background check form no later than the first day of employment.

**History:** Effective January 1, 1999; amended effective January 2, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

### **75-03-11-29. Correction of violations.**

1. Within three business days of receipt of the correction order, the operator shall notify the parents of each child enrolled in the preschool that a correction order has been issued. In addition to providing notice to the parent of each child, the operator shall post the correction order in a conspicuous location within the preschool until the violation has been corrected or for five days, whichever is longer.
2. Violations noted in a correction order must be corrected:
  - a. For a violation of North Dakota Century Code section 50-11.1-02.2; section 75-03-11-05; subsection 13 of section 75-03-11-08; section 75-03-11-09, section or 75-03-11-23; or subsection 2, 7, or 8 of section 75-03-11-18, within twenty-four hours;
  - b. For a violation requiring the hiring of a director with those qualifications set forth in section 75-03-11-08.1 or a teacher with those qualifications as set forth in section 75-03-11-08.2, within sixty days;
  - c. For a violation that requires an inspection by a state fire marshal or local fire department authority pursuant to section 75-03-11-17, within sixty days;
  - d. For a violation that requires substantial building remodeling, construction, or change, within sixty days; and
  - e. For all other violations, within twenty days.
3. All periods for correction begin on the date of receipt of the correction order by the operator.
4. The regional supervisor of early childhood services may grant an extension of additional time to correct violations, up to a period of one-half the original allowable time allotted. An extension may be granted upon application by the operator and a showing that the need for the extension is created by unforeseeable circumstances and the operator has diligently pursued the correction of the violation.
5. The operator shall furnish written notice to the authorized agent upon completion of the required corrective action. The correction order remains in effect until the authorized agent confirms that the corrections have been made.
6. At the end of the period allowed for correction, the department or its authorized agent shall reinspect a preschool that has been issued a correction order. If, upon reinspection, the department or its authorized agent determines that the preschool has not corrected a violation

identified in the correction order, the department or its authorized agent shall mail a notice of noncompliance with the correction order by certified mail to the preschool. The notice must specify the violations not corrected and the penalties assessed in accordance with North Dakota Century Code section 50-11.1-07.5.

7. If a preschool receives more than one correction order in a single year, the operator may be referred by the department for consulting services. The consulting services will be offered to assist the operator in maintaining compliance and to avoid future corrective action.

**History:** Effective January 1, 1999; amended effective January 2, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.1, 50-11.1-07.2, 50-11.1-07.3

### **75-03-11-30. Fiscal sanctions.**

1. The department shall assess a fiscal sanction of twenty-five dollars per day for each violation of North Dakota Century Code chapter 50-11.1; subsection 13 of section 75-03-11-08; or section 75-03-11-09, 75-03-11-13, 75-03-11-17, 75-03-11-18, or 75-03-11-19 for each day that the operator has not verified correction, after the allowable time for correction of violations ends, that the operator has not verified correction.
2. The department shall issue a fiscal sanction of fifteen dollars per day for each violation of section ~~75-03-11-09~~ 75-03-11-08.1, 75-03-11-08.2, 75-03-11-08.3, or 75-03-11-15; subsection 1, 2, or 4 of section 75-03-11-18; or subsection 1 of section 75-03-11-20 for each day that the operator has not verified correction, after the allowable time for correction of violations ends, that the operator has not verified correction.
3. The department shall issue a fiscal sanction of five dollars per day for each violation of any other provision of this chapter for each day that the operator has not verified correction, after the allowable time for correction of violations ends, that the operator has not verified correction.

**History:** Effective January 1, 1999; amended effective January 2, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-07.4, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.4, 50-11.1-08

## CHAPTER 75-03-11.1

### **75-03-11.1-07. Application for and nontransferability of school-age child care program license.**

1. An applicant shall submit an application for a license to the authorized agent. Application must be made in the form and manner prescribed by the department.
2. A license issued under this chapter is nontransferable and is valid only for the premises indicated on the license.
3. An application for a new license must be filed upon change of operator or location.
4. The department may not issue more than one ~~child care in-home registration, self-declaration, or~~ license per residence. A residence means real property that is typically used as a single family dwelling. ~~This subsection applies to new licenses issued on or after January 1, 2011. Existing operators~~ A provider or operator with more than one in-home registration, self-declaration, or license in a single residence or two or more providers or operators operating under in-home registrations, self-declarations, or licenses out of the same residence prior to January 1, 2011, will be exempt from this provision subsection until January 1, 2016, after which time all operators will be subject to the requirements of this subsection.

**History:** Effective June 1, 1995; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-03, 50-11.1-04, 50-11.1-06.2, 50-11.1-07, 50-11.1-08

**75-03-11.1-08. Duties of school-age child care program operator.** The operator of a school-age child care program is responsible for compliance with the requirements set forth in this chapter and North Dakota Century Code chapter 50-11.1. The operator:

1. Shall designate a qualified director, shall delegate appropriate duties to the director, and shall:
  - a. Ensure that the director is present at the school-age child care program at least sixty percent of the time that the program is open. If the operation has satellite sites, the director shall be present a combined total of sixty percent of the school-age program's hours of operation.

- b. Ensure that when the director and designated acting director are not present at the program, a person who meets the qualifications of a supervisor is on duty.
  - c. Ensure that the individual designated as an acting director for longer than thirty consecutive days meets the qualifications of a school-age child care program director.
  - d. Ensure that if the operator of the school-age child care program is also the director, that the operator meets the qualifications of a director set forth in section 75-03-11.1-08.1;
2. Shall apply for a license for the school-age child care program;
  3. Shall provide an environment that is physically and socially adequate for children;
  4. Shall notify the authorized agent of any major changes in the operation of, or in the ownership or governing body of the school-age child care program, including staff member changes;
  5. Shall ensure that the school-age child care program carries liability insurance against bodily injury and property damage;
  6. Shall formulate written policies and procedures for the operation of the school-age child care program relating to:
    - a. Hiring practices and personnel policies for all staff members;
    - b. Methods for obtaining references and employment histories of staff members;
    - c. Methods of conducting staff member performance evaluations;
    - d. Children's activities, care, and enrollment; ~~and~~
    - e. The responsibilities and rights of staff members and parents;
    - f. An explanation of how accidents and illnesses may be handled;
    - g. The methods of developmentally appropriate discipline and guidance techniques that are to be used;
    - h. The process for a parent or staff member to report a complaint, a suspected licensing violation, and suspected child abuse or neglect;

- i. The care and safeguarding of personal belongings brought to the child care center by a child or by another on a child's behalf;
  - j. Procedure for accountability when a child fails to arrive as expected at the school-age child care program; and
  - k. Transportation procedures, if the operator provides transportation;
7. Shall maintain enrollment, attendance, health, and other required records;
  8. Shall select an emergency designee;
  9. Shall maintain necessary information to verify staff member qualifications and to ensure safe care for the children in the school-age child care program;
  10. Shall inform parents of enrolled children and other interested parties about the school-age child care program's goals, policies, procedures, and content of the program, ~~including:~~
    - ~~a. How accidents and illnesses will be handled;~~
    - ~~b. Methods of developmentally appropriate discipline and guidance techniques to be used; and~~
    - ~~c. The process for reporting a complaint, a suspected licensing violation, and suspected child abuse or neglect;~~
  11. Shall advise parents of enrolled children of the school-age child care program's service fees, operating policies and procedures, location, and the name, address, and telephone number of the operator and the director;
  12. Shall provide parents of enrolled children information regarding the effective date, duration, scope, and impact of any significant changes in the school-age child care program's services;
  13. Shall ensure that the school-age child care program is sufficiently staffed at all times to meet the child to staff ratios for children in attendance and that no more children than the licensed capacity are served at any one time;
  14. Shall ensure that the school-age child care program has sufficient qualified staff members available to substitute for regularly assigned staff who are sick, on leave, or who are otherwise unable to be on duty;

15. Shall ensure that there are signed written agreements with the parents of each child that specify the fees to be paid, methods of payment, and policies regarding delinquency of fees;
- ~~16.~~ ~~Shall ensure that written policies are established which address the provision of emergency medical care, the care of a child with special needs if a child with special needs is in care, and the treatment of illness and accident;~~
- ~~17.~~ ~~Shall ensure that written policies are established concerning the care and safeguarding of personal belongings brought to the school-age child care program by a child or by another on the child's behalf;~~
- ~~18.~~ 16. Shall provide parents with unlimited access and opportunities for parents to observe their children while in care and provide parents with regular opportunities to meet with staff members responsible for caring for or teaching children before and during enrollment to discuss their children's needs. Providing unlimited access does not prohibit a school-age child care program from locking its doors when children are in care;
- ~~19.~~ 17. Shall provide parents, upon request, with progress reports on their children;
- ~~20.~~ 18. Shall ensure that provisions are made for safe arrival and departure of all children, and a system is developed to ensure that children are released only as authorized by the parent;
- ~~21.~~ ~~Shall develop and ensure compliance with a written policy and procedure for accountability when a normally unaccompanied child fails to arrive as expected at the program;~~
- ~~22.~~ 19. Shall develop a system to ensure the safety of children whose parents have agreed to allow them to leave the program without supervision, which must include, at a minimum:
  - a. Written permission from the parents allowing a child to leave the program without supervision; and
  - b. Consistent sign-out procedures for released children;
- ~~23.~~ 20. Shall report immediately, as a mandated reporter, any suspected child abuse or neglect as required by North Dakota Century Code chapter 50-25.1 and shall develop a written policy to address reporting by staff members;
- ~~24.~~ 21. Shall ensure that a staff member is on duty at all sites who meets current certification requirements in cardiopulmonary resuscitation by the American heart association, American red cross, or other

department-approved cardiopulmonary resuscitation training program and in a department-approved first-aid program;

- ~~25.~~ 22. Shall meet the qualifications of the director set forth in section 75-03-11.1-08.1 if the operator of the school-age child care program is also the director;
- ~~26.~~ 23. Shall ensure that staff members responsible for caring for or teaching children under the age of eighteen are directly supervised by an adult staff member; and
- ~~27.~~ 24. Shall report to the authorized agent within twenty-four hours:
- a. The death or serious accident or illness requiring hospitalization of a child while in the care of the program or attributable to care received in the program;
  - b. An injury to any child which occurs while the child is in the care of the program and which requires medical treatment;
  - c. Poisonings or errors in the administration of medication;
  - d. Closures or relocations of child care programs due to emergencies; and
  - e. Fire that occurs or explosions that occur in or on the premises of the school-age child care program.

**History:** Effective June 1, 1995; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11.1-08.1. Minimum qualifications of a school-age child care program director.** A director shall:

1. ~~The director shall be~~ Be an adult of good physical, cognitive, social, and emotional health, and shall use mature judgment when making decisions impacting the quality of child care;
2. ~~The director shall possess~~ Possess knowledge and experience in management and interpersonal relationships;
3. ~~The director shall hold~~ Hold at least one of the following qualifications, in addition to those set out in subsection 1:
  - a. A bachelor's degree in the field of early childhood education, child development, or elementary education;

- b. ~~A bachelor's degree with at least twenty-four semester hours or thirty quarter hours in child development, child psychology, or directly related fields with~~ at least six months of experience in a school-age child care program or similar setting; and one of the following:
  - (1) Eight semester hours or twelve quarter hours in early childhood education, child development, or elementary education;
  - (2) One hundred twenty hours of department-approved early childhood training; or
  - (3) A director's credential approved by the department;
- c. An associate degree in the field of early childhood education or child development with at least six months of experience in a school-age child care program or similar setting;
- d. ~~A teaching certificate in elementary education with at least six months of experience in a child care program;~~ An associate's degree with at least one year of experience in a school-age child care program and one of the following:
  - (1) Eight semester hours or twelve quarter hours in early childhood education, child development, or elementary education;
  - (2) One hundred twenty hours of department-approved early childhood training; or
  - (3) A director's credential approved by the department;
- e. A current certification as a child development associate or similar status with at least one year of experience in a school-age child care program or similar setting;
- f. ~~A bachelor's degree with twelve semester hours or fifteen quarter hours in child development, child psychology, or directly related fields with at least one year of experience in a child care program or similar setting; or~~
- g. ~~f.~~ Certification from a Montessori teacher training program with one year of experience in a Montessori school, school-age child care program, or similar setting, and at least one of the following:
  - (1) ~~twelve~~ Eight semester hours or ~~fifteen~~ twelve quarter hours in child development, ~~child psychology,~~ early childhood

education, or ~~fields directly related;~~ and elementary education;

(2) One hundred twenty hours of department-approved early childhood training; or

(3) A director's credential approved by the department; and

4. ~~The director shall certify~~ Certify annual completion of a minimum of thirteen hours of department-approved training related to child care.

**History:** Effective January 1, 1999; amended effective January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11.1-18. Minimum sanitation and safety requirements.**

1. ~~The In school-age child care programs where meals are prepared, the operator shall ensure that the state department of health conducts an annual inspection. The operator shall correct any code violations noted by the health inspector and shall file reports of the inspections and corrections made with the authorized agent. If only snacks or occasional cooking projects are prepared, a health inspection is not required.~~
2. The operator shall ensure that the school-age child care program's building, grounds, and equipment are located, cleaned, and maintained to protect the health and safety of children. The operator shall establish routine maintenance and cleaning procedures to protect the health of the children and the staff members.
3. The operator shall ensure that the school-age child care program ground areas are free from accumulations of refuse, standing water, unprotected wells, debris, flammable material, and other health and safety hazards.
4. The operator shall ensure that exterior play areas in close proximity to busy streets and other unsafe areas are contained or fenced, or have natural barriers to restrict children from those unsafe areas. Outdoor play areas must be inspected daily for hazards and necessary maintenance.
5. The operator shall ensure that garbage stored outside is kept away from areas used by children and is kept in containers with lids. Open burning is not permitted. The operator shall keep indoor garbage in covered containers. The operator may allow paper waste to be kept in open waste containers.

6. The operator shall ensure that wading pools used by the school-age child care program are strictly supervised and are emptied, cleaned, and sanitized daily.
7. The operator shall ensure that all swimming pools are approved annually by the local health unit.
8. The operator shall ensure that all school-age child care program buildings erected before January 1, 1970, which contain painted surfaces in a peeling, flaking, chipped, or chipped condition in any area where children may be present, have painted surfaces repainted or shall submit evidence that the paints or finishes do not contain hazardous levels of lead-bearing substances. For the purposes of this chapter, "hazardous levels of lead-bearing substances" means any paint, varnish, lacquer, putty, plaster, or similar coating of structural material which contains lead or its compounds in excess of seven-tenths of one milligram per square centimeter, or in excess of five-tenths of one percent in the dried film or coating, when measured by a lead-detecting instrument approved by the state department of health.
9. The operator shall ensure that indoor and outdoor equipment, toys, and supplies are safe, strong, nontoxic, and in good repair. The operator shall ensure that all toys are kept clean and in a sanitary condition. Books and other toys that are not readily cleanable must be sanitized as much as possible without damaging the integrity or educational value of the item.
10. The operator shall ensure that indoor floors and steps are not slippery and do not have splinters. The operator shall ensure that steps and walkways are kept free from accumulations of water, ice, snow, or debris.
11. The operator shall ensure that elevated areas, including stairs and porches, have railings and safety gates where necessary to prevent falls.
12. If the school-age child care program is providing care to children in wheelchairs, the operator shall provide doors of sufficient width and construction to accommodate any children in wheelchairs who are receiving care.
13. The operator shall ensure that exit doorways and pathways are not blocked.
14. The operator shall ensure that light bulbs in areas used by children are properly shielded or shatterproof.
15. The operator shall ensure that combustible materials are kept away from light bulbs and other heat sources.

16. The operator shall ensure adequate heating, ventilation, humidity, and lighting for the comfort and protection of the health of the children. All heating devices must be approved by local fire authorities. During the heating season when the school-age child care program is occupied by children, the room temperature must not be less than sixty-five degrees Fahrenheit [18 degrees Celsius] and not more than seventy-five degrees Fahrenheit [24 degrees Celsius].
17. The operator shall ensure that school-age child care program bathroom sinks, toilets, tables, chairs, and floors are cleaned daily. Cots and mats must be individually designated and cleaned and sanitized at least weekly. If different children use the same cots or mats, the cots or mats must be cleaned thoroughly and sanitized between each use. The operator shall provide separate storage for personal blankets or coverings.
18. The operator shall ensure that personal items including combs and toothbrushes are individually identified and stored in a sanitary manner.
19. Staff members and children shall wash their hands, according to recommendations by the federal centers for disease control and prevention, before preparing or serving meals, after using toilet facilities, and after any other procedure that may involve contact with bodily fluids. Hand soap and paper towels, sanitary hand-drying equipment, or single-use cloth towels must be available at each sink.
20. The operator shall ensure that potential hazards, such as guns, household cleaning chemicals, uninsulated wires, medicines, poisonous plants, and open stairways are not accessible to children. The operator shall keep guns and ammunition in locked storage, each separate from the other, or shall use trigger locks. The operator shall ensure other weapons and dangerous sporting equipment, such as bows and arrows, are not accessible to children.
21. Water supply standards:
  - a. The operator shall ensure that the school-age child care program has a drinking supply from an approved community water system or from a source tested and approved annually by the state department of health;
  - b. Drinking water must be easily accessible to the children and must be provided by either an angle-jet drinking fountain with mouthguard or by a running water supply with individual, single-serve drinking cups; and
  - c. The school-age child care program must have hot and cold running water.

22. Toilet and sink facilities:
- a. The operator shall provide toilet and sink facilities which are easily accessible to the areas used by the children and staff members;
  - b. Toilets must be located in rooms separate from those used for cooking, eating, and sleeping;
  - c. A minimum of ~~one sink and~~ one flush toilet must be provided for each fifteen children;
  - d. The operator shall provide separate restrooms for boys and girls and shall ensure that partitions are installed to separate toilets in these restrooms;
  - e. The operator shall provide at least one handwashing sink per toilet room facility; and
  - f. The operator shall provide safe step stools to allow children to use standard-size toilets and sinks or the operator shall ensure the availability of child-size toilets and sinks.
23. The operator of a school-age child care program not on a municipal or public water supply or wastewater disposal system shall ensure the school-age child care program's sewage and wastewater system has been approved by the state department of health.
24. Laundry:
- a. If the school-age child care program provides laundry service for common use linens, towels, or blankets, it shall have adequate space and equipment for safe and effective operation;
  - b. The operator shall ensure that soiled linens are placed in closed containers or hampers during storage and transportation;
  - c. The operator shall ensure that in all new or extensively remodeled school-age child care programs, the handling, sorting, or washing of soiled linens or blankets takes place in a designated area that is separated by a permanent partition from food preparation, serving, and kitchen areas;
  - d. The operator shall ensure that in an existing school-age child care program where physical separation of laundry and kitchen areas is impractical, procedures are developed to prohibit the washing or transportation of laundry while meals are being prepared or served;

- e. The operator shall ensure that sorting of laundry is not allowed in food preparation, serving, or kitchen areas;
  - f. If the school-age child care program provides laundry service for common use linens, towels, or blankets, or if different children's clothing, towels, or blankets are laundered together, the water temperature must be greater than one hundred forty degrees Fahrenheit [60 degrees Celsius]; and
  - g. The operator shall ensure that if the water temperature is less than one hundred forty degrees Fahrenheit [60 degrees Celsius], bleach or sanitizer is used in the laundry process during the rinse cycle or the program shall use a clothes dryer that reaches a temperature of at least one hundred forty degrees Fahrenheit [60 degrees Celsius].
25. The operator shall take steps to keep the school-age child care program free of insects and rodents. Chemicals for insect and rodent control may not be applied in areas accessible to children when children are present in the school-age child care program. Insect repellent may be applied outdoors on children with written parental permission.
26. Pets and animals:
- a. The operator shall ensure that only small pets that are contained in an aquarium or other approved enclosed container, cats, and dogs are present in areas occupied by children. Wire cages are not approved containers. Other indoor pets and animals must be restricted by a solid barrier and must not be accessible to children. The department may restrict any pet or animal from the premises that may pose a risk to children or may approve additional pets that do not pose a health or safety risk to children.
  - b. The operator shall ensure that animals are maintained in good health and appropriately immunized. Pet immunizations must be documented with a current certificate from a veterinarian.
  - c. The operator shall ensure parents are aware of the presence of pets and animals in the school-age child care program.
  - d. The operator shall notify parents immediately if a child is bitten or scratched and skin is broken.
  - e. A staff member responsible for caring for or teaching children shall supervise closely all contact between pets or animals and children. The staff member shall remove the pet or animal immediately if the pet or animal shows signs of distress or the child shows signs of treating the pet or animal inappropriately.

- f. The operator shall ensure that pets, pet feeding dishes, cages, and litter boxes are not present in any food preparation, food storage, or serving areas. The operator shall ensure that pet and animal feeding dishes and litter boxes are not placed in areas accessible to children.
- g. The operator shall ensure that indoor and outdoor areas accessible to children are free of animal excrement.
- h. The operator shall ensure that the school-age child care program is in compliance with all applicable state and local ordinances regarding the number, type, and health status of pets or animals.

**History:** Effective June 1, 1995; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

**75-03-11.1-28. Child abuse and neglect decisions.** An operator shall ensure safe care for the children receiving services in the school-age child care program.

1. If a services-required decision made under North Dakota Century Code chapter 50-25.1 exists, indicating that a child has been abused or neglected by an applicant, operator, director, supervisor, emergency designee, substitute staff member, or staff member, that decision has a direct bearing on the applicant's or operator's ability to serve the public in a capacity involving the provision of child care and the application or license may be denied or revoked. If a services-required determination under North Dakota Century Code chapter 50-25.1 and under chapter 75-03-19 exists indicating that a child has been abused or neglected by the applicant, operator, director, supervisor, emergency designee, substitute staff member, or staff member, the applicant or operator shall furnish information satisfactory to the department from which the department can determine the applicant's, operator's, director's, supervisor's, emergency designee's, substitute staff member's, or staff member's ability to provide care that is free of abuse and neglect. The department shall furnish the determination of current ability to the applicant or operator and to the director of the regional human service center or the director's designee for consideration and action on the application or license.
2. Each applicant, operator, director, supervisor, emergency designee, substitute staff member, and staff member shall complete a

department-approved authorization for background check form no later than the first day of employment.

**History:** Effective June 1, 1995; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-04, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-04, 50-11.1-07, 50-11.1-08

#### **75-03-11.1-29. Correction of violations.**

1. Within three business days of the receipt of a correction order, the operator shall notify the parents of each child receiving care at the school-age child care program that a correction order has been issued. In addition to providing notice to the parent of each child, the operator shall post the correction order in a conspicuous location within the school-age child care program and applicable satellite location until the violation has been corrected or for five days, whichever is longer.
2. Violations noted in a correction order must be corrected:
  - a. For a violation of North Dakota Century Code section 50-11.1-02.2; subsection 13 of section 75-03-11.1-08; section 75-03-11.1-09; subsections 2, 3 and 10, or 20 of section 75-03-11.1-18, and; or section 75-03-11.1-23, within twenty-four hours.
  - b. For a violation requiring the hiring of a school-age child care program director with those qualifications set forth in section 75-03-11.1-08.1 or a child care supervisor with those qualifications set forth in section 75-03-11.1-08.3, within sixty days.
  - c. For a violation that requires an inspection by a state fire marshal or local fire department authority pursuant to section 75-03-11.1-17, within sixty days.
  - d. For a violation that requires substantial building remodeling, construction, or change, within sixty days.
  - e. For all other violations, within twenty days.
3. All time periods for correction begin on the date of receipt of the correction order by the operator.
4. The regional supervisor of early childhood program services may grant an extension of additional time to correct violations, up to a period of one-half the original allowable time allotted. An extension may be granted upon application by the operator and a showing that the need

for the extension is created by unforeseeable circumstances and the operator has diligently pursued the correction of the violation.

5. The operator shall furnish a written notice to the authorized agent upon completion of the required corrective action. The correction order remains in effect until the authorized agent confirms that the corrections have been made.
6. At the end of the period allowed for correction, the department or its authorized agent shall reinspect a school-age child care program that has been issued a correction order. If, upon reinspection, the department or its authorized agent determines that the school-age child care program has not corrected a violation identified in the correction order, the department or its authorized agent shall mail a notice of noncompliance with the correction order by certified mail to the school-age child care program. The notice must specify the violations not corrected and the penalties assessed in accordance with North Dakota Century Code section 50-11.1-07.5.
7. If a school-age child care program receives more than one correction order in a single year, the department or authorized agent may refer the school-age child care program for consulting services to assist the operator in maintaining compliance to avoid future corrective action.

**History:** Effective June 1, 1995; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.1, 50-11.1-07.2, 50-11.1-07.3

#### **75-03-11.1-30. Fiscal sanctions.**

1. The department shall assess a fiscal sanction of twenty-five dollars per day for each violation of ~~subsections~~ North Dakota Century Code chapter 50-11.1; subsection 13 of section 75-03-11.1-08; section 75-03-11.1-09; subsection 2, 3, 4, 10, and 19 or 20 of section 75-03-11.1-20 and 75-03-11.1-18; or section 75-03-11.1-23 for each day that the operator has not verified correction, after the allowable time for correction of violations ends.
2. The department shall assess a fiscal sanction of fifteen dollars per day for each violation of section 75-03-11.1-08, except a violation of subsection 13 of section 75-03-11.1-08; subsections subsection 1, 2, 4, 5, 10, 17, and 20 or 19 of section 75-03-11.1-18; subsection 1 of section 75-03-11.1-19; subsections 3 and 11 of section 75-03-11.1-20; section 75-03-11.1-23; and subdivision a of or subsection 1 of section 75-03-11.1-24 for each day that the operator has not verified correction, after the allowable time for correction of violations ends.

3. The department shall assess a fiscal sanction of five dollars per day for each violation of any other provision of this chapter for each day that the operator has not verified correction, after the allowable time for correction of violations ends.

**History:** Effective June 1, 1995; amended effective July 1, 1996; July 1, 1996, amendments voided by the Administrative Rules Committee effective August 24, 1996; amended effective January 1, 1999; January 1, 2011; January 1, 2013.

**General Authority:** NDCC 50-11.1-07.4, 50-11.1-08

**Law Implemented:** NDCC 50-11.1-01, 50-11.1-07.4, 50-11.1-08

## CHAPTER 75-04-05

**75-04-05-01. Definitions.** In this chapter, unless the context or subject matter requires otherwise:

1. "Accrual basis" means the recording of revenue in the period when it is earned, regardless of when it is collected, and the recording of expenses in the period when incurred, regardless of when they are paid.
2. "Allowable cost" means the program's actual and reasonable cost after appropriate adjustments for nonallowable costs, income, offsets, and limitations.
3. "Bad debts" means those amounts considered to be uncollectible from accounts and notes receivable which were created or acquired in providing covered services that are eligible for reimbursement through medicaid federal financial participation.
4. "Board" means all food and dietary supply costs.
5. "Clients" means eligible individuals with developmental disabilities on whose behalf services are provided or purchased.
6. "Consumer" means an individual with developmental disabilities.
7. "Consumer representative" means a parent, guardian, or relative, to the third degree of kinship, of an individual with developmental disabilities.
8. "Cost center" means a division, department, or subdivision thereof, group of services or employees or both, or any unit or type of activity into which functions of a providership are divided for purposes of cost assignment and allocations.
9. "Day supports" means a day program to assist individuals acquiring, retaining, and improving skills necessary to successfully reside in a community setting. Services may include assistance with acquisition, retention, or improvement in self-help, socialization, and adaptive skills; provision of social, recreational, and therapeutic activities to maintain physical, recreational, personal care, and community integration skills; development of non-job task oriented prevocational skills such as compliance, attendance, task completion, problem solving, and safety; and supervision for health and safety.
10. "Department" means the North Dakota department of human services.
11. "Documentation" means the furnishing of written records including original invoices, contracts, timecards, and workpapers prepared to complete reports or for filing with the department.

12. "Extended services" means a federally mandated component designed to provide employment-related, ongoing support for an individual in supported employment upon completion of training, or on or off the job employment-related support for individuals needing intervention to assist them in maintaining employment. This may include job development, replacement in the event of job loss and, except for those individuals with serious mental illness, must include a minimum of two onsite job skills training contacts per month and other support services as needed to maintain employment. It may also mean providing other support services at or away from the worksite. If offsite monitoring is appropriate, it must, at a minimum, consist of two meetings with the individual and one contact with the employer each month.
13. "Facility-based" means a workshop for individuals with developmental disabilities licensed by the department to provide day services. This definition is not to be construed to include areas of the building determined by the department to exist primarily for nontraining or for production purposes.
14. "Fair market value" means value at which an asset could be sold in the open market in an arm's-length transaction between unrelated parties.
15. "Family support services" means a family-centered support service authorized for a client based on the primary caregiver's need for support in meeting the health, developmental, and safety needs of the client in order for the client to remain in an appropriate home environment.
16. "Generally accepted accounting principles" means the accounting principles approved by the American institute of certified public accountants.
17. "Historical cost" means those costs incurred and recorded on the facility's accounting records as a result of an arm's-length transaction between unrelated parties.
18. "Individual service plan" means an individual plan that identifies service needs of the eligible client and the services to be provided, and which is developed by the developmental disabilities case manager and the client or that client's legal representative, or both, considering all relevant input.
19. "Individualized supported living arrangements" means a residential support services option in which services are authorized for a client based on individualized needs resulting in an individualized ratesetting process and are provided to a client in a residence rented or owned by the client.

20. "Interest" means the cost incurred with the use of borrowed funds.
- ~~21.~~ 21. "Movable equipment" means movable care and support services equipment generally used in a facility, including equipment identified as major movable equipment in the American hospital association depreciation guidelines.
- ~~24.~~ 22. "Net investment in fixed assets" means the cost, less accumulated depreciation and the balance of notes and mortgages payable.
- ~~22.~~ 23. "Reasonable cost" means the cost that must be incurred by an efficiently and economically operated facility to provide services in conformity with applicable state and federal laws, regulations, and quality and safety standards.
- ~~23.~~ 24. "Related organization" means an organization which a provider is, to a significant extent, associated with, affiliated with, able to control, or controlled by, and which furnishes services, facilities, or supplies to the provider. Control exists when an individual or an organization has the power, directly or indirectly, significantly to influence or direct the action or policies of an organization or institution.
- ~~24.~~ 25. "Room" means the cost associated with the provision of shelter, housekeeping staff or purchased housekeeping services and the maintenance thereof, including depreciation and interest or lease payments of a vehicle used for transportation of clients.
- ~~25.~~ 26. "Service" means the provision of living arrangements and programs of daily activities subject to licensure by the department.
- ~~26.~~ 27. "Staff training" means an organized program to improve staff performance.
- ~~27.~~ 28. "Units of service" for billing purposes means:
- a. (1) In residential settings, one individual served for one 24-hour day;
  - ~~b.~~ (2) In day service settings, one individual served for one hour; and
  - e. (3) In extended services, one individual served for one hour of job coach intervention.

- b. The day of admission and the day of death, but not the day of discharge, are treated as a day served for residential services.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; May 1, 2006; July 1, 2010; January 1, 2013.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

#### **75-04-05-09. Rate payments.**

1. Except for intermediate care facilities for individuals with intellectual disabilities, payment rates will be established for training, room, and board.
2. Interim rates based on factors including budgeted data, as approved, will be used for payment of services during the year.
3. Room and board charges to clients may not exceed the maximum supplemental security income payment less twenty-five dollars for the personal incidental expenses of the client, plus the average dollar value of food stamps to the eligible clientele in the facility. If the interim room and board rate exceeds the final room and board rate, the provider shall reimburse clients in a manner approved by the department.
4. In residential facilities where rental assistance is available to individual clients or the facility, the rate for room costs chargeable to individual clients will be established by the governmental unit providing the subsidy.
5. In residential facilities where energy assistance program benefits are available to individual clients or the facility, room and board rates will be reduced to reflect the average annual dollar value of ~~such~~ the energy assistance program benefits.
6. Income from client production must be applied to client wages and the cost of production. The department will not participate in the gains or losses associated with client production conducted pursuant to the applicable provision of 29 CFR 525.
7. The final rate established is payment of all allowable, reasonable, and actual costs for all elements necessary to the delivery of a basic service to eligible clients subject to limitations and cost offsets of this chapter.
8. ~~No payments~~ A provider may be solicited ~~not solicit~~ or received by ~~a provider~~ receive a payment from a client or any other individual to supplement the final rate of reimbursement.
9. The rate of reimbursement established must be no greater than the rate charged to a private payor for the same or similar service.

10. The department will determine interim and final rates of reimbursement for continuing contract providers based upon cost data from the:
  - a. Submission requirements of section 75-04-05-02; and
  - b. Field and desk audits.
11. ~~Rates~~ The department shall base rates of continuing service providers, except for those identified in subdivision f of subsection 3 of section 75-04-05-10, ~~will be based~~ on the following:
  - a. ~~Rates~~ For rates for continuing contract providers, who have had no increase in the number of clients the provider is licensed to serve, ~~will be based upon~~; ninety-five percent of the rated occupancy established by the department, or actual occupancy, whichever is greater.
  - b. ~~Rates~~ For rates for continuing service providers, who have an increase in the number of clients the provider is licensed to serve in an existing service, ~~will be based upon~~:
    - (1) Subdivision a of subsection 11 of section 75-04-05-09 for the period until the increase takes effect; and
    - (2) Ninety-five percent of the projected units of service for the remaining period of the fiscal year based upon an approved plan of integration or actual occupancy, whichever is greater.
  - c. When establishing the final rates, the department may grant nonenforcement of subdivisions a and b of subsection 11 of section 75-04-05-09 when it determines the provider-implemented cost-containment measures consistent with the decrease in units, or when it determines that the ~~failure to do so~~ provider's implementation of cost-containment measures consistent with the decrease in units would have imposed a detriment to the well-being of its clients.
    - (1) Acceptable cost-containment measures include a decrease in actual salary and fringe benefit costs from the approved salary and fringe benefit costs for the day service or group home proportionate to the decrease in units.
    - (2) Detriment to the well-being of clients includes a forced movement from one group home to another or obstructing the day service movement of a client in order to maintain the ninety-five percent rated occupancy requirement.
12. Adjustments and appeal procedures are as follows:

- a. ~~Rate adjustments~~ A rate adjustment may be made to correct ~~errors~~ an error.
- b. A final adjustment will be made for ~~those facilities~~ a facility that ~~have~~ has terminated participation in the program.
- c. ~~Any requests~~ A provider may submit a request for reconsideration of the rate ~~must be submitted~~ in writing to the disability services division within ~~ten~~ fifteen calendar days of the date of the final rate notification. The department shall respond to a properly submitted request for reconsideration within ninety calendar days of receipt of the request. The department may redetermine ~~the~~ a rate on its own motion.
- d. ~~A~~ If a provider is dissatisfied with the decision resulting from the request for reconsideration, the provider may appeal ~~a~~ the decision within thirty days after ~~mailing of the department mails~~ the written notice of the decision ~~on a~~ resulting from the request for reconsideration of the final rate.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 1995; April 1, 1996; August 1, 1997; July 1, 2001; May 1, 2006; July 1, 2012; January 1, 2013.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

#### **75-04-05-15. Depreciation.**

1. The principles of reimbursement for provider costs require that payment for services include depreciation on depreciable assets that are used to provide allowable services to clients. This includes assets that may have been fully or partially depreciated on the books of the provider, but are in use at the time the provider enters the program. The useful lives of these assets are considered not to have ended and depreciation calculated on the revised extended useful life is allowable. Likewise, a depreciation allowance is permitted on assets that are used in a normal standby or emergency capacity. Depreciation is recognized as an allocation of the cost of an asset over its estimated useful life. If any depreciated personal property asset is sold or disposed of for an amount different than its undepreciated value, the difference represents an incorrect allocation of the cost of the asset to the facility and must be included as a gain or loss on the cost report. The facility shall use the sale price in computing the gain or loss on the disposition of assets.
2. Special assessments in excess of one thousand dollars paid in a lump sum must be capitalized and depreciated. Special assessments not paid in a lump sum may be expensed as billed by the taxing authority.
3. Depreciation methods:

- a. ~~The A provider shall use the~~ straight-line method of depreciation ~~must be used~~. All accelerated methods of depreciation, including depreciation options made available for income tax purposes, such as those offered under the asset depreciation range system, may not be used. ~~The A provider shall apply the~~ method and procedure for computing depreciation ~~must be applied~~ on a basis consistent from year to year and shall maintain detailed schedules of individual assets ~~must be maintained~~. If the books of account reflect depreciation different than that submitted on the cost report, a provider shall prepare a reconciliation ~~must be prepared~~.
- b. For all assets obtained prior to August 1, 1997, a provider shall compute depreciation ~~will be computed~~ using a useful life of ten years for all items except vehicles, which must be four years, and buildings, which must be twenty-five years or more. For assets other than vehicles and buildings obtained after August 1, 1997, a provider may use the American hospital association guidelines as published by the American hospital publishing, inc., in "Estimated Useful Lives of Depreciable Hospital Assets", revised ~~2004~~ 2008 edition, to determine the useful life or the composite useful life of ten years. ~~Whichever A provider may not use an option other than the useful life methodology is chosen, the provider may not thereafter use the other option~~ the provider initially chooses to use without the department's prior written approval. A provider shall use a useful life of ten years ~~must be used~~ for all equipment not identified in the American hospital association depreciation guidelines.
- c. A provider acquiring assets as an ongoing operation shall use as a basis for determining depreciation:
  - (1) The estimated remaining life, as determined by a qualified appraiser, for land improvements, buildings, and fixed equipment; and
  - (2) (a) A composite remaining useful life for movable equipment, determined from the seller's records;  
or  
(b) The remaining useful life for movable equipment, determined from the seller's records.
  - (3) ~~Movable equipment means movable care and support services equipment generally used in a facility, including equipment identified as major movable equipment in the American hospital association depreciation guidelines.~~

4. Acquisitions are treated as follows:

- a. If a depreciable asset has, at the time of its acquisition, a historical cost of at least ~~one~~ five thousand dollars, its cost must be capitalized and depreciated in accordance with subdivision b of subsection 3. ~~Cost~~ A provider shall capitalize as part of the cost of the asset, costs incurred during the construction of an asset, such as architectural, consulting and legal fees, and interest, etc., should be capitalized as a part of the cost of the asset.
  - b. ~~Major~~ A provider shall capitalize major repair and maintenance costs on equipment or buildings ~~must be capitalized~~ if they exceed five thousand dollars per project and will be depreciated in accordance with subdivision b of subsection 3.
5. ~~Proper~~ A provider shall maintain records ~~will that~~ provide accountability for the fixed assets and also provide adequate means by which depreciation can be computed and established as an allowable client-related cost.
  6. The basis for depreciation is the lower of the purchase price or fair market value at the time of purchase.  
  
~~In the case of~~ If the provider's cash payment for a purchase is reduced by a trade-in, fair market value will consist of the sum of the book value of the trade-in plus the cash paid.
  7. For depreciation and reimbursement purposes, a provider may record and depreciate donated depreciable assets ~~may be recorded and depreciated~~ based on their the asset's fair market value. If the provider's records do not contain the fair market value of the donated asset, as of the date of the donation, an appraisal must be made. An appraisal made by a recognized appraisal expert will be accepted for depreciation.
  8. Provision for increased costs due to the sale of a facility may not be made.
  9. ~~Providers which finance facilities~~ If a provider finances a facility pursuant to North Dakota Century Code chapter 6-09.6, the provider, subject to the approval of the department, may elect to be reimbursed based upon the mortgage principal payments rather than depreciation. Once an election is made by the provider, it may not be changed without department approval.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001; May 1, 2004; May 1, 2006; January 1, 2013.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 25-16-15, 50-24.1-01

**75-04-05-16. Interest expense.**

1. In general:
  - a. To be allowable under the program, interest must be:
    - (1) Supported by evidence of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required;
    - (2) Identifiable in the provider's accounting records;
    - (3) Related to the reporting period in which the costs are incurred;
    - (4) Necessary and proper for the operation, maintenance, or acquisition of the provider's facilities used therein;
    - (5) Unrelated to funds borrowed to purchase assets in excess of cost or fair market value; and
    - (6) When borrowed for the purpose of making capital expenditures for assets that were owned by any other facility or service provider on or after July 18, 1984, limited to that amount of interest cost which such facility or service provider may have reported, for ratesetting purposes, had the asset undergone neither refinancing nor a change of ownership.
  - b. In cases when it was necessary to issue bonds for financing, any bond premium or discount shall be accounted for and written off over the life of the bond issue.
2. Interest paid by the provider to partners, stockholders, or related organizations of the provider is not allowable as a cost except when interest expense is incurred subject to North Dakota Century Code chapter 6-09.6.
3. A provider may combine or "pool" various funds in order to maximize the return on investment. If funds are pooled, proper records must be maintained to preserve the identity of each fund in order to permit the earned income to be related to its source. Income earned on gifts and grants does not reduce allowable interest expense.
4. Funded depreciation requirements are as follows:
  - a. Funding of depreciation is the practice of setting aside cash or other liquid assets to be used for replacement of the assets depreciated or for other capital purposes. This provision is recommended as a means of conserving funds for the replacement of depreciable assets. It is expected that the funds will be invested to earn

revenues. The revenues generated by this investment will not be considered as a reduction of allowable interest expense provided such revenues remain in the fund.

- b. The deposits are, in effect, made from the cash generated by the noncash expense depreciation and do not include interest income. Deposits to the funded depreciation account are generally in an amount equal to the depreciation expense charged to costs each year. In order to qualify for all provisions of funding depreciation, the minimum deposits to the account must be fifty percent of the depreciation expensed that year. Deposits in excess of accumulated depreciation are allowable; however, the interest income generated by the "extra" deposits will be considered as a reduction of allowable interest expense.
- c. Monthly or annual deposits representing depreciation must be in the funded depreciation account for six months or more to be considered as valid funding transactions. Deposits of less than six months are not eligible for the benefits of a funded depreciation account. However, if deposits invested before the six-month period remain in the account after the six-month period, the investment income for the entire period will not reduce the allowable interest expensed in that period. Total funded depreciation in excess of accumulated depreciation on client-related assets will be considered as ordinary investments and the income therefrom will be used to offset interest expense.
- d. Withdrawals for the acquisition of capital assets, the payment of mortgage principal on these assets and for other capital expenditures are on a first-in, first-out basis.
- e. The provider may not use the funds in the funded depreciation account for purposes other than the improvement, replacement, or expansion of facilities or equipment replacement or acquisition related to client services.
- f. Existing funded depreciation accounts must be used for all capital outlays in excess of ~~one~~ five thousand dollars except with regard to those assets purchased exclusively with donated funds or from the operating fund, provided no amount was borrowed to complete the purchase. Should funds be borrowed, or other provisions not be met, the entire interest for the funded depreciation income account will be offset up to the entire interest expense paid by the facility for the year in question.

**History:** Effective July 1, 1984; amended effective June 1, 1985; June 1, 1995; July 1, 2001; January 1, 2013.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01

#### **75-04-05-24. Application.**

1. This chapter will be applied to providers of services to individuals with developmental disabilities, except distinct parts of state institutions for individuals with developmental disabilities which are certified as intermediate care facilities for individuals with intellectual disabilities, starting the first day of a facility's first fiscal year which begins on or after July 1, 1985; provided, however, that neither this section, nor the effective date, shall preclude the application and implementation of some or all of the provisions of this chapter through contract or through official statements of department policy. Specific sections of this chapter will be applied to services provided in distinct parts of state institutions for individuals with developmental disabilities which are certified as intermediate care facilities for individuals with intellectual disabilities. The sections of this chapter that apply are section 75-04-05-01; subsections 1, 4, 5, 6, and 7 of section 75-04-05-02; subsections 1, 2, and 3 of section 75-04-05-08; sections 75-04-05-09, 75-04-05-10, 75-04-05-11, and 75-04-05-12; subsections 1 through 10, 12 through 20, 22 through 27, 29 through 32, 34, 35, 37 through 40, 43, and 45 through 52 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-14, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, 75-04-05-19, 75-04-05-20, 75-04-05-21, 75-04-05-22, and 75-04-05-23; and subsection 1 of section 75-04-05-24.
2. This chapter will be applied to providers of supported employment extended services to individuals with developmental disabilities, mental illness, traumatic brain injury, and other severe disabilities, except as operated through the human service centers; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, subsections 1 through 3, 8 through 14, 16 through 18, 20, 22 through 23, 26, and 24, 27, and 28 of section 75-04-05-01; section 75-04-05-02; section 75-04-05-08; subsections 2, 6 through 10, and 12 of section 75-04-05-09; subsection 1, subsection 2, and subdivisions a, h, and i of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and k of subsection 1, and subdivisions a through c of subsection 2 of section 75-04-05-11; subsections 1 and 2, subdivisions a through d, f, and i of subsection 3, and subsections 4 through 7 of section 75-04-05-12; subsections 2 through 10, 12 through 53 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; and subsections 1, 2, and 5 of section 75-04-05-21 of this chapter will be applied to supported employment extended services.
3. This chapter will be applied to providers of individualized supported living arrangements services; provided, however, that neither this section nor the effective date shall preclude the application on

and implementation of some or all of the provisions of this chapter through contract or through official statement of department policy. Effective June 1, 1995, the following sections apply to the providers of individualized supported living arrangements services: sections 75-04-05-01, 75-04-05-02, and 75-04-05-08; subdivisions a and h of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and k of subsection 1 and subdivisions a and b of subsection 2 of section 75-04-05-11; section 75-04-05-12; subsections 1 through 10, 12 through 14, and 16 through 53 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; subsections 1 through 7 and 9 through 16 of section 75-04-05-20; and sections 75-04-05-21, 75-04-05-23, and 75-04-05-24. The following additions apply only to the providers of individualized supported living arrangements services:

- a. Each provider of individualized supported living arrangements shall maintain separate revenue records for direct service reimbursements and for administrative reimbursement. Records must distinguish revenues from the department from all other revenue sources. Direct service revenues are:
    - (1) Direct service reimbursements from the department;
    - (2) Copayment responsibility of an individual receiving individualized supported living arrangements services; and
    - (3) Intended to cover direct service costs.
  - b. Each provider of individualized supported living arrangements shall maintain cost records distinguishing costs attributable to the department from other cost sources. Private pay client revenues and cost records are to be separately maintained from revenue and cost records whose payment source is the department.
  - c. When direct service reimbursements from the department exceed direct service costs attributable to the department by the margin established by department policy, payback to the department is required. In these situations, the entire overpayment must be refunded.
  - d. A provider may appeal the department's determination of direct costs and reimbursements by requesting a hearing within thirty days after the departmental mailing of the payback notification.
4. This chapter will be applied to providers of family support services; provided, however, that neither this section nor the effective date shall preclude the application on and implementation of some or all of the provisions of this chapter through contract or through official

statement of department policy. Effective June 1, 1995, the following sections apply to providers of family support services: sections 75-04-05-01, 75-04-05-02, and 75-04-05-08; subdivisions a and h of subsection 3 of section 75-04-05-10; subdivisions a through f, h, i, and k of subsection 1 and subdivisions a and b of subsection 2 of section 75-04-05-11; section 75-04-05-12; subsections 1 through 10, 12 through 14, and 16 through 53 of section 75-04-05-13; sections 75-04-05-13.1, 75-04-05-15, 75-04-05-16, 75-04-05-17, 75-04-05-18, and 75-04-05-19; subsections 1 through 7 and 9 through 16 of section 75-04-05-20; and sections 75-04-05-21, 75-04-05-23, and 75-04-05-24. The following additions apply only to the providers of family support services:

- a. Each provider of family support services shall maintain separate revenue records for direct service reimbursements and for administrative reimbursements. These cost records must distinguish revenues from the department from all other revenue sources. Direct service revenues are:
  - (1) Direct service reimbursements from the department; and
  - (2) Parental copayment responsibility as documented on the family support service authorization.
- b. Each provider of family support services shall maintain cost records distinguishing costs attributable to the department from other cost sources. Private pay client cost records are to be separately maintained from cost records for clients whose payment source is the department.
- c. Payback in the form of a refund is required when direct service revenues from the department exceed direct service costs attributable to the department.
- d. A provider may appeal the department's determination of direct costs and reimbursements by requesting a hearing within thirty days after the departmental mailing of the payback notification.

**History:** Effective July 1, 1984; amended effective July 1, 1984; June 1, 1985; June 1, 1995; August 1, 1997; July 1, 2001; May 1, 2006; July 1, 2012; January 1, 2013.

**General Authority:** NDCC 25-01.2-18, 50-06-16

**Law Implemented:** NDCC 25-16-10, 50-24.1-01; 34 CFR 363