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MAY 1994

CHAPTER 4-07-03

4-07-03-11. Classification appeal to the director. An appointing authority or an employee may appeal a classification assigned to a class or position by submitting a written notice to the director, central personnel division, within fifteen working days from the date on the written classification decision issued by the central personnel division. The appeal notice must state the specific issue being appealed and it must contain the reasons for the review. The director shall review the information contained in the appeal and provide a decision in writing to the parties within sixty calendar days from the date on the appeal notice.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

CHAPTER 4-07-04

4-07-04-10. Pay grade appeal to the director. An appointing authority or an employee may appeal a pay grade assigned to a class or a position by submitting a written notice to the director, central personnel division, within fifteen working days from the date on the written pay grade decision issued by the central personnel division. The appeal notice must state the specific issue being appealed and it must contain information to substantiate a further review. The director shall review the information contained in the appeal and provide a decision in writing to the parties within sixty calendar days from the date on the appeal notice.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-04-11. Pay grade exception. Upon receipt of a request to review a pay grade from an appointing authority or an employee the director, central personnel division, may assign a pay grade that is higher than that determined by the application of the class evaluation system. This may be done when the pay grade assigned to a class has not resolved significant problems in the recruiting or retention of qualified individuals for a class. When a pay grade exception is assigned to a class, the grade must be identified as such and the appointing authority and all employees in the class must be notified.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-04-12. Periodic review. Classes assigned a pay grade exception are subject to periodic review by the central personnel division. Such classes must be reviewed no less than once every five years to verify the appropriateness of the assigned pay grade. The director, central personnel division, shall notify the respective appointing authorities and all employees in the class that a review is being conducted. The appointing authority and employees may submit information for the review.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

STAFF COMMENT: Chapter 4-07-11 contains all new material but is not underscored so as to improve readability.

CHAPTER 4-07-11
REDUCTION-IN-FORCE

4-07-11-01. Scope of chapter. This chapter applies to all agencies, departments, institutions, and boards and commissions which employ classified employees, except those institutions in the university system. Additionally, this chapter applies to those agencies of local government that employ individuals whose positions are classified by the central personnel division.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-11-02. Definitions. The terms throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except "reduction-in-force" means the loss of employment by an employee as a result of a reduction in appropriations, lack of work, curtailment of work, or reorganization.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-11-03. Reduction-in-force. An appointing authority, after giving written notice to a classified employee, may cause an employee to lose their employment due to a reduction-in-force. Prior to initiating a reduction-in-force, an appointing authority shall carefully conduct a written analysis of the affected employees in the agency to determine those employees who will be subject to the reduction-in-force. The appointing authority shall use all of the following four factors in the required analysis:

1. The acquired knowledge and demonstrated skills of the employees compared to the work to be done. Employees lacking the necessary knowledge and skills are subject to the reduction-in-force.

2. The level of demonstrated work performance. Employees performing consistently at a lower level compared to other employees are subject to the reduction-in-force.

3. The length of service of the employees. Appointing authorities should list the number of years and months employees have been in the classified service. Employees with the fewer years of service are subject to the reduction-in-force.

4. The extent of training needed to ensure that reassigned employees would be fully productive if they were given different job assignments. Employees requiring the greater amount of training are subject to the reduction-in-force.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-11-04. Written documentation required. An appointing authority that initiates a reduction in-force is required to maintain written documentation of the analysis required by section 4-07-11-03.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-11-05. Emergency, temporary, or probationary employees. An appointing authority may not subject a classified employee who has satisfactorily completed the probationary period to a reduction-in-force while there are emergency, temporary, or probationary employees serving in the same class in the same agency location.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-11-06. Nondiscriminatory. An appointing authority that initiates a reduction-in-force shall do so only in a nondiscriminatory manner in accordance with North Dakota Century Code section 14-02.4-01.

Additionally, an appointing authority may not use a reduction-in-force as a substitute for disciplinary measures.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-11-07. Reemployment following a reduction-in-force. An individual who has lost employment due to a reduction-in-force must be offered reemployment by the former employing agency if the following conditions are present:

1. A position vacancy occurs in the former employing agency, and the appointing authority decides to fill the vacancy by appointing someone other than a current employee.

2. The individual meets the minimum qualifications established for the particular position.

3. No more than one year has elapsed since the individual lost employment due to the reduction-in-force.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

CHAPTER 4-07-15

4-07-15-02. Definitions. The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except ~~"leave without pay" means the approved absence from work without pay of an employee for up to no more than one year's duration.~~:

1. "Leave without pay" means the approved absence from work without pay of an employee.

2. "Educational leave" means the approved leave of absence from work without pay of an employee to attend school.

History: Effective September 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-15-03. Leave without pay. An appointing authority may grant an employee's request for a leave of absence without pay provided that:

1. The absence of the employee will not unduly disrupt the agency's operations or services.

2. ~~The appointing authority and the employee have agreed in writing about the terms and conditions of the employee's return to work.~~ The employee is placed on leave without pay status and is not terminated.

3. The employee does not accrue annual leave while on leave without pay status, but retains any unused annual leave hours, subject to other restrictions, and retains the employee's previous years of continuous service for the purpose of determining the employee's annual leave accrual rate.

4. The employee does not accrue sick leave while on leave without pay status, but retains any unused sick leave hours.

5. If the leave without pay status is scheduled to extend longer than fourteen consecutive calendar days, the appointing authority and the employee must agree in writing, prior to the beginning of the leave, about the status of employee benefits, and the terms and conditions of the employee's return to work.

6. The leave without pay does not exceed one year in duration.

History: Effective September 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-15-04. Educational leave. An appointing authority may grant an employee educational leave provided that:

1. The absence of the employee will not unduly disrupt the agency's operations or services.

2. The employee is placed on educational leave status and is not terminated.

3. The employee does not accrue annual leave while on educational leave, but retains any unused annual leave hours, subject to other restrictions, and retains the employee's previous years of continuous service for the purpose of determining the employee's annual leave accrual rate.

4. The employee does not accrue sick leave while on educational leave, but retains any unused sick leave hours.

5. The appointing authority and the employee must agree in writing, prior to the beginning of the leave, about the status of employee benefits, and the terms and conditions of the employee's return to work.

6. The educational leave does not exceed two years in duration.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

4-07-19-05. Required actions. An appointing authority shall take certain required actions when the suspension without pay, demotion, or dismissal of a nonprobationary classified employee is being considered. In such situations an appointing authority shall provide the following:

1. A written notice of the intent to take the action and the reasons for the action.

2. An opportunity for the employee to respond to the allegations in writing.

3. A written notice of the final action taken, after the employee's opportunity to respond. The notice must include a statement describing the employee's right to appeal, if any.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1)

STAFF COMMENT: Chapter 4-07-20 contains all new material but is not underscored so as to improve readability.

CHAPTER 4-07-20
GRIEVANCE PROCEDURES

4-07-20-01. Scope of chapter. This chapter applies to all agencies, departments, institutions, and boards and commissions that employ classified employees, except those institutions in the university system. Additionally, this chapter applies to those agencies of local government that employ individuals whose positions are classified by the central personnel division.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

4-07-20-02. Requirements for grievance procedures. Each agency, department, institution, board, and commission subject to this chapter shall establish internal grievance procedures that include the following:

1. The use of a standard grievance form.
2. Specific steps to be followed in processing the grievance, and limitations on the amount of time the parties have to respond.
3. A requirement that the parties must respond to the issues raised in the grievance.
4. A method of counting time that is in working days.
5. Provisions that allow an employee a reasonable amount of time to process a grievance without loss of pay during regular working hours.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

4-07-25-04. Reexamination schedule.

~~1. An applicant who fails an examination may retake the examination in accordance with a reexamination schedule established by the central personnel division.~~

~~2. An applicant who has passed an examination may retake the examination once, according to reexamination procedures established by the central personnel division. The central personnel division shall use the higher of the two examination scores.~~ An applicant who has taken an examination may retake the examination according to procedures established by the central personnel division. The central personnel division shall then use the highest of the examination scores.

History: Effective September 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 54-42-03, 54-44.3-12
Law Implemented: NDCC 54-42-03, 54-44.3-12

TITLE 7

Agriculture, Commissioner of

JUNE 1994

CHAPTER 7-03.1-06

7-03.1-06-02. Milk offered for sale must be wholesome and unadulterated.

1. Milk offered for sale must meet minimum United States department of agriculture standards.

2. ~~Effective--July-1,-1993,-the-legal-somatic-cell-count-shall-be seven-hundred-fifty-thousand-per-milliliter.~~

3. A producer's raw milk shall be under warning when:

   a. Monthly bacteria counts by the direct microscopic clump cell count or standard plate count exceed one million. Milk under warning because of exceeding a one million bacteria count on two successive monthly tests, must be rejected from the market for a minimum of one milking.

   b. Two out of the last four monthly somatic cell counts exceed one million~~;-seven--hundred--fifty--thousand--after July-1,--1993~~. Milk under warning because of somatic cell counts will result in a warning letter sent to the producer. No sooner than three days nor later than twenty-one days after the first warning letter, another sample must be taken and, if this test exceeds one million, the dairy commissioner shall reject the milk from the market. A producer will need three consecutive counts below the legal limit to regain full status.

   c. The sediment content exceeds one and five-tenths or equivalent by the mixed sample method; milk under warning

because of sediment content must be resampled and tested between three and twenty-one days following notice of violation and if found to exceed one and fifty-hundredths milligrams by the mixed sampling method or equivalent must be rejected from the market.

d. The same inspection item has been debited consecutively on the last three dairy facility inspections, unless the farm score is ninety or above. Violations of the same inspection item on four consecutive facility inspections will result in action to suspend certification if score is below ninety, and maximum points are taken for each violation.

e. Reinstatement of certification status cannot be accomplished until conditions leading to the suspension have been corrected by evidence of either test results or a satisfactory inspection of the facility, as determined by the dairy commissioner.

4. 3. Wholesomeness. Milk offered for sale must be tested monthly to determine sediment content. The sediment standard is:

No. 1	Not to exceed fifty-hundredths milligrams or equivalent
No. 2	Not to exceed one and fifty-hundredths milligrams or equivalent

Note: All sediment tests must be by the mixed sample method, unless otherwise approved by the dairy commissioner.

5. 4. Volume requirement. The volume of milk in the bulk tank after the first milking must reach the agitator to such a level that adequate agitation of the milk is possible. Failure to produce adequate volumes on the first milking will result in suspension of a producer's certification to sell raw milk.

History: Effective August 1, 1986; amended effective April 1, 1993; October 28, 1993.
General Authority: NDCC 4-29-03, 4-29-04, 4-30-55.1
Law Implemented: NDCC 4-30-27, 4-30-31

TITLE 10

Attorney General

10-15-01-06. Use of list price or similar comparisons. It is a deceptive act or practice for a seller to make a price comparison or to claim a savings, expressed or implied, from a list price or term of similar meaning, unless:

1. The list price does not exceed the highest price at which substantial sales of the merchandise have been made in the seller's trade area;

2. The list price is the price at which the seller offered the merchandise for a reasonably substantial period of time in the recent, regular course of its business, openly, actively, and in good faith, with an intent to sell the merchandise at that price;

3. The list price does not exceed the highest price at which the product is offered by a reasonable number of sellers in the seller's trade area for a reasonably substantial period of time in the recent, regular course of business; or

4. The list price does not exceed the seller's cost plus the percentage markup regularly used by the seller in the actual sale of such merchandise or merchandise of a similar class or kind, in the seller's recent, regular course of business.

History: Effective January 1, 1994.
General Authority: NDCC 51-12-09, 51-15-05, 54-12-17
Law Implemented: NDCC 51-12-09, 51-15-01, 51-15-02

OBJECTION

THE LEGISLATIVE COUNCIL'S COMMITTEE ON ADMINISTRATIVES RULES OBJECTS TO SECTION 10-15-01-06 AS ADOPTED BY THE ATTORNEY GENERAL EFFECTIVE JANUARY 1, 1994.

The committee objects to this rule because the committee deems it to be unreasonable, arbitrary, or capricious.

Section 28-32-03.3 provides that after the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court shall declare the whole or portion of the rule objected to invalid and judgment shall be rendered against the agency for court costs.

History: Effective May 3, 1994.
General Authority: NDCC 28-32-03.3

TITLE 13

Banking and Financial Institutions, Department of

JUNE 1994

STAFF COMMENT: Chapters 13-02-16, 13-02-17, and 13-02-18 contain all new material but are not underscored so as to improve readability.

CHAPTER 13-02-16
TRUST POWERS

13-02-16-01. Authorization. A banking association receiving approval by the board to exercise trust powers may exercise trust powers at its main banking house, banking house or office, paying and receiving stations, and drive-in and walkup facility locations. Only one application is required for a banking association. Trust powers granted by the board prior to the effective date of this chapter for the bank's separate banking house locations shall be considered to heretofore apply to all locations.

History: Effective June 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-02(13), 6-03-13.1, 6-03-17, 6-05-01

13-02-16-02. Application. An original and ten copies of the application to exercise trust powers must be filed with the board. In

lieu of an original application, the board may accept a copy of the application submitted to the federal deposit insurance corporation or federal reserve system. The applicant must provide any additional information determined by the commissioner or board to be relevant.

History: Effective June 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-02(13), 6-05-01

13-02-16-03. Criteria for approval. The applicant must demonstrate that the proposed trust committee and officers have experience commensurate with the trust powers being requested. Upon granting trust powers, the board may require the applicant to commit to a training program of trust schools and seminars acceptable to the board. The board may also direct the applicant to enter into a training agreement with another trust company or bank.

History: Effective June 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-02(12), 6-05-01

13-02-16-04. Publication. Upon filing an application, the secretary of the board shall cause to be published notice of the application for two successive weeks in the official newspaper of the county of the main banking house, and all locations. The notice of application must also be sent by certified mail by the secretary of the board to all banks and trust companies located within the banking trade area association within ten days of final publication provided under this section. Any party must submit to the board written comments concerning the application, or a written request for an opportunity to be heard or both, no later than ten days after the date of final publication.

History: Effective June 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-02(12), 6-05-01

13-02-16-05. Hearing. A public hearing by the board may be required on an application for trust powers whenever the board or commissioner determines that it is in the public interest to hold such a hearing or whenever an interested party's request for an opportunity to be heard is granted. Notice of hearing on an application must, if required, be issued at least forty-five days prior to the hearing on an application. The notice of hearing must be published by the secretary of the board for two successive weeks in the official newspaper of the county of the main banking house, banking houses or offices, drive-in and walkup facilities, or paying and receiving stations are located.

The notice of hearing must also be sent by certified mail by the secretary of the board to all banks and trust companies located within the banking association's trade area.

History: Effective June 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-02(12), 6-05-01

CHAPTER 13-02-17
SALE OR PURCHASE OF ASSOCIATIONS, BANKING INSTITUTIONS, OR HOLDING COMPANIES

13-02-17-01. Publication. Upon filing a completed application the secretary of the board shall cause to be published notice of application in the official newspaper of the county where the association, banking institution, or holding company is principally located. The notice must specify the name of the association, banking institution, or holding company, and the number of shares to be sold or purchased, or in any manner transferred, and the number of total outstanding shares. The notice must also provide that written comments may be submitted to the board, and the application may be requested or reviewed in the office of the department. Any party must submit written comments concerning the application to the board no later than ten days after the date of publication. The notice may be included with any notice for a similar application submitted to the federal deposit insurance corporation or the federal reserve board.

History: Effective June 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-08-08.1(2)

CHAPTER 13-02-18
DISCONTINUANCE OF A PAYING AND RECEIVING STATION

13-02-18-01. Publication. Upon filing a completed application, the bank shall cause to be published notice of application for two successive weeks in the official newspaper of the county where the paying and receiving station is located. The notice must invite comments be sent to the board. Any party must submit written comments concerning the application to the board no later than thirty days after the date of final publication. The notice may be included with any notice for a branch closing required by the federal deposit insurance corporation or the federal reserve board.

History: Effective June 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-03-19

OCTOBER 1994

STAFF COMMENT: Chapter 13-03-01.1 contains all new material but is not underscored so as to improve readability.

ARTICLE 13-03

CREDIT UNIONS

CHAPTER 13-03-01
CHECK CASHING FUNDS

[Repealed effective December 1, 1983]

CHAPTER 13-03-01.1
PRACTICE AND PROCEDURE

13-03-01.1-01. Applicability. The state credit union board shall follow the practices and procedures established by the state banking board under article 13-01.1 for all application and administrative proceedings unless otherwise specified in this chapter.

History: Effective October 1, 1994.
General Authority: NDCC 6-01-04, 28-32-02
Law Implemented: NDCC 6-01-01, 6-01-04, 28-32-05

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

State Credit Union Board
State Capitol, 13th Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0080

History: Effective October 1, 1994.
General Authority: NDCC 6-01-04, 28-32-02
Law Implemented: NDCC 6-01-01, 6-01-04, 28-32-05

13-03-01.1-03. Copies. For any application or administrative hearing procedure, the original and eight copies of any documents must be furnished to the board.

History: Effective October 1, 1994.
General Authority: NDCC 6-01-04, 28-32-02
Law Implemented: NDCC 6-01-01, 6-01-04, 28-32-05

13-03-02-02. Requirements for advancement of money on security of real property. No state-chartered credit union ~~organized and operating under the laws of North Dakota~~, except ~~the North Dakota~~ corporate central credit union, ~~Bismarck, North Dakota, which is specifically exempted from the provisions of this section,~~ shall may advance money on security of real property until ~~all of~~ the following requirements have ~~been fulfilled~~ are met:

1. The mortgage deed, signed by the record owner and ~~wife or husband, if any, as the case may be~~ spouse, or by the authorized corporate officer or authorized partner, has been properly recorded in the office of the register of deeds of the county ~~in which such~~ where the real property is located.

2. ~~An abstract of title of the real property involved has been furnished to the credit union, at the expense of the borrower. Subsequent to, and within ninety days of the advancement of funds, the abstract of title must be updated to include the mortgage deed as specified in subsection 1.~~

~~3.~~ A For loans greater than ten thousand dollars or fifteen percent of the credit union's equity, a written opinion by an attorney is obtained, certifying that the mortgagor is the owner of the real property in fee simple, and indicating the order of priority of the lien established by the mortgage.

~~4.~~ 3. In lieu of ~~abstract of title and~~ a written opinion required in ~~subsections~~ subsection 2 ~~and 3~~, a title insurance policy equal to at least the original amount of the mortgage will be satisfactory. The policy ~~shall show~~ must name the credit union as the insured.

~~5.~~ 4. A written appraisal has been obtained ~~and filed with the loan papers, which~~ conducted by a certified or licensed appraiser as required by the Federal Financial Reform, Recovery and Enforcement Act of 1989 [Pub. L. 101.73; 103 Stat. 512; 12 U.S.C. 3332 et seq.], or an appraisal by the credit union on real estate loans in excess of ten thousand dollars or fifteen percent of the credit union's equity. The appraiser shall appraise the land and structures separately, and the appraisal must be made by the credit committee or a designated appraiser who shall appraise the real property and structures at their actual cash value ~~in their opinion; provided, that~~. However, no relative of a borrower or applicant may act in making the appraisal. In such case, it shall be the duty of the ~~credit committee~~ board of directors of the credit union considering the loan to appoint another member of the credit union to serve on the ~~appraisal~~ credit committee. The written appraisal must be filed with the loan papers.

~~6.~~ 5. ~~Proper~~ Adequate fire and tornado insurance has been ~~secured~~ obtained with a mortgage clause for the benefit of the credit union ~~in case of loss, which insurance shall be~~ in an amount equal to ~~at least seventy-five percent of the appraised value of the structures or the amount of the loan, whichever is the lesser~~ amount of the outstanding liens.

~~7.~~ 6. A ~~proper~~ note for the amount of the loan has been signed by the mortgagor or mortgagors ~~coinciding in all particulars with the note described in the mortgage required under subsection 1~~ consistent with the terms of the mortgage.

7. An abstract of title of the real property for first real estate mortgages 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 ninety days after the advancement of funds, the abstract of title, if prepared, must be updated to include the mortgage. After one year from the date of the first real estate mortgage, the credit union may return the abstract to the mortgagor.

History: Amended effective May 1, 1982; November 1, 1985; October 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

CHAPTER 13-03-16

13-03-16-01. Definitions.

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

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

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

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

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

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

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

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

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

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

6. "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.

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

STAFF COMMENT: Chapter 13-03-17 contains all new material but is not underscored so as to improve readability.

CHAPTER 13-03-17
EXCESS DEPOSIT INSURANCE

13-03-17-01. Authorization. The board of directors of a North Dakota state-chartered credit union may authorize purchase of an excess deposit insurance policy in addition to deposit insurance coverage provided by the national credit share insurance fund for the credit union's members.

History: Effective October 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

13-03-17-02. Financial information. Prior to purchasing an excess deposit insurance policy, the board of directors shall evaluate the financial condition and rating, if any, of the insurance company by acquiring adequate and current financial information. The board shall, on at least an annual basis, continue to evaluate the company's financial condition and rating.

History: Effective October 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

13-03-17-03. Notice of termination of insurance. If an excess deposit insurance policy is terminated, either at the request of the credit union or the insurance company, the credit union must notify in writing all members covered by such excess deposit insurance at least ninety days prior to the effective date of termination. The credit union must allow any member affected by the policy termination to withdraw the deposit without the assessment of any fee or early withdrawal penalty.

History: Effective October 1, 1994.
General Authority: NDCC 6-01-04
Law Implemented: NDCC 6-06-06

TITLE 18.5

Credit Review Board

JUNE 1994

CHAPTER 18.5-01-01

18.5-01-01-01. History.

1. The provisions of North Dakota Century Code chapter 6-09.10 were established in 1985, setting up a credit review board to deal with the matter of ever increasing farm foreclosures. The board was given authority to negotiate with lenders on behalf of farmers and to provide interest subsidies to eligible farmers for eligible purchases, refinancing, or redemptions of the farmer's home-quarter.

2. In 1987, North Dakota Century Code chapter 6-09.10 was amended to consolidate the negotiations undertaken by the board and the department of agriculture's farm credit counseling program. North Dakota Century Code sections 4-01-19.2 and 4-01-19.3 were repealed.

3. In 1987, North Dakota Century Code sections 6-09.10-08.1 through 6-09.10-08.6 were added to North Dakota Century Code chapter 6-09.10 to provide further assistance to financially distressed farmers and small businesses in the form of legal and tax assistance. Two hundred thousand dollars were appropriated to the board to provide such assistance under the administration and supervision of the commissioner of agriculture and the board.

4. In 1989, North Dakota Century Code chapter 6-09.10 was further amended. The farm credit counseling program was renamed the agricultural mediation service. The commissioner of agriculture was given additional authority to contract with

mediators to mediate between a farmer and a farmer's creditors.

5. In 1991, North Dakota Century Code chapter 6-09.10 was amended, authorizing the agricultural mediation service to negotiate and resolve any farmer-related problems.

6. In 1993, North Dakota Century Code chapter 6-09.10 was amended to expand the number of members of the board and to increase its responsibilities to include recommending policies and procedures to the industrial commission and to the state board of vocational education, and to coordinate a farm management delivery system.

History: Effective January 1, 1988; amended effective December 1, 1989; January 1, 1992; June 1, 1994.
General Authority: NDCC 28-32-02.1
Law Implemented: NDCC 28-32-02.1

18.5-01-01-01.1. Definitions.

1. The definitions as set forth in section 18.5-02-01-00.1 are applicable to this chapter.

2. "Farm diversification analytic system" means the coordinated effort among various entities and the credit review board to serve farmers, including a system of computer programs and analytic tools. Such system will assist farmers in analyzing their farm businesses through farm budgeting, financial planning, and traditional, nontraditional, and value-added enterprise analyses.

History: Effective June 1, 1994.
General Authority: NDCC 6-09.10-09
Law Implemented: NDCC 6-09.10-02.1, 6-09.10-03

18.5-01-01-02. Coordination of farm assistance programs. The credit review board is charged with responsibility in providing assistance to eligible farmers and other persons pursuant to the provisions of North Dakota Century Code chapter 6-09.10. ~~The responsibility of coordination, supervision, and administration is shared with the commissioner.~~

1. The responsibilities and duties under North Dakota Century Code chapter 6-09.10 belonging solely to the board are as follows:

   a. Adopting written policies governing negotiators, mediators, and staff~~.~~ of the agricultural mediation service including:

~~b.~~ (1) Approving interest rate buydowns as authorized by North Dakota Century Code sections 6-09.10-05, 6-09.10-07, and 6-09.10-08.

~~c.~~ (2) Charging reasonable fees to farmers and other persons for any assistance provided pursuant to North Dakota Century Code chapter 6-09.10. Mediation fees must be twenty-five dollars per hour for the farmer and for each creditor of the farmer attending mediation meetings to whom the farmer owes ten thousand dollars or more. For noncredit-related disputes, parties must be charged twenty-five dollars per hour for attending mediation meetings. The board may waive the payment of all or a portion of mediation fees for anyone that the administrator certifies is unable to pay such fees. Fees must be ten dollars per hour per farmer for providing negotiating assistance. However, no farmer may be charged for the first ten hours of negotiating assistance provided by a negotiator. The board may waive payment of all or a portion of the fees to be paid for providing negotiating assistance for any farmer that the administrator certifies is unable to pay such fees.

~~d.~~ (3) Making all decisions on deferral, restructure, or waiver of payment, or other reasonable loan servicing options, for assistance provided under the provisions of North Dakota Century Code ~~chapter 6-09.10~~ sections 6-09.10-05 and 6-09.10-08.4.

b. Recommending policies and procedures to the industrial commission regarding farm loan programs of the Bank of North Dakota.

c. Recommending policies for the adult farm management program to the state board of vocational education.

d. Developing and administering a grant program to provide farmers with access to the farm diversification analytic system. This program shall coordinate a farm management delivery system among the adult farm management program, agricultural mediation service, and the North Dakota state university extension service.

e. Adopting rules implementing any of the provisions of North Dakota Century Code chapter 6-09.10.

2. The responsibilities and duties belonging solely to the commissioner under North Dakota Century Code chapter 6-09.10 are as follows:

a. Establishing and administering the agricultural mediation service.

b. Appointing the administrator of the service.

c. Hiring staff and hiring or contracting with mediators and negotiators to mediate between eligible farmers and other persons.

3. The commissioner and the board shall have joint responsibility and duty under North Dakota Century Code chapter 6-09.10 as follows:

a. Implementing and administering legal and tax assistance to eligible farmers and small businesses as authorized by North Dakota Century Code sections 6-09.10-08.1 through 6-09.10-08.5.

b. Selecting appropriate cases for assistance to be made pursuant to North Dakota Century Code sections 6-09.10-08.1 through 6-09.10-08.5 among eligible farmers and small business persons.

c. Administering payment for assistance to any farmer or small business who receives assistance under North Dakota Century Code sections 6-09.10-08.1 through 6-09.10-08.5.

History: Effective January 1, 1988; amended effective December 1, 1989; January 1, 1992; June 1, 1994.
General Authority: NDCC 6-09.10-09, 28-32-02.1
Law Implemented: NDCC 6-09.10-02.1, 6-09.10-03, 6-09.10-05, 6-09.10-06, 6-09.10-07, 6-09.10-08, 6-09.10-08.1, 6-09.10-08.2, 6-09.10-08.3, 6-09.10-08.4, 6-09.10-08.5, 28-32-02.1

18.5-01-01-03. Board members. There are ~~three~~ six members of the board. The governor, the attorney general, and the commissioner of agriculture shall each appoint two members to the board. One member shall serve as the chair, one as the vice chair, and one as the treasurer~~;-and-one-as-the-member-at-large-in-charge-of-personnel~~.

History: Effective January 1, 1988; amended effective January 1, 1992; June 1, 1994.
General Authority: NDCC 6-09~~.10~~-09 6-09.10-02, 28-32-02.1
Law Implemented: NDCC 28-32-02.1

18.5-01-01-05. Inquiries.

1. Any inquiries concerning assistance to be provided by the agricultural mediation service through its negotiators and mediators should be addressed to:

Administrator
Agricultural Mediation Service
Department of Agriculture

State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505

2. Any inquiries concerning the board or laws administered by the board should be addressed to:

~~Administrator~~ Chair
~~Agricultural-Mediation-Service~~ Credit Review Board
~~Department-of-Agriculture~~ 6th Floor, State Capitol
~~State-Capitol~~
600 East Boulevard Avenue
Bismarck, North Dakota 58505

3. Any inquiries concerning legal or tax assistance to be provided under the supervision and administration of the commissioner and the board should be addressed to the same person as in subsection 1.

History: Effective January 1, 1988; amended effective December 1, 1989; January 1, 1992; June 1, 1994.
General Authority: NDCC 28-32-02.1
Law Implemented: NDCC 28-32-02.1

CHAPTER 18.5-02-01

18.5-02-01-00.1. Definitions. In title 18.5, unless the context or subject matter otherwise requires:

1. "Administrator" means the administrator of the agricultural mediation service, appointed by the commissioner to administer the service.

2. "Commissioner" means the commissioner of the state department of agriculture.

3. "Formal mediation" means the process of formal meetings between a farmer and another person, initiated by request of either the farmer or another person. Formal mediation meetings must be held with the objective of obtaining a voluntary settlement of the farmer's problems and providing for the future conduct of financial relations between the parties. Settlement must be satisfactory to all parties and must have a goal of permitting the farmer to reside in the farm residence and to continue to produce agricultural commodities. Formal mediation must always result in issuance of a mediation report. A negotiator may be assigned to assist a farmer in formal mediation.

4. "Informal mediation" means the process of assisting a farmer to obtain settlement. The administrator shall assign a negotiator to assist an eligible farmer in informal mediation. The negotiator will provide negotiation assistance and information to the farmer regarding problems.

5. "Initiating creditor" means a creditor that has notified the farmer of the availability of mediation.

6. "Mediator" means a person hired by or contracting with the commissioner to do formal mediation work as directed by the administrator.

7. "Negotiator" means a person hired by or contracting with the commissioner to do the negotiating work of informal and formal mediation as directed by the administrator.

~~7.1.~~ 8. "Party" means the following:

   a. For the purposes of chapters 18.5-02-03 and 18.5-02-03.1, any person notified of or attending a formal mediation meeting.

   b. For the purposes of chapter 18.5-02-02, any person as determined by the administrator based upon a review of the file and interviews with the negotiator and farmer, if

necessary. Parties include persons who provided to, or discussed with, the negotiator information ordinarily deemed confidential, such as financial, mental health, and similar personal information.

~~7.~~ 9. "Person" means a person as defined in subsection 5 of North Dakota Century Code section 6-09.10-01.

~~8.~~ 10. "Requesting creditor" means a creditor that has requested mediation.

~~9.~~ 11. "Service" means the agricultural mediation service established by the commissioner to disseminate information to farmers concerning farm problems, to assist in resolving problems, to provide negotiators to negotiate on behalf of the farmer, and to provide mediators to mediate between a farmer and any other person.

~~10.~~ 12. "Staff" means a person or those persons hired by the commissioner, who are not mediators or negotiators, but who work directly under the supervision of the administrator to assist in administering the service or to assist the credit review board in its responsibilities and duties.

History: Effective January 1, 1988; amended effective December 1, 1989; January 1, 1992; June 1, 1994.
General Authority: NDCC 6-09.10-09
Law Implemented: NDCC 6-09.10-03, 6-09.10-04

18.5-02-01-06. Written policies. The board shall adopt written policies governing the results sought to be achieved by the board for mediators, negotiators, and staff of the agricultural mediation service in carrying out the provisions of North Dakota Century Code chapter 6-09.10, and this chapter. The agricultural mediation service administrator shall implement the written policies of the board to achieve the results desired by the board as set forth in its written policies.

History: Effective January 1, 1988; amended effective December 1, 1989; June 1, 1994.
General Authority: NDCC 6-09.10-09
Law Implemented: NDCC 6-09.10-03

18.5-02-01-07. Recommendations.

1. The board will meet at least quarterly with representatives of the Bank of North Dakota regarding the Bank's farm loan programs to review policies and procedures of the Bank. Annually, or more frequently if needed, the board will develop and present recommendations to the industrial commission regarding the farm loan programs of the Bank of North Dakota.

2. The board will meet at least quarterly with representatives of the state board of vocational education to review policies and procedures of the board. Annually, or more frequently if needed, the credit review board will develop and present recommendations to the state board of vocational education regarding the adult farm management program.

History: Effective June 1, 1994.
General Authority: NDCC 6-09.10-09
Law Implemented: NDCC 6-09.10-02.1

18.5-02-01-08. Program implementation. The board shall develop and administer a grant program to provide farmers with access to the farm diversification analytic system. The program shall coordinate a farm management delivery system among the adult farm management program, agricultural mediation service, and the North Dakota state university extension service. Each of these three entities shall report at least quarterly to the credit review board addressing the following:

1. The extent and nature of assistance provided to farmers.

2. Number of farmers assisted.

3. Recommendations to the credit review board on how these three entities and others, if appropriate, can most effectively and efficiently serve farmers.

4. Future plans and goals of the entity.

5. Other matters as deemed appropriate by the board.

History: Effective June 1, 1994.
General Authority: NDCC 6-09.10-09
Law Implemented: NDCC 6-09.10-02.1

TITLE 28

Engineers and Land Surveyors, Board of Registration for Professionals

AUGUST 1994

CHAPTER 28-01-02.1

28-01-02.1-01. Meetings. The board shall hold meetings at least twice each year, on the ~~first~~ third Friday in ~~March~~ January and the third Friday in ~~September~~ July. The chairman may call special meetings when the chairman deems such meetings necessary. The executive secretary shall notify all members at least one calendar week in advance of a meeting, and shall give public notice as required by law. The date, time, and place of each meeting must be mutually agreed upon by a quorum of the board. All meetings of the board, whether regular meetings or special meetings, must be open public meetings.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-07

28-01-02.1-05. Forms - Records - Roster - Reports.

1. **Forms.** All applications and requests, for which the board has prescribed a form, must be presented on these forms as ~~prescribed~~. Copies of forms in use and instructions for their completion are available from the board office.

2. **Records.**

   a. The open records law requires that most records, papers, and reports of the board are public in nature and may be obtained through the executive secretary upon request and payment of costs of reproduction, handling, and mailing.

b. The board shall keep a record of all its proceedings, including its action on each application coming before the board.

c. The board shall keep a record of all applications and requests received.

d. The board shall keep a record of all certificates issued.

e. The board shall keep a record of all complaints received and of any actions taken on those complaints.

3. **Roster.** The closing date for all registrants to be included in the roster for any year is March first. The roster must contain, among other things, the names of all registered professional engineers and registered land surveyors showing the registrant's address. Copies of the roster must be made available and mailed upon request at no cost to each person holding a current registration and mailed to or made available to all county and city auditors and clerks of district courts. Copies must be placed on file with the secretary of state and with the libraries in accordance with the state repositories laws. Copies may be sold to the public at a cost not less than the cost of publication and postage.

4. **Annual reports.** An annual report, an annual audit report, and such other summaries as required must be filed with the appropriate state agencies as required, such as the office of the governor, state auditor, and secretary of state.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-09, 43-19.1-10, 43-19.1-11

28-01-02.1-06. Statement of purpose of rules - Amendments.

1. **Purpose of rules.** The purpose of these rules is to ensure proper, equitable, and uniform performance of the duties of the board of registration by regulation of its members, personnel, meetings, records, examinations, and the conduct thereof.

2. **Amendment of rules.** These rules may be amended at any regular meeting of the board by a majority vote of the board membership and in accordance with state statutes.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-08

28-01-02.1-07. Gender and definitions.

1. **Gender.** This title is to be read and interpreted in a nongender context without regard to race, creed, or sex.

2. **Definitions.** The terms used throughout this title have the same meaning as in North Dakota Century Code chapter 43-19.1, except:

   a. "Accreditation board for engineering and technology accredited curriculum" means those academic programs offered by institutions of higher learning which the national accreditation board for engineering and technology (ABET) certify to have met the criteria and qualifications required to receive the designations as accredited programs in the education, training, and preparation of the graduates from such programs; engineering curriculum must have the accreditation of the engineering accreditation commission (EAC) within the accreditation board for engineering and technology and land surveying curriculum must have either engineering accreditation commission or technology accreditation commission (TAC) of the accreditation board for engineering and technology to be acceptable to the board.

   b. "Application" means the act of furnishing data, documents, and such information under oath as may be required by the board and on forms prescribed by the board.

   c. "Code of ethics" means that set of rules prescribed by the board and adopted herein which govern the professional conduct of all registrants.

   d. <u>"Engineering intern" and "land surveyor (surveying) intern" are recognized by the board as synonymous with engineer-in-training and land surveyor-in-training provided the intern designations are conferred under the same requirements as the "in-training" designations pursuant to these rules.</u>

   <u>e.</u> "Examination" means that series of tests prescribed by the board which are developed to ascertain the level of proficiency in the fundamentals and in the practices of the professions regulated by the board.

History: Effective January 1, 1988; <u>amended effective August 1, 1994</u>.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-08

CHAPTER 28-02.1-01

28-02.1-01-01. Applications - Kinds of applications. Applications may be submitted to the board for registration as a:

1. Engineer-in-training.
2. Land surveyor-in-training.
3. Professional engineer.
   a. Examination.
   b. Endorsement.
4. Registered land surveyor.
   a. Examination.
   b. Endorsement.
5. Professional engineer temporary permitholder.
6. Business with a certificate of authority to practice engineering or land surveying.
7. Reinstatement for lapsed registration of a certificate holder.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-08

28-02.1-01-02. Completing applications.

1. All data and information requested on the board's application forms must be furnished accurately and completely.
2. When space provided on forms is inadequate, use supplementary sheets provided by this board (or if not provided, sheets of a good grade of white paper, eight and one-half by eleven inches [215.90 by 279.40 millimeters] are to be used).
3. All applications made to this board must be subscribed and sworn to on the forms used by the applicant before a notary public or other persons qualified to administer oaths.
4. In order to allow sufficient time for processing and for securing examinations, all applications which may require examinations must be filed with this board ~~at least forty-five days before the date set for the appropriate examinations~~

prior to January first for the April examinations and July first for the October examinations.

5. Withholding information or providing statements which are untrue or misrepresent the facts may be cause for denial of an application.

6. It is the responsibility of the applicant to supply correct addresses of all references and to be sure that the references are supplied as requested. If a reference fails to respond, this will delay the processing of an application either until a reply is obtained or another reference is ~~given~~ supplied.

7. In relating experience, the applicant must account for all employment or work experience for the period of time which has elapsed since the beginning of the employment record. If not employed, or employed in other kinds of work, this should be indicated in the experience record.

8. Applications for registration properly executed and issued with verification by the national council of ~~engineering~~ examiners for engineers and surveyors (~~NCEE~~ NCEES) will be accepted in lieu of the same information that is required on the form prescribed and furnished by this board.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-12

28-02.1-01-04. Applications from applicants with degrees from foreign schools.

1. All foreign language documentation submitted with the completed application must be accompanied with translations certified to be accurate by a competent authority.

2. All applicants shall furnish evidence of experience which can be verified.

3. All applicants seeking registration must be prepared to write examinations which are administered in the English language.

4. National council of engineering examiners' recommendations on foreign engineering curricula must generally serve as a board's guide for evaluation.

5. Those applicants who for political or other valid reasons are unable to obtain transcripts of their college shall be required to complete a supplementary application form as approved by the board or the national council of engineering examiners.

6. Foreign curricula may be required to be evaluated by university faculty administering engineering graduate school requirements in this state and such evaluations may be used as a guide by the board.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-13

28-02.1-01-05. Disposal of applications. Applications may be approved; deferred for further information, more experience, acceptable references, or other reasons; or may be denied.

1. **Approved applications.** When an application is approved by the board members showing that the applicant has met all the requirements for registration or certification required by the statutes of this state, the applicant must be granted registration or certification with notification by the executive secretary of the board.

2. **Deferred applications.** Applications deferred for any reason are retained on file pending later ~~disposal~~ disposition when proper remedy as requested is presented.

3. **Denied applications.** When an application is denied, it is kept on file for one year and then destroyed. Applications may be denied (all and any approval thereof) when in the board's judgment: (a) reinstatement is requested after revocation and there is insufficient rehabilitation; or (b) an application has been denied for cause in other jurisdictions.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-25

28-02.1-01-06. Reconsideration of applications. Reconsideration may be requested of an application which has been denied or deferred when the request is based on additional information or reconsideration, or both. Request must be made within one year after the decision was made to reject the original application.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-08, 43-19.1-14, 43-19.1-17

28-02.1-01-07. Retention of records of applications.

1. All applications, approved or deferred, will be retained in permanent files maintained by the board.

2. All applications for which required information has not been furnished for one year or more after the last entry in the applicant's file must be deemed to be an incomplete application. Incomplete applications may be destroyed.

3. Information may be extracted from approved applications to prepare the required publication of the roster. Such information may be stored on computer storage disks or tapes. From time to time information may be added to the records as it is supplied to the board. Added information may include address changes, notices of disciplinary actions, suspensions, lapses, or reinstatements.

4. At all times, upon proof of identity, an applicant's file is available for review. In no case may original documents be altered, removed, or returned. Application records once submitted become the property of the board.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-10

CHAPTER 28-02.1-02

28-02.1-02-01. Processing of applications.

1. Application forms for registration as a professional engineer or land surveyor may be obtained from the office of the secretary of the board of registration for professional engineers and land surveyors.

2. Applications must be received in the board office ~~at least forty-five days before the scheduled date for any professional engineer or land surveyor examination~~ by January first for the April examinations and by July first for the October examinations.

3. All information received from references named by the applicant must be ~~obtained by~~ received at the board office. No member of the board may be named as a reference.

4. ~~No~~ An applicant may not be admitted to the examination until the applicant's application has been received, processed, and approved by the board.

5. An applicant may not confer with any member of the board while it is in session about the applicant's case while it is before the board. This, however, does not apply to any special committee which the board appoints nor to the executive secretary of the board.

6. Applicants whose applications have been approved, but who fail to appear for examination four consecutive times, must be deemed to have withdrawn their applications.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-08, 43-19.1-12

CHAPTER 28-02.1-04

28-02.1-04-02. Experience. The following describes what the board considers acceptable experience. The applicant must provide proof that the experience meets these requirements.

1. The experience must be gained following graduation or training when credit is to be granted on academic achievement.

2. The experience gained through military service must be substantially equivalent in character to civilian experience in similar fields or disciplines. Generally, military experience is not favored by the board unless the applicant served in a military engineering related component of the armed services.

3. Experience must be gained under the supervision of a registered professional.

4. Experience must be substantially related to the registration or discipline applied for. Dual registration must fulfill experience requirements for each application without duplicate credits for time of gaining experience.

5. Generally, the board will require responsible charge and design components for an applicant in fulfilling experience requirements if the applicant is seeking professional engineering registration.

6. An engineering or land surveying applicant may be granted one year's experience for each postgraduate degree following a baccalaureate degree in the field of practice.

7. Board does not recognize construction staking as land surveying experience.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-14, 43-19.1-15, 43-19.1-16, 43-19.1-17

CHAPTER 28-02.1-05

28-02.1-05-01. Qualifications and requirements - Engineers-in-training. Engineer-in-training applicants must satisfy the following requirements:

1. A graduate of a four-year or more accreditation board for ~~engineering-and-technology~~ accredited engineering curriculum may be approved to write the fundamentals of engineering (EIT) examination. Senior year students within one year of graduation may be approved to write the fundamentals of engineering exam.

2. A graduate of a four-year nonaccreditation board for ~~engineering-and-technology~~ accredited engineering curriculum and four additional years of acceptable experience may be approved to write the fundamentals of engineering (EIT) examination.

3. All other applicants not qualifying under subsections 1 and 2 must acquire ten years of acceptable engineering experience before they may be approved to write the fundamentals of engineering (EIT) examination.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-14, 43-19.1-15

28-02.1-05-02. Qualifications and requirements - Professional engineer. Applicants with variant educational backgrounds will have different examination and experience requirements. These requirements must be acquired sequentially as listed in the following categories:

1. Graduates from a four-year or more accreditation board for accredited ~~engineering-and--technology~~ engineering curricula must satisfy the following requirements:

   a. An eight-hour examination in engineering fundamentals. (Engineer-in-training certificate)

   b. A minimum of four years of acceptable experience in engineering subsequent to graduation and prior to writing the principles and practice of engineering (PE) examination.

   c. An eight-hour examination in the principles and practice of engineering (PE).

2. Graduates from nonaccredited engineering curricula must satisfy the following requirements:

a. An eight-hour examination in engineering fundamentals. (Engineer-in-training certificate)

b. A minimum of eight years' experience in engineering work of a character satisfactory to the board subsequent to graduation and prior to writing the principles and practices (PE) examination.

c. An eight-hour examination in the principles and practice of engineering (PE).

3. All other applicants not qualifying under subsections 1 and 2 must satisfy the following requirements:

a. An eight-hour examination in engineering fundamentals. (Engineer-in-training certificate)

b. A minimum of twenty years of acceptable practice in engineering work, the last ten years of which has been in responsible charge of engineering work of a character satisfactory to the board.

c. An eight-hour examination in the principles and practice of engineering (PE).

4. Teacher of engineering.

a. An eight-hour examination in engineering fundamentals is required. (Engineer-in-training certificate)

b. The individual must have taught, in an engineering school of recognized standing, a minimum of four years and must have a minimum of two years of practical engineering experience satisfactory to the board.

c. An eight-hour examination in the principles and practice of engineering (PE) is required.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-14

CHAPTER 28-02.1-06

28-02.1-06-01. Qualifications and requirements - Land surveyors-in-training. Land surveyors-in-training applicants must meet the following requirements:

1. A graduate of a four-year or more accreditation board for engineering and technology accredited land surveying or engineering curriculum approved by the board may be approved to write the fundamentals of land surveying (LSIT) examination. Senior year students within one year of graduation may be approved to write the fundamentals of land surveying (LSIT) examination.

2. A graduate of a non-accreditation board for engineering and technology accredited curriculum in land surveying or engineering approved by the board and with two or more years of acceptable land surveying experience may be approved to write the fundamentals of land surveying (LSIT) examination.

3. a. All other applicants not qualifying under subsections 1 and 2 must have at least four ~~or more~~ years of acceptable land surveying experience before they may be approved to write the fundamentals of land surveying (LSIT) examination.

   b. Nongraduates of any land surveying or engineering curriculum approved by the board may be granted up to two years credit toward their experience requirements.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-16.1

28-02.1-06-02. Qualifications and requirements - Registered land surveyor. Applicants with variant educational backgrounds have different examination and experience requirements. These requirements must be acquired sequentially as listed in the following categories:

1. A graduate of a four-year or more accreditation board for engineering and technology accredited land surveying or engineering curriculum approved by the board:

   a. An eight-hour examination in fundamentals of land surveying (LSIT certificate).

   b. A minimum of four years of experience in land surveying work of a character satisfactory to the board, and indicating that the applicant is competent to practice land surveying.

c. ~~A four-hour~~ An examination in the principles and practices of land surveying (LS).

d. A take-home orientation examination ~~(four-hour equivalent)~~, pertaining to land surveying laws, procedures, and practices in North Dakota.

2. A graduate from a non-accreditation board for engineering and technology accredited curriculum in land surveying or engineering approved by the board:

a. An eight-hour examination in fundamentals of land surveying (LSIT certificate).

b. A minimum of six years' experience in land surveying work of a character satisfactory to the board, and indicating that the applicant is competent to practice land surveying.

c. ~~A four-hour~~ An examination in the principles and practices of land surveying (LS).

d. A take-home orientation examination ~~(four-hour-equivalent)~~ pertaining to land surveying laws, procedures, and practices in North Dakota.

3. All other applicants not qualifying under subsections 1 and 2:

a. An eight-hour examination in the fundamentals of land surveying (LSIT certificate).

b. A minimum of eight years of experience in land surveying of a character satisfactory to the board indicating that the applicant is competent to practice land surveying. Nongraduates of any land surveying or engineering curriculum approved by the board may be granted up to two years credit toward their experience requirements.

c. A four-hour examination in the principles and practices of land surveying (LS).

d. A take-home orientation examination ~~(four-hour-equivalent)~~ pertaining to land surveying laws, procedures, and practices in North Dakota.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-16, 43-19.1-16.1

28-02.1-08-02. Seals.

1. The board has adopted standard seals or stamps similar to those illustrated in the appendix to this chapter for use by registered professional engineers and land surveyors as prescribed by law.

2. Seals may be of rubber stamp or metal impression type and are ordered through the secretary of the board on forms supplied for this purpose.

3. All seals and stamps must be validated by the signature of the holder of the seal.

4. The board cautions against the use of computer-aided design (CAD) seals for these reasons:

   a. Risks of misuse;

   b. Professional cannot delegate the responsibility to affix the seal to his work; and

   c. Original plans and documents require personal original signatures (and original seals) as opposed to photocopies or facsimiles.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-21

SEAL DESIGNS

1. Professional Engineer Stamp

2. Land Surveyor Stamp

3. Combined Professional Engineer and Land Surveyor Stamp

CHAPTER 28-02.1-10

28-02.1-10-01. Examinations.

1. The engineering and land surveying examinations must be held in April and October each year, with the time, date, and place set by the board.

2. Orientation examinations (a take-home ~~test~~ exam) for land surveyors requires a score of eighty or greater to pass the examination.

3. An applicant failing to pass a professional examination may take the next scheduled examination after six months by payment of the examination fee provided the applicant achieved a score of at least fifty.

4. The board may require one or more questions in examinations measuring familiarity with the code of ethics. Similarly, in furtherance of the board's determination of rehabilitation, an examination on the code of ethics may be required.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-19

28-02.1-10-02. Fees. Effective July 1, 1987, the following fees ~~are required~~ may not exceed:

Registration Fees

Professional engineer	$ 50.00
Land surveyor	$ 50.00
~~Engineer-in-training~~	~~$ 35.00~~
~~Land surveyor-in-training~~	~~$ 35.00~~
Partnership or corporation	$100.00
Temporary permit	$ 50.00

Examination fee (in addition to the registration and renewal fees) at board cost, including scoring and five dollars for postage and handling and proctoring.

Cost of administration of continuing education or professional competency programs will be assessed and billed annually to the professions requesting these services. Billings will be separately identified apart from the renewal fees.

Renewal Fees

Professional engineer	$ ~~27.50~~ 50.00

Land surveyor	~~$ 27.50~~ 50.00
Professional engineer and land surveyor	~~$ 52.00~~ 95.00
Partnership or corporation	$100.00

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-18, 43-19.1-27

28-03.1-01-11. Compensation from other parties. The engineer or land surveyor will not accept compensation, financial or otherwise, from more than one interested party for the same service~~,-or-for-services pertaining-to-the-same-work,-unless-there--is--full--disclosure--to--and consent-of-all-interested-parties~~. The engineer or land surveyor:

1. Will not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.

2. Will not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with the engineer's or land surveyor's clients or employer in connection with work for which the engineer or land surveyor is responsible.

History: Effective January 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 43-19.1-08
Law Implemented: NDCC 43-19.1-24

TITLE 30

Game and Fish Department

STAFF COMMENT: Chapter 30-02-06 contains all new material but is not underscored so as to improve readability.

CHAPTER 30-02-06
NORTH DAKOTA GAME WARDEN ASSOCIATION MOOSE RAFFLE

30-02-06-01. Procedures and conditions. Prior to the printing or distribution of any raffle tickets, the North Dakota game warden association shall submit to the director of the North Dakota game and fish department an overall plan of raffle procedures and program conditions for the director's approval. A detailed copy of guidelines for volunteers who are assisting in the sales of raffle tickets must also be submitted. Upon the director's approval, the North Dakota game warden association must provide a copy of these guidelines to all volunteers prior to the volunteers being issued tickets for sale to the public. The raffle must be organized and conducted in accordance with chapter 99-01-09 and North Dakota Century Code chapter 53-06.1.

History: Effective May 1, 1994.
General Authority: NDCC 20.1-08-04.2
Law Implemented: NDCC 20.1-08-04.2

30-02-06-02. Accounting statement. The North Dakota game warden association shall provide the director of the game and fish department with a detailed accounting statement within thirty days after the completion of the raffle drawing. This statement must include

information regarding raffle expenses, gross and net raffle income, number of tickets sold and unsold, as well as documented proof that no more than ten percent of the gross raffle proceeds were used to promote the raffle.

History: Effective May 1, 1994.
General Authority: NDCC 20.1-08-04.2
Law Implemented: NDCC 20.1-08-04.2

30-02-06-03. Financial report. The North Dakota game warden association shall provide the director of the game and fish department with an annual financial report to show documentation of how all raffle proceeds were used and the balance of unspent funds.

History: Effective May 1, 1994.
General Authority: NDCC 20.1-08-04.2
Law Implemented: NDCC 20.1-08-04.2

CHAPTER 30-03-05

30-03-05-01. Fishing contest defined. A fishing contest is any event where prizes or cash are given for catching fish from waters open to public use. These events include~~,-but-are-not-limited-to,~~ high value tag contests, fishing tournaments, biggest fish contests, and contests giving prizes for the largest number or weight of fish. Entry fees must be collected and listed separately from other activities. Fishing contests do not include the following:

1. Individual big fish promotions ~~not--based--on--tag-returns~~ sponsored by resident, local businesses not charging any entry or participation fee. If any local, resident business desires to sponsor a high value (prizes exceeding one thousand dollars cash or merchandise) individual fishing contest, the game and fish ~~commissioner~~ director shall designate the species of game fish to be included and the contest may be limited to only those species in select waters.

2. Any local fishing tournament ~~not~~ charging an entry or participation fee ~~in-excess~~ of less than five dollars per ~~fisherman--or--with--a--total--of-fifty-or-fewer-participating boats,-or-both~~ angler, unless there are more than forty-nine participating individuals or twenty-four participating boats.

3. Local tournaments where fishing is ~~from-shore-or~~ through the ice ~~for-nongame-species~~ where the activity is beneficial to the fishery resource as determined by the game and fish director.

History: Effective March 1, 1984; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-05(22)
Law Implemented: NDCC 20.1-02-05(22)

30-03-05-02. Organizations eligible. Only nonprofit veterans, charitable, education, religious, and fraternal organizations, civic and service clubs, and public-spirited organizations, as those organizations are defined in North Dakota Century Code chapter 53-06.1 will be issued permits to hold fishing contests. Exemptions to this requirement may be granted by the game and fish ~~commissioner~~ director, if, in the opinion of the ~~commissioner~~ director, the contest is not detrimental to the fishery resource or to the public, or both.

History: Effective March 1, 1984; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-05(22)
Law Implemented: NDCC 20.1-02-05(22)

30-03-05-03. Use of proceeds. A minimum of seventy-five percent of any entry or participation fee paid by the contestants for fishing activities must be returned to the contestants as cash or merchandise

(must be cash equivalent and cannot include donated merchandise) payback. Payback procedures must be stated in the tournament rules and regulations. A minimum of ten percent of the gross proceeds from entry or participation fees must be expended on fishery conservation projects or for providing public access to fishing areas and the intended project must be identified on the permit application form. Moneys for fishery conservation or public access projects must be allocated within ninety days after the completion of the tournament. The fishery conservation projects and public access projects must be approved by the game and fish ~~commissioner~~ director.

In the absence of an outside sponsor, the tournament committee may retain a maximum of fifteen percent of the gross proceeds from entry or participation fees for expenses incurred in putting on the contest.

History: Effective March 1, 1984; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-05(22)
Law Implemented: NDCC 20.1-02-05(22)

30-03-05-04. Application. Anyone desiring to hold a fishing contest must submit an application for a permit to the game and fish ~~commissioner~~ director at least ~~forty-five~~ thirty days prior to the start of the contest. Information on the application must include the name of the applicant, location of the waters where the contest is to be held, the dates of the contest, the number of participants expected for the contest, the amount of the entry fee, identification of the intended fishery conservation or public access project, a copy of the tournament regulations, and the name of a person to be contacted for additional information about the contest.

History: Effective March 1, 1984; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-05(22)
Law Implemented: NDCC 20.1-02-05(22)

30-03-05-05. Fishing contest rules and regulations.

1. In a boat tournament, committee/sponsors shall provide boat launching and loading assistance to tournament participants.

2. All approved tournaments shall utilize a tagging system designed to ~~reduce~~ prevent high-grading of game fish. This requirement does not apply to ~~catch-and-release~~ live-release fishing contests.

3. The ratio of tournament patrol boats to participant boats shall at no time be less than one to twenty in fishing contests involving one hundred or fewer boats and one to twenty-five for contests involving more than one hundred boats.

4. The North Dakota game and fish department may add further tournament regulation restrictions if deemed necessary.

5. Fishing contests for all game and nongame fish, with the exception of paddlefish, pallid and shovelnose sturgeon, zander, and grass carp (white amur) are allowable.

History: Effective March 1, 1984; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-05(22)
Law Implemented: NDCC 20.1-02-05(22)

30-03-05-06. Reasons for denying permits. Permits may not be issued if the game and fish ~~commissioner~~ director believes the fishing contest does not or will not comply with game and fish rules or regulations, ~~will~~ or could be harmful to the fishing resource, or that public use facilities such as boat ramps, parking areas, campgrounds, and related facilities are inadequate to support the contest, or committee/sponsors have failed to submit timely reports in a previous year.

History: Effective March 1, 1984; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-05(22)
Law Implemented: NDCC 20.1-02-05(22)

30-03-05-07. Post-contest report required. Within thirty days after completion of the fishing contest, the permittee shall submit a report to the game and fish ~~commissioner~~ director. The report must include the number of contest participants, the quantity (number and total weight) and species of fish taken in the contest, the gross and net proceeds for the tournament, the percentage of the entry fees paid back to the participants as prizes, and suggested conservation projects for departmental approval. Failure to submit this report is justification for denial of future fishing contest permits. Moneys for fishing conservation or public access projects must be allocated within ninety days after the completion of the tournament.

History: Effective March 1, 1984; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-05(22)
Law Implemented: NDCC 20.1-02-05(22)

CHAPTER 30-04-05

30-04-05-02. License design. The following hunting, fishing, and fur-bearer stamps will be issued and are to be attached to the appropriate nonresident or resident fishing, hunting, and fur-bearer certificate: resident small game ~~{age--nineteen--and--over},--resident small-game-{under-the-age-of-nineteen}~~, nonresident small game, resident big game (deer and antelope), nonresident big game (deer and antelope), resident fur-bearer, resident fishing, fishing license for residents sixty-five years or over, fishing license for a resident totally or permanently disabled, nonresident fishing, nonresident short-term fishing, resident husband and wife fishing, nonresident nongame hunting, resident and nonresident permits to hunt deer in certain restricted areas, ~~wild--turkey,~~ resident and nonresident general game, and nonresident waterfowl hunting. A license for these categories shall consist of the appropriate signed stamp, the completed fishing, hunting, and fur-bearer certificate, and tags if required. For a license to be valid, required stamps for licenses must be attached in the designated positions on the certificate and the licensee's signature must be made in ink across the face of each stamp.

History: Effective March 1, 1983; amended effective May 1, 1994.
General Authority: NDCC 20.1-02-04
Law Implemented: NDCC 20.1-03-02, 20.1-03-03, 20.1-03-07.1, 20.1-03-11, 20.1-03-12

30-04-05-03. Combined licenses. The following licenses or permits are combined into one stamp each: ~~resident-big-game--{deer--gun only}--and--permit-to-hunt-deer-in-certain-restricted-areas;-nonresident big-game-{deer-gun-only}-and-permit-to-hunt-deer-in--certain--restricted areas;~~ resident general game and habitat restoration stamp; and nonresident general game and habitat restoration stamp.

History: Effective March 1, 1983; amended effective September 1, 1989; May 1, 1994.
General Authority: NDCC 20.1-02-04
Law Implemented: NDCC 20.1-03-12, 20.1-03-12.1

TITLE 33

Health and Consolidated Laboratories, Department of

MAY 1994

CHAPTER 33-03-11

33-03-11-01. Definitions. Words defined in North Dakota Century Code chapter 43-38 have the same meaning in this chapter, and in addition:

1. "Aseptic technique" means practices that render and keep the skin site and instruments free from all micro-organisms or contamination.

2. "Department" means the state department of health and consolidated laboratories.

3. "Initial license" means the first license.

~~2.~~ 4. "Person" means an individual human being.

~~3.~~ 5. "Relicensure" means any license issued after the initial license.

~~4. "State health officer" means the state health officer of the North Dakota state department of health and consolidated laboratories as defined in North Dakota Century Code title 23.~~

History: Effective September 25, 1979; amended effective February 1, 1992; May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-01

33-03-11-02. License required - Fees.

1. A person may not hold oneself out to the public as an electronic hair removal technician without a license issued by the ~~state-health-council~~ department.

2. A license may not be sold, assigned, or transferred.

3. The license shall expire midnight on December thirty-first of the year issued. License renewal shall be on a calendar year basis renewable on January first of each year.

4. The license shall be displayed in a conspicuous place easily viewable by the persons treated.

5. The license fee shall be thirty dollars each for an initial license for the first year or part of a year.

6. The relicensure fee shall be twenty-five dollars each per year or part of a year.

7. Licenses ~~will~~ shall be issued and license fees will be collected on a calendar year basis. License fees will not be prorated for a partial year.

History: Effective September 25, 1979; amended effective February 1, 1992; May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC ~~43-38-04~~ 43-38-03

33-03-11-03. Application for license. Application for a license shall be made to the ~~state-health-officer~~ department on forms prescribed by the ~~state-health-officer~~ department.

~~History:~~ Effective September 25, 1979; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11-04. Issuance and renewal of licenses.

1. The state health council shall delegate to the department the authority to manage and implement the electronic hair removal technician licensure program.

2. Upon receipt of an initial or relicensure application, the ~~state--health--council--will~~ department shall evaluate the applicant's qualifications. ~~The-evaluation-may-be-an-onsite inspection-for-the-purpose-of-sanitation-and-disease--control.~~

3. If minimum standards described in section 33-03-11-05 are met, the ~~state-health-council~~ department shall issue a license.

History: Effective September 25, 1979; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-02

33-03-11-05. Minimum standards for licensure.

1. An applicant for licensure must meet the minimum standards prescribed by this subsection.

   a. The applicant must be at least eighteen years of age.

   b. The applicant must have a general education equivalent to the completion of four years ~~in~~ of high school or certificate of general educational development.

   c. An electronic hair removal technician must have successfully completed a course in an electrolysis school which meets the minimum standards as set forth in section 33-03-11-08 in electronic hair removal in the technique of removing hair other than through the use of the electric needle. The applicant must provide one letter of recommendation for the issuance of a technician license from one instructor knowledgeable in the electronic hair removal process without the use of an electric needle.

   d. ~~The licensee must at all times employ sanitary and disease control practices acceptable to the state health council.~~ Written ~~effective~~ procedures for aseptic techniques acceptable to the department must be ~~available and followed~~ developed and implemented by the licensee.

2. Electronic hair removal technicians practicing or holding a license to practice from the North Dakota board of hairdressers and cosmetologists on June 30, 1979, will be deemed qualified and will be issued their licenses upon certification from the board as to the existence of such licenses. All other applicants for a license must document their qualifications for licensure in accordance with this section.

3. A licensed electronic hair removal technician is not permitted to remove hair with the use of the electric needle, but is permitted to practice any other method of hair removal.

History: Effective September 25, 1979; amended effective February 1, 1992; May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11-06. Denial, suspension, or revocation of license. The ~~state-health-council~~ department may deny, suspend, or revoke a license for noncompliance with this chapter.

History: Effective September 25, 1979; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11-07. ~~State-health-officer~~ Department - Administration of program. The ~~state--health--officer~~ department shall administer the licensing program in North Dakota~~.--Pursuant~~ pursuant to subsection 5 of North Dakota Century Code section 43-38-03~~,-it--is--the--intent--of--the state--health--council-to-set-program-policy-through-the-promulgation-of regulations--as--charged--in--the--statute--and--to---vest---all---other administrative-powers-in-the-state-health-officer~~.

History: Effective September 25, 1979; amended effective February 1, 1992; May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 23-01-05, 43-38-03

33-03-11-08. Recognition of curriculum.

1. The ~~state---health--council~~ department will recognize an applicant for a license as eligible for a license when the applicant has graduated from a school which has provided at a minimum two hundred hours of training in the following curriculum areas taught by instructors:

a. ~~Subject~~	~~Hours~~
~~(1)~~ Practical training in the following branches of electrolysis:	200
Sanitation and sterilization as applied to electrology	
Patron protection	
Universal precautions	
Use of the electrical currents	
Use of equipment and instruments	
Precautionary measures to observe before and after treatment	
Immediate aftercare	
Home care (patron instruction	

in home care)

Destruction of the papilla

Observation (demonstration and result of work)

Note: At least two-thirds of the hours in this subject shall be in actual performance of services on another person.

b. ~~(2)~~ Theoretical and practical training in the following:

Ethics, professional conduct

Optional and unassigned hours

c. ~~(3)~~ Theory covering the following subjects:

Sanitation and sterilization as applied to electrology

Universal precautions

Electricity

Dermatology

Trichology

Bacteriology

Study of the peripheral vascular system (capillaries)

Study of the sensory nervous system (nerve endings)

Hygiene

Provisions of the electrolysis law and regulations pertinent to the practice of electrology.

2. Students enrolled in North Dakota are prohibited to do practical work on patrons outside of school premises. Practical work may be done by students within the school premises and under the direct supervision of an instructor.

3. ~~All--electrolysis--schools--in-North-Dakota-are-to-post-a-sign with-letters-at-least-four--inches--[10.16--centimeters]--tall~~

~~conspicuously--placed--to--be--seen-by-the-school's-patrons-as follows:~~

~~All--electrolysis--work--in--this--school--is-performed-by students--under--the--direct--supervision--of--a--licensed electrologist.---You-will-only-be-charged-a-reasonable-fee to-cover-expenses-of-equipment-and-materials-used.~~

~~4.~~ Cosmetology schools in North Dakota teaching the theory of electrolysis to their cosmetology students as part of the cosmetology curriculum are exempt from the provisions of this chapter. However, such instructions on electrolysis in a cosmetology school will not be credited toward the number of hours required in an electrolysis school for licensure purposes.

History: Effective September 25, 1979; amended effective February 1, 1992; May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11-09. Curriculum substitution. In lieu of the course requirements listed in section 33-03-11-08, operators of depilatron and removatron-type hair removal machines shall be required to complete forty hours of coursework in an acceptable program designed specifically for the machines which they will be operating. Such coursework shall be submitted to the department and approved on a case-by-case basis prior to operator ~~certification~~ licensure. In addition to these requirements, an operator of a depilatron or removatron-type hair removal machine shall be a licensed cosmetologist in accordance with North Dakota Century Code chapter 43-11.

History: Effective February 1, 1983; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

CHAPTER 33-03-11.1

33-03-11.1-01. Definitions.

1. "Approved" means determined acceptable in writing, by the department.

2. "Aseptic technique" means practices that render and keep the skin site and instruments free from all micro-organisms or contamination.

3. "Department" means the department of health and consolidated laboratories.

~~3.~~ 4. "Electrologist" means a person proficient in the permanent removal of hair by electrology and who is currently licensed by the department to practice in North Dakota.

~~4.~~ 5. "Electrology" means the ~~method of removing hair from the human body by application of an electrical current to the hair papilla by means of a probe to cause decomposition, coagulation, or dehydration of the hair papilla and thus permanently remove the hair~~ permanent removal of hair by the conduction of an electrical current through a probe inserted into the hair follicle to destroy the papilla.

~~5.~~ 6. ~~"Electrology related" means workshops, home study courses approved by the international board of electrologist certification or the American electrology association, or workshops sponsored by hospitals or other health care agencies specific to infection control or the hands on practice of electrology that have been completed by licensed electrologists to obtain necessary continuing education hours for licensure~~ "Electrology continuing education hour" means a sixty-minute session or home study course approved by a national electrology association or organization, or an infection control or electrology-related session provided by a hospital or another health care related setting.

~~6.~~ 7. "Facility" means ~~physical place of business and includes all~~ areas used by the electrologist and ~~patients during business hours, including, but not limited to, the treatment rooms and waiting and reception areas~~ client.

~~7. "Grandfather provision" means the one time opportunity for licensure without examination under the specific provisions of this chapter.~~

~~3.~~ 8. "Initial license" means the first license.

9. "Instruments" means probes, forceps, hemotstats, tweezers, or other equipment required for the actual hair removal process.

10. "National association or organization" means the American electrology association, the international guild of professional electrologists, or the society of clinical and medical electrologists.

11. "Official transcript" means a school's certified document ~~certified-by-an-approved--school--indicating~~ that lists the courses, course hours, and ~~types-of-coursework,-examinations, and-scores~~ grades of an electrolysis program.

~~11.~~ 12. "Probe" means the needle or filament used to administer the electric current to the hair-papilla ~~to--permanently--remove hair~~.

~~12.~~ 13. "Provisional" means license granted based on conditions as established specifically by the department in response to ~~the licensure~~ noncompliance ~~issues--found--to-be-present-or-have been--present--on--a---recurring---basis---during---the---past twenty-four-month--period--related-to-the-practice-or-facility of-an-individual-electrologist-or--electrology--business~~ with the licensure requirements in this chapter.

~~13.~~ 14. "Relicensure" means the issuance of any license ~~issued~~ after the initial license.

~~14.~~ 15. "Renew" means to extend a current license ~~issued~~ for one year if compliance with licensure rules has been maintained.

~~15.~~ 16. "Violation of licensure requirement" means noncompliance with requirements of this chapter.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-01

33-03-11.1-02. ~~License-required---Fees~~ Licensure requirements.

1. The state health council ~~delegates~~ shall delegate to the ~~state health--officer~~ department the authority to manage and implement the electrology licensure program.

2. A person may not hold themselves out to the public as an electrologist or practice electrology without a current license issued by the department.

3. A license may not be sold, assigned, or transferred.

4. The license expires at midnight on December thirty-first of the year issued. Licensure renewal must be on a calendar year basis renewable on January first of each year.

5. The license must be displayed in a place easily viewable by clients and the public.

6. ~~Electrologist--licenses must be issued by the department.~~ The initial license fee is fifty dollars ~~annually for new licenses~~ for the first year and will not be prorated for a partial year.

7. The license renewal fee is twenty-five dollars per year. Licenses will be issued and license fees will be collected on a calendar year basis and will not be prorated for a partial year.

8. A licensed electrologist must practice permanent hair removal through the use of an electronic probe.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-02, 43-38-03

33-03-11.1-03. Application for initial licensure. Application for a an initial license must be made to the department on forms prescribed by the department and must be accompanied by:

1. The ~~first-year~~ initial license fee~~.~~;

2. Proof of age of at least eighteen and identity such as driver's license or birth certificate, and a copy of a high school diploma, or ~~equivalency--examination~~ certificate of general educational development, or degree from an accredited institution of higher education~~.~~; and

3. ~~Official~~ An official transcript from an electrology school meeting the program requirements for training as defined in section 33-03-11.1-17 ~~or--results--of--having satisfactorily completed an approved electrology licensure examination~~.

~~4.--Electrologists---not--licensed--by--January-1,--1992,--by--the department--must--document---successful---completion---of---an electrology--course--from-an-electrology-school-which-at-least meets-the--standards--set--forth--in--section--33-03-11-08--or successfully---complete---a---department-approved--electrology licensure-examination.~~

5.--A--licensed-electrologist-must-practice-permanent-hair-removal through-the-use-of-a-probe.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-02, 43-38-03

33-03-11.1-04. Applications for licensure and grandfathering provision.

1.--Applicants--who--fail--to-complete-the-application-process-and obtain-a-license-from-the-department-prior-to-January-1,-1992, will-be-required-to-meet-the-standards-in-this-chapter.

2.--Electrologists-holding-current-licenses-with-the-department-as of-January-1,-1992,-will-be--considered--to--be--eligible--for ongoing-licensure-with-the-department,-provided-the-individual continues-to-actively-practice-electrology--and--provides--the department--with--evidence--of--required--continuing-education hours. Repealed effective May 1, 1994.

History: Effective-February-1,-1992.
General Authority: NDCC-43-38-03
Law Implemented: NDCC-43-38-03

33-03-11.1-05. Electrologist licensure examination.

1.--Persons--applying--for--licensure-as-an-electrologist-in-North Dakota--may--either--satisfactorily--complete--the---licensure examination--or--provide--to--the--department-documentation-of satisfactory-completion--of--a--school--meeting--the--criteria described-in-section-33-03-11.1-11.

2.--The--applicant-for-examination-for-electrology-licensure-shall notify-the-department-regarding-scheduling-of-the-examination.

3.--The-examination-will-consist-of-a-nationally-accepted,-legally defensible,-standardized-written-test-and-a--practical--skills demonstration--component.---In--addition,-the-examination-must consist-of-a-test-mechanism-that-has--been--developed--from--a pool--of--test--questions-to-ensure-that-more-than-one-form-of the-written-test-is-available-for-administration.

4.--The--practical-skills-demonstration-portion-of-the-examination must-consist-of-actual-facial--hair--removal--proctored--by--a currently--licensed--electrologist.---The-hair-removal-must-be performed-on-an-individual-provided-by-the-examinee.

5.--Both---the---written--and--practical--skills--portion--of--the examination-must-be-performed-without-assistance--of--manuals, notes,--books,--or--any-other-additional-materials-or-persons.

~~The practical skills component of the examination must be proctored by a licensed electrologist.~~

~~6. Examinees must achieve a passing score on each component of the examination to be considered eligible for state licensure as an electrologist.~~

~~7. Examinations meeting this criteria must be submitted for review and approval by the department prior to being acceptable as a mechanism for licensure as an electrologist in North Dakota.~~ Repealed effective May 1, 1994.

History: ~~Effective February 1, 1992.~~
General Authority: ~~NDCC 43-38-03~~
Law Implemented: ~~NDCC 43-38-03~~

33-03-11.1-06. Notification of examination date, and results. ~~After completion and scoring of an approved test with results forwarded to the department, the department will notify the examinee in writing of the test scores and the examinee's eligibility for licensure.~~ Repealed effective May 1, 1994.

History: ~~Effective February 1, 1992.~~
General Authority: ~~NDCC 43-38-03~~
Law Implemented: ~~NDCC 43-38-03~~

33-03-11.1-07. Retake of examination sections.

~~1. A candidate may not take the entire examination or a section of the examination more than three times before becoming ineligible for licensure.~~

~~2. If a candidate fails the examination or a section of the examination on the third attempt, the candidate must satisfactorily complete an approved electrology course prior to being eligible for licensure.~~ Repealed effective May 1, 1994.

History: ~~Effective February 1, 1992.~~
General Authority: ~~NDCC 43-38-03~~
Law Implemented: ~~NDCC 43-38-03~~

33-03-11.1-08. Issuance, renewal, and reactivation of a license.

1. Upon receipt of a an initial licensure application or a relicensure application, the department shall evaluate the qualifications of the applicant for compliance with the requirements of this chapter.

2. Falsification of information on the application shall constitute license revocation.

3. The department may ~~perform--an~~ evaluate an electrologist's compliance with these licensure requirements at any time through:

   a. An announced or unannounced onsite inspection ~~of-the facility-or--place--of--business--if--the--department--has received--a--complaint--of-noncompliance-with-this-chapter against--persons--performing--services--as--described---in chapter--33-01-11.1~~ scheduled at the discretion of the department; or

   b. A request for submission of written documentation verifying compliance.

~~3.~~ 4. If the licensure applicant meets the requirements as found in this chapter, including the application fee and continuing education hours, the department shall issue a license.

~~4.~~ 5. Licenses not renewed by December thirty-first of each year will be deemed suspended and an additional fee not to exceed ten dollars must be assessed from the applicant. Licenses not renewed by March of each year will be terminated and reapplication for licensure will be needed to reinstate the license.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11.1-09. Continuing education.

1. To maintain licensure, electrologists must obtain a minimum of five ~~hours--of--electrology-related~~ electrology continuing education hours per year.

2. ~~Home-study--electrology-related--continuing-education-programs may-comprise-not-more-than-two-hours-of-the--total--five--hour yearly-requirement.~~

~~3.~~ Certificates of completion to verify number of continuing education hours must be submitted to the department along with annual renewal applications and fees in order to obtain a renewal license.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11.1-10. Infection control and safety. ~~Facilities utilized as the site for the practice of electrology must provide a clean and sanitary environment to promote appropriate infection control. The environment must be clean, well lighted, provide good ventilation, and infection control practices must comply with requirements described in Hygienic and Safety Standards for the Practice of Electrology, Journal of Electrology, The Journal of the American Electrology Association, Volume 4, January 1989, Number 1.~~ Written policies and procedures must be established and implemented by the licensed electrologist for infection control and safety and shall include at a minimum the following:

1. Handwashing and glove use.

   a. Hands must be washed before treatment of each client, before donning gloves, and immediately after gloves are removed.

   b. Handwashing must include the use of antibacterial soaps:

      (1) Bar soaps must be kept on a rack to allow water to drain.

      (2) Liquid soap containers must be disposable; or

      (3) Reusable liquid soap containers must be cleaned and refilled with fresh soap at least once a month.

   c. The handwashing technique used must include:

      (1) Use of antibacterial soap and water;

      (2) A vigorous rubbing together of all surfaces of lathered hands, especially between fingers and fingernail areas, for at least fifteen to twenty seconds;

      (3) A thorough rinsing under a stream of water; and

      (4) Hands dried thoroughly with a clean disposable paper towel, then faucets turned off with the paper towel.

   d. A new pair of nonsterile disposable examination gloves must be worn during the treatment of each client.

   e. When a treatment session is interrupted, gloves must be removed and discarded. When gloves are removed during a treatment session, hands must be washed as provided in subdivision c and a fresh pair of gloves used prior to continuing the treatment session.

f. Gloves must be worn during the procedures of mechanical precleaning, cleaning, rinsing, and drying of needles or probes and forceps or tweezers.

g. Torn or perforated gloves must be removed immediately, and hands must be washed as provided in subdivision c after the gloves are removed.

2. Cleaning and sterilizing instruments or items and other safety precautions.

a. Needles or probes and forceps or tweezers must either be presterilized disposable or thoroughly cleaned and sterilized between clients.

b. Reusable instruments and containers must be cleaned and then sterilized consistent with the following:

(1) New reusable instruments must be cleaned and then sterilized before initial use.

(2) All containers including the container lids used to hold contaminated needles or probes and forceps or tweezers must be cleaned and sterilized at least daily or whenever overtly contaminated on days the electrologist is practicing electrology.

(3) Pickup hemostats, forceps, or tweezers and holding cylinder must be cleaned and sterilized at least daily or whenever overtly contaminated on the days the electrologist is practicing electrology.

(4) Unused instruments in containers that have been opened must be resterilized after a twenty-four-hour period.

(5) Instruments contaminated before use, for example, dropping or touching a soiled surface, must be resterilized before use.

(6) Needles or probes that have been used to treat a client must be:

(a) Mechanically precleaned using a clean cottonball or swab moistened with a solution of low-residue detergent or a protein dissolving enzyme detergent and cool water;

(b) Accumulated in a holding container by submersion in a solution of low-residue detergent or a protein dissolving enzyme detergent and cool water;

(c) Thoroughly rinsed with warm water and drained;

(d) Cleaned by soaking in a protein dissolving enzyme detergent used according to manufacturer's instructions cleaned in an ultrasonic cleaning unit or used according to manufacturer's instructions; and

(e) Rinsed and dried.

(7) Needles or probes and forceps or tweezers must be packaged individually or in small multiples, or unpackaged and placed in cleaned and dried stainless steel or heat-tempered glass containers. All containers must have well-fitting lids that are clean and dry.

(8) Cleaned instruments or items must be sterilized by one of the following methods:

(a) Dry heat. The following temperatures relate to the time of exposure after attainment of the specific temperature and do not include a heat-up lag time.

[1] Three hundred forty degrees Fahrenheit [170 degrees Celsius] for one hour; or

[2] Three hundred twenty degrees Fahrenheit [160 degrees Celsius] for two hours.

(b) Moist heat - autoclave. The following exposure times relate only to the time the material is at temperature and does not include a penetration or heat-up lag time.

[1] Fifteen minutes at two hundred fifty degrees Fahrenheit [121 degrees Celsius]; fifteen pounds per square inch [103.5 kilopascals] for unpackaged instruments or items; or

[2] Thirty minutes at two hundred fifty degrees Fahrenheit [121 degrees Celsius]; fifteen pounds per square inch [103.5 kilopascals] for packaged instruments or items.

(c) Other time-temperature relationships recommended by the manufacturer for a specific instrument.

(9) Dry heat ovens and autoclaves (steam under pressure) must be approved by the United States food and drug administration and must be cleaned, used, and

maintained according to the manufacturer's instructions.

(10) Sterilizers must have visible physical indicators, for example, thermometers, timers.

(11) Chemical (i.e., color change) indicators must be used on or in each package or container to indicate items have been exposed to a sterilization process.

(12) Biological indicators must be used no less than once a month per sterilizer according to manufacturer's instructions to assure mechanical function and operator's technique and to determine sterilization efficiency and recorded in permanent sterility assurance file.

c. Aseptic technique must be followed when handling sterilized instruments or items.

d. To prevent accidental needle-stick injuries, disposable or damaged needles or probes must not be recapped, bent, or otherwise manipulated by hand prior to disposal. Disposable or damaged needles or probes must be placed in a sturdy puncture-resistant container. Disposal of the container must be as follows:

(1) The contents must be disinfected with a freshly prepared dilution of household bleach and water consisting of one part bleach and nine parts water; allowed to sit for thirty minutes; solution poured off; and the container securely sealed and disposed into the regular trash disposal, unless otherwise specified by department and local health regulations; or

(2) Needles or probes may be decontaminated for handling by cleaning and sterilizing consistent with the requirements in this section and placed in a puncture-resistant container. The container must be securely sealed and disposed into the regular trash disposal.

e. Removable tip of epilator needle or probe holder must be removed after each treatment and cleaned with soap or detergent and water, rinsed, dried, and disinfected by submersion in seventy percent isopropyl alcohol for a minimum of ten minutes. The covered container used to hold the alcohol should be emptied at least daily or whenever visibly contaminated, then cleaned, dried, and refilled with fresh alcohol. Nonremovable tip of epilator needle or probe holders must be wiped with a detergent-germicide or disinfectant after each treatment.

3. Environmental control and housekeeping.

a. Offices and treatment rooms must be clean, well-lighted, and well-ventilated.

b. A sink with hot and cold running water must be accessible to each treatment room.

c. Toilet facilities must be available.

d. A hospital-grade disinfectant-detergent registered by the environmental protection agency must be used for all cleaning unless otherwise specifically stated in this chapter.

e. Fresh disposable paper drapes must be used on the treatment table or chair for each client, or the treatment table or chair must be wiped down with detergent-germicide or disinfectant or a bleach solution after each client.

f. Soiled disposable items must be discarded into a container lined with a plastic bag, securely fastened, and disposed daily into the regular trash disposal.

g. Epilator needle or probe holder and the portion of the cord in direct contact with the client or electrologist must be wiped with a detergent-germicide or disinfectant after each treatment.

h. Magnifier or treatment lamps must be wiped with a detergent-germicide or disinfectant after each treatment.

i. After each use, client eyeshields must be cleaned using a brush and soap or detergent and water, then rinsed and dried.

j. Blood spills on environmental surfaces must be cleaned as follows:

(1) Disposable gloves must be worn;

(2) Paper towels used to blot up the visible material;

(3) Paper towels then discarded into a plastic bag, securely fastened and disposed into the regular trash disposal;

(4) Area wiped down with paper towels and an environmental protection agency-registered disinfectant-detergent or a freshly prepared one to one hundred parts dilution of household bleach and water (one-fourth cup bleach and one gallon [3.79 liters] water);

(5) Area allowed to air dry; and

(6) Paper towels and gloves discarded into a plastic bag, securely fastened and disposed into the regular trash disposal.

4. Client infection control considerations.

a. Blood and body fluid precautions must be consistently used for all clients.

b. The skin site must be evaluated prior to each treatment.

c. Before treatment, the skin site must be cleansed of visible soil using soap and water or a germicidal skin preparation, then wiped with an antiseptic product. Skin sites not visibly soiled must be wiped with an acceptable antiseptic product.

d. After treatment, the skin site must be wiped with an acceptable antiseptic product.

e. Application of ice in a fresh disposable paper towel in a fresh plastic bag or healing cream, lotion, or ointment, or a combination of these things, may be applied to the treated skin site at the discretion of the electrologist. Creams, lotions, and ointments must be kept in clean, covered containers and handled in a sanitary manner.

f. Client must be instructed on the appropriate posttreatment care to promote healing of the treated skin site.

5. Exposures to hepatitis B virus (HBV), HIV, and other bloodborne pathogens.

a. Electrologists should be immunized against hepatitis B virus.

b. Universal precautions must be implemented with all clients.

c. The following steps should be taken when a needle or probe stick, puncture injury, or mucous membrane exposure has occurred:

(1) Remove and discard gloves.

(2) Wash exposed surface with running water, soap, or germicidal handwashing solution. If wound is bleeding, allow to bleed. After thoroughly cleaning the wound, apply alcohol, betadine, or hydrogen peroxide. If there is mucous membrane exposure, flush exposed area thoroughly with water.

(3) Immediate contact should be made with electrologist's personal physician for appropriate consultation, for example, for necessary postexposure strategies.

(4) Documentation of the exposure should be made, including: date, route of exposure, circumstance under which exposure occurred, name of source client, followup testing, and any necessary postexposure prophylaxis.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11.1-12. Equipment. Practicing electrologists shall maintain the following equipment:

1. A probe-type epilator approved by the federal communications commission.

2. A sufficient supply of sterile disposable or ~~sterile~~ nondisposable needles or probes, probe tips, and ~~sterile~~ forceps or tweezers for each patient.

3. A treatment light to enable adequate visualization of the treatment area.

4. A ~~hemostate~~ hemostat, forceps, or tweezer forcep to transfer sterile instruments utilizing aseptic techniques.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11.1-13. Restrictions to practice. Electrologists may not perform electrology treatment if any of the following are present:

1. Licensee is diagnosed as having a communicable disease or parasitic infection.

2. The hair to be removed is in an area of high bacterial colonization such as nostrils or ear canals.

3. The hair to be removed is from a wart, mole, birthmark, eyelashes, a diabetic ~~patient~~ client, or a ~~patient~~ client with a pacemaker unless a written ~~order~~ permission for the

treatment has been obtained from the client's physician prior to treatment.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11.1-14. Client records. Licensed electrologists shall compile and maintain a record of health history assessment information on each client. Each record must include at least:

1. Name and address of client.
2. Type of treatment required or requested and physician ~~order~~ permission if necessary.
3. Description of hair and skin.
4. Date ~~and~~, duration, and area of each treatment.
5. Special instructions or notations relating to treatment precautions or needs, such as allergies or a pacemaker.
6. Name and telephone number of referring physician if applicable.
7. Outcome of treatment.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11.1-15. Complaints. After receipt of a complaint regarding violation of electrology licensure rules, the department shall request that the complainant submit the complaint in writing. Confidentiality regarding the identity of the complainant will be maintained if requested by the complainant.

1. The department shall send a written summary of the complaint by certified mail to the electrologist requesting a written reply to the allegation.
2. A reply from an electrologist will be considered by the department if received within fourteen days of the date on which the electrologist received the complaint summary.
3. The department will determine if further action ~~including an onsite inspection~~ is required in investigating the complaint.

4. A summary of the results of the investigation will be sent to the complainant and the licensed ~~electrologists~~ electrologist within fourteen days of the completion of the investigation.

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

33-03-11.1-17. Approved training ~~curriculum~~ program. Only programs ~~meeting~~ that the department determines to meet the curriculum criteria in section ~~33-03-11.1-11~~ 33-03-11.1-17 will be considered as ~~being~~ to be an approved training ~~curriculum~~ program.

1. ~~After--January-1,--1992,-unless-previously-grandfathered-under section--33-03-11.1-04,--applicants--will--be---eligible---for licensure---only---if---they--have--successfully--completed--a department-approved-electrology-examination-or-an--electrology course---from---a---school---whose---curriculum---includes~~ A department-approved electrology training program must have a curriculum that contains, at a minimum, six hundred hours, three hundred seventy of which are practical training.

2. Curriculum ~~breakdown~~ content for an approved electrology training programs ~~is-as-follows~~ must include the following:

~~Curriculum-requirement~~	~~Theory~~ Hours	~~Practical~~ Hours
Law and rules	~~5~~	~~0~~
Bacteriology	~~20~~	~~0~~
Sanitation and sterilization	~~20~~	~~15~~
Anatomy and physiology	~~20~~	~~0~~
Endocrinology	~~20~~	~~0~~
Structure, dynamics, and diseases of skin and hair	~~30~~	~~0~~
Circulatory and nervous system	~~20~~	~~0~~
Electricity	~~20~~	~~0~~
Electrolysis	~~20~~	~~115~~
Galvanic		
Thermolysis	~~20~~	~~115~~
Blend		
~~Combination-of-electrolysis-and thermolysis-combined~~	~~20~~	~~110~~
Draping and positioning	~~10~~	~~10~~
Professional ethics and business practices	~~5~~	~~5~~
~~Totals~~	~~230~~	~~370~~

~~3.--A--school--providing-a-total-of-at-least-six-hundred-hours-may be--approved--by--the--department--if--the---school---provides~~

~~documentation--that--all--of--the-areas-listed-in-subsection-2 have-been-included-but-the-hours-per-subject-differ.~~

~~4.--Official--transcripts--for--schooling-must-be-submitted-to-the department-for-approval-prior-to--determining--eligibility--of the-individual-for-licensure.~~

History: Effective February 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 43-38-03
Law Implemented: NDCC 43-38-03

CHAPTER 33-06-01

33-06-01-01. Reportable diseases. All reportable diseases shall be confidential and not open to inspection. The following diseases are hereby declared to be reportable in this state.

1. Acquired immune deficiency syndrome (A.I.D.S.).
2. Amebiasis.
3. Anthrax.
4. Blastomycosis.
5. Botulism.
6. Brucellosis.
7. Campylobacter enteritis.
8. Chancroid.
9. Chickenpox (varicella).
10. Chlamydial infections.
11. Cholera.
12. Diphtheria.
13. E. coli 0157:H7 infection.
14. Encephalitis (specify etiology).
15. Foodborne or waterborne outbreaks.
16. Giardiasis.
17. Gonorrhea.
18. Granuloma inguinale.
19. Hantavirus.
20. Haemophilus influenzae b.
20. 21. Hemolytic uremic syndrome.
21. 22. Hepatitis (specify type).
22. 23. Herpes simplex (genital).

~~23.~~ 24. Histoplasmosis.

~~24.~~ 25. Human immunodeficiency virus infection.

~~25.~~ 26. Influenza.

~~26.~~ 27. Lead poisoning.

~~27.~~ 28. Legionellosis.

~~28.~~ 29. Leprosy.

~~29.~~ 30. Leptospirosis.

~~30.~~ 31. Lyme disease.

~~31.~~ 32. Lymphogranuloma venereum.

~~32.~~ 33. Malaria.

~~33.~~ 34. Measles (rubeola).

~~34.~~ 35. Meningitis (specify etiology).

~~35.~~ 36. Mumps.

~~36.~~ 37. Nosocomial infections.

~~37.~~ 38. Ornithosis (Psittacosis).

~~38.~~ 39. Pertussis.

~~39.~~ 40. Plague.

~~40.~~ 41. Poliomyelitis.

~~41.~~ 42. Rabies.

~~42.~~ 43. Reye's syndrome.

~~43.~~ 44. Rocky Mountain spotted fever.

~~44.~~ 45. Rubella.

~~45.~~ 46. Salmonellosis.

~~46.~~ 47. Scabies (in institutions).

~~47.~~ 48. Shigellosis.

~~48.~~ 49. Syphilis.

~~49.~~ 50. Tetanus.

~~50.~~ 51. Toxic-shock syndrome.

~~51.~~ 52. Trichinosis.

~~52.~~ 53. Tuberculosis.

~~53.~~ 54. Tularemia.

~~54.~~ 55. Typhoid fever.

History: Amended effective May 1, 1984; December 1, 1986; January 1, 1988; January 1, 1989; October 1, 1990; January 1, 1991; February 1, 1992; May 1, 1994.
General Authority: NDCC 23-07-01
Law Implemented: NDCC 23-07-01

JUNE 1994

CHAPTER 33-03-31

33-03-31-01. ~~Application---Filing-Fee~~ Definitions. ~~Parties-to-a cooperative-agreement-seeking-a-certificate--of--public--advantage--must file-an-application-with-the-state-department-of-health-and-consolidated laboratories.--The-application-must-be-accompanied--by--a--fee--totaling forty--thousand--dollars--paid--in--equal--shares--by--each-party-to-the cooperative-agreement.--The-application-and-fee--must--be--sent--to--the accounting--division-of-the-department-and-will-be-deemed-to-be-filed-on the-date-the-application-and--all--fee--payments--are--received--by--the accounting--division.---A-complete-copy-of-the-application-must-be-filed simultaneously--with--the--office--of--the--attorney--general.~~ Unless otherwise defined, or made inappropriate by context, all words used in this chapter have the meanings given to them under North Dakota Century Code chapter 23-17.5, except:

1. "Applicant" or "applicants" means the party or parties to a cooperative agreement for which a certificate of approval is sought under this chapter.

2. "Certificate" means a certificate of public advantage issued under this chapter.

3. "Competition" means that state of the relevant market in which individual buyers and sellers do not influence price by their purchases or sales.

4. "Relevant geographic market" means that geographic area from which the applicants traditionally draw significant patronage in the relevant product market, or, in the case of a new product, that area from which the applicants may reasonably anticipate significant patronage.

5. "Relevant product market" means a product or group of products offered by the applicants under the cooperative agreement and all products or groups of products that a reasonable health care consumer would find to be acceptable substitutes.

History: Effective October 1, 1993; amended effective June 1, 1994.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC ~~23-17.5-03~~ 23-17.5-01

33-03-31-02. Administration by state health officer. The state health officer or, if appropriate, the officer's designee shall administer the provisions of this chapter.

History: Effective June 1, 1994.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-17.5

33-03-31-03. Application, filing fee, and prefiling procedure.

1. Form and content of application. The applicants may submit an application in whatever form or content they deem appropriate, subject only to the requirements of this section. The application must be supported by sufficient information and documentation to meet the applicants' burden of proof with respect to the standards for certification set forth in North Dakota Century Code section 23-17.5-03.

2. Minimum application requirements. An application for a certificate must include:

   a. The exact name of each applicant, type of business organization, and the address of each applicant's principal business office.

   b. For each applicant, the name, address, and telephone number of the person authorized to receive notices and communications with respect to the application.

   c. A description of the nature and scope of the cooperation in the agreement.

   d. A description of any consideration passing to any party under the agreement.

   e. A proposed plan for postcertificate monitoring and active supervision by the department. This proposed plan must include:

      (1) A description of the standards and criteria by which the benefits and disadvantages of the agreement may be measured. These may include the standards and

criteria used by the applicable professional accreditation or certification agencies or bodies. It is preferred that any standards and criteria measuring quality focus on patient or client outcomes.

(2) A description of the information and the format for reports to be submitted periodically to the department sufficient to permit the department to evaluate whether performance by the applicants under the cooperative agreement is consistent with state policy as expressed in North Dakota Century Code chapter 23-17.5.

(3) A schedule setting forth the dates on which the compliance information will be periodically submitted to the department.

f. A copy of the cooperative agreement.

g. A verified statement by an authorized officer of each applicant attesting to the accuracy of the information contained in the application.

3. Optional information and documentation to meet burden of proof. The information and documentation in support of the application will vary with the subject matter of the cooperative agreement and the nature of the activities of the applicants. The applicants may consult with department and attorney general staff prior to filing the application for assistance in determining what supporting information and documentation may be useful in evaluating the application.

a. Reduction in competition. The following items are examples of information and documentation that may assist the department and attorney general in evaluating the reduction in competition resulting from a cooperative agreement:

(1) A list of the services or products that are the subject of the proposed cooperative agreement.

(2) A list of the services or products that are necessarily connected or offered with the services or products that are the subject of the proposed cooperative agreement.

(3) A description of the geographic territory that will be served under the cooperative agreement.

(4) If the geographic territory described in paragraph 3 is different from the territory in which the applicants have offered these services or products

over the last five years, a description of how and why it differs.

(5) A list of all products or services that a substantial share of the users of the products or services to be provided under the cooperative agreement would consider substitutes for those products or services.

(6) Identification of whether the services or products of the cooperative agreement are currently being offered or are reasonably capable of being offered by other providers in the geographic territory described in paragraph 3 and, if so, a list of those providers.

(7) A list of the steps necessary, under current market and regulatory conditions, for a third party to enter the geographic territory described in paragraph 3 and compete by offering the same or similar services or products.

(8) A description of how the cooperative agreement will affect competition in the geographical territory over the life of the cooperative agreement.

(9) Copies of all business proposals, consultant reports, and feasibility studies used in the development of the proposed cooperative agreement.

(10) A description of the previous history of dealings between the parties.

(11) A pro forma statement of projected financial performance under the cooperative agreement.

(12) An explanation of how the cooperative agreement will affect the product and geographical markets to be serviced.

(13) An explanation of the projected effects of the cooperative agreement on each applicant's current business.

(14) An estimate of the market share of the applicants before and after the cooperative agreement regarding the services or products that are the subject of the cooperative agreement.

(15) A statement of why the services or products would not be provided at anticipated levels of price, availability, or quality in a competitive market.

(16) A description of other anticipated effects of the cooperative agreement. In this description, the

applicant may include information possessed by the applicants or otherwise available to them regarding:

(a) Current and anticipated demand for the affected products or services.

(b) Current and anticipated capacity within the market to supply the services or product.

b. Likely benefits to health care consumers. The following items are examples of information and documentation that may assist the department and the attorney general in evaluating the likely benefits to health care consumers from a cooperative agreement:

(1) An explanation of the anticipated effect of the cooperative agreement on costs, including:

(a) Pro forma financial statements showing the effect of the cooperative agreement on the cost of services or products that are the subject of the application.

(b) The intentions of the parties regarding the extent to which the projected cost savings will be passed on to the public. This explanation may include any undertaking by the applicants regarding their pricing for the services or products that are the subject of the application.

(c) The intentions of the applicants regarding the pricing of other services or products as a result of the cooperative agreement that is the subject of the application.

(2) An explanation of how the cooperative agreement will affect availability of health care services or products, including:

(a) Information showing the relationship between the price of products or services and the demand for the products or services.

(b) New sales or service outlets to be established.

(c) Identity of target populations to be served by the cooperative agreement.

(d) Identity of populations currently being served by the applicants.

(e) Expected reductions, if any, in the availability of health care services and products to some populations, and how, in the view of the applicants, those reductions are compensated for by increases in the availability of health care services and products to other populations.

(3) An explanation of how the cooperative agreement will increase the quality of health care. It is preferred that the application address quality issues in terms of patient or client outcomes and the standards and criteria used by the applicable professional accreditation or certification agencies or bodies or any other generally accepted quality measures. For example, a hospital may include:

(a) Patient morbidity and mortality.

(b) Periods required for convalescence.

(c) Number of patient days in the hospital.

(d) The ability of medical staff to attain needed experience and the frequency of treatment necessary to better outcomes.

(e) Patient and family satisfaction.

(f) Number of readmissions for the same condition.

(g) Any other features which are likely to increase the quality of health care.

4. Limited waiver of time limit. If the department determines that the information submitted by an applicant is unclear, incomplete, or insufficient on which to base a decision, the department may request the applicant to augment or supplement the original filing. In the event the department requests that the applicants augment or supplement the original filing, the applicants may, by written notice to the department, waive the benefit of the ninety-day review time limit and extend the review period for an additional period not to exceed ninety days unless a longer extension of the review period is agreed to by the applicants and the department.

5. Filing fee. Except as provided in subsection 6, the application must be accompanied by a fee equal to the maximum assessment permitted by North Dakota Century Code chapter 23-17.5.

6. Prefiling procedure.

a. Prior to filing an application, potential applicants may submit to the department a request for determination of filing fee. This request must be accompanied by a detailed summary of the proposed application and a fee of two thousand dollars. This fee must be credited against the filing fee if the application is timely filed. In the event the potential applicants choose not to file the application, this fee is not refundable.

b. The department shall review the detailed summary of the proposed application and determine the amount of filing fee based upon the anticipated costs of review of the application and active supervision of the certified agreement. No later than twenty days following receipt of a request for determination of filing fee, the department shall notify the applicants of the amount of the filing fee. In no event may this amount exceed the maximum assessment permitted by North Dakota Century Code chapter 23-17.5. The notice must allocate the amount of the filing fee between the anticipated costs of review of the application and the costs of active supervision of the certified agreement.

c. The filing fee determined under this subsection is effective if the application is filed within one hundred eighty days after notice of the amount of the filing fee. Upon filing the application, the applicants shall pay that portion of the filing fee allocated to the costs of review of the application, less the two thousand dollars previously paid. Upon approval of the application, the applicants shall pay that portion of the fee allocated to the costs of active supervision of the certified agreement. Failure to pay the balance of the fee within thirty days of approval of the application renders the certificate void. In the event the application is denied, the applicants shall not be obligated to pay the balance of the fee allocated to the costs of active supervision. In the event the department determines that the application filed is not substantially the same as that described in the summary, the department may assess an additional filing fee by notice to the applicants. The additional filing fee must be paid within thirty days of the notice.

History: Effective June 1, 1994.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-17.4-03, 23-17.5-02, 23-17.5-11

33-03-31-04. Notice and hearing.

1. Notice of hearing. Upon filing of the application and payment of the application fee and at least twenty days prior to the

date set for hearing, the department shall provide the applicants with written notice of the time and place for the public hearing on the application. The department shall also, within that period, publish a notice of hearing in the official newspapers of all counties where any of the applicants have a principal place of business and all counties in which the applicants plan to do business under the cooperative agreement. The published notice must include sufficient information to advise the public of the nature of the cooperative agreement and must invite written comments and oral testimony from the public at the public hearing.

2. Public hearing. The public hearing must be conducted by an independent hearing officer under article 98-02. If requested by the department the hearing officer shall prepare a recommended decision, including finds of fact, conclusions of law, and a proposed order approving the application, not approving it, or approving it subject to terms and conditions.

History: Effective June 1, 1994.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-17.5-02

33-03-31-05. Departmental review.

1. Decision. The department shall issue a decision consisting of findings of fact and conclusions of law on the application for a certificate and an order either approving the application, not approving it, or approving it subject to terms and conditions. The decision of the department must be based upon the record, which must consist of all information and documentation filed with the department by the applicants and any interested persons in the proceeding, including responses to the department's information requests and testimony presented at the public hearing.

2. Criteria applicable to applications. North Dakota Century Code section 23-17.5-03 sets forth the standards by which the department is to measure whether the likely benefits to health care consumers resulting from the cooperative agreement outweigh any disadvantages attributable to a reduction in competition that may result from the agreement.

   a. Potential benefits. In evaluating the potential benefits to health care consumers from a cooperative agreement, the department may consider the following criteria:

      (1) Enhancement of the quality of health care services. The department may consider the likely effect of the cooperative agreement on patient or client outcomes. The department may consider the standards and criteria used by the applicable professional

accreditation or certification agencies or bodies or any other generally accepted quality measures.

(2) Geographical proximity of health care facilities to the communities traditionally served. The department may consider the extent to which the cooperative agreement is likely to:

(a) Make a new health care service or product available in a particular geographic area.

(b) Prevent the closing or substantial downsizing of a health care facility or the elimination or reduction of a health care service that would otherwise be likely to occur without the cooperative agreement.

(c) Preserve health care facilities or services in one community at the expense of health care facilities or services in another community.

(3) Gains in cost efficiency. The department may consider the extent to which the proposed cooperative agreement is likely to result in:

(a) Any cost savings to the applicants.

(b) Any cost savings being passed on to the health care consumer.

(c) Cost shifting through higher prices to other payers or purchasers of other products and services.

(d) Reduced costs of regulation, both for the state and the applicants.

(e) Any other result likely to reduce costs to health care consumers.

(f) The extent to which any cost savings will be obtained at the expense of a degradation of the quality of medical products or services.

(4) Improvements in the utilization of health care resources and equipment.

(5) Avoidance of duplication of health care resources. The department may consider:

(a) The extent to which the same or substitute products or services are available in the same community or geographic market.

(b) Any excess capacity in the provision of the same or substitute products and services existing within the same community or geographical market.

b. Potential disadvantages. In evaluating the disadvantages attributable to a reduction in competition that may result from a cooperative agreement, the department may consider:

(1) The relevant product and geographic markets to which the agreement will be administered. In determining the relevant markets, the department may take into account elasticities of supply and demand and the ability of a hypothetical monopolist to profitably reduce output and increase price in a small but significant and nontransitory manner.

(2) The existing market shares in the relevant product and geographic markets of the applicants, as well as any other parties operating within those markets.

(3) The presence of actual or potential market entrants and ease or difficulty of market entry into the relevant product and geographic markets.

(4) Whether or not the agreement results in the creation of a new product or one previously unavailable in the relevant geographic market.

(5) The reasonably anticipated effect of the agreement on existing market structure.

(6) The ways, if any, the agreement will promote competition in the relevant product and geographic markets.

c. Conflict between objectives. In the event there is a conflict between or among the statutory standards for certification when applied to an application, the department shall address the conflict in its decision and state the reasons supporting the manner in which the department resolves the conflict.

History: Effective June 1, 1994.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-17.5-02, 23-17.5-03

33-03-31-06. Active supervision of certified agreements.

1. The order approving the application must set forth a plan for postcertificate monitoring and active supervision of the

activities of the parties under the certified cooperative agreement. The plan must include:

a. A description of the standards and criteria by which the actual benefits and disadvantages of the agreement may be measured.

b. A description of the information and the format for reports to be submitted periodically to the department sufficient to ensure that performance by the parties under the certified agreement is in accord with the state policy as expressed in North Dakota Century Code chapter 23-17.5.

c. A schedule setting forth the dates on which the information and reports determined under subsection 2 will be submitted to the department.

2. The department shall publish notice in the official newspapers of all counties where any of the applicants have a principal place of business and of all counties in which the applicants do business under the cooperative agreement. This notice must be published two years after the date of the issuance of the certificate and at two-year intervals thereafter for as long as the certificate remains subject to active supervision by the department. This notice must solicit comments from the public concerning the impact the cooperative agreement has had on the cost, quality, and availability of medical products or services.

History: Effective June 1, 1994.
General Authority: NDCC 23-01-02, 28-32-02
Law Implemented: NDCC 23-17.5-04

33-03-31-07. Certificate modification. At any time after the certificate of public advantage has been issued, the terms and conditions of the certificate may be modified by agreement between the applicants and the department. Before agreeing to modify any certificate, the department shall publish notice of the proposed modifications in the official newspapers of all counties in which any of the parties to the certified agreement have a principal place of business and of all counties in which the parties do business under the cooperative agreement. The notice must contain an explanation of the proposed modification and invite comments on the proposed modification. Upon motion of the parties or upon its own motion, the department may hold a public hearing on the proposed modification. A modification agreement becomes effective thirty days following the later of the date of the public notice or the public hearing, if any.

History: Effective June 1, 1994.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-17.5

33-03-31-08. Certificate termination.

1. Grounds for termination. After notice and hearing, the department may terminate a certificate of public advantage if it is found to be more probable than not that:

   a. The applicants have failed to comply with material terms or conditions of the certificate of public advantage;

   b. The applicants have failed to perform the terms and conditions of the cooperative agreement as represented to the department at the time of the application; or

   c. The likely or actual benefits to health care consumers from the cooperative agreement no longer outweigh the disadvantages attributable to a reduction in competition resulting from the agreement.

2. Complaint. If it appears that any of the grounds for certificate termination exist, the department or the attorney general may initiate administrative proceedings to revoke a certificate of public advantage by serving upon the applicants a copy of a complaint alleging sufficient facts to support termination of the certificate.

3. Procedure. Proceedings to terminate a certificate of public advantage are a contested case proceeding subject to the procedure set forth in North Dakota Century Code chapter 28-32.

History: Effective June 1, 1994.
General Authority: NDCC 23-01-03, 28-32-02
Law Implemented: NDCC 23-17.5-04

AUGUST 1994

STAFF COMMENT: Chapter 33-03-32 contains all new material but is not underscored so as to improve readability.

CHAPTER 33-03-32
STATE COMMUNITY MATCHING LOAN REPAYMENT PROGRAM FOR NURSE PRACTITIONERS, PHYSICIANS ASSISTANTS, AND CERTIFIED NURSE MIDWIVES

33-03-32-01. Definitions.

1. "Center for rural health" means the center for rural health at the university of North Dakota.

2. "Community" means any county, city, or township in North Dakota.

3. "Council" means the state health council.

4. "Department" means the state department of health and consolidated laboratories.

5. "Eligible applicant" means a nurse practitioner, physician assistant, or certified nurse midwife who is licensed or

registered to practice by the respective state regulatory agency.

6. "Eligible community" means a North Dakota community with a need for a nurse practitioner, physician assistant, or certified nurse midwife. The center for rural health shall designate eligible communities.

7. "Eligible loan" means an educational loan acceptable to an accredited nurse practitioner, physician assistant, or nurse midwife educational program and made by a bank, credit union, savings and loan association, insurance company, accredited school, government, or other financial or credit institution in its capacity as lender and in which the lender is subject to examination and supervision by an agency of the United States or the state in which the lender has its principal place of business.

History: Effective August 1, 1994.
General Authority: NDCC 43-12.2
Law Implemented: NDCC 43-12.2

33-03-32-02. Responsibilities and process.

1. At least annually the center for rural health shall provide public notice of the loan repayment programs to communities and accredited nurse practitioner and physician assistant educational programs in North Dakota and to selected nurse midwife educational programs in the United States and Canada.

2. A community wishing to be designated as eligible for participation in the program shall complete a form developed by the center for rural health. Forms will be available upon request from the department and the center for rural health. Completed forms must be submitted to the center for rural health. In addition to the criteria stated in North Dakota Century Code section 43-12.2-04, the form must include:

   a. A statement of health personnel needs.

   b. A signed statement of community endorsement and financial commitment to participate in this program.

3. The center for rural health shall update and give the department a list of eligible communities by January of each year.

4. The center for rural health shall assist eligible communities to locate eligible nurse practitioners, physician assistants, or certified nurse midwives.

5. A nurse practitioner, physician assistant, or certified nurse midwife may apply for repayment of an education loan on an application developed by the department and the center for rural health. The application will be available upon request from the department and center for rural health. In addition to the criteria stated in North Dakota Century Code section 43-12.2-03, the applicant shall submit the completed application to the department. The application must include the following information:

   a. A current North Dakota license or registration to practice.

   b. A list of states in which the applicant is currently licensed or registered to practice as well as the states in which the applicant has a lapsed license or registration.

   c. A description of any litigation to which the applicant is a party.

   Three letters of recommendation and an agreement signed by the applicant and the community stating the conditions of the loan repayment must be submitted along with the application.

6. The department and center for rural health shall jointly review the application within sixty days of its receipt. The application and its review will be considered by the council at its next regularly scheduled meeting.

7. The council shall consider the criteria specified in North Dakota Century Code section 43-12.2-03, as well as all information contained in the application and accompanying documents.

8. The council shall approve or deny the application within ninety days after the council meeting when the application was considered.

9. The council may approve more than five applications in any fiscal year; however, no more than five loan repayments can begin in any fiscal year.

10. The council shall designate which loan repayments can begin in any fiscal year based on a priority system adopted by the council.

History: Effective August 1, 1994.
General Authority: NDCC 43-12.2
Law Implemented: NDCC 43-12.2

33-03-32-03. Loan repayment contract.

1. Before receiving a loan repayment under this chapter, each applicant selected shall enter into a loan repayment contract with the state and community agreeing to the terms and conditions upon which the loan repayment is granted, the penalties for a breach of the loan repayment contract, and the conditions under which the applicant can be released from any obligations under the contract without penalty.

2. The state health officer shall sign the loan repayment contract for the state. A community representative shall sign the loan repayment contract for the community.

3. The loan repayment contract must include:

   a. The amounts to be paid by the state and by the community.

   b. The specific term in which the nurse practitioner, physician assistant, or certified nurse midwife is obligated to provide primary health care services within the community.

   c. A provision that any financial obligation of the state arising out of a loan repayment contract entered into under this chapter, and any obligation of the applicant that is conditioned thereon, is contingent on funds being appropriated by the legislative assembly for loan repayments under North Dakota Century Code chapter 43-12.2.

   d. Such other statements of the rights and liabilities of the department and of the applicant considered necessary by the council.

History: Effective August 1, 1994.
General Authority: NDCC 43-12.2
Law Implemented: NDCC 43-12.2

CHAPTER 33-11-01

33-11-01-01. Definitions. Words defined in North Dakota Century Code chapter 23-27 shall have the same meaning in this chapter.

1. "An ambulance driver" means an individual who operates a vehicle.

2. "An ambulance run" means the response of an ambulance vehicle and personnel to an emergency or nonemergency for the purpose of rendering medical care or transportation or both to someone sick or incapacitated.

3. "An attendant" means a qualified individual responsible for the care of the patient while on an ambulance run.

4. "Department" means the state department of health and consolidated laboratories as defined in North Dakota Century Code chapter 23-01.

5. "Driver's license" means the license as required under North Dakota Century Code section 39-06-01.

6. "Emergency care technician" means a person who meets the requirements of the state emergency care technician program and is certified by the department.

7. "Emergency medical ~~technician-ambulance~~ technician-basic" means a person who meets the requirements of the national emergency medical technician-ambulance program and is certified by the national registry of emergency medical technicians.

8. "Emergency medical technician-paramedic" means a person who meets the requirements of the national emergency medical technician-paramedic program and is certified by the national registry of emergency medical technicians and licensed by the board of medical examiners under chapter 50-03-03.

9. "Equivalent" means training of equal or greater value which accomplishes the same results as determined by the department.

10. "Personnel" means qualified attendants, or drivers, or both, within an ambulance service.

11. "Separate location" means separate town, city, or municipality.

12. "State health council" means the council as defined in North Dakota Century Code title 23.

13. "Nonemergency health transportation" means health care transportation provided on a scheduled basis by licensed health care facilities to their own patients or residents whose impaired health condition requires special transportation considerations, supervision, or handling but does not indicate a need for medical treatment during transit or emergency medical treatment upon arrival at the final destination.

14. "Licensed health care facilities" means facilities licensed under North Dakota Century Code chapter 23-16.

History: Effective September 25, 1979; amended effective March 1, 1985; January 1, 1986; June 1, 1991; August 1, 1994.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

33-11-02-02. Training standards for attendant. The attendant must have a current certification in the American national red cross advanced first aid course or its equivalent and must have a current American heart association, Dakota affiliate, inc. basic rescuer (cardiopulmonary resuscitation) certification or its equivalent. Effective January 1, 1998, the attendant must have current emergency care technician certification or national registry emergency medical technician-basic certification or its equivalent and must have a current American heart association, Dakota affiliate, inc. basic rescuer (cardiopulmonary resuscitation) certification or its equivalent.

History: Effective March 1, 1985; amended effective January 1, 1986; August 1, 1994.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

33-11-02-03. Minimum equipment requirements.

1. Mounted ambulance cot with retaining straps.
2. Stretchers with retaining straps. Vehicle design dictates quantity.
3. Piped oxygen system - with appropriate regulator and flow meter, or two "E" size bottles for minimum oxygen supply with regulator and flow meter.
4. Portable oxygen unit with carrying case. To include one "D" size bottle with another "D" bottle in reserve.
5. Three nasal cannulas, three oxygen masks in assorted sizes, and three sets of oxygen supply tubing.
6. Suction - portable - capable of achieving 400 mmgh/4 seconds or less.
7. Bag mask type resuscitation unit with child and adult size face masks or pocket masks with oxygen inlet in pediatric and adult sizes.
8. Spine boards - one full-size and one half-size, with retaining straps.
9. Commercial fracture splints usable for open and closed fractures, or padded boards.
10. Cold packs - four minimum.

11. Fire extinguisher - dry chemical, mounted, five pound [2.27 kilogram] minimum.

12. Head-to-board immobilization device ~~or two sandbags~~.

13. Obstetrical kit - disposable or sterilizable.

14. ~~Poison kit or syrup of ipecac~~ Activated charcoal.

15. Two sterile burn sheets.

16. Three triangular bandages.

17. Two trauma dressings - approximately ten inches [25.4 centimeters] by thirty-six inches [91.44 centimeters].

18. Twenty-five sterile gauze pads - four inches [10.16 centimeters] by four inches [10.16 centimeters].

19. Twelve soft roller self-adhering type bandages - five yards [4.57 meters] long.

20. ~~Bite sticks~~ One set of nasopharyngeal airways in adult and child sizes.

21. One set of oropharyngeal airways in adult, child, and infant sizes.

22. ~~Roll of aluminum foil - eighteen inches [45.72 centimeters] by twenty-five feet [7.62 meters] - sterilized and wrapped~~ Two sterile occlusive dressings approximately three inches [76.2 millimeters] by nine inches [228.6 millimeters].

23. Four rolls of adhesive tape - assorted sizes.

24. Shears - blunt - two minimum.

25. Bedpan, emesis basin, urinal - single use or disinfected.

26. One gallon [3.79 liters] of distilled water or saline solution.

27. Intravenous fluid holder - cot mounted or ceiling hooks.

28. Flashlights - two minimum.

29. Sanitary napkins.

30. Cotton tip applicators.

31. Small, medium, and large cervical collars~~, headband, chin straps~~.

32. Two blankets, four sheets, two pillows, four towels.

33. ~~Sterilization--agent--to-clean-equipment---local-option~~ Phenol disinfectant product, such as lystophene or amphyl.

34. Reflectorized flares for securing scene - set of three minimum.

35. One set socket wrenches, crowbar, heavy hammer, screwdriver, hacksaw, pliers.

36. Blood pressure ~~manometer~~ manometer, cuff, and stethoscope.

37. Lower extremity traction splint.

38. VHF radio with the capability of meeting state emergency medical services standards as determined by the department.

39. Glutose or glucose - one dose for oral use.

40. Disposable gloves - ~~four-pair~~ one box each of small, medium, and large sizes.

41. Four disposable hot packs.

42. Personal protection equipment such as mask, nonabsorbent gown, protective eyeware - minimum of four.

43. Biological fluid cleanup kit.

History: 33-11-01-11; redesignated effective March 1, 1985; amended effective February 1, 1989; August 1, 1994.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

CHAPTER 33-11-03

33-11-03-01. ~~Standards~~ Minimum standards for personnel.

1. ~~One--person-must-have,-as-a-minimum,-a-current~~ The driver must be the equivalent of an emergency medical ~~technician-ambulance~~ technician-basic or emergency care technician ~~certification~~.

2. ~~One--person--must--have,-as-a-minimum,-a-current~~ The attendant must be an emergency medical technician-paramedic ~~certification~~, or be a registered nurse currently certified as an emergency medical ~~technician-ambulance~~ technician-basic or emergency care technician who has a current American heart association, Dakota affiliate, inc. advanced cardiac life support certification.

History: Effective March 1, 1985; amended effective January 1, 1986; August 1, 1994.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

33-11-03-02. Minimum equipment standards. The ambulance must contain all the equipment requirements as found in section 33-11-02-03, plus the following:

1. Cardiac ~~monitor.---Defibrillator~~ defibrillator with pediatric capabilities~~,-electrocardiogram-voice--recorder--if--automatic defibrillator-is-used~~.

2. Portable radio. Rechargeable battery operated capable of reaching law enforcement and hospitals.

3. ~~Portable---suction.----Rechargeable---battery---operated--with appropriate-catheters.~~

4. ~~Medical~~ Adult three-chambered medical antishock trousers or second lower extremity traction splint.

~~5.~~ 4. ~~Esophageal-obturator~~ Endotracheal airway.

~~6.~~ 5. Intravenous therapy equipment. Catheters, tubing solutions, as approved by medical director.

~~7.~~ 6. ~~Blood-tubes~~ Glucose measuring device.

~~8.~~ 7. Syringes and needles.

~~9.~~ 8. Alcohol swabs. Betadine swabs.

~~10.~~ 9. Electrocardiogram supplies. Rolls of electrocardiogram paper, monitor electrodes and defibrillator pads.

~~11.--Chemstix-or-dextrostix.~~

History: Effective March 1, 1985; amended effective August 1, 1994.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

33-11-03-03. Minimum medication requirements. The ambulance must contain the following medications:

1. Sodium bicarbonate.
2. Epinephrine.
3. Lidocaine.
4. Atropine.
5. Naloxone.
6. Nitroglycerin.
7. Diazepam.
8. Dextrose fifty percent.
9. Adenosine.
10. Magnesium sulfate.
11. Bretylium.
12. Bronchodilator.

History: Effective March 1, 1985; amended effective August 1, 1994.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

33-11-03-05. Availability on first call. ~~The--advanced-life support-ambulance-must-be-available-for-the-first-call.--If-the-advanced life--support--ambulance--is--already--on-an-ambulance-run,-a-basic-life support-ambulance-may-respond-to--the--emergency--call.---A--basic--life support--ambulance--may--also--be--offered--on-prescheduled-nonemergency calls.~~ The number of advanced life support ambulances available for first call by the licensed ambulance service is dependent upon the population of the city in which the ambulance is based. For cities with a population less than ten thousand, one advanced life support ambulance must be available for first call. For cities with populations between ten thousand one and forty-five thousand, two advanced life support

ambulances must be available for first call. For cities with populations greater than forty-five thousand, three advanced life support ambulances must be available for first call.

History: Effective March 1, 1985; amended effective January 1, 1986; August 1, 1994.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

33-17-01-02. Definitions. For the purpose of this chapter the following definitions shall apply:

1. "Action level" means the concentration of lead or copper in water specified in title 40, Code of Federal Regulations, part 141, subpart I, section 141.80(c), that determines, in some cases, the treatment requirements set forth under title 40, Code of Federal Regulations, part 141, subpart I, that a water system is required to complete.

2. "Best available technology" or "BAT" means the best technology, treatment techniques, or other means which the department finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking cost into consideration). For the purposes of setting maximum contaminant levels for synthetic organic chemicals, any best available technology must be at least as effective as granular activated carbon.

3. "Coagulation" means a process using coagulant chemicals and mixing by which colloidal and suspended materials are destabilized and agglomerated into flocs.

4. "Community water system" means a public water system which serves at least fifteen service connections used by year-round residents or regularly serves at least twenty-five year-round residents.

5. "Compliance cycle" means the nine-year calendar year cycle during which public water systems must monitor for inorganic and organic chemicals excluding lead, copper, trihalomethanes, and unregulated contaminants. Each compliance cycle consists of three 3-year compliance periods. The first calendar year cycle begins January 1, 1993, and ends December 31, 2001; the second begins January 1, 2002, and ends December 31, 2010; and the third begins January 1, 2011, and ends December 31, 2019.

6. "Compliance period" means a three-year calendar year period within a compliance cycle during which public water systems must monitor for inorganic and organic chemicals excluding lead, copper, trihalomethanes, and unregulated contaminants. Each compliance cycle has three 3-year compliance periods. Within the first compliance cycle, the first compliance period runs from January 1, 1993, to December 31, 1995; the second from January 1, 1996, to December 31, 1998; and the third from January 1, 1999, to December 31, 2001.

7. "Confluent growth" means a continuous bacterial growth covering the entire filtration area of a membrane filter, or a portion thereof, in which bacterial colonies are not discrete.

~~6.~~ 8. "Contaminant" means any physical, chemical, biological, or radiological substance or matter in water.

~~7.~~ 9. "Conventional filtration treatment" means a series of processes including coagulation, flocculation, sedimentation, and filtration resulting in substantial particulate removal.

~~8.~~ 10. "Corrosion inhibitor" means a substance capable of reducing the corrosivity of water toward metal plumbing materials, especially lead and copper, by forming a protective film on the interior surface of those materials.

~~9.~~ 11. "Cross connection" means any connection or arrangement between two otherwise separate piping systems, one of which contains potable water and the other either water of unknown or questionable safety or steam, gas, or chemical whereby there may be a flow from one system to the other, the direction of flow depending on the pressure differential between the two systems.

~~10.~~ 12. "CT" or "CT calc" means the product of residual disinfectant concentration (C) in milligrams per liter determined before or at the first customer and the corresponding disinfectant contact time (T) in minutes. If disinfectants are applied, at more than one point prior to the first customer, the CT of each disinfectant sequence must be determined before or at the first customer to determine the total percent inactivation or total inactivation ratio. In determining the total inactivation ratio, the residual disinfectant concentration of each disinfection sequence and the corresponding contact time must be determined before any subsequent disinfection application points. CT ninety-nine point nine is the CT value required for ninety-nine point nine percent (three-logarithm) inactivation of Giardia lamblia cysts. CT ninety-nine point nine values for a wide variety of disinfectants and conditions are set for under title 40, Code of Federal Regulations, part 141, subpart H. CT calculated divided by CT ninety-nine point nine is the inactivation ratio. The total inactivation ratio is determined by adding together the inactivation ratio for each disinfection sequence. A total inactivation ratio equal to or greater than one point zero is assumed to provide a three-logarithm inactivation of Giardia lamblia cysts.

~~11.~~ 13. "Department" means the North Dakota state department of health and consolidated laboratories.

~~12.~~ 14. "Diatomaceous earth filtration" means a process resulting in substantial particulate removal in which a precoat cake of diatomaceous earth filter media is deposited on a support

membrane or septum, and while the water is filtered by passing through the cake on the septum, additional filter media known as body feed is continuously added to the feed water to maintain the permeability of the filter cake.

~~13.~~ 15. "Direct filtration" means a series of processes including coagulation and filtration but excluding sedimentation resulting in substantial particulate removal.

~~14.~~ 16. "Disinfectant" means any oxidant, including, but not limited to, chlorine, chlorine dioxide, chloramines, and ozone added to water in any part of the treatment or distribution process, that is intended to kill or inactivate pathogenic microorganisms.

~~15.~~ 17. "Disinfectant contact time" (T in CT calculations) means the time in minutes that it takes for water to move from the point of disinfectant application or the previous point of disinfectant residual measurement to a point before or at the point where residual disinfectant concentration (C) is measured. Where only one C is measured, T is the time in minutes that it takes for water to move from the point of disinfectant application to a point before or at where C is measured. Where more than one C is measured, T, for the first measurement of C, is the time in minutes that it takes the water to move from the first or only point of disinfectant application to a point before or at the point where the first C is measured. For subsequent measurements of C, T is the time in minutes that it takes for water to move from the previous C measurement point to the C measurement point for which the particular T is being calculated. Disinfectant contact time in pipelines must be calculated by dividing the internal volume of the pipe by the maximum hourly flow rate through that pipe. T within mixing basins and storage reservoirs must be determined by tracer studies or an equivalent demonstration.

~~16.~~ 18. "Disinfection" means a process which inactivates pathogenic organisms in water by chemical oxidants or equivalent agents.

~~17.~~ 19. "Domestic or other nondistribution system plumbing problem" means a coliform contamination problem in a public water system with more than one service connection that is limited to the specific service connection from which the coliform-positive sample was taken.

~~18.~~ 20. "Effective corrosion inhibitor residual", for the purpose of title 40, Code of Federal Regulations, part 141, subpart I only, means a concentration sufficient to form a passivating film on the interior walls of pipe.

~~19.~~ 21. "Filtration" means a process for removing particulate matter from water by passage through porous media.

~~20.~~ 22. "First draw sample" means a one-liter sample of tap water, collected in accordance with title 40, Code of Federal Regulations, part 141, section 141.86(b)(2), that has been standing in plumbing pipes at least six hours and is collected without flushing the tap.

~~21.~~ 23. "Flocculation" means a process to enhance agglomeration or collection of smaller floc particles into larger, more easily settleable particles through gentle stirring by hydraulic or mechanical means.

~~22.~~ 24. "Gross alpha particle activity" means the total radioactivity due to alpha particle emission as inferred from measurements on a dry sample.

~~23.~~ 25. "Ground water under the direct influence of surface water" means any water beneath the surface of the ground with significant occurrence of insects or other macroorganisms, algae, or large-diameter pathogens such as Giardia lamblia, or significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH which closely correlate to climatological or surface water conditions.

~~24.~~ 26. "Halogen" means one of the chemical elements chlorine, bromine, or iodine.

27. "Initial compliance period" means the first full compliance period that begins January 1, 1993, during which public water systems must monitor for inorganic and organic chemicals excluding lead, copper, trihalomethanes, and unregulated contaminants.

~~25.~~ 28. "Large water system", for the purpose of title 40, Code of Federal Regulations, part 141, subpart I only, means a water system that serves more than fifty thousand persons.

~~26.~~ 29. "Lead service line" means a service line made of lead that connects the water main to the building inlet and any pigtail, gooseneck, or other fitting that is connected to a lead line.

~~27.~~ 30. "Legionella" means a genus of bacteria, some species of which have caused a type of pneumonia called legionnaires disease.

~~28.~~ 31. "Maximum contaminant level" means the maximum permissible level of a contaminant in water which is delivered to any user of a public water system.

~~29.~~ 32. "Maximum total trihalomethane potential" means the maximum concentration of total trihalomethanes produced in a given water containing a disinfectant residual after seven days at a temperature of twenty-five degrees Celsius [77 degrees Fahrenheit] or above.

~~30.~~ 33. "Medium-size water system", for the purpose of title 40, Code of Federal Regulations, part 141, subpart I only, means a water system that serves three thousand one to fifty thousand persons.

~~31.~~ 34. "Near the first service connection" means at one of the twenty percent of all service connections in the entire system that are nearest the water supply treatment facility as measured by water transport time within the distribution system.

~~32.~~ 35. "Noncommunity water system" means a public water system that is not a community water system that primarily provides service to other than year-round residents. A noncommunity water system is either a "nontransient noncommunity" or "transient noncommunity" water system.

~~33.~~ 36. "Nontransient noncommunity water system" means a noncommunity water system that regularly serves at least twenty-five of the same persons over six months per year.

~~34.~~ 37. "Optimal corrosion-control treatment", for the purpose of title 40, Code of Federal Regulations, part 141, subpart I only, means the corrosion-control treatment that minimizes the lead and copper concentrations at users' taps while ensuring that the treatment does not cause the water system to violate any national primary drinking water regulations.

~~35.~~ 38. "Person" means an individual, corporation, company, association, partnership, municipality, or any other entity.

~~36.~~ 39. "Point of disinfectant application" means the point where the disinfectant is applied and water downstream of that point is not subject to recontamination by surface water runoff.

~~37.~~ 40. "Point-of-entry treatment device" means a treatment device applied to the drinking water entering a house or building for the purpose of reducing contaminants in the drinking water distributed throughout the house or building.

~~38.~~ 41. "Point-of-use treatment device" means a treatment device applied to a single tap used for the purpose of reducing contaminants in drinking water at that one tap.

~~39.~~ 42. "Potable water" means water free from impurities in amounts sufficient to cause disease or harmful physiological effects, with the physical, chemical, biological, or radiological quality conforming to applicable maximum permissible contaminant levels.

43. "Product" means any chemical or substance added to a public water system, any materials used in the manufacture of public water system components or appurtenances, or any pipe, storage

tank, valve, fixture, or other materials that come in contact with water intended for use in a public water system.

40. 44. "Public water system" means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals sixty or more days out of the year. A public water system is either a "community" or a "noncommunity" water system.

45. "Repeat compliance period" means any subsequent compliance period after the initial compliance period during which public water systems must monitor for inorganic and organic chemicals excluding lead, copper, trihalomethanes, and unregulated contaminants.

41. 46. "Residual disinfectant concentration" (C in CT calculations) means the concentration of disinfectant measured in milligrams per liter in a representative sample of water.

42. 47. "Sampling schedule" means the frequency required for submitting drinking water samples to a certified laboratory for examination.

43. 48. "Sanitary survey" means an onsite review of the water source, facilities, equipment, operation, and maintenance of a public water system for the purpose of evaluating the adequacy of such source, facilities, equipment, operation, and maintenance for producing and distributing safe drinking water.

44. 49. "Sedimentation" means a process for removal of solids before filtration by gravity or separation.

45. 50. "Service line sample" means a one-liter sample of water, collected in accordance with title 40, Code of Federal Regulations, part 141, section 141.86(b)(3), that has been standing for at least six hours in a service line.

46. 51. "Single family structure", for the purpose of title 40, Code of Federal Regulations, part 141, subpart I only, means a building constructed as a single-family residence that is currently used either as a residence or a place of business.

47. 52. "Slow sand filtration" means a process involving passage of raw water through a bed of sand at low velocity resulting in substantial particulate removal by physical and biological mechanisms.

48. 53. "Small water system", for the purpose of title 40, Code of Federal Regulations, part 141, subpart I only, means a water system that serves three thousand three hundred or fewer persons.

~~49.~~ 54. "Supplier of water" means any person who owns or operates a public water system.

~~50.~~ 55. "Surface water" means all water which is open to the atmosphere and subject to surface runoff.

~~51.~~ 56. "System with a single service connection" means a system which supplies drinking water to consumers with a single service line.

~~52.~~ 57. "Too numerous to count" means that the total number of bacterial colonies exceeds two hundred on a forty-seven millimeter membrane filter used for coliform detection.

~~53.~~ 58. "Total trihalomethanes" means the sum of the concentration in milligrams per liter of the trihalomethane compounds (trichloromethane [chloroform], dibromochloromethane, bromodichloromethane and tribromomethane [bromoform]), rounded to two significant figures.

~~54.~~ 59. "Transient noncommunity water system" means a noncommunity water system that primarily provides service to transients.

~~55.~~ 60. "Trihalomethane" means one of the family of organic compounds, named as derivatives of methane, wherein three of the four hydrogen atoms in methane are each substituted by a halogen atom in the molecular structure.

~~56.~~ 61. "Virus" means a virus of fecal origin which is infectious to humans by waterborne transmission.

~~57.~~ 62. "Waterborne disease outbreak" means the significant occurrence of acute infectious illness, epidemiologically associated with the ingestion of water from a public water system which is deficient in treatment, as determined by the appropriate local or state agency.

~~58.~~ 63. "Water system" means all sources of water and their surroundings and includes all structures, conducts, and appurtenances by means of which the water is collected, treated, stored, or delivered.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990; August 1, 1991; February 1, 1993; August 1, 1994.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-02, 61-28.1-03

33-17-01-06. Maximum contaminant levels, action levels, and treatment technique requirements.

1. **Inorganic chemicals.** The maximum contaminant levels, action levels, and treatment technique requirements for inorganic chemical contaminants are as follows:

~~CONTAMINANT~~	~~LEVEL MILLIGRAM(S)-PER-LITER~~
~~Arsenic~~	~~0.05~~
~~Barium~~	~~1~~
~~Cadmium~~	~~0.010~~
~~Chromium~~	~~0.05~~
~~Mercury~~	~~0.002~~
~~Nitrate-(as-N)~~	~~10~~
~~Selenium~~	~~0.01~~
~~Silver~~	~~0.05~~
~~Fluoride~~	~~4.0~~

CONTAMINANT	MAXIMUM CONTAMINANT LEVEL MILLIGRAM(S) PER LITER	ACTION LEVEL MILLIGRAM(S) PER LITER	TREATMENT TECHNIQUES REQUIREMENTS
Antimony	0.006		
Arsenic	0.05		
Asbestos	7 million fibers per liter (longer than ten micrometers)		
Barium	2		
Beryllium	0.004		
Cadmium	0.005		
Chromium	0.1		
Copper		The 90th percentile level must be less than or equal to 1.3	Source water and corrosion control treatment
Cyanide (as free cyanide)	0.2		
Fluoride	4.0		
Lead		The 90th percentile level must be less than or equal to 0.015	Source water and corrosion control treatment, public education, and lead service line replacement
Mercury	0.002		
Nickel	0.1		
Nitrate (as N)	10		
Nitrite (as N)	1		
Selenium	0.05		
Thallium	0.002		
Total Nitrate and Nitrite (as N)	10		

At the discretion of the department, nitrate levels not to exceed twenty milligrams per liter may be allowed in a noncommunity water system if the supplier of water demonstrates to the satisfaction of the department that:

a. Such water will not be available to children under six months of age;

b. There will be continuous posting of the fact that nitrate levels exceed ten milligrams per liter and the potential health effect of exposure;

c. Local and state public health authorities will be notified annually of nitrate levels that exceed ten milligrams per liter; and

d. No adverse health effects shall result.

2. **Organic chemicals.** The maximum contaminant levels and treatment technique requirements for organic chemical contaminants are as follows:

CONTAMINANT	LEVEL MILLIGRAM-PER-LITER
Chlorinated-hydrocarbons:	
Endrin-(1,2,3,4,10,-10-hexachloro-6,7-epoxy-1,4,4a,5,6,7,8,8a-octa-hydro-1,4-endo,endo-5,8-dimethanonaphthalene)	0.0002
Lindane-(1,2,3,4,5,6-hexachloro-cyclohexane,-gamma-isomer)	0.004
Methoxychlor-(1,1,1-Trichloro-2,2-bis-[p-methoxyphenyl]-ethane)	0.1
Toxaphene($C_{10}H_{10}Cl_8$-Technical chlorinated-camphene,-67-69% chlorine)	0.005
Chlorophenoxys:	
2,4-D-(2,4-Dichlorophenoxyacetic acid)	0.1
2,4,5-TP-Silvex-(2,4,5-Trichloro-phenoxypropionic-acid)	0.01
Total-trihalomethanes.--The-sum-of-the concentrations-of:	
Bromodichloromethane, Dibromochloromethane, Tribromomethane-(bromoform)-and Trichloromethane-(chloroform)	0.10
Volatile-synthetic-organic-chemicals:	
Benzene	0.005
Vinyl-chloride	0.002
Carbon-tetrachloride	0.005
1,2-Dichloroethane	0.005
Trichloroethylene	0.005

~~1,1-Dichloroethylene~~	~~0.007~~
~~1,1,1-Trichloroethane~~	~~0.20~~
~~para-Dichlorobenzene~~	~~0.075~~

CONTAMINANT	MAXIMUM CONTAMINANT LEVEL MILLIGRAM(S) PER LITER	TREATMENT TECHNIQUE REQUIREMENTS
Nonvolatile Synthetic Organic Chemicals:		
Acrylamide		The combination (or product) of dose and monomer level may not exceed 0.05 percent dosed at 1 part per million (or equivalent)
Alachlor	0.002	
Atrazine	0.003	
Benzo (a) pyrene	0.0002	
Carbofuran	0.04	
Chlordane	0.002	
Dalapon	0.2	
Dibromochloropropane (DBCP)	0.0002	
Di (2-ethylhexyl) adipate	0.4	
Di (2-ethylhexyl) phthalate	0.006	
Dinoseb	0.007	
Diquat	0.02	
Endothall	0.1	
Endrin	0.002	
Epichlorohydrin		The combination (or product) of dose and monomer level may not exceed 0.01 percent dosed at 20 parts per million (or equivalent)
Ethylene dibromide (EDB)	0.00005	
Glyphosate	0.7	
Heptachlor	0.0004	
Heptachlor epoxide	0.0002	
Hexachlorobenzene	0.001	
Hexachlorocyclopentadiene	0.05	
Lindane	0.0002	
Methoxychlor	0.04	
Oxamyl (Vydate)	0.2	
Polychlorinated biphenyls (PCBs)	0.0005	
Pentachlorophenol	0.001	
Picloram	0.5	
Simazine	0.004	
Toxaphene	0.003	
2,3,7,8-TCDD (Dioxin)	0.00000003	

2,4-D	0.07
2,4,5-TP Silvex	0.05

Total Trihalomethanes. The sum of the concentrations of:

Bromodichloromethane Dibromochloromethane Tribromomethane (Bromoform) and Trichloromethane (Chloroform)	0.10

Volatile Synthethic Organic Chemicals:

Benzene	0.005
Carbon tetrachloride	0.005
p-Dichlorobenzene	0.075
o-Dichlorobenzene	0.6
1,2-Dichloroethane	0.005
1,1-Dichloroethylene	0.007
cis-1,2-Dichloroethylene	0.07
trans-1,2-Dichloroethylene	0.1
Dichloromethane	0.005
1,2-Dichloropropane	0.005
Ethylbenzene	0.7
Monochlorobenzene	0.1
Styrene	0.1
Tetrachloroethylene	0.005
Toluene	1
1,2,4-Trichlorobenzene	0.2
1,1,1-Trichloroethane	0.2
1,1,2-Trichloroethane	0.005
Trichloroethylene	0.005
Vinyl chloride	0.002
Xylenes (total)	10

3. **Turbidity.**

a. General. All public water systems that utilize surface water sources shall provide filtration and disinfection treatment. Public water systems that utilize ground water sources deemed by the department to be under the direct influence of surface water shall provide disinfection treatment and may be required to provide filtration treatment as set forth under title 40, Code of Federal Regulations, part 141, subpart H.

b. Interim requirements. The following maximum contaminant levels for turbidity in drinking water, measured at a representative entry point to the distribution system, apply to public water systems that utilize surface water sources and provide filtration treatment until June 29, 1993, and to public water systems that utilize surface water sources but do not provide filtration treatment that

the department has determined in writing must install filtration until June 29, 1993, or until filtration is installed, whichever is later:

(1) One turbidity unit as determined by a monthly average except that five or fewer turbidity units may be allowed if the system can demonstrate to the department that the higher turbidity does not:

(a) Interfere with disinfection;

(b) Prevent maintenance of an effective disinfectant agent throughout the distribution system; or

(c) Interfere with microbiological determinations.

(2) Five turbidity units based on an average for two consecutive days.

c. Final requirements. Beginning June 29, 1993, public water systems that utilize surface water sources or ground water sources deemed by the department to be under the direct influence of surface water shall comply with the treatment technique requirements for turbidity and disinfection set forth under title 40, Code of Federal Regulations, part 141, subpart H.

4. **Radioactivity.** The maximum contaminant levels for radioactivity are as follows:

CONTAMINANT	LEVEL PICOCURIES PER LITER
Combined radium-226 and radium-228	5
Gross alpha particle activity, including radium-226, but excluding radon and uranium	15

5. **Microbiological.** The maximum contaminant levels for coliform bacteria are as follows:

a. Monthly maximum contaminant level violations.

(1) No more than one sample per month may be total coliform-positive for systems collecting less than forty samples per month.

(2) No more than five point zero percent of the monthly samples may be total coliform-positive for systems collecting forty or more samples per month.

All routine and repeat total coliform samples must be used to determine compliance. Special purpose samples, such as those taken to determine whether disinfection practices following pipe placement, replacement, or repair are sufficient, and samples invalidated by the department, may not be used to determine compliance.

b. Acute maximum contaminant level violations.

(1) No repeat sample may be fecal coliform or E.coli-positive.

(2) No repeat sample may be total coliform-positive following a fecal coliform or E.coli-positive routine sample.

c. Compliance must be determined each month that a system is required to monitor. The department hereby identifies the following as the best technology, treatment techniques, or other means generally available for achieving compliance with the maximum contaminant levels for total coliform bacteria: protection of wells from contamination by appropriate placement and construction; maintenance of a disinfection residual throughout the distribution system; proper maintenance of the distribution system including appropriate pipe replacement and repair procedures, cross-connection control programs, main flushing programs, proper operation and maintenance of storage tanks and reservoirs, and continual maintenance of a positive water pressure in all parts of the distribution system; filtration and disinfection or disinfection of surface water and disinfection of ground water using strong oxidants such as chlorine, chlorine dioxide, or ozone; the development and implementation of a department-approved wellhead protection program.

6. **Confirmation sampling.** The department may require confirmation samples and average confirmation sample results with initial sample results to determine compliance. At the discretion of the department, sample results due to obvious monitoring errors may be deleted prior to determining compliance.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990; February 1, 1993; August 1, 1994.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03

33-17-01-07. Inorganic chemical sampling and monitoring requirements.

1. ~~Sampling--frequency--for--community--water--systems.~~ Sampling frequency for community and nontransient noncommunity water systems.

   a. ~~Surface-water-supplies.--Community-water-systems-utilizing surface-water-sources-shall-sample-for-inorganic--chemical contaminants--except--lead-and-copper-at-yearly-intervals.~~ Inorganics excluding lead and copper. Community and nontransient noncommunity water systems shall conduct monitoring to determine compliance with the maximum contaminant levels for the inorganic chemicals, excluding lead and copper, as set forth under title 40, Code of Federal Regulations, section 141.23.

   b. ~~Ground--water-supplies.--Community-water-systems-utilizing ground-water-sources-shall-sample-for--inorganic--chemical contaminants---except---lead---and--copper--at--three-year intervals.~~ Lead and copper. Community and nontransient noncommunity water systems shall comply with the monitoring and treatment technique requirements for lead and copper set forth under title 40, Code of Federal Regulations, part 141, subpart I.

   c. ~~Surface---and--ground--water--supplies.---Community--water systems-utilizing-surface-water-or--ground--water--sources shall--comply--with-the-monitoring-and-treatment-technique requirements-for-lead-and-copper-set-forth-under-title-40, Code---of---Federal---Regulations,---part-141,--subpart-I.~~ Unregulated contaminants. Community and nontransient noncommunity water systems shall monitor for sulfate as set forth under title 40, Code of Federal Regulations, section 141.40(n).

   d. Monitoring waivers. With the exception of arsenic, copper, lead, nitrate, and nitrite, the department may grant community and nontransient noncommunity water systems waivers from the monitoring requirements for the inorganic chemicals as set forth under title 40, Code of Federal Regulations, part 141, sections 141.23 and 141.40. The department may issue monitoring waivers only if the conditions set forth under title 40, Code of Federal Regulations, part 141, section 142.16(e) are fully met.

2. ~~Sampling----frequency----for---noncommunity---water---systems. Noncommunity-water-systems-shall-sample-for--nitrate--(as--N). The--analysis-shall-be-repeated-at-intervals-determined-by-the department.--Nontransient--noncommunity--water--systems--shall comply---with---the---monitoring---and---treatment---technique requirements-for-lead-and-copper--set--forth--under--title-40, Code--of--Federal--Regulations,-part-141,-subpart-I.~~ Sampling frequency for transient noncommunity water systems. Transient noncommunity water systems shall conduct monitoring to determine compliance with the maximum contaminant levels for

nitrate and nitrite as set forth under title 40, Code of Federal Regulations, section 141.23.

~~3.--Sampling-frequency-for-check-samples.~~

~~a.--If--the--result-of-an-analysis-indicates-that-the-level-of any-contaminant-exceeds-the-maximum-contaminant-level,-the system--shall--report--to-the-department-within-seven-days and--initiate--three--additional--analyses--at--the---same sampling-point-within-one-month.~~

~~When--the--average--of--four--analyses-exceeds-the-maximum contaminant-level,-the-system-shall-notify-the--department and--give--notice--to-the-public.--Monitoring-after-public notification-shall-be-at-a--frequency--designated--by--the department---and---shall---continue---until---the--maximum contaminant-level-has-not-been-exceeded-in-two--successive samples-or-until-a-monitoring-schedule-as-a-condition-to-a variance,-exemption,-or-enforcement--action--shall--become effective.~~

~~b.--Compliance--with-the-maximum-contaminant-level-for-nitrate shall-be-determined-on--the--basis--of--the--mean--of--two analyses.---When-a-level-exceeding-the-maximum-contaminant level-for-nitrate-is-found,-a--second--analysis--shall--be initiated--within-twenty-four-hours-and-if-the-mean-of-the two-analyses-exceeds-the-maximum--contaminant--level,--the system--shall-notify-the-department-and-give-notice-to-the public.~~

History: Amended effective July 1, 1988; February 1, 1993; August 1, 1994.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03

33-17-01-08. Organic chemical sampling and monitoring requirements.

1. ~~Chlorinated--hydrocarbons--and--chlorophenoxys.~~ Volatile and nonvolatile synthetic organic chemicals.

   a. ~~Sampling-frequency-for-community-water-systems.~~ Coverage. Community and nontransient noncommunity water systems shall conduct monitoring to determine compliance with the maximum contaminant levels for the volatile and nonvolatile synthetic organic chemicals.

      ~~(1)--Surface--water--supplies.---Community--water--systems shall--sample---at---intervals---specified---by---the department,--but--in-no-event-less-frequently-than-at three-year--intervals.---Samples--analyzed--shall--be collected-during-the-period-of-the-year-designated-by~~

~~the department as the period when contamination is most likely to occur.~~

~~(2) Ground water supplies. Community water systems shall sample when specified by the department.~~

b. ~~Sampling frequency for check samples. If the result of an analysis indicates that the level of any contaminant exceeds the maximum contaminant level, the system shall report to the department within seven days and initiate three additional analyses at the same sampling point within one month. When the average of four analyses exceeds the maximum contaminant level, the system shall notify the department and give notice to the public. Monitoring after public notification shall be at a frequency designated by the department and shall continue until the maximum contaminant level has not been exceeded in two successive samples or until a monitoring schedule as a condition to a variance or enforcement action shall become effective.~~ Sampling frequency. The number and frequency of samples shall be as prescribed by the department and set forth under title 40, Code of Federal Regulations, part 141, section 141.24.

c. Compliance. Compliance for each point that is sampled more frequently than annually must be determined based on a running annual average. Compliance for each point that is sampled on an annual or less frequent basis must be determined based on the initial sample result, or the average of the initial and confirmation sample results.

2. **Total trihalomethanes.**

a. Coverage. Community water systems which serve a population of ten thousand or more individuals and which add a disinfectant to the water in any part of the drinking water treatment process shall collect samples for the purpose of analysis for total trihalomethanes.

b. Sampling frequency. The minimum number of samples required to be taken by the system shall be based on the number of treatment plants used by the system. Multiple wells drawing raw water from a single aquifer may, with the department's approval, be considered one treatment plant.

All samples taken within an established frequency shall be collected within a twenty-four-hour period.

(1) Routine sampling. Analyses for total trihalomethanes shall be performed at quarterly intervals on at least four water samples for each treatment plant used by the system. At least twenty-five percent of the

samples shall be taken at locations within the distribution system reflecting the maximum residence time of the water in the system. The remaining seventy-five percent shall be taken at representative locations in the distribution system, taking into account number of persons served, different sources of water, and different treatment methods employed.

(2) Reduced sampling frequency.

(a) Systems utilizing surface water or a combination of surface and ground water. The sampling frequency may be reduced to a minimum of one sample analyzed per quarter taken at a point in the distribution system reflecting the maximum residence time of the water in the system.

The system's sampling frequency may only be reduced upon written request by the system and upon a determination by the department that data from at least one year of sampling at a frequency of four samples collected per calendar quarter per water treatment plant used by the system and local conditions demonstrate that total trihalomethane concentrations will be consistently below the maximum contaminant level.

If at any time during which the reduced sampling frequency is in effect, the result from any analysis exceeds the maximum contaminant level and such results are confirmed by at least one check sample taken promptly after such results are received, or if the system makes any significant change to its source of water or treatment program, the system shall immediately resume sampling on a routine basis of four samples per quarter per treatment plant used by the system. Such increased sampling shall continue for at least one year before the frequency may be reduced again.

(b) Systems utilizing only ground water. The sampling frequency may be reduced to a minimum of one sample analyzed per year per water treatment plant taken at a point in the distribution system reflecting the maximum residence time of the water in the system.

The system's sampling frequency may only be reduced upon written request by the system and upon a determination by the department that the system has a maximum total trihalomethane

potential of less than the maximum contaminant level and local conditions demonstrate that the system is not likely to approach or exceed the maximum contaminant level.

If at any time during which the reduced sampling frequency is in effect, the result from any analysis for maximum total trihalomethane potential is equal to or exceeds the maximum contaminant level and such results are confirmed by at least one check sample, the system shall immediately resume sampling on a routine basis of four samples per quarter per treatment plant used by the system. Such increased sampling shall continue for at least one year before the frequency may be reduced again.

In the event of any significant change to the system's source of water or treatment program, the system shall immediately analyze an additional sample for maximum total trihalomethane potential taken at a point in the distribution system reflecting maximum residence time of the water in the system for the purpose of determining whether the system must begin sampling on a routine basis of four samples per quarter per treatment plant used by the system.

(3) Increased sampling frequency. At the option of the department, sampling frequencies may be increased above the minimum in those cases where it is necessary to detect variations of total trihalomethane levels within the distribution system.

c. Compliance. Compliance with the maximum contaminant level shall be determined based on a running annual average of quarterly analyses.

If the average of analyses covering any twelve-month period exceeds the maximum contaminant level, sampling shall be at a frequency designated by the department and shall continue until a monitoring schedule as a condition to a variance or enforcement action becomes effective.

If the average of analyses covering any twelve-month period exceeds the maximum contaminant level, or if the system fails to monitor, the system shall notify the department and give notice to the public.

d. Reporting. All analyses shall be reported to the department within thirty days of the system's receipt of such results.

e. Modification of treatment methods for reduction of total trihalomethanes. Before a system makes any significant modification to its existing treatment process for the purpose of achieving compliance with the trihalomethane regulations, the system must submit and obtain department approval of a detailed plan setting forth its proposed modification and those safeguards that it will implement to ensure that the water will not be adversely affected by such modification. Each system shall comply with the provisions set forth in the department-approved plan. At a minimum, the department-approved plan shall require the system modifying its disinfection practice to:

(1) Evaluate the water system for sanitary defects and evaluate the source water for biological quality;

(2) Evaluate its existing treatment practices and consider improvements that will minimize disinfectant demand and optimize finished water quality throughout the distribution system;

(3) Provide baseline water quality survey data of the distribution system as the department may require;

(4) Conduct additional monitoring to assure continued maintenance of optimal microbiological quality in finished water; and

(5) Demonstrate an active disinfectant residual throughout the distribution system at all times during and after the modification.

~~3.--Volatile-synthetic-organic-chemicals.~~

~~a.--Coverage--and-effective-dates.--Community-and-nontransient noncommunity-water-systems-serving-more-than-ten--thousand people-shall-analyze-samples,-as-appropriate,-beginning-no later-than-January-1,-1988.---Community--and--nontransient noncommunity--water--systems--serving--from-three-thousand three--hundred--to--ten--thousand--people--shall---analyze samples,--as--appropriate,--no-later-than-January-1,-1989. Other--community--and--nontransient---noncommunity---water systems--shall--analyze--samples,-as-appropriate,-no-later than-January-1,-1991.~~

~~b.--Sampling-frequency.~~

~~(1)--Ground-water-systems.--Systems-shall-sample-at-points of-entry-to-the-distribution-system-representative-of each--source--unless--the-sources-are-combined-before distribution,-then-the-system-must-sample-at-an-entry point--to--the--distribution-system-during-periods-of normal-operating--conditions.---Systems--must--sample~~

every--three--months--if--volatile--synthetic-organic chemicals-are-detected-in-the-initial--sample--or--in any-subsequent-sample.--Sampling-must-be-conducted-at the-same-location-or-a-more--representative--location each--quarter.--Systems-must-sample-every-three-years if--volatile--synthetic--organic--chemicals--are--not detected--in--the-initial-sample-or-in-any-subsequent sample-but-the-system-is-vulnerable-and-has-more-than five---hundred--service--connections.---Systems--must sample-every-five-years-if-volatile-synthetic-organic chemicals--are--not-detected-in-the-initial-sample-or in-any--subsequent--sample--and--the--system--is--not vulnerable--or--is-vulnerable-but-has-five-hundred-or less-service-connections.

Analysis--for--vinyl--chloride--is--required-only-for systems--that--have--detected--one--or--more--of--the following------two-carbon------organic-----compounds: trichloroethylene;--------------tetrachloroethylene; 1,2-dichloroethane;-----------1,1,1-trichloroethane; cis-1,2-dichloroethylene;-trans-1,2-dichloroethylene; or--1,1-dichloroethylene.---The--analysis--for--vinyl chloride-is-required-at-each--distribution--or--entry point--at-which-one-or-more-of-the-two-carbon-organic compounds-were-found.--If-the-first-analysis-does-not detect--vinyl-chloride,-the-department-may-reduce-the frequency-of-vinyl-chloride-monitoring-to-once--every three--years-for-that-sample-location-or-other-sample locations-which-are-more-representative-of--the--same source.

(2)--Surface--water--systems.---Systems--shall--sample--at points--of---entry---to---the---distribution---system representative--of-each-source-unless-the-sources-are combined-before-distribution,-then--the--system--must sample--at--an-entry-point-to-the-distribution-system after-any-application-of-treatment-during-periods--of normal--operating--conditions.---Systems--must-sample every-three--months--if--volatile--synthetic--organic chemicals--are--detected--in-the-initial-sample-or-in any-subsequent-sample.--Sampling-must-be-conducted-at the--same--location-or-a-more-representative-location each-quarter.--Systems-must-sample-quarterly-for--the first--year--and--every--three--years--thereafter--if volatile-synthetic-organic-chemicals-are-not-detected but--the--system-is-vulnerable-and-has-more-than-five hundred-service--connections.---Systems--must--sample quarterly--for--the--first--year-and-every-five-years thereafter-if-volatile--synthetic--organic--chemicals are-not-detected-but-the-system-is-vulnerable-and-has five-hundred-or-less--service--connections.---Systems may--be--required-to-monitor-at-department-discretion if--volatile--synthetic--organic--chemicals--are--not

detected--in-the-first-year-of-quarterly-sampling-and the-system-is-not-vulnerable.

Systems-may-be-required-to-analyze-for-vinyl-chloride at-the-discretion-of-the-department.

c.--Reduced-sampling-frequency.--The-department-may-reduce-the frequency-of-monitoring-to-once--per--year--for--a--system detecting--volatile--synthetic-organic-chemicals-at-levels consistently-less-than-the-maximum-contaminant--level--for three-consecutive-years.

d.--Vulnerability.----Vulnerability---of---systems---shall--be determined-by-the-department-based-upon-an--assessment--of the-following:

(1)--Previous-monitoring-results;

(2)--Number-of-persons-served-by-the-system;

(3)--Proximity-of-a-smaller-system-to-a-larger-system;

(4)--Proximity--to-commercial-or-industrial-use,-disposal, or-storage-of-volatile-synthetic--organic--chemicals; and

(5)--Protection-of-the-water-source.

A--system-is-deemed-to-be-vulnerable-for-a-period-of-three years-after-any-volatile--synthetic--organic--chemical--or unregulated----contaminant,----except---for---disinfection byproducts,-is-detected.

e.--Reporting.---The--results-of-all-analyses-must-be-reported to-the-department--within--thirty--days--of--the--system's receipt-of-such-results.

f.--Compliance.---Compliance--must--be-determined-based-on-the results-of-running-annual-average--of--quarterly--sampling for--each-sampling-location.--If-one-location's-average-is greater-than--the--maximum--contaminant--level,--then--the system--must--be--deemed--to--be--out--of-compliance.--For systems-that-only-take-one-sample-per-location,-compliance must-be-based-on-that-one-sample.

The--department--has--the--authority--to--allow-the-use-of monitoring--data--collected--after--January-1,--1983,--for purposes---of--monitoring--compliance.---If--the--data--is consistent-with-the-other-requirements-of-these-rules,-the department--may--use--that--data--to-represent-the-initial monitoring-if-the-system-is-determined-by--the--department not-to-be-vulnerable.

The department has the authority to determine compliance or initiate enforcement action based upon analytical results and other information compiled by a sanctioned representative or agency.

g. Public notification. If a system fails to monitor or comply with a maximum contaminant level, the system shall notify the department and give notice to the public.

4. Unregulated contaminants.

a. Coverage and effective dates. Community and nontransient noncommunity water systems serving more than ten thousand people shall analyze samples, as appropriate, beginning no later than January 1, 1988. Community and nontransient noncommunity water systems serving from three thousand three hundred to ten thousand people shall analyze samples, as appropriate, no later than January 1, 1989. Other community and nontransient noncommunity water systems shall analyze samples, as appropriate, no later than January 1, 1991. Systems may use monitoring data collected any time after January 1, 1983, to meet the requirements for unregulated contaminants, provided that the monitoring program was consistent with the requirements of these rules.

b. Sampling frequency.

(1) Ground water systems. Systems shall sample at points of entry to the distribution system representative of each source unless the sources are combined before distribution, then the system must sample at an entry point to the distribution system during periods of normal operating conditions. The minimum number of samples is one sample per entry point to the distribution system.

(2) Surface water systems. Systems shall sample quarterly for one year at points of entry to the distribution system representative of each source unless the sources are combined before distribution, then the system must sample at an entry point to the distribution system during periods of normal operating conditions. The minimum number of samples is one year of quarterly samples per water source.

(3) Repeat monitoring. Systems shall repeat the monitoring for unregulated contaminants every five years from the effective dates.

c. Monitoring requirements. Systems shall monitor for the following unregulated contaminants:

~~(1)--Chloroform.~~

~~(2)--Bromodichloromethane.~~

~~(3)--Chlorodibromomethane.~~

~~(4)--Bromoform.~~

~~(5)--trans-1,2-Dichloroethylene.~~

~~(6)--Chlorobenzene.~~

~~(7)--m-Dichlorobenzene.~~

~~(8)--Dichloromethane.~~

~~(9)--cis-1,2-Dichloroethylene.~~

~~(10)--o-Dichlorobenzene.~~

~~(11)--Dibromomethane.~~

~~(12)--1,1-Dichloropropene.~~

~~(13)--Tetrachloroethylene.~~

~~(14)--Toluene.~~

~~(15)--p-Xylene.~~

~~(16)--o-Xylene.~~

~~(17)--m-Xylene.~~

~~(18)--1,1-Dichloroethane.~~

~~(19)--1,2-Dichloropropane.~~

~~(20)--1,1,2,2-Tetrachloroethane.~~

~~(21)--Ethylbenzene.~~

~~(22)--1,3-Dichloropropane.~~

~~(23)--Styrene.~~

~~(24)--Chloromethane.~~

~~(25)--Bromomethane.~~

~~(26)--1,2,3-Trichloropropane.~~

~~(27)--1,1,1,2-Tetrachloroethane.~~

~~(28)--Chloroethane.~~

~~(29)--1,1,2-Trichloroethane.~~

~~(30)--2,2-Dichloropropane.~~

~~(31)--o-Chlorotoluene.~~

~~(32)--p-Chlorotoluene.~~

~~(33)--Bromobenzene.~~

~~(34)--1,3-Dichloropropene.~~

~~Systems---must---monitor---for---ethylene---dibromide--and 1,2-dibromo-3-chloropropane---only---if---the---department determines--they-are-vulnerable-to-contamination-by-either or-both-of--these--substances.---A--vulnerable--system--is defined--as--a-system-which-is-potentially-contaminated-by ethylene---dibromide---and----1,2-dibromo-3-chloropropane, including--surface-water-systems-where-these-two-compounds are-applied,-manufactured,-stored,-disposed-of,-or-shipped upstream,--and-for-ground-water-systems-in-areas-where-the compounds-are-applied,-manufactured,-stored,-disposed--of, or--shipped--in--the--ground--water-recharge-basin,-or-for ground-water-systems-that-are-in-proximity-to--underground storage-tanks-that-contain-leaded-gasoline.~~

~~Monitoring--for--the-following-unregulated-contaminants-is required-at-the-discretion-of-the-department:~~

~~(1)--1,2,4-Trimethylbenzene.~~

~~(2)--1,2,4-Trichlorobenzene.~~

~~(3)--1,2,3-Trichlorobenzene.~~

~~(4)--n-Propylbenzene.~~

~~(5)--n-Butylbenzene.~~

~~(6)--Naphthalene.~~

~~(7)--Hexachlorobutadiene.~~

~~(8)--1,3,5-Trimethylbenzene.~~

~~(9)--p-Isopropyltoluene.~~

~~(10)--Isopropylbenzene.~~

~~(11)--Tert-butylbenzene.~~

~~(12)--Sec-butylbenzene.~~

~~(13)--Fluorotrichloromethane.~~

~~(14)--Dichlorodifluoromethane.~~

~~(15)--Bromochloromethane.~~

~~Instead--of--performing--the--monitoring--for--unregulated contaminants,-a-system--serving--fewer--than--one--hundred fifty--service--connections--may--send--a--letter--to--the department--stating--that--its--system--is--available--for sampling.---This--letter-must-be-sent-to-the-department-no later-than-January-1,-1991.~~

~~d.--Reporting.---The--results-of-all-analyses-must-be-reported to-the-department--within--thirty--days--of--the--system's receipt-of-such-results.~~

3. Unregulated contaminants.

a. Coverage. Community and nontransient noncommunity water systems shall monitor for the unregulated organic contaminants.

b. Monitoring requirements. Systems shall monitor for the following unregulated organic contaminants as set forth under title 40, Code of Federal Regulations, part 141, section 141.40(n):

Aldicarb

Aldicarb sulfoxide

Aldicarb sulfone

Aldrin

Butachlor

Carbaryl

Dicamba

Dieldrin

3-Hydroxycarbofuran

Methomyl

Metolachlor

Metribuzin

Propachlor

Systems shall monitor for the following unregulated organic contaminants as set forth under title 40, Code of Federal Regulations, part 141, sections 141.40(b) through 141.40 (h):

Chloroform

Bromodichloromethane

Chlorodibromomethane

Bromoform

m-Dichlorobenzene

1,1,-Dichloropropene

1,1-Dichloroethane

1,1,2,2-Tetrachloroethane

1,3-Dichloropropane

Chloromethane

Bromomethane

1,2,3-Trichloropropane

1,1,1,2-Tetrachloroethane

Chloroethane

2,2-Dichloropropane

o-Chlorotoluene

p-Chlorotoluene

Dibromomethane

Bromobenzene

1,3-Dichloropropene

Systems shall monitor for the following unregulated organic contaminants at the discretion of the department:

1,2,4-Trimethylbenzene

1,2,3-Trichlorobenzene

n-Propylbenzene

n-Butylbenzene

Naphthalene

Hexachlorobutadiene

1,3,5-Trimethylbenzene

p-Isopropyltoluene

Isopropylbenzene

Tert-butylbenzene

Sec-butylbenzene

Fluorotrichloromethane

Dichlorodifluoromethane

Bromochloromethane

Instead of performing the monitoring for the unregulated organic contaminants, a system serving fewer than one hundred fifty service connections may send a letter to the department stating that the system is available for sampling. This letter must be sent to the department by January 1, 1994.

4. Monitoring waivers. With the exception of acrylamide, epichlorohydrin, and total trihalomethanes, the department may grant community and nontransient noncommunity water systems waivers from the monitoring requirements for the organic chemicals as set forth under title 40, Code of Federal Regulations, part 141, sections 141.24 and 141.40. The department may issue waivers only if the conditions set forth under title 40, Code of Federal Regulations, part 141, section 142.16(e) are fully met.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990; August 1, 1994.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03

33-17-01-13. Reporting and public notification.

1. **Reporting requirements.** Except where a shorter reporting period is specified, the system shall report to the department the result of any test, measurement, or analysis required within the first ten days following the month in which the

results are received or the first ten days following the end of the required monitoring period as stipulated by the department, whichever of these is shorter.

The system shall notify the department within forty-eight hours of the failure to comply with any primary drinking water regulations including failure to comply with monitoring requirements, except that failure to comply with the maximum contaminant levels for total coliform bacteria must be reported to the department no later than the end of the next business day after the system learns of the violation.

Systems that utilize surface water sources or ground water sources deemed by the department to be under the direct influence of surface water shall comply with the applicable reporting requirements set forth under title 40, Code of Federal Regulations, part 141, subpart H, section 141.75. Community and nontransient noncommunity water systems shall comply with the applicable reporting requirements for lead and copper set forth under title 40, Code of Federal Regulations, part 141, subpart I, section 141.90.

The system is not required to report analytical results to the department in cases where the department performed the analysis.

The system shall, within ten days of completion of each public notification required, submit to the department a representative copy of each type of notice distributed, published, posted, or made available to the persons served by the system or to the media.

The system shall submit to the department, within the time stated in the request, copies of any records required to be maintained by the department or copies of any documents then in existence which the department is entitled to inspect under the provisions of state law.

2. **Public notification.**

a. Maximum contaminant level, treatment technique, and variance and exemption schedule violations. A public water system which fails to comply with an applicable maximum contaminant level or an established treatment technique or which fails to comply with the requirements of any schedule prescribed pursuant to a variance or exemption shall notify persons served by the system as follows:

(1) By publication in a daily newspaper of general circulation in the area served by the system as soon as possible, but in no case later than fourteen days after notification of the violation or failure. If

the area served by the system is not served by a daily newspaper of general circulation, notice must instead be given by publication in a weekly newspaper of general circulation serving the area;

(2) By mail delivery, or by hand delivery, not later than forty-five days after the violation or failure. The department may waive mail or hand delivery if it determines that the system has corrected the violation or failure within the forty-five-day period; and

(3) A copy of the notice must be furnished to the radio and television stations serving the area served by the system as soon as possible, but in no case later than seventy-two hours after receiving notification of the violation or failure, for the following violations or failures that may pose an acute risk to human health: exceedance of the maximum contaminant level for nitrate or nitrite; exceedance of the maximum contaminant level for coliform bacteria when fecal coliform bacteria or E. coli are present in the water distribution system; occurrence of a waterborne disease outbreak in a system which utilizes surface water sources or ground water sources deemed by the department to be under the direct influence of surface water that does not provide filtration treatment.

A public water system must give notice at least once every three months by mail delivery or by hand delivery for as long as the violation or failure exists.

A community water system in an area that is not served by a daily or weekly newspaper of general circulation or a noncommunity water system must give notice within fourteen days after notification of the violation or failure by hand delivery or by continuous posting in conspicuous places within the area served by the system. Posting must continue for as long as the violation or failure exists.

b. Other violations, variances, and exemptions. A public water system which fails to perform required monitoring, fails to complete required sanitary surveys, fails to comply with an established testing procedure, is granted a variance, or is granted an exemption shall notify persons served by the system as follows:

(1) By publication in a daily newspaper of general circulation in the area served by the system within three months after notification of the violation or

grant. If the area served by the system is not served by a daily newspaper of general circulation, notice shall instead be given by publication in a weekly newspaper of general circulation serving the area.

(2) A public water system must give notice at least once every three months by mail delivery or by hand delivery for as long as the violation exists or the variance or exemption is in existence.

(3) A community water system in an area that is not served by a daily or weekly newspaper of general circulation or a noncommunity water system must give notice within three months after notification of the violation or grant by hand delivery or by continuous posting in conspicuous places within the area served by the system. Posting must continue for as long as the violation exists or the variance or exemption remains in effect.

c. Notice to new billing units. A community water system must give a copy of the most recent public notice for any outstanding violation of any maximum contaminant level, or any treatment technique requirement, or any variance or exemption schedule to all new billing units or new hookups prior to or at the time service begins.

d. General notice content. Each notice must provide a clear and readily understandable explanation of the violation, any potential adverse health effects, the population at risk, the steps that the public water system is taking to correct such violation, the necessity for seeking alternative water supplies, if any, and any preventive measures the consumer should take until the violation is corrected. Each notice must be conspicuous and may not contain unduly technical language, unduly small print, or similar problems that frustrate the purpose of the notice. Each notice must include the telephone number of a designee of the public water system as a source of additional information concerning the notice. Notices shall be multilinqual where appropriate.

e. Mandatory health effects language. When providing the information on potential adverse health effects required in notices of violations of maximum contaminant levels or treatment technique requirements, or notices of the granting or the continued existence of variances or exemptions, or notices of failure to comply with a variance or exemption schedule, public water systems shall include specific language, available from the department, for the following contaminants as set forth under

title 40, Code of Federal Regulations, part 141, section 32, paragraph e, and part 143, section 143.5:

~~(1)--Trichloroethylene.~~

~~(2)--Carbon-tetrachloride.~~

~~(3)--1,2-Dichloroethane.~~

~~(4)--Vinyl-chloride.~~

~~(5)--Benzene.~~

~~(6)--1,1-Dichloroethylene.~~

~~(7)--para-Dichlorobenzene.~~

~~(8)--1,1,1-Trichloroethane.~~

~~(9)--Fluoride.~~

~~(10)--Total-coliform-bacteria.~~

~~(11)--Fecal-coliform-bacteria-or-E.coli.~~

~~(12)--Microbiological.~~

~~(13)--Lead.~~

~~(14)--Copper.~~

(1) Antimony.

(2) Asbestos.

(3) Barium.

(4) Beryllium.

(5) Cadium.

(6) Chromium.

(7) Copper.

(8) Cyanide.

(9) Fluoride.

(10) Lead.

(11) Mercury.

(12) Nickel.

(13) Nitrate.

(14) Nitrite.

(15) Selenium.

(16) Thallium.

(17) Fecal coliform bacteria or E. coli.

(18) Microbiological.

(19) Total coliform bacteria.

(20) Acrylamide.

(21) Alachlor.

(22) Aldicarb.

(23) Aldicarb sulfone.

(24) Aldicarb sulfoxide.

(25) Atrazine.

(26) Benzene.

(27) Benzo(a)pyrene.

(28) Carbofuran.

(29) Carbon tetrachloride.

(30) Chlordane.

(31) Dalapon.

(32) Dibromochloropropane (DBCP).

(33) ortho-Dichlorobenzene.

(34) para-Dichlorobenzene.

(35) 1,2-Dichloroethane.

(36) 1,1-Dichloroethylene.

(37) cis-1,2-Dichloroethylene.

(38) trans-1,2-Dichloroethylene.

(39) Dichloromethane.

(40) 1,2-Dichloropropane.

(41) 2,4-D.

(42) Di (2-ethylhexyl) adipate.

(43) Di (2-ethylhexyl) phthalate.

(44) Dinoseb.

(45) Diquat.

(46) Endothall.

(47) Endrin.

(48) Epichlorohydrin.

(49) Ethylbenzene.

(50) Ethylene dibromide (EDB).

(51) Glyphosate.

(52) Heptachlor.

(53) Heptachlor epoxide.

(54) Hexachlorobenzene.

(55) Hexachlorocyclopentadiene.

(56) Lindane.

(57) Methoxychlor.

(58) Monochlorobenzene.

(59) Oxamyl (Vydate).

(60) Pentachlorophenol.

(61) Picloram.

(62) Polychlorinated biphenyls (PCBs).

(63) Simazine.

(64) Styrene.

(65) 1,2,4-Trichlorobenzene.

(66) 2,3,7,8-TCDD (Dioxin).

(67) Tetrachloroethylene.

(68) 1,1,1-Trichloroethane.

(69) 1,1,2-Trichloroethane.

(70) Trichloroethylene.

(71) Toluene.

(72) Toxaphene.

(73) 2,4,5-TP Silvex.

(74) Vinyl chloride.

(75) Xylenes.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990; August 1, 1991; February 1, 1993; August 1, 1994.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03, 61-28.1-05

33-17-01-19. Protection of public water systems.

1. **Cross-connection control.**

   a. Cross connections are prohibited except when and where, as approved by the authority having jurisdiction, suitable protective devices are installed, tested, and maintained to ensure proper operation on a continuing basis.

   b. A system shall be designed, installed, and maintained in such a manner as to prevent nonpotable liquids, solids, or gases from being introduced into the water through cross connections or any other piping connections to the system.

2. **Interconnections.**

   a. Interconnection between two or more systems shall be permitted only with the written approval of the department.

   b. Interconnection between a nonpublic and public water system shall not be permitted unless specifically approved in writing by the department.

3. **Return of used water prohibited.** Water used for cooling, heating, or other purposes shall not be returned to the system. Such water may be discharged into an approved

drainage system through an airgap or may be used for nonpotable purposes.

4. ~~Introduction--of-chemicals-and-other-substances.--No-chemicals or--other--substances--that---could---produce---either---toxic conditions,-taste,-odor,-or-discoloration-in-a-system-shall-be introduced-into-or-used-in-such-systems.~~ Products in contact with water. All products that may come into contact with water intended for use in a public water system must meet American national standards institute/national sanitation foundation international standards 60-1988 and 61-1991. Suppliers of water for public water systems may not willfully introduce or permit the introduction of a product into the public water system which has not first been determined to meet these standards. At the discretion of the department, suppliers of water for public water systems shall compile and maintain on file for inspection by the department a list of all products used by the system. Prior to using a product not on the list, suppliers of water for public water systems shall either determine that the product meets these standards or notify the department of the type, name, and manufacturer of the product. A product will be considered as meeting these standards if so certified by an organization accredited by the American national standards institute to test and certify such products.

5. ~~Painting--of--water--tanks.--The-interior-surface-of-a-potable water-tank,-piping,-or-equipment-shall-be-lined,--painted,--or repaired--with--only--approved-materials-which-will-not-affect either-the-taste,-odor,-color,--or--potability--of--the--water supply--when--the--tank,--piping,-or-equipment-is-placed-in-or returned-to-service.~~

6. **Used materials.** Containers, piping, or materials which have been used for any purpose other than conveying potable water shall not be used.

History: Effective December 1, 1982; amended effective July 1, 1988; August 1, 1994.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03

33-36-01-02. Emergency medical services training programs. The department shall establish training, testing, and certification requirements for the following emergency medical services programs:

1. Primary certification programs:
   a. First responder;
   b. Emergency care technician;
   c. Emergency medical technician-basic;
   d. Emergency medical technician-intermediate; and
   e. Emergency medical technician-paramedic; and
   f. Advanced first aid ambulance attendant.
2. Certification scope enhancement programs:
   a. Emergency medical services instructor;
   b. Automatic defibrillation;
   c. Manual defibrillation;
   d. Intravenous maintenance;
   e. Flight medical crew;
   f. Automobile extrication;
   g. Automobile extrication instructor;
   h. First responder-refresher;
   i. Emergency medical technician-basic refresher;
   j. Emergency medical technician-intermediate refresher; and
   k. Emergency medical technician-paramedic refresher; and
   l. Epinephrine administration; and

m. Dextrose administration.

History: Effective April 1, 1992; amended effective October 1, 1992; August 1, 1994.
General Authority: NDCC 23-27-04.3
Law Implemented: NDCC 23-27-04.3

33-36-01-03. Training, testing, and certification standards for primary certification programs. The department shall authorize the conduct of courses, the testing of students, and the certification of personnel when application has been made on forms provided and in the manner specified by the department contingent on the following requirements:

1. First responder:

   a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Services: First Responder Training Course".

   b. Textbooks. The department shall publish a list of approved textbooks.

   c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as a first responder or its equivalent.

   d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all stations of a practical examination conducted by the course coordinator. The practical examination must consist of no less than one medical, one cardiopulmonary resuscitation, and one trauma station.

   e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the second year.

   f. Recertification. The department shall recertify for a two-year period expiring on December thirty-first those persons who have met one of the following requirements:

      (1) Completion of a sixteen hour North Dakota first responder refresher course.

(2) Completion of a twenty-four hour emergency medical technician-basic refresher course.

(3) Audit lessons two, three, four, five, seven, ten, fourteen, and twenty-one of an emergency medical technician-basic course consisting of twenty-five hours.

2. Emergency care technician and emergency medical technician-basic:

a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Technician-Ambulance National Standard Curriculum", in the edition specified by the department.

b. Textbooks. The department shall publish a list of approved textbooks.

c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency care technician or its equivalent.

d. Testing. Students must pass the national registry's written examination and a practical examination provided by the department which meets the national registry's standards in order to be eligible for certification. The content of the practical examination must be determined by the department, and the department shall establish policies regarding retesting of failed written and practical examinations consistent with those established by the national registry.

e. Emergency care technician initial certification. The department shall issue initial certification as an emergency care technician to persons under the age of eighteen who have completed an authorized course and passed the testing process or those who have requested reciprocity from another state with equivalent training. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the second year.

f. Emergency medical technician-basic initial certification. A person eighteen years of age or older who has completed an authorized course and passed the testing process shall obtain certification from the national registry.

g. Recertification of emergency care technicians. The department shall recertify for a two-year period expiring on December thirty-first those persons who have met all of the following requirements:

(1) Completion of a twenty-four hour emergency medical technician-basic refresher course which includes the American heart association's cardiopulmonary resuscitation course c refresher or its equivalent, answering correctly at least seventy percent of the questions on a written examination provided by the department and passing a local practical examination meeting the department's requirements.

(2) Completion of forty-eight hours of continuing education as approved by the department or the national registry.

h. Recertification of emergency medical technicians-basic. Emergency medical technician-basics must be recertified by the national registry recertification policies.

3. Emergency medical technician-intermediate:

a. Student prerequisite certification. Students must be certified as an emergency care technician or its equivalent prior to testing.

b. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Technician-Intermediate National Standard Curriculum", in the edition specified by the department.

c. Textbooks. The department shall publish a list of approved textbooks.

d. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency medical technician-intermediate or its equivalent.

e. Testing. Students must pass the written and practical examinations as provided by the national registry and administered by the department in order to be eligible for certification.

f. Emergency medical technician-intermediate initial certification. A person eighteen years of age or older who has completed an authorized course and passed the testing process shall obtain certification from the national registry.

g. Recertification of emergency medical technician-intermediate. Emergency medical technician-intermediate must be recertified by the national registry recertification policies.

4. Emergency medical technician-paramedic:

a. Student prerequisite certification. Students must be certified as an emergency care technician or its equivalent prior to testing.

b. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Technician-Paramedic National Standard Curriculum", in the edition specified by the department.

c. Textbooks. The department shall publish a list of approved textbooks.

d. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency medical technician-paramedic or its equivalent.

e. Field internship. Courses must be required to provide a minimum of three hundred hours of field internship experience with a licensed advanced life support ambulance service.

f. Testing. A student must pass the written and practical examinations as provided by the national registry and administered by the department in order to be eligible for certification.

g. Emergency medical technician-paramedic initial certification. A person eighteen years of age or older who has completed an authorized course and passed the testing process shall obtain certification from the national registry.

h. Recertification of emergency medical technician-paramedic. An emergency medical technician-paramedic must be recertified by the national registry recertification policies.

5. a. Advanced first aid ambulance attendant initial certification. The department shall issue initial certification to persons currently certified in American national red cross advanced first aid and who demonstrate a minimum of two years experience with a North Dakota licensed ambulance service as evidenced by North Dakota ambulance service license application personnel rosters.

b. Recertification of advanced first aid ambulance attendants. The department shall recertify for a three-year period, expiring on March thirty-first, those persons who have completed a twenty-four hour emergency medical technician-basic refresher course, which includes the American heart association's cardiopulmonary resuscitation course c refresher or its equivalent, answering correctly at least seventy percent of the questions on a written examination provided by the department and passing a local practical examination meeting the department's requirements.

History: Effective April 1, 1992; amended effective August 1, 1994.
General Authority: NDCC 23-27-04.3
Law Implemented: NDCC 23-27-04.3

33-36-01-04. Training, testing, and certification standards for certification scope enhancement programs. The department shall authorize the conduct of courses, the testing of students, and the certification of personnel when application has been made on forms provided and in the manner specified by the department contingent on the following requirements:

1. Automatic defibrillation:

   a. Student prerequisite certification. Students must be certified as a first responder or its equivalent, with oxygen and suction training.

   b. Curriculum. The course curriculum must be that issued by the department entitled "Automatic Defibrillator: Coordinator Handbook".

   c. Textbooks. The textbook must be chapter twenty from the advanced cardiac life support textbook published by the American heart association.

   d. Course instructor. The course instructor must be a physician, registered nurse, or paramedic and must be currently certified by the American heart association in advanced cardiac life support.

   e. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination conducted by the department. The practical examination must consist of the automatic defibrillation of a simulated cardiac arrest patient.

   f. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. The certification

must expire one year from the date the practical and written tests were passed.

g. Recertification. The department shall recertify for a one-year period those persons who have met all of the following requirements:

(1) Quarterly review of the automatic defibrillation process conducted by a person trained at least to the emergency care technician level and certified in automatic defibrillation.

(2) Demonstration of skill competence to the squad's medical director five to seven months after becoming certified.

(3) Successful completion of the department's written and practical examinations.

2. Manual defibrillation:

a. Student prerequisite certification. A student must be certified as an emergency care technician or its equivalent.

b. Curriculum. The course curriculum must be that issued by the department entitled "Manual Defibrillator/Monitor Curriculum".

c. Course instructor. The course instructor must be a physician, registered nurse, or paramedic and must be currently certified by the American heart association in advanced cardiac life support.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination conducted by the department. The practical examination must consist of the manual defibrillation of a simulated cardiac arrest patient and correctly identify eleven out of thirteen static cardiac strips.

e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. The certification must expire one year from the date the practical and written tests were passed.

f. Recertification. The department shall recertify for a one-year period those persons who have met all of the following requirements:

(1) Quarterly review of the manual defibrillation process conducted by a person trained at least to the emergency care technician level and certified in manual defibrillation.

(2) Demonstration of skill competence to the squad's medical director five to seven months after becoming certified.

(3) Successful completion of the department's written and practical examinations.

3. Intravenous therapy maintenance:

a. Student prerequisite certification. A student must be certified as an emergency care technician or its equivalent.

b. Curriculum. The course curriculum must be that issued by the department entitled "EMT/ECT IV Maintenance Module".

c. Course instructor. The course instructor must be an emergency medical technician-intermediate or its equivalent.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination provided by the department. The practical examination must consist of performing intravenous maintenance skills on a manikin.

e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of that year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the following year.

f. Recertification. The department shall recertify for a one-year period those persons who have completed the department's one hour refresher course, written examination, and practical examination.

4. Flight medical crew:

a. Student prerequisite certification. An individual must be enrolled as an emergency medical technician-paramedic student or certified as an emergency medical technician-paramedic or its equivalent.

b. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "Air Medical Crew National Standard Curriculum", in the edition specified by the department.

c. Course instructor. The department shall provide the course instructor.

d. Initial certification. The department shall issue initial certification to persons who have completed an authorized course. A person who has completed an authorized course between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the second year.

e. Recertification. The department shall recertify for a two-year period those persons who have completed the department's four hour refresher course or complete eight hours of air medical related education.

5. Automobile extrication:

a. Curriculum. The course curriculum must be that issued by transportation rescue consultants, inc. entitled "The Carbusters: Principles, Techniques and Handtools".

b. Course instructor. The course instructor must be certified by the department as an automobile extrication instructor.

c. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department.

d. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the second year.

e. Recertification. The department shall recertify for a two-year period those persons who complete the department's six hour refresher course or audit eight hours of an initial course and pass the department's written examination.

6. Automobile extrication instructor:

a. Curriculum. The course curriculum must be that issued by transportation rescue consultants, inc. entitled "The Carbusters: Principles, Techniques and Handtools".

b. Course instructor. The department shall provide the course instructor.

c. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department.

d. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of the following year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the second year.

e. Recertification. The department shall recertify for a two-year period those persons who have satisfactorily conducted an automobile extrication course or have audited eight hours of an automobile extrication instructor course.

7. Emergency medical services instructor:

a. Student prerequisite. An individual must be at least eighteen years of age in order to be certified.

b. Curriculum. The course curriculum must consist of thirty-two hours of training based on the curriculum issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Services Instructor Training Program, A National Standard Curriculum", in the edition specified by the department. The department shall determine which training topics must be extracted from the curriculum to comprise the thirty-two hours of training.

c. Course instructor. The course instructor must be provided by the department.

d. Initial certification. The curriculum must be divided into two 16-hour blocks of instruction and the department shall issue initial certification to persons for each sixteen-hour block. Persons completing the first block of instruction between January first and June thirtieth must be certified until December thirty-first of that year. Persons completing the first block of instruction between July first and December thirty-first must be certified until December thirty-first of the following year.

Persons completing the second block of instruction must be certified for an additional year beyond the expiration date of the first block. The department may determine equivalencies for either block of instruction.

e. Recertification. The department shall recertify for a two-year period those persons who have completed the department's eight hour refresher course or have audited eight hours of an initial emergency medical services instructor course.

8. First responder refresher:

a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "First Responder Refresher Training Program National Standard Curriculum", in the edition specified by the department.

b. Textbooks. The department shall publish a list of approved textbooks.

c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as a first responder or its equivalent.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the course coordinator and pass all stations of a practical examination conducted by the course coordinator. The practical examination must consist of no less than one medical, one cardiopulmonary resuscitation, and one trauma station.

9. Emergency medical technician-basic refresher:

a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "EMT Ambulance Refresher Training Program National Standard Curriculum", in the edition specified by the department.

b. Textbooks. The department shall publish a list of approved textbooks.

c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency care technician or its equivalent.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination

provided by the department and pass all stations of a practical examination conducted by the course coordinator.

10. Emergency medical technician-intermediate refresher:

    a. Curriculum. The course coordinator shall select topics consisting of twelve hours of training from the curriculum issued by the United States department of transportation, national highway traffic safety administration entitled "Emergency Medical Technician-Intermediate National Standard Curriculum", in the edition specified by the department.

    b. Textbooks. The department shall publish a list of approved textbooks.

    c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency medical technician-intermediate or its equivalent.

11. Emergency medical technician-paramedic refresher:

    a. Curriculum. The course curriculum must be that issued by the United States department of transportation, national highway traffic safety administration entitled "EMT Paramedic Refresher Training Program National Standard Curriculum", in the edition specified by the department.

    b. Textbooks. The department shall publish a list of approved textbooks.

    c. Course coordinator. The course coordinator must be certified by the department as an emergency medical services instructor and must be currently certified as an emergency medical technician-paramedic or its equivalent.

12. Epinephrine administration:

    a. Student prerequisite certification. A student must be certified as an emergency care technician or its equivalent.

    b. Curriculum. The course curriculum must be that issued by the department entitled "EMT/ECT Epinephrine Administration Module".

    c. Course instructor. The course instructor must be a physician, registered nurse, or paramedic.

    d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination

provided by the department and pass all portions of a practical examination provided by the department. The practical examination must consist of performing subcutaneous injection of epinephrine with the use of a preloaded, self-injecting device such as the epipen trainer.

e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of that year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the following year.

f. Recertification. The department shall recertify for a one-year period those persons who have completed the department's one hour refresher course, written examination, and practical examination.

13. Dextrose administration:

a. Student prerequisite certification. A student must be certified as an emergency medical technician-intermediate or its equivalent.

b. Curriculum. The course curriculum must be that issued by the department entitled "EMT-I -- 50% Dextrose Administration Module".

c. Course instructor. The course instructor must be a physician, registered nurse, or paramedic.

d. Testing. The student must correctly answer at least seventy percent of the questions on a written examination provided by the department and pass all portions of a practical examination provided by the department. The practical examination must consist of administration of the drug by aseptic injection into intravenous administration tubing.

e. Initial certification. The department shall issue initial certification to persons who have completed an authorized course and passed the testing process. Persons passing the testing process between January first and June thirtieth must be certified until December thirty-first of that year. Persons passing the testing process between July first and December thirty-first must be certified until December thirty-first of the following year.

f. Recertification. The department shall recertify for a one-year period those persons who have completed the

department's one hour refresher course, written examination, and practical examination.

History: Effective April 1, 1992; amended effective October 1, 1992; August 1, 1994.
General Authority: NDCC 23-27-04.3
Law Implemented: NDCC 23-27-04.3

OCTOBER 1994

CHAPTER 33-20-01.1

33-20-01.1-03. Definitions. The terms used throughout this title have the same meaning as in North Dakota Century Code chapter 23-29, except:

1. "Agricultural waste" means solid waste derived from the production and processing of crops and livestock such as manure, spoiled grain, grain screenings, undigested rumen material, livestock carcasses, fertilizer, and fertilizer containers, but does not include pesticide waste or pesticide containers.

2. "Airport" means public-use airport open to the public without prior permission and without restrictions within the physical capacities of available facilities.

3. "Aquifer" means a geological formation, group of formations, or portion of formation capable of yielding significant quantities of ground water to wells or springs.

4. "Closed unit" means a landfill or surface impoundment or a portion thereof that has received solid waste for which closure is complete.

5. "Closure" means the taking of those actions to close and reclaim a solid waste management unit or facility. Closure actions may include, but are not limited to, sloping filled areas to provide adequate drainage, applying final cover, providing erosion control measures, grading and seeding, installing monitoring devices, constructing surface water

control structures, installing gas control systems, and measures necessary to secure the site.

6. "Commercial waste" means solid waste generated by stores, offices, restaurants, warehouses, and other nonmanufacturing activities exclusive of household waste, industrial waste, and special waste.

7. "Compliance boundary" means the vertical planar surface that extends downward into the uppermost aquifer and that circumscribes the waste management units at which ~~the ground water protection~~ water quality standards or maximum concentration limits apply. ~~The compliance boundary may be either the facility boundary or an alternative boundary within the facility.~~

8. "Composting" means the controlled biological decomposition of organic solid waste under aerobic conditions.

9. "Detachable container" means a reusable container for the collection, storage, or transportation of solid waste that is mechanically loaded or handled (for example, "dumpsters" and "rolloffs").

10. "Drop box facility" means a facility used for the placement of a detachable container including the area adjacent for necessary entrance and exit roads, unloading, and turn-around areas. Drop box facilities normally serve the general public with loose loads and receive solid waste from off-site.

11. "Energy conversion facility" has the same meaning as in North Dakota Century Code subsection 5 of section 49-22-03, except that refining of liquid hydrocarbon products is excluded.

12. "Existing unit" means a landfill or surface impoundment or a portion thereof that is receiving or has received solid waste for which closure has not been completed.

13. "Facility" means all contiguous land and structures, other appurtenances, and improvements on land which include one or more solid waste management units, such as a transfer station, solid waste storage building, a solid waste processing system, a resource recovery system, an incinerator, a surface impoundment, a surface waste pile, a land treatment area, or a landfill. A facility may or may not be used solely for solid waste management.

14. "Final cover" means any combination of compacted or uncompacted earthen material, synthetic material, and suitable plant growth material which, after closure, will be permanently exposed to the weather and which is spread on the top and side slopes of a landfill or facility.

15. "Floodplain" means the lowland and relatively flat areas adjoining inland and coastal waters that are inundated by a one hundred-year flood.

16. "Free liquid" means the liquid which separates from the solid portion of a solid waste under ambient pressure and normal, above freezing temperature. The environmental protection agency paint filter liquids test method or visual evidence must be used to determine if a waste contains free liquid.

~~16.~~ 17. "Garbage" means putrescible solid waste such as animal and vegetable waste resulting from the handling, preparation, cooking, and consumption of food, including wastes from markets, storage facilities, and processing plants.

~~17.~~ 18. "Gas condensate" means the liquid generated as a result of gas recovery processes at a landfill disposal unit.

19. "Ground water" means water below the land surface in a geologic unit in which soil pores are filled with water and the pressure of that water is equal to or greater than atmospheric pressure.

~~18.~~ 20. "Hazardous waste" has the meaning given by North Dakota Century Code section 23-20.3-02 and further defined in chapter 33-24-02.

~~19.~~ 21. "Household waste" means solid waste, such as trash and garbage, normally derived from households, single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day use recreation areas.

~~20.~~ 22. "Incinerator" has the meaning given by section 33-15-01-04.

~~21.~~ 23. "Industrial waste" has the same meaning as in North Dakota Century Code section 23-29-03. Such waste may include, but is not limited to, residues or spills of any industrial or manufacturing process and waste resulting from the following: fertilizer/agricultural chemicals; food and related products/byproducts; inorganic chemicals; iron and steel manufacturing; leather and leather products; nonferrous metals manufacturing/foundries; organic chemicals; plastics and resins manufacturing; pulp and paper industry; rubber and miscellaneous plastic products; textile manufacturing; transportation equipment; petroleum refining; and the combustion of municipal waste or regulated infectious waste.

~~22.~~ 24. "Inert waste" means nonputrescible solid waste which will not generally contaminate water or form a contaminated leachate. Inert waste does not serve as food for vectors. Inert waste includes, but is not limited to: construction and demolition material such as metal, wood, bricks, masonry and cement

concrete; asphalt concrete; ~~tires;~~ metal; tree branches; bottom ash from coal fired boilers; and waste coal fines from air pollution control equipment.

~~23.~~ 25. "Land treatment" means the controlled application of solid waste, excluding application of animal manure, into the surface soil to alter the physical, chemical, and biological properties of the waste.

~~24.~~ 26. "Landfill" has the meaning given by North Dakota Century Code section 23-29-03 and that is not a land treatment unit, surface impoundment, injection well, or waste pile.

27. "Lateral expansion" means a horizontal extension of the waste boundaries of an existing landfill disposal unit.

~~25.~~ 28. "Leachate" means a liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such waste.

~~26.~~ 29. "Leachate ~~collection~~ removal system" means any combination of landfill base slopes, liners, permeable zones, pipes, detection systems, sumps, pumps, holding areas or retention structures, treatment systems, or other features that are designed, constructed, and maintained to contain, collect, detect, remove, and treat leachate.

30. "Lower explosive limit" means the lowest percent by volume of a mixture of explosive gases in air that will propagate a flame at twenty-five degrees Celsius [77 degrees Fahrenheit].

~~27.~~ 31. "Municipal waste incinerator ash" means the residue produced by the incineration or gasification of municipal waste.

32. "Operator" means the person responsible for the overall operation of a facility or part of a facility.

33. "Owner" means the person who owns a facility or part of a facility.

~~28.~~ 34. "Plan of operation" means the written plan developed by an owner or operator of a facility detailing how a facility is to be operated during its active life.

~~29.~~ 35. "Postclosure period" means the period of time following closure of a solid waste management unit during which the owner or operator must perform postclosure activities.

36. "Processing" means an operation designed to separate, shred, compress, or otherwise modify a recyclable material to facilitate the transport or resource recovery of the material.

~~30.~~ 37. "Radioactive waste" means solid waste containing radioactive material and subject to the requirements of article 33-10.

~~31.--"Recover--or--recycle"-means-any-method,-technique,-or-process utilized-to-separate,-process,-modify,-convert,-treat,--shred, compress,--or--otherwise-prepare-solid-waste-so-that-component materials-or-substances-may-be-beneficially-used-or-reused.~~

~~32.~~ 38. "Recyclable ~~materials~~ material" means ~~all~~ a solid waste material that has been segregated for recycling or converted into a raw material ~~or a~~, substitute for a raw material, or a commodity.

39. "Recycling" means collecting, sorting, or recovering material that would otherwise be solid waste and performing all or part of a method or technique, including processing, to create a recyclable material.

40. "Runoff" means any snowmelt, rainwater, leachate, or other liquid that drains from any part of a facility over another part of the facility or over land adjoining the facility.

41. "Run-on" means any snowmelt, rainwater, or other liquid that drains from land adjoining a facility onto any part of the facility or that drains from one part of the facility onto another part of the facility.

~~33.~~ 42. "Scavenging" means uncontrolled removal of solid waste materials from any solid waste management facility.

~~34.~~ 43. "Sequential partial closure" means bringing discrete, usually adjacent, portions of a disposal facility to elevation and grade in an orderly, continually progressing process as part of the operations of the facility for facilitating closure.

~~35.~~ 44. "Sludge" means solid waste in a semisolid form consisting of a mixture of solids and water, oils, or other liquids.

~~36.--"Solid-waste-processing"-means-an-operation-for-the-purpose-of modifying-the-characteristics-or-properties-of-solid-waste--to facilitate--transportation,--resource-recovery,-or-disposal-of solid-waste-including--any--process--designed--to--recover--or recycle-waste.~~

~~37.~~ 45. "Suitable plant growth material" means that soil material (normally the A and the upper portion of B horizons which are dark colored due to organic staining) which, based upon a soil survey, is acceptable as a medium for plant growth when respread on the surface of regraded areas.

~~38.~~ 46. "Surface impoundment" means a human-made excavation, diked area, or natural topographic depression designed to hold an

accumulation of solid waste which is liquid, liquid bearing, or sludge for containment, treatment, or disposal.

~~39.~~ 47. "Transfer station" means a site or building used to transfer solid waste from a vehicle or a container, such as a rolloff box, into another vehicle or container for transport to another facility.

~~40.~~ 48. "Treatment" means a method or process designed to change the physical, chemical, or biological character or composition of a solid waste or leachate so as to neutralize the waste or leachate or so as to render the waste or leachate safer for public health or environmental resources during transport, storage, or disposal. The term does not include resource recovery.

49. "Used oil" means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

~~41.~~ 50. "Waste pile or pile" means any noncontainerized accumulation of nonflowing solid waste.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-01.1-04. Care and disposal of solid waste.

1. Any person who owns or operates any premises, business establishment, or industry is responsible for the ~~handling, care, and disposal~~ solid waste management activities, such as storage, transportation, resource recovery, or disposal, of solid waste generated or managed at ~~his~~ that person's premises, business establishment, or industry.

2. No solid waste may be delivered to a facility which is not in compliance with this article or abandoned upon any street, alley, highway, public place, or private premises.

3. Solid waste must be stored, collected, and transported in a manner that provides for public safety, prevents uncontrolled introduction into the environment, and minimizes harborage for insects, rats, or other vermin.

4. Except in unincorporated areas of this state, household waste must be removed from the premises or containers at regular intervals not to exceed seven days and transported to a solid waste management unit or facility.

5. Used oil, lead-acid batteries, major appliances, and scrap metal may not be collected or transported for disposal to any solid waste disposal unit or facility unless such unit or facility has provision for intermediate storage and recycling of these materials and all such materials are appropriately segregated for recycling.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-01.1-04.1. Storage containers and areas. All household wastes are to be stored in the manner provided by this section.

1. Storage containers.

a. Single-use containers.

(1) Single-use containers, such as paper or plastic bags, liners, or cartons, must have a maximum capacity of thirty-two gallons [121.1 liters] unless otherwise allowed by the local unit of government, must be leakproof and must be puncture resistant. Paper bags must be specifically designed for solid waste containment or disposal.

(2) Paper containers may not be used for outside storage unless supported by wall-mounted or freestanding holders or frames. When filled, the container top must be tied, stapled, or crimped to completely confine the contents.

b. Residential containers.

(1) Reusable residential containers must be rigid and durable, nonabsorbent, watertight, tapered, corrosion resistant, rodentproof, easily cleanable, and have a flytight cover. These containers must be covered except when adding or removing waste.

(2) Residential containers must have a maximum capacity of thirty-two gallons [121.1 liters].

(3) When residential containers are kept in the outdoor environment, storage racks or supports must be provided to minimize corrosion, to prevent breeding of insects, and to prevent rodent harborage. The bottom of the racks or supports must be at least one foot [30.5 centimeters] above ground level. The covers may be chained to the rack or to a permanent structure.

c. Bulk containers. Bulk containers or detachable containers, such as dumpsters, must be constructed of rigid and durable, rust-resistant and corrosion-resistant material, be equipped with tight-fitting lids or doors to prevent entrance of insects or rodents, and must be leakproof. Lids and covers must be closed except when adding or removing waste.

2. Enclosed storage areas.

a. Storage rooms, buildings, or areas must be of rodentproof construction which is readily cleanable with proper drainage.

b. Storage rooms or buildings, if not refrigerated, must be adequately vented and all openings must be screened.

3. Maintenance of containers and enclosed storage areas.

a. All containers and enclosed areas for storage of solid waste must be maintained in good repair and in a manner as necessary to prevent litter, nuisances, odors, insect breeding, and rodents.

b. Containers that are broken or otherwise fail to meet requirements of this section must be replaced with complying containers.

4. Unconfined waste. Unless special service or special equipment is provided by the collector for handling unconfined waste materials such as trash, brush, leaves, tree cuttings, newspapers and magazines, and other debris for manual pickup and collection, these materials must be in securely tied bundles or in boxes, sacks, or other receptacles and solid waste so bundled may not exceed fifty pounds [22.7 kilograms] in weight and four feet [1.8 meters] in length. Such wastes may not be placed out for collection twenty-four hours before scheduled pickup.

History: Effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-01.1-12. Waste treatment. The department may require the treatment of a solid waste which may have incompatible characteristics with another solid waste prior to or during codisposal or which may produce a constituent in the waste's laboratory extract or leachate that exceeds twenty percent of a toxicity standard provided by section 33-24-02-14 or ten parts per million polychlorinated biphenols. The department must consider factors such as the site hydrogeological characteristics, toxicity of the waste, anticipated leachate quality, mobility of waste constituents, fate of leachate constituents during

migration, potential site capacity, or local uses of waters of the state.

1. Treatment, when performed, must reduce:

   a. Toxicity of the waste; or

   b. The mobility of constituents contained in or derived from the waste into leachate; or

   c. Both the toxicity and mobility.

2. When treatment is required, the generator of the solid waste or the owner or operator of the facility at which the waste would be treated must provide a demonstration of the treatment technology for approval by the department.

3. An owner or operator may propose and demonstrate treatment of solid waste so as to remove or separate toxic materials or constituents from the waste prior to disposal. In evaluating the demonstration, the department shall consider such factors as technical feasibility; the proposed management of the removed or separated waste materials or constituents; the physical, chemical, and biological processes affecting fate and transport; relative degree of removal of the toxic materials or constituents; or the resulting characteristics of the waste or leachate. If the treatment achieves leachate concentrations of constituents in or derived from the remaining waste which are less than the standards of article 33-16, the department may reduce or waive one or more of the criteria of this article which are enumerated in one or more of the following subdivisions:

   a. The liner or hydraulic barrier.

   b. The leachate removal system.

   c. The site efficiency for collection or rejection of precipitation that falls on the landfill.

   d. The ground water monitoring plan and system.

   e. The plan of operation.

   f. The postclosure plan and postclosure period.

   g. Recordkeeping and reporting.

History: Effective August 1, 1993; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-02.1

33-20-02.1-01. Solid waste management permit required. Every person who transports solid waste or operates a solid waste management unit or facility is required to have a valid permit issued by the department, unless the activity is an emergency, exemption, or exception as provided in this section.

1. If the department determines an emergency exists, it may issue an order citing the existence of such emergency and require that certain actions be taken as necessary to meet the emergency in accordance with the provisions of North Dakota Century Code section 23-29-10.

2. A solid waste management permit is not required for the following activities or facilities:

   a. Backyard composting of leaves, grass clippings, or wood chips;

   b. A collection point for parking lot or street sweepings;

   c. Collection sites for wastes collected and received in sealed plastic bags from such activities as periodic cleanup campaigns for cities, rights of way, or roadside parks;

   d. ~~Collection---sites~~ Places which receive one or more recyclable materials ~~solely---from----the----voluntary participation--of--other--persons~~, excluding garbage, for storage or for processing after which the material is transported for resource recovery, disposal, or storage;

   e. Onsite incinerators used by hospitals, clinics, laboratories, or other similar facilities solely for incineration of commercial waste or infectious waste generated onsite;

   f. Rock and dirt fills that receive any combination of rock, dirt, or sand; and

   g. Surface impoundments for storage, handling, and disposal of oil and gas exploration and production wastes on a lease or area permitted through the North Dakota industrial commission under North Dakota Century Code section 38-08-04.

3. A permit for the transportation of solid waste is not required by persons who:

a. Transport solely their own waste to a solid waste management unit or facility;

b. Transport waste entirely within a facility regulated under this article or entirely on their property; ~~and~~ or

c. Transport a recyclable ~~materials~~ material other than waste used oil or scrap tires.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-02.1-02. Permits by rule. The owner or operator of the following facilities is deemed to have obtained a permit for a solid waste management facility without making application for it~~,-unless-the department-finds-that-the-facility-is--not~~ as long as the owner or operator remains in compliance with section 33-20-04.1-01 and the ~~listed~~ rules and requirements provided in the respective subsections of this section:

1. A facility for inert waste operated for municipalities which together have one thousand or fewer people provided:

   a. The owner or operator of a new facility or lateral expansion of a landfill notifies the department, on forms available from the department, ninety days prior to any construction;

   b. ~~A--permanent--sign--must--be-posted-at-the-entrance-of-the facility,-which-indicates-the-following:~~

      ~~(1)--The-name-of-the-facility's-owner;~~

      ~~(2)--The-name-and-telephone-number-of-a-person-responsible for-the-facility;~~

      ~~(3)--The-wastes-accepted-at-the-facility;-and~~

      ~~(4)--The--days--and-hours-the-facility-is-open-for-access; and~~

   c. The facility is in compliance with sections 33-20-02.1-04, 33-20-04.1-02, and 33-20-04.1-09 and with chapter ~~33-20-05~~ 33-20-05.1.

2. A drop box facility in compliance with subsection 2 of section 33-20-04.1-06.

3. A waste pile for composting only grass and leaves that is operated for ten thousand or fewer people in compliance with section 33-20-04.1-07 provided the owner or operator notifies

the department, on forms available from the department, ninety days prior to construction.

4. A pile of scrap tires accumulated by a tire dealer, a municipality, or a county which contains either one thousand three hundred or fewer car tires, twenty-five tons [22.7 metric tons] or less of shredded tires or a pile of tires, which is equivalent in volume to one twin-axle semitrailer load or less, provided that no public nuisance is created and the following requirements are addressed:

   a. Access to the facility is monitored or controlled;

   b. The location is accessible by fire control and emergency equipment; and

   c. The owner or operator has appropriate provisions and financial arrangements for the recycling or disposal of tires.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-02.1-04. Record of notice.

1. Within ~~thirty~~ sixty days of the issuance of a permit for any landfill, surface impoundment or land treatment unit if not already completed, the owner or operator shall record a notarized affidavit with the county register of deeds. The affidavit must specify that this facility, as noted in the legal description, is permitted to accept solid waste for disposal. This affidavit must specify that another affidavit must be recorded upon the facility's final closure.

2. Within sixty days of completion of final closure of any landfill, surface impoundment or land treatment facility and prior to sale or lease of the property on which the facility is located, the owner shall comply with North Dakota Century Code section 23-29-13. The record or plat shall, in perpetuity, notify any person conducting a title search that the land has been used as a solid waste disposal facility. The record or plat must indicate the types and quantities of solid waste placed in the site and details on the site's construction, operation, or closure (including precautions against any building, earth moving, or tillage on the closed site) that are necessary to ensure the long-term maintenance and integrity of the closed facility.

3. The department must be provided a certified copy of any affidavit or plat within sixty days of recording.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-02.1-06. Permit modification, suspension, or revocation.

1. A permit may be modified, suspended, revoked, or denied by the department for reasons pertaining to: circumstances which do not meet the purpose and provisions of this article, the provisions of the permit, or the plans and specifications submitted as part of the application for permit; or, violations of any applicable laws or rules. The department shall provide written notice to the permittee.

2. If a change occurs during the life of a permit for transporting solid waste (such as the number or type of vehicles used to transport waste, the service area, the waste categories transported, or the solid waste management facilities use), the permittee shall notify the department in writing within thirty days.

3. If a change occurs during the life of a permit for a solid waste management unit or facility, as specified in subsection 4, the permittee shall apply for and receive a modification of the permit prior to enacting the change. Routine maintenance, repair, or replacement, or an increase in hours of operations may not be considered a construction or operation change. Changes, including frequency of monitoring and reporting, waste sampling or analysis method, schedules of compliance, and revised cost estimates for closure and postclosure may be effected through written notice to and approval by the department.

4. The following changes at a permitted solid waste management unit or facility require a permit modification:

   a. A change to the facility boundaries or acreage;

   b. An increase in average daily solid waste ~~volume received~~ specified in the permit or permit application, calculated by weight or volume for any twelve consecutive months;

   c. A change in the solid waste characteristics ~~or categories~~;

   d. An increase or decrease in finished height or finished slope of a landfill;

   e. Any increase in landfill trench or excavation depth;

f. A change in facility site development which will result in impact to or encroachment into a one hundred-year floodplain, a ravine, a wetland, or a drainageway ~~or which will adversely impact surface water or ground water~~;

g. A change in site drainage or management of ~~surface water, ground water, or leachate~~ runoff or run-on;

h. A change in facility site development which will result in disposal of wastes closer to site boundaries than originally approved;

i. The addition of solid waste management units, which, if sited independently, would require a permit; or

j. Other changes that could have an adverse affect on the safety, health, or welfare of nearby residents, property owners, or the environment.

5. An application for modification of a solid waste management unit or facility shall follow the procedures and provisions of ~~chapter~~ section 33-20-03.1-02.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-02.1-07. Renewal of permit. An application for renewal of any permit must be submitted at least sixty days prior to the expiration date. The application for renewal must follow the procedures and provisions of ~~chapter~~ section 33-20-03.1-02. The conditions of an expired permit continue in force until the effective date of a new permit, if the permittee has submitted a timely and complete application for a new permit and the department, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

CHAPTER 33-20-03.1

33-20-03.1-01. Preapplication procedures.

1. For all new solid waste management facilities subject to the location standards of subsection 2 of section 33-20-04.1-01, a preapplication consisting of a preliminary facility description and a site assessment must be submitted to the department for review prior to submitting a permit application.

   a. The preliminary facility description must include, at a minimum, the location of the facility; a projection of capacity, size, daily waste receipts, type of waste accepted, years of operation, description of operation, and costs; and a discussion of the proposed facility's compliance with local zoning requirements and the district waste management plan.

   b. The preliminary site assessment must include available information pertaining to the site's geology, hydrogeology, topography, soils, and hydrology based on existing information.

2. Within sixty days of receipt of a preapplication, the department will provide written notification of approval or disapproval of the preapplication. If, after review of all information received, the department makes the determination to disapprove the preapplication, the department shall inform the applicant in writing of the reasons for the disapproval. If the preapplication is disapproved, the applicant may submit a new preapplication. A disapproval must be without prejudice to the applicant's right to a hearing before the department pursuant to North Dakota Century Code chapter 28-32.

3. An application may be filed only after approval of the preapplication and a finding by the department, after consultation with the state geologist and state engineer, that the site is geologically and hydrogeologically suitable for further evaluation and consideration.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

33-20-03.1-02. Permit application procedures.

1. An application for a permit must be submitted on forms available from the department by any person desiring to

transport solid waste or to establish, construct, or operate a solid waste management unit or facility.

2. The application for a permit must be prepared by the applicant or the applicant's authorized agent and signed by the applicant.

3. Four copies of the application and supporting documents are required to be submitted to the department with the fee specified in chapter 33-20-15.

4. Upon the submission of an application for a permit for a new solid waste management unit or facility, the applicant shall publish a public notice indicating that an application has been submitted to the department. The public notice must indicate the type and location of the unit or facility and must be made by two separate publications in the official county newspaper in the county in which the site or operation is located. The applicant shall provide proof of publication by submitting to the department, within ~~thirty~~ sixty days after the second publication of the notice, and affidavit from the publisher accompanied by a copy of the published notice, which shows the date of publication. The department may require public notice for ~~major-modifications-of-permitted units-or-facilities~~ facility changes listed in subsection 4 of section 33-20-02.1-06.

5. Applicants proposing a solid waste management facility in a mining permit area for disposal of coal processing waste must also file a copy of the application with the public service commission in accordance with subdivision a of subsection 1 of section 69-05.2-19-02.

6. Applications for a solid waste management unit or facility permit must include the following information where applicable:

   a. A completed application form, subsection 1;

   b. A description of the ~~categories~~ anticipated physical and chemical characteristics, estimated amounts, and sources of solid waste to be accepted, including the demonstration required by North Dakota Century Code section 23-29-07.8;

   ~~b.~~ c. ~~Detailed--geologic--and--hydrogeologic-evaluation~~ The site characterization of section 33-20-13-01 and a demonstration that the site fulfills the location standards of section 33-20-04.1-01;

   ~~c.~~ d. Soil survey and segregation of suitable plant growth material;

e. Demonstrations of capability to fulfill the general facility standards of section 33-20-04.1-02;

~~d.~~ f. ~~Site~~ Facility engineering ~~plans----and---facility~~ specifications adequate to demonstrate the capability to fulfill performance, design, and construction criteria provided by this article and enumerated in this subdivision;

(1) Transfer stations and drop box facilities, section 33-20-04.1-06.

(2) Waste piles, section 33-20-04.1-07.

(3) Resource recovery, section 33-20-04.1-08.

(4) Land treatment, sections 33-20-04.1-09 and chapter 33-20-09.

(5) Surface impoundments, sections 33-20-04.1-09 and chapter 33-20-08.1.

(6) Any disposal, section 33-20-04.1-09.

(7) Inert waste landfill, chapter 33-20-05.1.

(8) Municipal waste landfill, chapter 33-20-06.1.

(9) Industrial waste landfill, chapters 33-20-07.1 or 33-20-10.

(10) Special waste landfill, chapter 33-20-07.1;

~~e.~~ g. ~~Plan~~ The plan of operation of section 33-20-04.1-03;

~~f.~~ h. ~~Surface--water--and--ground--water--protection--provisions~~ Demonstration of the treatment technology of section 33-20-01.1-12;

~~g.--Odors,-dust,-and-open-burning-control-provisions;~~

~~h.--Accident-prevention-and-safety-provisions;~~

~~i.--Fire-protection-provisions;~~

~~j.~~ i. ~~Inspection,--recordkeeping,--and--reporting-procedures~~ The place where the operating record is or will be kept, section 33-20-04.1-04;

~~k.--Access-control-and-facility-sign-descriptions;~~

~~l.--Operator-training-procedures;~~

j. Demonstration of capability to fulfill the ground water monitoring, section 33-20-13-02;

~~m.~~ k. Construction quality assurance and quality control ~~procedures~~;

~~n.~~ l. ~~Closure and postclosure period procedures~~ Demonstrations of capability to fulfill the closure standards, section 33-20-04.1-05 and otherwise provided by this article;

~~o.~~ m. ~~Financial assurance provisions; and~~ Demonstrations of capability to fulfill the postclosure standards, section 33-20-04.1-09 and otherwise provided by this article;

~~p.~~ n. ~~Documentation~~ Demonstration of conformance with the district solid waste management plan, as required by North Dakota Century Code sections 23-29-06 and 23-29-07; and

o. A disclosure statement as required by North Dakota Century Code section 23-29-07.11.

7. Applications for a solid waste transporter's permit must include the following information:

a. A completed application form, subsection 1;

b. Description of the types of solid waste to be transported, approximate quantities, and anticipated generator sources;

c. A list of the anticipated solid waste management facilities that will store, treat, process, recycle, or dispose the solid waste;

d. Description of equipment and transportation spill prevention as required by section 33-20-01.1-05; and

e. A disclosure statement as required by North Dakota Century Code section 23-29-07.11.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07, 23-29-07.8, 23-29-07.11

33-20-03.1-03. Permit application review and action.

1. The department will review the applications, plans, and specifications for solid waste transporters and for solid waste management facilities and information submitted as a result of the public notices.

2. Upon completion of the department's review, the application for permit will be approved, returned for clarification and additional information, or denied.

   a. The basis for approval must be an application which demonstrates compliance with this article and the North Dakota Century Code chapter 23-29.

   b. The basis for return must be an application which is procedurally or technically incomplete, inaccurate, or deficient in detail, or which precludes an orderly review and evaluation. If the application is returned, the applicant may resubmit an application, complete with all necessary information to satisfy deficiencies. If the applicant does not resubmit an application within six months, the department shall consider the application withdrawn, and any subsequent application must be considered a new application.

   c. The basis for denial must be an application which contains false, misleading, misrepresented, or substantially incorrect or inaccurate information; fails to demonstrate compliance with this article; proposes construction, installation, or operation of a solid waste management unit or facility which will result in a violation of any part of this article; or is made by an applicant for whom an environmental compliance background review reveals any of the circumstances listed in subsection 14 of North Dakota Century Code section 23-29-04.

3. If the department makes a preliminary determination to issue a permit <u>for a solid waste management facility</u>,the department shall prepare a draft permit. The draft permit will be available for public review and comment after the department publishes a notice of its intent to issue the permit. The public notice must be published in the official county newspaper in the county in which the solid waste management unit or facility is located and in a daily newspaper of general circulation in the area of the facility.

4. <u>a.</u> Interested persons may submit written comments to the department on the draft permit within thirty days of the <u>final</u> public notice. All written comments will be considered by the department in the formulation of its final determinations.

5. <u>b.</u> The department shall hold a hearing if it determines there is significant public interest in holding such a hearing. Public notice for a hearing will be made in the same manner as for a draft permit. The hearing will be before the department and will be held at least fifteen days after the public notice has been published.

~~6.~~ 4. If, after review of all information received, the department approves the permit application, the department shall issue a permit. The department may impose reasonable conditions upon a permit.

~~7.~~ 5. If, after review of all information received, the department makes the determination to deny the permit, the applicant will be notified, in writing, of the denial. The department shall set forth in any notice of denial the reasons for denial. If the application is denied, the applicant may submit a new application, which will require a new public notice. A denial must be without prejudice to the applicant's right to a hearing before the department pursuant to North Dakota Century Code chapter 28-32.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07

CHAPTER 33-20-04.1

33-20-04.1-01. General location standards.

1. No solid waste management facility may be located in areas which result in impacts to human health or environmental resources or in an area which is unsuitable because of reasons of topography, geology, hydrology, or soils.

2. Sites for new, or for lateral expansions of, land treatment units, surface impoundments closed with solid waste in place, municipal waste landfills, industrial waste landfills, and special waste landfills must minimize, control, or prevent the movement of waste or waste constituents with geologic conditions and engineered improvements. Sites should be underlain by materials with low permeability to provide a barrier to contaminant migration.

   a. The following geographic areas or conditions must be excluded in the consideration of a site:

      (1) Where the waste is disposed within an aquifer;

      (2) Within a public water supply designated wellhead protection area;

      (3) Within a one hundred-year floodplain;

      (4) Where geologic or manmade features, including underground mines, may result in differential settlement ~~or~~ and failure of ~~the structural integrity of~~ a structure or other improvement on the facility;

      (5) On the edge of or within channels, ravines, or steep topography whose slope is unstable due to erosion or mass movement;

      (6) Within woody draws; or

      (7) In areas designated as critical habitats for endangered or threatened species of plant, fish, or wildlife.

   b. The following geographic areas or conditions may not be approved by the department as a site unless the applicant demonstrates there are no reasonable alternatives:

      (1) Over or immediately adjacent to principal glacial drift aquifers identified by the state engineer;

(2) Closer than one thousand feet [304.8 meters] to a down gradient drinking water supply well;

(3) Closer than two hundred feet [60.96 meters] horizontally from the ordinary high water elevation of any surface water or wetland;

(4) Within final cuts of surface mines; or

(5) Closer than one thousand feet [304.8 meters] to any state or national park.

c. The department may establish alternative criteria based on specific site conditions.

3. No municipal waste landfill or lateral expansion may be located within ten thousand feet [3048 meters] of any airport runway currently used by turbojet aircraft or five thousand feet [1524 meters] of any runway currently used by only piston-type aircraft. Owner or operators proposing a new site or lateral expansions for a municipal waste landfill within a five-mile [8.05-kilometer] radius of an airport must notify the affected airport and the federal aviation administration.

4. A minimum horizontal separation of twenty-five feet [7.62 meters] must be maintained between new or lateral expansions of solid waste management units and any aboveground or underground pipeline or transmission line. The owner shall designate the location of all such lines and easements.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-02. General facility standards. An owner or operator of a solid waste management facility~~,-except-these--permitted--by--rule,~~ shall comply with these general facility standards:

1. All personnel involved in solid waste handling and in the facility operation or monitoring must be instructed in specific procedures to ensure compliance with the permit, the facility plans, and this article as necessary to prevent accidents and environmental impacts. Documentation of training, such as names, dates, description of instruction methods, and copies of certificates awarded, must be placed in the facility's operating record.

2. The solid waste management facility shall comply with the water protection provisions of chapter 33-20-13.

3. The solid waste management facility may not cause a discharge of pollutants into waters of the state unless such discharge is in compliance with requirements of the North Dakota pollutant discharge elimination system pursuant to chapter 33-16-01.

4. The solid waste management facility may not cause a violation of the ambient air quality standard or odor rules, article 33-15, at the facility boundary.

5. Suitable control measures must be taken whenever fugitive dust is a nuisance or exceeds the levels specified in article 33-15.

6. Open burning is prohibited except as allowed under article 33-15.

7. ~~Suitable--measures-must-be-taken-to-prevent-and-control-fires. Arrangements-must-be-made-with-the-local--fire--department--to acquire-their-services-when-needed.~~

8. A permanent sign must be posted at the entrance of a facility, or at the entrance of a solid waste management unit used by a facility for wastes generated onsite, which indicates the following:

   a. The name of the facility;

   b. The permit number;

   c. The name and telephone number of the owner and the operator if different than the owner;

   d. The days and hours the facility is open for access;

   e. The wastes not accepted for disposal; and

   f. Any restrictions for trespassing, burning, hauling, or nonconforming dumping.

8. The owner or operator of a facility shall periodically inspect solid waste managed at the facility, on a schedule proposed by the owner or operator and approved by the department, to control and reject unauthorized solid wastes as specified by this article, a permit, or a plan of operation.

9. All litter or windblown rubbish, trash, or garbage must be returned to collection containers or vehicles, to storage containers or areas, or to a solid waste management facility.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-03. Plan of operation. All solid waste management facilities, except those permitted by rule, shall meet the requirements of this section.

1. The owner or operator of a solid waste management unit or facility shall prepare and implement a plan of operation approved by the department as part of the permit. The plan must describe the facility's operation to operating personnel and the facility must be operated in accordance with the plan. The plan of operation must be available for inspection at the request of the department. Each plan of operation must include, where applicable:

   a. A description of waste acceptance ~~plan--detailing~~ procedures, including categories of solid waste to be accepted ~~at--the--facility,--waste--acceptance~~ and waste rejection procedures~~,--and---other---information---deemed necessary---by--the--owner--or--operator~~ as required by subsection 2 of section 33-20-05.1-02 or subsection 8 of section 33-20-06.1-02 or subsection 2 of section 33-20-07.1-01 or subsection 4 of section 33-20-10-03;

   b. A description of waste handling procedures;

   c. A description of facility inspection ~~and--monitoring~~ activities required by subsection 2, including frequency;

   d. A description of contingency ~~plan-describing-what~~ actions ~~will-be-taken~~ for the following:

      (1) Fire or explosion;

      (2) Leaks;

      (3) Ground water contamination;

      (4) Other releases (for example, dust, debris, failure of run-on diversion or runoff containment systems); and

      (5) Any other issues pertinent to the facility.

   e. ~~Equipment,~~ Leachate removal system operation~~,~~ and maintenance procedures;

   f. Safety ~~and-health-plans-or~~ procedures;

   g. For landfills, implementation of sequential partial closure;

   h. ~~An~~ A description of industrial waste or special waste management ~~plan-that-describes--how--industrial--waste--or special--waste--delivered--to--a--solid--waste--management~~

~~facility will be managed. The owner or operator must~~ specify procedures, which include:

(1) A procedure for notifying solid waste generators and haulers of the facility operating requirements and restrictions;

(2) A procedure for evaluating waste characteristics, liquid content, the specific analyses that may be required for specific wastes, and the criteria used to determine when analyses are necessary, the frequency of testing, and the analytical methods to be used;

(3) A procedure for inspecting and ~~managing the waste and~~ for identifying any special management requirements, and the rationale for accepting or rejecting a waste based on its volume and characteristics;

(4) ~~The plan must address how~~ Procedures for managing the following solid waste ~~will be managed~~, as appropriate:

(a) Bulk chemical containers which contain free product or residue;

(b) Asbestos;

(c) Waste containing polychlorinated biphenyls at a concentration less than fifty parts per million;

(d) Radioactive waste;

(e) Rendering and slaughterhouse waste;

(f) Wastes that could spontaneously combust or that could ignite other waste because of high temperatures;

(g) Foundry waste;

(h) Ash from incinerators, resource recovery facilities, and power plants;

(i) Paint residues, paint filters, and paint dust;

(j) Sludges, including ink sludges, lime sludge, wood sludge, and paper sludge;

(k) Fiberglass, urethane, polyurethane, and epoxy resin waste;

(l) Spent activated carbon filters;

(m) Oil and gas exploration and production waste;

(n) Wastes containing free liquids;

(o) Contaminated soil waste from cleanup of spilled products or wastes; and

(p) Any other solid waste that the owner or operator plans to handle.

(5) The owner or operator must ~~indicate--in-the-plan~~ describe any solid waste that will not be accepted at the facility; and

~~(6)~~ i. The owner or operator must amend the plan whenever ~~the~~ operating procedures, contingency actions, waste management ~~practices~~ procedures, or wastes have changed. The owner or operator shall submit the amended plan to the department for approval or disapproval.

2. The owner or operator shall inspect the facility to ensure compliance with ~~the-approved-plans-and-specifications-and~~ this article, a permit and approved plans. The owner or operator shall keep an inspection log including ~~at--least~~ information such as the date of inspection, the name of the inspector, a notation of observations made, and the date and nature of any repairs or corrective action taken. ~~The-log-must-be-kept-at the-facility-or--other--permanent--office--from--the--date--of inspection.---Inspection-records-must-be-made-available-to-the department-upon-request.~~

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-04. Recordkeeping and reporting. The owner or operator of a solid waste management facility, except those permitted by rule, shall comply with these recordkeeping and reporting requirements:

1. A solid waste management facility may not accept solid waste until the department has received and approved a report which includes narrative, drawings, and test results to certify that the facility has been constructed in accordance with the approved plans and specifications and as required by the permit.

2. ~~An--owner--or-operator-shall-maintain-operating-records-on-the categories-and-weights-or-volumes-of-solid-waste--received--at the--facility.---Any-major~~ An owner or operator shall keep an operating record consisting of a copy of each application,

plan, report, notice, drawing, inspection log, test result or other document required by this article, including those enumerated in the subdivisions of this subsection, or a permit. The operating record must include any deviations from ~~the--facility--plans,-the-permit-and~~ this article ~~must-also-be noted-on-the-operating-records,~~ the permit, and facility plans where department approval is required. The owner or operator shall provide a copy of any document in the operating record upon receiving a request from the department. The operating record must be kept at the facility, or at a location near the facility within North Dakota and approved by the department.

a. The permit preapplication, section 33-20-03.1-01.

b. The permit application, section 33-20-03.1-02.

c. An amended permit application, section 33-20-03.1-03.

d. The site characterization, section 33-20-13-01.

e. Any site demonstrations, section 33-20-04.1-01.

f. Documentation of training, section 33-20-04.1-02.

g. The plan of operation, section 33-20-04.1-03.

h. Facility inspection logs, section 33-20-04.1-03.

i. Records of notice, section 33-20-02.1-04.

j. As-built drawings and certifications, sections 33-20-04.1-04 and 33-20-04.1-05.

k. The ground water monitoring plan, all monitoring data, and statistical interpretations, section 33-20-13-02.

l. Records of the weight or volume of waste, section 33-20-04.1-09.

m. The closure plan, sections 33-20-04.1-05 and 33-20-14-02.

n. The postclosure plan, sections 33-20-04.1-09 and 33-20-14-02.

o. The financial assurance instruments for closure and postclosure, chapter 33-20-14.

p. Records of gas monitoring and remediation, section 33-20-06.1-02.

q. The annual report, section 33-20-04.1-04.

r. Notices of intent to close and completion of postclosure, sections 33-20-04.1-05 and 33-20-04.1-09 respectively.

s. The permit and any modifications, sections 33-20-02.1-03 and 33-20-02.1-06.

3. An owner or operator shall prepare and submit a copy of an annual report to the department by March first of each year. The annual report must cover facility activities during the previous calendar year and must include the following information:

a. Name and address of the facility;

b. Calendar period covered by the report;

c. Annual quantity for each category of solid waste in tons or volume;

d. Identification of occurrences and conditions that prevented compliance with the permit and this article; and

e. Other items identified in the facility plans and permit.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-05. General closure standards. The requirements of this section apply to all solid waste management facilities, unless otherwise specified.

1. Each owner or operator shall close their facility in a manner that achieves the following:

a. Minimizes the need for further maintenance; and

b. Controls, minimizes, or eliminates any escape of solid waste constituents, leachate, fugitive emissions, contaminated runoff, or waste decomposition products.

2. Sequential partial closure must be implemented to minimize the working face of a landfill.

3. Closure must be implemented within thirty days after receipt of the final volume of waste and must be completed within one hundred eighty days following the beginning of closure activities, unless otherwise specified and approved under subsection 5. Prior to beginning closure, the owner or operator must notify the department in writing of the intent to close.

4. ~~When--closure--of--any-landfill-is-completed-in-part-or-whole,~~ each The owner or operator of a landfill for which closure is completed in part or whole shall enter into the operating record and submit to the department:

   a. As-built drawings showing the topography, pertinent design features, extent of waste, and other appropriate information; and

   b. Certification by the owner or operator and a professional engineer that closure has been completed in accordance with the approved closure plan and this article.

5. Each owner or operator shall prepare and implement a written closure plan approved by the department as part of the permitting process. The closure plan must ~~project--time intervals-at-which-closure-is-to-be-implemented,-describe--the resources--and--equipment--necessary-for-closure,-and-identify closure-cost-estimates-and-projected-fund-withdrawals-from-the financial-assurance-instrument.~~:

   a. Estimate the largest area ever requiring final cover at any time during the active life of the site;

   b. Estimate the maximum inventory of solid waste onsite over the active life of the facility;

   c. For landfills, describe the final cover and the methods to install the cover;

   d. Project time intervals at which sequential partial closure or closure is to be implemented;

   e. Describe the resources and equipment necessary for closure; and

   f. Identify closure costs estimates and provide financial assurance mechanisms as required by chapter 33-20-14.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-06. Transfer stations, ~~baling---and---compaction~~ processing systems, and drop box facilities.

1. Transfer stations,~~--baling--and--compaction~~ and processing systems must be designed, constructed, and operated to meet the following, where applicable:

   a. Control access and maintain aesthetics with a combination of fencing, trees, shrubbery, or natural features;

b. Be sturdy and constructed of easily cleanable material;

c. Provide effective control of birds, rodents, insects, and other vermin;

d. Be adequately screened to prevent and control blowing of litter;

e. Provide protection of the tipping floor from wind, rain, or snow;

f. Minimize noise and dust nuisances;

g. Provide pollution control measures to protect surface water and ground water including runoff and equipment wash down water control measures;

h. Provide all-weather access roads and vehicular traffic areas;

i. Provide any necessary pollution control measures to protect air quality including odor and dust control and prohibit burning;

j. Prohibit scavenging;

k. Have communication capabilities to immediately summon fire, police, or emergency personnel in the event of an emergency; and

l. Remove all solid waste from the facility at closure to a permitted facility.

2. Drop box facilities must:

a. Be accessible by all-weather roads;

b. Be designed and serviced as often as necessary to ensure adequate capacity. Storage of solid waste outside the detachable containers is prohibited; and

c. Remove all remaining solid waste to a permitted facility and remove the drop box from the facility at closure.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-07. Piles used for storage and treatment - Standards.

~~1.--Applicability.~~

a. This section is applicable to solid waste stored or treated in piles, composting, sludge piles, scrap tire piles ~~of more than eight hundred tires~~, garbage which is in place for more than three days, putrescible waste, other than garbage, which is in place for more than three weeks, and other solid waste not intended for recycling which is in place for more than three months.

~~b. Waste piles stored in fully enclosed buildings are not subject to these standards provided that no liquids or sludges with free liquids are added to the pile or the facility does not pose a potential threat to human health and the environment.~~

1. Vector control measures must be instituted when necessary to prevent the transmission of disease and otherwise prevent and reduce hazards created by rats, snakes, insects, birds, cats, dogs, skunks, and other animals or vermin.

2. An owner and operator of a waste pile, except composting of grass and leaves, shall:

   a. Comply with the general facility standards of section 33-20-04.1-02; and

   b. ~~Remove~~ Maintain the site including the removal of all solid waste, as necessary, and at closure to a permitted facility, or otherwise manage the waste that is in keeping with the purpose of this article.

3. Requirements for waste piles likely to produce a leachate are:

   a. Waste piles must be underlain by concrete, asphalt, clay, or an artificial liner. The liner must be of sufficient thickness and strength to withstand stresses imposed by waste handling equipment and the pile;

   b. Runoff and run-on control systems must be designed, installed, and maintained to handle a twenty-five-year, twenty-four-hour storm event;

   c. Based on site and waste characteristics and the proposed operation, the department may require that waste piles have the following:

      (1) A ground water monitoring system that complies with chapter 33-20-13;

      (2) A leachate collection and treatment system; and

      (3) Financial assurance; and

d. The department may require that the entire base or liner be inspected for wear and integrity and repaired or replaced by removing storage waste or otherwise providing inspection access to the base or liner.

4. An owner or operator of a tire pile shall:

a. Control access to the tire pile by fencing;

b. Limit ~~the--tire--pile~~ piles of scrap tires to a maximum basal area of ten thousand square feet [929 square meters] in size, which, along with the fire lane, must be underlain by concrete, asphalt, clay overlain with gravel, or other appropriate material of sufficient thickness, strength, and low permeability to withstand stresses imposed by waste handling equipment, fire control equipment, and to minimize liquid infiltration in case of a fire;

c. Limit the height of the tire pile to twenty feet [6.1 meters];

d. Provide for a fifty-foot [15.24-meter] fire lane around the tire pile;

e. Provide site access by fire control equipment;

f. Provide run-on and runoff control systems adequate to control surface water from a twenty-five-year, twenty-four-hour precipitation event; and

g. ~~Comply--with--subsection-3--if--the--total-accumulation-of tires-on-the-site-exceeds-a-basal--area--of--ten--thousand square---feet---[929---square--meters]~~ Provide financial assurance adequate to remove stockpiled waste and to remediate environmental contingencies.

5. An owner or operator of a composting facility for grass and leaves shall:

a. Direct surface water or storm water from composting and waste storage areas;

b. Control surface water drainage to prevent leachate runoff;

c. Store solid waste separated from compostable material in a manner that controls vectors and aesthetic degradation, and remove this solid waste from the site to an appropriate facility at least weekly;

d. Turn the yard waste periodically to aerate the waste, maintain temperatures, and control odors; and

e. Prevent the occurrence of sharp objects greater than one inch [2.54 centimeters] in size in finished compost offered for use.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-08. ~~Solid--waste--processing--and--resource~~ Resource recovery --~~Standards~~ facilities. In addition to sections 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, and 33-20-04.1-05, the owner or operator of a facility which conducts ~~solid--waste--processing--or--operates--a~~ resource recovery ~~system~~ other than processing shall comply with these standards.

1. All liquids must be collected and treated to meet the water protection provisions of chapter 33-20-13.

2. Surface water must be diverted away from all open storage areas.

3. Solid waste must be confined to storage containers and areas specifically designed to store waste. Waste handling and storage systems must provide sufficient excess capacity to prevent nuisances, environmental impacts, or health hazards in the event of mechanical failure or unusual waste flows.

4. ~~Solid--waste-processing-and-resource~~ Resource recovery systems or facilities must be operated on first-in, first-out basis. Stored solid waste containing ~~household-waste~~ garbage may not be allowed to remain unprocessed for more than forty-eight hours unless adequate provisions are made to control flies, rodents, odors, or other environmental hazards or nuisances.

5. All solid waste, recovered materials, or residues must be controlled and stored in a manner that does not constitute a fire or safety hazard or a sanitary nuisance.

6. All residues from ~~solid-waste-processing-and~~ resource recovery systems or facilities must be handled and disposed according to this article.

7. All incinerators used for solid waste must be constructed and operated in compliance with article 33-15.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-04.1-09. General disposal standards.

1. In addition to sections 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, and 33-20-04.1-05, the standards of this section apply to all landfills, surface impoundments closed with solid waste in place, and land treatment units, unless otherwise indicated.

2. Construction and operation standards for solid waste management facilities regulated by this section:

   a. Every solid waste landfill or facility shall have and maintain, or have access to, equipment adequate for the excavation, compaction, covering, surface water management, and monitoring procedures required by approval plans and this article.

   b. Roads must be constructed and maintained to provide access to the facility. Access roads must be cleaned and decontaminated as necessary.

   c. There must be available an adequate supply of suitable cover material, which, if necessary, must be stockpiled and protected for winter operation.

   d. The final cover of all disposal facilities must be designed and constructed in a manner that ensures the quality and integrity of the hydraulic barrier and the protective vegetative cover.

   e. The working face or open area of a landfill must be limited in size to as small an area as practicable. Sequential partial closure must be implemented as necessary to keep the disposal area as small as practicable and to close filled areas in a timely manner.

   f. ~~The disposal of liquids, sludges, and wastes containing free liquids in excess of household quantities is prohibited unless authorized by the department.~~

   g. ~~f.~~ All disposal facilities shall identify, quantify, remove, stockpile, and maintain suitable plant growth material for later use in closure.

   ~~h.~~ g. Any recycling or salvage activity must be authorized by the owner or operator and must be in a separate area in a manner to avoid injury and interference with the landfill operation.

   ~~i.~~ h. Vehicles, farm machinery, metal appliances, or other similar items brought to the facility for recycling may be stored temporarily in a separate area.

   ~~j.~~ i. Vector control measures, in addition to the application of cover material, must be instituted whenever necessary to

prevent the transmission of disease, prevent bird hazards to aircraft, and otherwise prevent and reduce hazards created by rats, flies, snakes, insects, birds, cats, dogs, and skunks.

~~k.~~ j. All domestic animals must be excluded from the facility. Feeding of garbage to animals is prohibited.

~~l.~~ k. All earthen material must be maintained onsite unless removal from the site is authorized by the department.

3. Construction and operation standards, excluding inert waste landfills.

   a. The landfill must be designed and operated to prevent the run-on and runoff of surface waters resulting from a maximum flow of a twenty-five-year, twenty-four-hour storm.

   b. Facilities receiving on average over twenty tons [18.2 metric tons] per day of solid waste shall make provisions for measuring all waste delivered to and disposed in the facility. Weight measurements are preferable; volume measurements (cubic yards) are acceptable.

   c. Active areas of the landfill must be surveyed periodically to ensure that filling is proceeding in a manner consistent with the landfill design and that closure grades are not exceeded.

   d. All ~~surface--water--resulting--from~~ run-on, or runoff, ~~snowmelt,-infiltration,-direct-precipitation,-or--leachate~~ must be properly controlled to avoid ~~any~~ its concentration ~~of-water~~ on or in ~~the~~ solid waste and to minimize infiltration ~~of--water~~ into the waste material. Waste ~~disposal~~ Disposal shall avoid any areas within the facility where ~~surface--water--is-concentrated~~ run-on or runoff accumulates.

   e. Leachate removal systems must be operated and maintained to assure continued function according to the design efficiency. This shall include, where applicable:

      (1) Flushing, inspection and, if necessary, repair of collection lines after placement of the first layer of waste in a landfill cell;

      (2) Annual sampling and analysis of leachate for the parameters required under the ground water quality monitoring required under section 33-20-13-02;

      (3) At minimum, semiannual monitoring of leachate head or elevations above the liner;

(4) Annual flushing of leachate collection lines to remove dirt and scale; and

(5) Inclusion of leachate removal system operation, inspection, and maintenance procedures in the operating record.

4. Closure standards, excluding land treatment units.

a. Closed solid waste management units may not be used for cultivated crops, heavy grazing, buildings, or any other use which might disturb the protective vegetative and soil cover.

b. All solid waste management units must be closed with a final cover designed to:

(1) Have a permeability less than or equal to the permeability of any bottom liner or natural subsoils present;

(2) Minimize precipitation run-on from adjacent areas;

(3) Minimize erosion and optimize drainage of precipitation falling on the landfill. The grade of slopes may not be less than three percent, nor more than fifteen percent, unless the permit applicant or permittee provides justification to show steeper slopes are stable and will not result in ~~exeessive erosion~~ surface soil loss in excess of one-tenth of one percent per year for the first year and one-hundredth of one percent per year thereafter. In no instance may slopes exceed twenty-five percent; and

(4) Provide a surface drainage system which does not adversely affect drainage from adjacent lands.

c. The final cover must include six inches [15.2 centimeters] or more of suitable plant growth material which must be seeded with shallow rooted grass or native vegetation.

5. Postclosure standards for solid waste management facilities regulated by this section.

a. The owner or operator of a landfill or a surface impoundment closed with solid waste in place shall meet the following during the postclosure period:

(1) Maintain the integrity and effectiveness of the final cover, including making repairs to the cover to correct effects of settlement, subsidence, and other

events, and preventing run-on and runoff from eroding or otherwise damaging the final cover;

(2) Maintain and operate the leachate collection system, if applicable;

(3) Monitor the ground water and maintain the ground water monitoring system, if applicable; and

(4) Operate and maintain the gas control system, if applicable.

b. The owner or operator of a municipal waste landfill, an industrial waste landfill, a special waste landfill, a surface impoundment closed with solid waste remaining in place, or a land treatment facility shall prepare and implement a written postclosure plan approved by the department as a part of the permitting process. The postclosure plan must address facility maintenance and monitoring activities for a postclosure period of thirty years.

(1) Postclosure includes appropriate: ground water monitoring; surface water monitoring; gas monitoring; and maintenance of the facility, facility structures, and ground water monitoring systems.

(2) The postclosure plan must: provide the name, address, and telephone number of the person or office to contact during the postclosure period; and project time intervals at which postclosure activities are to be implemented, identify postclosure cost estimates, ~~and projected fund withdrawals from the financial assurance instrument~~ and provide financial assurance mechanisms as required by chapter 33-20-14.

(3) The department may require an owner or operator to amend the postclosure plan, including an extension of the postclosure period, and implement the changes. If the permittee demonstrates that the facility is stabilized, the department may authorize the owner or operator to discontinue postclosure activities.

c. Following completion of the postclosure period, the owner or operator shall notify the department verifying that postclosure management has been completed in accordance with the postclosure plan.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-05.1

33-20-05.1-01. Applicability. An owner or operator of an inert waste landfill, which does not qualify for a permit by rule, shall comply with this chapter and with sections 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, 33-20-04.1-05, and 33-20-04.1-09. An inert waste landfill, which is permitted by rule, shall comply with section 33-20-02.1-02 and with this chapter, but is exempt from sections ~~33-20-04.1-02,~~ 33-20-04.1-03, and 33-20-04.1-04.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-05.1-03. Lime sludge waste. Lime sludge from a water treatment plant may be disposed in an inert waste landfill ~~contingent upon proper design, operation, and permitting requirements and~~ contingent upon departmental approval, which must be based upon factors such as site characteristics, site design, site operation, or permit conditions.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-06.1

33-20-06.1-01. Applicability. The requirements of this chapter and of sections 33-20-01.1-08, 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, 33-20-04.1-05, and 33-20-04.1-09 apply to owners and operators of municipal waste landfills, except that the department may allow alternate ~~design-and-performance-standards~~ performance and design criteria, as specified in subsections 2 and 3 of section 33-20-06.1-02, and it may waive section 33-20-04.1-03 for a municipal waste landfill receiving less than twenty tons [18.2 metric tons] per day based upon factors such as the site's climate, hydrogeology, topography, geology, ground water quality and location, and the type of wastes received.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-06.1-02. Performance and design criteria. The owner or operator of a municipal waste landfill facility shall comply with these design, construction, and operating standards.

1. Access to the facility must be controlled by lockable gates and a combination of fencing, natural barriers, or artificial barriers. The gates must be locked when an attendant is on duty.

2. Any new or lateral expansion of a municipal waste landfill must be underlain with a hydraulic barrier and leachate removal system capable of collecting and removing leachate and contaminated surface water within the landfill.

   a. The liner and leachate removal system must be compatible with the waste and leachate.

   b. The liner and leachate removal system must maintain its integrity for the life of the facility and the postclosure period.

   c. The leachate removal system must have a collection efficiency of ninety percent or better and be capable of maintaining a hydraulic head of twelve inches [30.5 centimeters] or less above the liner.

   d. The liner must consist of one of the following:

      (1) A natural soil liner constructed of at least four feet [1.2 meters] of natural soil having a hydraulic conductivity not to exceed 1×10^{-7} centimeters per second; or

(2) A composite liner consisting of two components; the upper component must consist of a minimum thirty mil flexible membrane liner, and the lower component must consist of at least a two-foot [61.0-centimeter] layer of compacted soil with a hydraulic conductivity of no more than 1×10^{-7} centimeters per second. Flexible membrane liner components consisting of high density polyethylene must be at least sixty mil thick. The flexible membrane liner component must be installed in direct and uniform contact with the compacted soil component.

e. The drainage layer of the leachate removal system must have a hydraulic conductivity of 1×10^{-3} centimeters per second or greater throughout. The drainage layer must have sufficient thickness to provide a transmissivity of 3.0×10^{-2} centimeters squared per second or greater.

f. Appropriate measures must be provided as necessary for preparation of the liner subgrade, quality assurance, and quality control testing of the construction of the liner and leachate removal system, and protection and maintenance of the liner and leachate removal system to ensure the integrity of the system.

g. An alternative liner and leachate removal system for a landfill site may be approved by the department based--on. The department must consider factors such as the proposed system's ability to control leachate migration, the hydrogeologic characteristics of the site and surrounding land, the climate of the area, or the potential leachate quality.

3. The liner and leachate removal system in combination with the final cover must achieve a site efficiency of ninety-five percent or better for rejection or collection of the precipitation that falls on the site.

4. Methane and other gases from waste decomposition may not be allowed to migrate laterally from the landfill so as to endanger structures, environmental resources, or adjacent properties.

a. The concentration of methane gas generated by landfills on the facility must not exceed twenty-five percent of the lower explosive limit for methane in structures or appurtenances on the facility.

b. The concentration of methane gas must not exceed the lower explosive limit for methane at the facility boundary.

c. Monitoring of methane gas must be conducted at least quarterly, on a schedule proposed by the owner or operator

and approved by the department, to assure that the standards of subdivisions a and b are met. The frequency of monitoring must consider such factors as the facility site conditions, hydrogeologic conditions surrounding the site, or climate of the area.

d. If methane gas levels exceed the standards of subdivisions a and b, the owner or operator must:

(1) Immediately take action to protect public health;

(2) Notify the department within seven days; and

(3) Implement remedial measures within sixty days.

5. A certified operator must be on duty while the facility is receiving solid waste. Facilities receiving on average over twenty tons [18.2 metric tons] of municipal waste per day shall have an attendant at or near the entrance to the facility to monitor, accept or reject, measure, and record wastes arriving at the facility.

6. Solid waste must be unloaded at the bottom of the working face of the fill. The waste must then be spread in layers and compacted as densely as practicable. Each layer may not exceed a thickness of two feet [61.0 centimeters] of material after compaction is completed.

7. Household pet animal carcasses may be buried along with other municipal household waste. Larger animal carcasses must be disposed of immediately and must be placed at least four feet [1.2 meters] below grade with at least twelve inches [30.5 centimeters] of cover material directly covering the carcass.

8. The following wastes may not be accepted for disposal in municipal waste landfills unless approved by the department:

a. Hazardous waste, except in amounts normally in municipal waste;

b. Industrial waste, if not addressed in the industrial waste management plan and the permit;

c. Lead acid batteries;

d. Liquids, except in amounts normally in household waste, unless the liquid is leachate or gas condensate derived from the municipal solid waste landfill and the municipal solid waste landfill, whether it is a new or existing landfill or a lateral expansion, is designed with a composite liner and leachate collection system as described in this section;

e. Major appliances;

f. Municipal waste incinerator ash;

g. Other waste, if the department determines that such waste has toxic or adverse characteristics which can impact public health or environmental resources;

h. Pesticide containers which are not empty and have not been triple-rinsed, except those normally in municipal waste;

i. Polychlorinated biphenyls (PCB) waste as defined in 40 CFR part 761;

j. Raw or digested sewage sludges, lime sludges, grit chamber cleanings, animal manure, septic tank pumpings, bar screenings, and other sludges, if not included in the permit;

~~j.~~ k. Regulated infectious waste, except in amounts normally in household waste;

~~k.~~ l. Special waste; and

~~l.~~ m. Waste Used oil.

9. A uniform compacted layer of six inches [15.2 centimeters] or more of suitable earthen material or other departmentally approved material must be placed on all solid waste by the end of each working day. All cover must be free of trash, garbage, or other similar waste.

10. On all areas where final cover or additional solid waste will not be placed within one month, an additional six inches [15.2 centimeters] or more of compacted, clay-rich earthen material or other departmentally approved material must be placed. This intermediate cover may be removed when disposal operations resume.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-07.1

33-20-07.1-01. Performance and design criteria. In addition to the requirements of section 33-20-01.1-08 and chapter 33-20-04.1, the owner or operator of an industrial waste landfill or a special waste landfill shall comply with the design, construction, and operating standards as follows:

1. On all areas of the landfill where final cover or additional solid waste will not be placed within six months, eight inches [20.3 centimeters] or more of compacted clay-rich soil material, similar material, or a synthetic cover must be placed to prevent ponding of surface water, to minimize infiltration of surface water, and to control windblown dust.

2. Solid waste disposal in industrial waste landfills and special waste landfills must be limited to those wastes identified in the permit application or permit. Regulated infectious waste, waste used oil as a free liquid, hazardous waste, and radioactive waste may not be accepted for disposal at the landfill.

3. All solid wastes deposited at the landfill must be spread and compacted as densely as practicable to minimize waste volume and promote drainage of surface water.

4. Any new or lateral expansion of an industrial waste landfill must be designed with an appropriate hydraulic barrier and leachate management system capable of collecting and removing leachate and contaminated surface water within the disposal unit.

   a. The liner and leachate removal system must be compatible with the waste and leachate.

   b. The liner and leachate removal system must maintain its integrity during the operating period and through the postclosure period.

   c. The system must have a collection efficiency of ~~ninety-five~~ ninety percent or better and must be capable of maintaining a hydraulic head of twelve inches [30.5 centimeters] or less above the liner.

   d. For landfills that receive wastes containing water soluble constituents, the liner must consist of at least four feet [1.2 meters] of compacted natural soil having a hydraulic conductivity not to exceed 1×10^{-7} centimeters per second. This requirement does not apply to landfills receiving only oilfield drilling cuttings and drilling mud.

e. A composite liner is required for landfills receiving wastes which may contain leachable organic constituents. The liner must consist of at least three feet [91.4 centimeters] of recompacted clay with a hydraulic conductivity not to exceed 1×10^{-7} centimeters per second overlain with at least a sixty mil flexible membrane liner.

f. The drainage layer must have a hydraulic conductivity of 1×10^{-3} centimeters per second or greater throughout. The drainage layer must have a sufficient thickness to provide a transmissivity of 3×10^{-2} centimeters squared per second or greater.

~~g. An alternative liner may be approved by the department based on the proposed system's ability to control leachate migration.~~

~~h.~~ The liner and leachate removal system in combination with the final cover must achieve a site efficiency of at least ninety-eight and one-half percent or better for collection or rejection of the precipitation that falls on the site.

~~i.~~ h. The requirements of this subsection for a liner ~~and~~, leachate collection system, or both liner and leachate collection system may be ~~waived~~ modified by the department if the permit applicant ~~can demonstrate~~ demonstrates that, based on factors such as geology and hydrology of the site, characteristics of the waste, and engineering design, ~~the liner and leachate collection system is not necessary~~ any leachate migration can be prevented or controlled.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-08.1

33-20-08.1-01. Performance and design criteria. In addition to the requirements of section 33-20-04.1-09, the owner or operator of a surface impoundment shall comply with the following:

1. Applicability.

   a. The design, construction, and operating standards of this section are applicable to surface impoundments that store or treat solid waste, sludges containing free liquids, free liquids containing high concentrations of dissolved solids, or liquids derived from processing or handling solid waste.

   b. The standards of this section are not applicable to the following units:

      (1) Surface impoundments which treat wastewater, the discharge of which is subject to federal, state, or local water pollution discharge permits;

      (2) Surface impoundments which handle agricultural waste generated by farming operations;

      (3) Lime sludge settling basins;

      (4) Basins used to collect and store storm water runoff; and

      (5) Oil and gas exploration and production waste regulated under North Dakota Century Code section 38-08-04.

2. The owner or operator must design, construct, and operate each surface impoundment so as to:

   a. Comply with the surface water and ground water protection standards of chapter 33-20-13;

   b. New units must have a compacted soil liner of a minimum ~~two~~ four feet ~~[61.0--centimeters]~~ [1.22 meters] of 1×10^{-7} centimeters per second or lesser hydraulic conductivity or ~~an--equivalent~~ any combination of soil liner thickness, underlying soil thickness~~,--soil~~ and hydraulic conductivity, or a flexible membrane liner which would control the migration of waste or waste constituents ~~through-the-liner~~ during the active life of the surface impoundments and, for surface impoundments closed with solid waste in place, during the postclosure period;

c. Have dikes designed to maintain their structural integrity under conditions of a leaking liner and capable of withstanding erosion; and

d. Have the freeboard equal to or greater than two feet [61.0 centimeters] to avoid overtopping from wave action or precipitation.

3. Monitoring and inspection.

a. While a surface impoundment is in operation, it must be inspected by the owner or operator monthly and after storms to detect evidence of any of the following:

(1) Deterioration, malfunctions, or improper operation of control systems;

(2) Sudden drops in the level of the impoundment's contents; and

(3) Severe erosion, seepage, or other signs of deterioration in dikes or other containment devices.

b. Prior to placing a surface impoundment into operation or prior to renewed operation after six months or more during which the impoundment was not in service, a professional engineer must certify that the impoundment's dike and liner have structural integrity.

4. Emergency repairs and contingency plans.

a. When a malfunction occurs in the waste containment system which can cause a release to land or water, a surface impoundment must be removed from service and the owner or operator must take the following actions:

(1) Immediately shut down the flow of additional waste into the impoundment;

(2) Immediately stop the leak and contain the waste which has been released;

(3) Take steps to prevent catastrophic failure;

(4) If a leak cannot be stopped, empty the impoundment;

(5) Clean up all released waste and any contaminated materials; and

(6) Notify the department of the problem within twenty-four hours after detecting the problem.

b. As part of the contingency plan, the owner or operator must specify a procedure for complying with the requirements of subdivision a of this subsection.

c. No surface impoundment that has been removed from service in accordance with the requirements of this section may be restored to service unless the portion of the impoundment which was failing is repaired and the following steps are taken:

(1) If the impoundment was removed from service as the result of actual or imminent dike failure, the owner or operator must certify the dike's structural integrity; and

(2) If the impoundment was removed from service as the result of a sudden drop in the liquid level, the following actions must be taken:

(a) For any existing portion of the impoundment without a liner, a liner must be installed; and

(b) For any portion of the impoundment that is lined, the liner must be repaired and the owner or operator must certify that the repaired liner meets the design specification approved in the permit.

d. A surface impoundment, that has been removed from service in accordance with the requirements of this subsection and that is not repaired within six months, must be closed in accordance with the provisions of sections 33-20-04.1-05 and 33-20-04.1-09.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-10

33-20-10-03. Waste disposal. In addition to the requirements of section 33-20-01.1-08 and chapter 33-20-04.1, the owner or operator of a landfill shall comply with the performance and design criteria as follows:

1. Any new or lateral expansion of a landfill must be designed with a hydraulic barrier and leachate management system.

   a. Synthetic liners, leachate detection systems, and leachate removal systems must be compatible with solid waste disposed and the waste's leachate.

   b. Leachate removal and management systems must be capable of collecting and removing leachate and contaminated surface water.

   c. Synthetic liners and leachate removal systems must withstand all physical and chemical stresses during the operating period and through the postclosure period.

   d. The synthetic liners and leachate ~~collection~~ removal systems must have a collection efficiency of ninety-seven percent or better of precipitation falling on the fill area before closure and must be capable of removing leachate to limit the hydraulic head above the upper liner, exclusive of collection sumps, to twelve inches [30.5 centimeters] or less within thirty-six hours of a precipitation event.

   e. A composite liner is required which includes at a minimum from bottom to top:

      (1) At least three feet [91.4 centimeters] of recompacted clay with a hydraulic conductivity not to exceed 1×10^{-7} centimeters per second;

      (2) A synthetic flexible membrane liner at least sixty mil thick;

      (3) A secondary drainage layer with a hydraulic conductivity of 1×10^{-3} centimeters per second or greater throughout and with sufficient thickness to provide a transmissivity of 3×10^{-2} centimeters squared per second or greater;

      (4) A synthetic flexible membrane liner at least eighty mil thick; and

      (5) A drainage layer with a hydraulic conductivity of 1×10^{-3} centimeters per second or greater and with sufficient thickness to provide a transmissivity of 3×10^{-2} centimeters squared per second or greater.

f. No composite liner may be exposed to freezing more than one winter season. At least three feet of solid waste or other material approved by the department must be placed above the upper drainage layer on all lined areas by December first. No disposal may take place after December first in areas which have not met this requirement without first testing the composite liner's integrity and receiving approval from the department.

2. The facility must include a leachate detection and ~~collection~~ removal system and an onsite leachate management system or offsite leachate management.

   a. The amount of leachate collected for onsite or offsite management must be measured and recorded.

   b. The quality of the leachate must be periodically evaluated on a schedule proposed by the facility owner and approved by the department.

   c. The department may require the construction of onsite surface impoundments to achieve the equivalent or better design standards of onsite landfills, based on site specific factors such as hydrogeological characteristics, anticipated leachate quality, anticipated static head or expected duration of use.

   d. The department may require an owner or operator to control wildlife access to onsite surface impoundments based upon leachate quality and site circumstances.

3. Runoff must be contained, collected, and transferred to an onsite surface impoundment, unless another management method is approved by the department.

4. Solid waste disposal in landfills must be limited to those wastes identified in the permit application, waste acceptance plan, or permit. Regulated infectious waste, waste used oil as a free liquid which can be recovered or recycled, hazardous waste, and radioactive waste may not be accepted for disposal at the landfill.

5. All solid wastes deposited at the landfill must be placed, spread, or compacted to minimize or prevent settlement and to promote drainage of surface water. The sequence and direction of below-grade operations must be conducted to prevent surface water from entering the active fill area.

6. On all areas of the landfill where final cover or additional solid waste will not be placed within one month, eight inches [20.3 centimeters] or more of compacted clay-rich soil material, similar material, or a synthetic cover must be

placed to prevent ponding of surface water, to minimize infiltration of surface water, and to control windblown dust.

7. The composite liner in combination with the final cover after closure must achieve an efficiency of at least ninety-nine and nine-tenths percent or better for collection or rejection of the precipitation that falls on the landfill.

History: Effective August 1, 1993; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-13

33-20-13-01. Site characterization. The department shall require adequate ~~surface--and--subsurface--water--quality--monitoring--and~~ site characterization to ensure that the waters of the state are not or will not be adversely impacted by the solid waste management facility. At a minimum, the ~~initial-hydrologic~~ site characterization must address the following:

1. Location and water quality of lakes, rivers, streams, springs, or wetlands within one mile [1.61 kilometers] of the site boundary based on available data;

2. Domestic and livestock wells within one mile [1.61 kilometers] of the site boundary. Information collected should include the location, water quality, depth to water, well depth, screened intervals, yields, and the aquifers tapped;

3. Site location in relation to the one hundred-year floodplain;

4. Depth to the thicknesses of the uppermost aquifers;

5. Hydrologic properties of the uppermost aquifers beneath the proposed facility including existing water quality, flow directions, flow rates, porosity, coefficient of storage, hydraulic conductivity, and potentiometric surface or water table; and

6. An evaluation of the potential for impacts to surface and ground water quality from the proposed facility.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07.6

33-20-13-02. Ground water quality monitoring.

1. ~~Based--upon--the--site--characteristics--and-type-of-facility,~~ ~~applicants-may-be-required--to~~ An owner or operator of a resource recovery unit, a land treatment unit, a surface impoundment, or a landfill, except an inert waste landfill, must incorporate a ground water monitoring system into the design of the facility. If the owner or operator demonstrates to the department that there is no potential for migration of solid waste constituents to the uppermost aquifer during the life of the solid waste management unit and the postclosure period, the department may suspend this requirement. The demonstration must be based upon factors such as the site

characterization, the solid waste characteristics and constituents, the potential capacity of the unit or facility, and the physical, chemical, and biological processes affecting contaminant fate and transport.

2. Ground water monitoring systems must be designed to effectively detect the migration of ~~leachate constituents from the landfill units or other operational areas~~ contamination. At a minimum, a water quality monitoring system shall:

a. Include one ground water monitoring well located upgradient of the ~~waste handling and storage facility~~ solid waste management unit, and at least two wells located downgradient of the ~~waste handling and storage facility~~ unit. The monitoring wells should be installed at appropriate locations and depths to yield ground water from the uppermost aquifer and all hydraulically connected aquifers below the ~~active portion of~~ solid waste management units on the facility;

b. ~~Document~~ Represent the elevation of ground water in each well immediately prior to purging and so that the owner or operator may determine the rate and direction of ground water flow each time ground water is sampled;

c. ~~Document~~ Represent the quality of ground water that has not been affected by ~~solid waste activities;~~ and spills or leakage from solid waste management units;

d. ~~Document~~ Represent the quality of ground water to ensure detection of contamination passing the compliance boundary~~.~~;

e. Ground water samples at municipal waste landfills must not be filtered prior to analysis; and

f. The frequency and number of samples collected must be consistent with statistical procedures for evaluating ground water data. A minimum of four independent samples from each well must be collected for analysis during the first sampling event for establishing background data at upgradient (subdivision c) and downgradient (subdivision d) wells, unless four or more sampling events occur prior to acceptance of solid waste by the facility. The monitoring frequency must be semiannual during the active life of the facility and during the postclosure period. The department may specify an alternate frequency for sampling based upon such factors as site hydrogeological characteristics, solid waste characteristics, evidence of a spill or leakage, or resource value of the aquifer.

2. 3. Additional wells may be required in complicated hydrogeological settings or to define the extent of contamination detected.

3. 4. A written ground water monitoring plan ~~should~~ must be developed for approval by the department and implemented as part of the permitting process. The plan must include:

a. Number and location of wells;

b. Procedures for decontamination of drilling and sampling equipment;

c. Procedures for sample collection;

d. ~~Analytical~~ Sample analytical procedures;

e. Chain of custody control;

f. Parameters for analysis;

g. Quality assurance or quality control procedures;

h. A monitoring schedule; ~~and~~

i. ~~Reporting--and--data~~ Data statistical methods and analysis procedures.; and

j. Reporting of a statistical increase over a background value or of an exceedance of a maximum concentration limit or a water quality standard.

5. Ground water monitoring data obtained under this section must be analyzed within a reasonable period of time after completing sampling and laboratory analysis to determine whether or not a statistical increase over background values or an exceedance of a maximum concentration limit or water quality standard has occurred for each parameter required in the monitoring plan or permit. Statistical methods must, as appropriate:

a. Be appropriate for the distribution of the data and, if inappropriate for a normal theory test, be transformed or a distribution-free theory test must be used.

b. Control or correct for seasonal and spatial variability in the data.

c. Account for data below the limit of detection that can be reliably achieved by routine laboratory techniques, using the limit as the lowest concentration level for a chemical parameter which is below detection.

d. Be protective of human health and environmental resources.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04, 23-33-05, 23-33-11, 61-28-04, 61-28-05
Law Implemented: NDCC 23-29-04, 23-33-05, 23-33-06, 23-33-08, 23-33-11, 61-28-04

33-20-13-03. Water quality standards.

1. All solid waste management systems, operations, units, and facilities must be designed, constructed, operated, maintained, closed, and maintained after closure so as to be in compliance with North Dakota Century Code chapter 61-28, and water quality standards defined in articles 33-16 and 33-17. ~~The department shall specify monitoring requirements based upon the nature of the waste and site conditions.~~ Compliance with these standards is enforceable at the compliance boundary of the facility~~, as set forth in the permit, unless otherwise determined by the department~~.

2. Whenever ground water monitoring is required, the department must specify in the facility permit the specific elements of ground water monitoring, including indicator parameters which are constituents in or derived from solid waste, the maximum concentration limits in ground water for each parameter not otherwise defined by subsection 1, and the compliance boundary, considering:

   a. The physical and chemical characteristics of the waste, including the potential for migration in surface water, in the unsaturated zone beneath the facility, and in ground water;

   b. The hydrogeological characteristics of the site and the surrounding land;

   c. The existing quality and quantity of ground water, other possible sources of contamination, and the direction of ground water flow;

   d. The detectability of the indicator parameters or constituents in surface water or in ground water; or

   e. The proximity of the facility to surface waters; and

   f. Appropriate parameters from the list in table 1.

3. The compliance boundary shall be located on land owned by the owner of the facility and no more than five hundred feet [152.4 meters] from a landfill or landfill disposal cell.

TABLE 1

List of Parameters for Assessing Ground Water Quality

a. Parameters measured in the field:

(1) Appearance (including color, foaming, and odor)
(2) pH[1]
(3) Specific conductance[2]
(4) Temperature
(5) Water elevation[3]

b. General geochemical parameters:

(1) Amonia nitrogen
(2) Total hardness
(3) Iron
(4) Calcium
(5) Magnesium
(6) Manganese
(7) Potassium
(8) Total alkalinity
(9) Bicarbonate
(10) Carbonate
(11) Chloride
(12) Floride
(13) Nitrate + Nitrite, as N
(14) Total phosphorus
(15) Sulfate
(16) Sodium
(17) Total dissolved solids (TDS)
(18) Total suspended solids (TSS)
(19) Cation/anion balance

c. Heavy metals:

Group A:

(1) Arsenic
(2) Barium
(3) Cadmium
(4) Chromium
(5) Lead
(6) Mercury
(7) Selenium
(8) Silver

Group B:

(9) Antimony
(10) Beryllium
(11) Cobalt
(12) Copper
(13) Nickel
(14) Thallium
(15) Vanadium
(16) Zinc

d. Total organic carbon (TOC)
Chemical oxygen demand (COD)

e. Naturally occurring radionuclides:

(1) Radon
(2) Radium
(3) Uranium

f. Volatile organic compounds, both halogenated and nonhalogenated:

Halogenated:

Acrylonitrile
Allyl chloride
1,1-Dichloroethylene
1,2-Dichloropropane

Bromochloromethane
Bromodichloromethane
Bromoform
Bromomethane
Carbon disulfide
Carbon tetrachloride
Chlorobenzene (monochlorobenzene)
Chlorodibromomethane
Chloroethane
Chloroform
Chloromethane
Dibromomethane
1,2-Dibromo-3-chloropropane
1,2-Dibromoethane
Dichloroacetonitrile
1,2-Dichlorobenzene
1,3-Dichlorobenzene
1,4-Dichlorobenzene
Dichlorodifluoromethane
1,1-Dichloroethane
1,2-Dichloroethane
cis-1,3-Dichloropropene
cis-1,2-Dichloroethylene
trans-1,2-Dichloroethylene
trans-1,3-Dichloropropene
trans-1,4-Dichloro-2-butene
Dichlorofluoromethane
Dichloromethane (methylene chloride)
1,3-Dichloropropene
2,3-Dichloro-1-propene
Pentachloroethane
1,1,1,2-Tetrachloroethane
1,1,2,2-Tetrachloroethane
Tetrachloroethylene
1,1,1-Trichloroethane
1,1,2-Trichloroethane
Trichloroethylene
Trichlorofluoromethane
1,2,3-Trichloropropane
1,1,2-Trichlorotrifluoroethane
Vinyl acetate
Vinyl chloride

Nonhalogenated:

Acetone
Benzene
Cumene
Ethylbenzene
Ethyl ether
Methyl butyl ketone
Methyl ethyl ketone
Methyl iodide
Methyl isobutyl ketone
Pyrene
Styrene
Tetrahydrofuran
Toluene
m-Xylene
o-Xylene
p-Xylene

g. Pesticides:

Aldrin
Chlordane
Chloroform
4,4 DDT
Dibenzofuran
Dieldrin
Dimethoate
Endosulfan
Endrin
Heptachlor
Lindane
Methyl bromide
Methyl methacrylate
Methylene bromide
Naphthalene
Parathion

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[1] Two measurements: in field, and immediately upon sample's arrival in laboratory.

[2] As measured in field.

[3] As measured to the nearest 0.01 foot in field

before pumping or bailing.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04, 23-33-05, 23-33-11, 61-28-04, 61-28-05
Law Implemented: NDCC 23-29-04, 23-33-05, 23-33-06, 23-33-08, 23-33-11, 61-28-04

33-20-13-05. Remedial measures and corrective action.

1. Within ninety days of finding that a parameter has been detected at a significant level exceeding the ground water standards established under sections 33-20-13-02 and 33-20-13-03, the owner or operator shall initiate an assessment of remedial measures. The assessment must:

   a. Be completed within a reasonable time period, unless otherwise specified by permit or the department;

   b. Include an evaluation of the nature and extent of the release of the constituents including pathways to human and environmental receptors;

   c. Include an analysis of the effectiveness of potential remedial measures in meeting all requirements of subsection 2 and include the following:

      (1) The performance, reliability, ease of implementation, and potential impacts of each potential remedial measure;

      (2) The time required to begin and complete each potential remedial measure;

      (3) The costs of implementation of each potential remedial measure; and

      (4) The permit requirements or other environmental or public health requirements that may substantially affect implementation of each potential remedial measure;

   d. When requested by the department, the owner or operator must discuss results of the assessment of remedial measures, prior to selection of a corrective action remedy, in a public meeting with interested and affected persons.

2. Based on the results of the assessment of remedial measures conducted under subsection 1, the owner or operator must select a corrective action remedy within thirty days which, at minimum, meets the following standards:

a. Is protective of human health and environmental resources;

b. Attains the ground water protection standards under sections 33-20-13-02 and 33-20-13-03;

c. Controls the sources of release so as to reduce or eliminate, to the maximum extent practicable, further releases of constituents that may pose a threat to human health or environmental resources; and

d. Complies with this article and other applicable environmental statutes and rules.

3. When selecting a corrective action remedy under subsection 2, the owner or operator shall consider these factors:

a. The short-term and long-term effectiveness of the potential remedial measure considering:

(1) Magnitude of reducing exposure to constituents;

(2) Likelihood of further releases;

(3) Practical capability of technologies; and

(4) Time until the standards are achieved.

b. The ease or difficulty of implementing the potential remedial measure considering:

(1) Availability of equipment and specialists;

(2) Long-term management needs such as monitoring, operation, and maintenance; and

(3) Need to coordinate with and obtain necessary approvals or permits from other agencies.

c. The need for interim measures to control the sources of the release and to protect human health and environmental resources.

d. The schedules for initiating, conducting, and completing the potential remedial measure.

e. Practical capability of the owner or operator.

4. The owner or operator shall provide the department with a document fully describing the remedial measures assessment under subsection 1 and the selected corrective action remedy under subsections 2 and 3.

5. Upon selection of the corrective action remedy under subsection 2 and with the concurrence of the department, the owner or operator shall establish and implement the remedy.

   a. During implementation, the owner or operator shall monitor the effectiveness of the remedy.

   b. Implementation shall be considered complete when all actions and standards required to complete the remedy have been satisfied and approved by the department.

   c. The owner or operator shall place a certification that the corrective action remedy has been completed in the operating record.

History: Effective October 1, 1994.
General Authority: NDCC 23-29-04, 23-33-11, 61-28-04, 61-28-05
Law Implemented: NDCC 23-29-04, 23-33-02, 23-33-06, 23-33-08, 61-28-04

CHAPTER 33-20-14

33-20-14-01. Financial assurance for solid waste disposal facilities.

1. The requirements of this chapter apply to all new and expanded solid waste disposal facilities, and to existing solid waste disposal facilities that have not been closed by April 9, 1994. These requirements do not apply to inert waste landfills.

2. New or expanded facilities must demonstrate financial assurance prior to acceptance of solid waste and existing facilities by the date given in subsection 1.

3. ~~Publicly-owned-or-operated~~ Owners of facilities may set up one ~~account~~ mechanism to demonstrate financial assurance for both closure and postclosure care of each facility. The amount of funds available through the mechanisms must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for financial assurance of closure and of postclosure care.

~~3.--Privately--owned-or-operated-facilities-must-set-up-a-separate account--for--both--closure--and--postclosure--care--of---each facility.~~

4. Mechanisms used to demonstrate financial assurance under this chapter must ensure that the amount of funds assured is adequate to cover the costs of closure and postclosure care and that the funds will be available in a timely fashion whenever needed, until released from the financial assurance requirement by the department.

5. Mechanisms must be legally valid and binding under North Dakota law.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-14-02. Cost estimates for closure and postclosure.

1. Each owner or operator shall prepare separate written closure and postclosure ~~cost~~ estimates of the costs of hiring a third party to complete identified activities of the facility closure and postclosure plans. ~~These--estimates--must--be updated-at-least-every-three-years.~~

a. The initial cost estimates must be in current dollars, and cost estimates must be adjusted annually for inflation.

b. The cost estimate for closure must equal the cost of closing the largest area requiring a final cover during the active life of the facility.

c. The owner or operator must increase the cost estimates if changes in the closure plan or postclosure plan increase the maximum costs of closure or postclosure care, respectively. The owner or operator may reduce a cost estimate for closure if it exceeds the maximum costs of closure during the remaining life of the facility or a cost estimate for postclosure care if it exceeds the maximum costs of postclosure during the remaining postclosure period.

d. The cost estimate for postclosure must account for the total costs of postclosure care over the entire postclosure period, including the most expensive costs of postclosure during the postclosure period.

2. Each owner or operator shall prepare a new closure or postclosure cost estimate whenever any of the following occurs:

   a. Changes in operating plans or facility design affect the closure or postclosure plans;

   b. There is a change in the expected year of closure; and

   c. The department directs the owner or operator to revise the closure or postclosure plan.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-14-03. Financial assurance mechanism for closure and postclosure.

1. Each owner or operator of an applicable solid waste disposal facility shall establish one or more financial assurance mechanisms ~~in~~ which together total an amount equal to the closure cost estimate ~~and~~ or postclosure cost estimate prepared in accordance with section 33-20-14-02. ~~The financial assurance mechanism must be approved by the department.~~

2. ~~Solid waste disposal facilities shall provide one or more of the~~ Each financial assurance mechanism must be approved by the department. The following financial assurance ~~instruments~~

mechanisms are acceptable, provided respective requirements of section 33-20-14-07 are met:

a. Reserve account;

b. Trust fund;

c. Surety bond;

d. Irrevocable letter of credit;

e. Financial test;

f. Insurance policy; and

~~f.~~ g. Corporate guarantee in accordance with the form and content of subdivision a of subsection ~~10~~ 8 of section 33-24-05-81.

3. A trust fund, surety bond, letter of credit, corporate guarantee, financial test, or insurance policy may be terminated or canceled only if alternate financial assurance is substituted or if the owner or operator is released from the requirement by the department.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-14-04. Implementation of financial assurance for closure and postclosure.

1. The closure plan and postclosure plan required by this article must specify the financial assurance mechanisms required by this chapter and, if a reserve account, trust fund, surety bond, or insurance policy, the methods and schedules for funding the mechanisms.

2. Publicly owned solid waste disposal facilities shall comply with the following:

   a. Closure and postclosure financial assurance funds must be generated for each facility as indicated in the closure and postclosure plans;

   b. Each facility owner or operator must establish a procedure with the ~~financial-assurance-instruments~~ trustee of the financial assurance mechanism for notification of nonpayment of funds to be sent to the department; and

   c. Each owner or operator shall file with the department an annual report of the financial assurance ~~accounts~~

mechanism established for closure and postclosure activities.

3. Privately owned solid waste disposal facilities shall comply with the following:

   a. Each owner or operator shall file with the department within ninety days of each succeeding year an annual audit of the financial assurance mechanisms established for closure and postclosure activities; and

   b. Annual audits must be conducted by a certified public accountant licensed in the state and must be filed with the department no later than March thirty-first of each year for the previous calendar year, including each year of the postclosure period.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-14-05. Financial assurance for corrective action.

1. The department may require an owner or operator to undertake remedial measures, including corrective action, under the provisions of subsection 10 of North Dakota Century Code section 23-29-04 and chapter 61-28 when a release occurs.

2. An owner or operator required to undertake corrective action must have a detailed estimate, in current dollars, of the cost of hiring a third party to perform the corrective action.

   a. The cost estimate must account for the total costs of corrective action for the entire corrective action period.

   b. The owner or operator must annually adjust the cost estimate for inflation until corrective action is completed.

   c. The owner or operator shall increase the cost estimate if changes in corrective action or conditions increase the total costs. The owner or operator may reduce the cost estimate if the total costs exceed the maximum remaining costs of corrective action.

3. An owner or operator required to undertake corrective action shall establish financial assurance in accordance with section 33-20-14-07 no later than one hundred twenty days after the corrective action remedy has been selected. The owner or

operator shall provide continuous coverage for corrective action until demonstrating compliance with article 33-16.

History: Effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-14-06. Liability requirements for industrial waste landfills. An owner or operator of an industrial waste landfill shall demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility. The owner or operator shall have and maintain liability coverage for sudden accidental occurrences in the amount of at least one million dollars per occurrence with an annual aggregate of at least two million dollars, exclusive of legal defense costs. This liability coverage may be demonstrated with one or more of the mechanisms listed in subsection 2 of section 33-20-14-03.

History: Effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

33-20-14-07. Specific requirements of mechanisms for financial assurance.

1. Trust fund. A trust fund must satisfy the requirements of this subsection.

   a. The trustee must be an entity which has authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

   b. Payments into the trust fund must be made annually over the initial permit or over the remaining life of the solid waste management unit or facility, whichever is shorter. This is the pay-in period.

   c. The first payment into the trust fund must equal or exceed the current cost estimate for closure or postclosure, whichever is applicable, divided by the number of years defined in subdivision b. The amount of subsequent payments must be determined by the following formula:

$$\text{Next payment} = \frac{CE - CV}{Y}$$

   Where CE is the current cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

d. The initial payment into the trust fund must be made for new or expanded facilities before the initial receipt of solid waste or for existing facilities before the effective date as provided by subsection 1 of section 33-20-14-01.

e. If an owner or operator establishes a trust fund after having used one or more alternative mechanisms specified in section 33-20-14-03, the initial payment into the trust fund must equal or exceed the amount that the fund would contain if the fund were established initially and annual payments made according to subdivision c.

f. The owner or operator, or other person authorized to conduct closure or postclosure care may request reimbursement from the trustee for these expenses. Requests for reimbursement will be approved by the trustee only if sufficient funds are remaining in the trust fund.

2. Surety bond. A surety bond guaranteeing payment or performance must satisfy to the requirements of this subsection.

a. The penal sum of the bond must be in an amount equal to or greater than the current closure or postclosure cost estimate, whichever is applicable.

b. Under the terms of the bond, the surety must become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

c. The owner or operator must establish a standby trust fund that meets the requirement of subsection 1, except for payment provisions in subdivisions b, c, and d.

d. Payments made under the terms of the bond must be deposited by the surety into the standby trust fund. Payments from the trust fund must be approved by the trustee.

e. Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the department one hundred twenty days or more in advance of the cancellation. If the surety cancels the bond, the owner or operator must obtain alternate financial assurance.

3. Letter of credit. A letter of credit must satisfy the requirements of this subsection.

a. The issuing institution of a letter of credit must have authority to issue letters of credit and its operations

must be regulated and examined by a federal or state agency.

b. A letter from the owner or operator, referring to the letter of credit by number, issuing institution, and date and including the name and address of the solid waste management unit or facility and the amount of funds assured, must be provided with the letter of credit to the department.

c. The letter of credit must be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for closure or postclosure care, whichever is applicable. The letter of credit must provide that the expiration date will be automatically extended for a period of one year unless the issuing institution has canceled the letter of credit by sending notice of cancellation to the owner or operator and to the department one hundred twenty days or more in advance of the cancellation. If the letter of credit is canceled by the issuing institution, the owner or operator must obtain alternate financial assurance.

4. Insurance. Insurance must satisfy the requirements of this subsection.

a. The insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer in one or more states.

b. The insurance policy must guarantee that funds will be available to close the solid waste management unit or facility whenever closure occurs or to provide postclosure care whenever the postclosure period begins, whichever is applicable. The policy must also guarantee that, once closure or postclosure care begins, the insurer will be responsible for paying out funds to the owner or operator or other person authorized to conduct closure or postclosure care up to an amount equal to the face amount of the policy.

c. The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure or postclosure care, whichever is applicable. The term face amount means the total amount the insurer is obligated to pay under the policy.

d. Each insurance policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer.

e. The insurance policy must provide that the insurer may not cancel, terminate, or fail to renew the policy, except for failure to pay the premium. The automatic renewal of the policy must provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay a premium, the insurer may cancel the policy by sending notice of cancellation by certified mail to the owner or operator and to the department one hundred twenty days or more in advance of cancellation. If the insurer cancels the policy, the owner or operator must obtain alternate financial assurance.

5. Financial test and corporate guarantee. A financial test or corporate guarantee must satisfy the requirements of this subsection.

a. For the financial test, the owner or operator must have:

(1) A ratio of current assets to current liabilities greater than one and five-tenths, or a current rating for the owner's or operator's most recent bond issuance of AAA, AA, or A as issued by Standard and Poor's or Aaa, Aa, or A as issued by Moody's; and

(2) Net working capital and tangible net worth each at least four times the sum of the current cost estimates for closure or postclosure, whichever is applicable; and

(3) Tangible net worth of at least two million dollars; and

(4) Assets located in the United States amounting to at least four times the current cost estimates for closure or postclosure care, whichever is applicable.

b. To demonstrate the financial test, the owner or operator must submit the following items to the department in a letter which transmits:

(1) A copy of an independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest fiscal year; and

(2) A report from an independent certified public accountant to the owner or operator stating that:

(a) The accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, yearend financial statements for the latest fiscal year; and

(b) In connection with that procedure, no matters came to lead the accountant to believe that specified data should be adjusted.

c. After initial submission of the items in subdivision b, the owner or operator must send updated information to the department within ninety days of each succeeding fiscal year. This information must consist of all items specified in subdivision b.

d. If the owner or operator no longer meets the requirements of subdivision a, the owner or operator must send notice by certified mail to the department within ninety days and establish alternate financial assurance within one hundred twenty days.

e. The department may disallow use of the financial test on the basis of qualification in the opinion expressed by the certified public accountant in the accountant's report on examination of owner's or operator's statements. An adverse opinion or a disclaimer of opinion may be cause for disallowance. The owner or operator shall provide alternate financial assurance within thirty days after notification of the disallowance.

f. An owner or operator may meet the requirements of this subsection by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator or a firm whose parent corporation is also the parent corporation of the owner or operator. The guarantor must meet the requirements of subdivisions a through e and a certified copy of the guarantee must accompany the items in subdivision b. The terms of the guarantee must provide that:

(1) Guarantor will complete closure or postclosure care, whichever is applicable, if the owner or operator fails to do so; and

(2) The corporate guarantee will remain in effect unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the department; and

(3) Guarantor will provide alternate financial assurance within ninety days if the corporate guarantee is canceled and if the owner or operator fails to provide approved alternate financial assurance.

History: Effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

CHAPTER 33-20-15

33-20-15-01. Application processing fee.

1. Applicants for permits for transporting solid waste and for solid waste management facilities shall pay, at the time the permit application is filed, an application processing fee as follows:

   a. Seventy-five dollars for a solid waste transporter.

   b. Five thousand dollars for any ~~solid-waste-processing-and~~ resource recovery system or facility.

   c. One thousand dollars for any municipal waste landfill facility that receives on average less than twenty tons [18.2 metric tons] per day.

   d. Three thousand dollars for any municipal waste landfill facility that receives on average from twenty tons [18.2 metric tons] per day to fifty tons [45.4 metric tons] per day.

   e. Five thousand dollars for any municipal waste landfill facility that receives on average more than fifty tons [45.4 metric tons] per day to five hundred tons [453.5 metric tons] per day.

   f. Twenty thousand dollars for any municipal waste landfill facility that receives on average more than five hundred tons [453.5 metric tons] per day.

   g. ~~Five~~ Three thousand dollars for any surface impoundment facility plus two thousand dollars for each surface impoundment included in the facility. A surface impoundment receiving an average of more than ten tons [9.1 metric tons] of waste per day and which will be closed with the waste materials remaining in place shall pay applicable fees for the appropriate size of industrial waste or special waste landfill facility.

   h. One thousand dollars for any industrial waste or special waste landfill facility that receives on average ten tons [9.1 metric tons] per day or less.

   i. Ten thousand dollars for any industrial waste or special waste facility that receives on average more than ten tons [9.1 metric tons] but less than one hundred tons [90.7 metric tons] per day.

j. Twenty thousand dollars for any industrial waste or special waste facility that receives on average one hundred tons [90.7 metric tons] or more per day.

k. Two thousand dollars for any inert waste landfill that receives on average more than forty tons [18.1 metric tons] per day.

2. Modifications of existing unexpired permits which are initiated by the department may not require an application processing fee. Modifications of existing unexpired permits not initiated by the department that require major review may be required to submit a processing fee with the modification request.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04, 23-29-07.1
Law Implemented: NDCC 23-29-04, 23-29-07.1

33-20-15-02. Annual permit fee. Beginning July 1, 1993, the owners or operators of an activity or facility required to have a permit under these rules are subject to an annual permit fee for each permit. The fee period must begin each July first and the fee must be paid by July thirty-first. All fees must be made payable to the North Dakota state department of health and consolidated laboratories. The annual permit fee is as follows:

1. For transport of solid waste twenty-five dollars.

2. For a ~~solid--waste--processing~~ resource recovery system or facility system five hundred dollars.

~~2.~~ 3. For industrial waste or special waste facility five hundred dollars.

~~3.~~ 4. For a municipal waste landfill facility receiving on average more than twenty tons [18.2 metric tons] per day but less than fifty tons [45.4 metric tons] per day five hundred dollars.

~~4.~~ 5. For a municipal waste landfill facility receiving on average more than fifty tons [45.4 metric tons] per day and less than five hundred tons [453.5 metric tons] per day one thousand dollars.

~~5.~~ 6. For a municipal waste landfill facility receiving on average more than five hundred tons [453.5 metric tons] per day five thousand dollars.

6. 7. For a surface impoundment facility five hundred dollars.

History: Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994.
General Authority: NDCC 23-29-04, 23-29-07.1
Law Implemented: NDCC 23-29-04, 23-29-07.1

33-20-16-02. Certification and application.

1. In order to be certified as a municipal waste landfill operator ~~or as a municipal waste incinerator operator~~, an applicant must take and pass a written examination given by the department or its authorized representative.

2. The department shall charge certification fees of twenty-five dollars for initial certification and fifteen dollars for annual renewal.

3. An individual desiring to attend the training session and take the certification examination shall file and submit the fee and application form at least thirty days before the scheduled training and certification session.

History: Effective December 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04, 23-29-07.9

CHAPTER 33-20-17

33-20-17-01. District solid waste management plans.

1. The comprehensive solid waste management ~~plans~~ plan required by ~~the Act~~ North Dakota Century Code chapter 23-29 for each solid waste management district must be developed and implemented for the following purposes:

   a. Reduce the amount of solid waste generated.

   b. Reuse materials.

   c. ~~Compost---wastes--such--as~~ Composting leaves and grass clippings.

   d. Recycle everything possible.

   e. Recover energy from waste.

   f. Landfill the remaining wastes.

   g. To coordinate solid waste management among district political subdivisions.

2. At a minimum, each district solid waste management plan must contain the following plan elements:

   a. Documentation demonstrating compliance with North Dakota Century Code chapter 23-29 for formation of the district.

   b. Solid waste management goals and objectives for ten-year plan.

   c. Solid waste inventory (including special wastes, regulated infectious wastes and tires excluding regulated hazardous wastes), types, and quantities for each community and county; and a district summary.

   d. Solid waste amounts and types transported to another district or state; and the amounts, types, and sources of waste received from another district or state.

   e. Descriptions of existing solid waste collectors, service areas, routes, transfer stations, and types of service for all communities and counties served.

   f. Descriptions of existing resource recovery, waste processing, and disposal methods and facilities, existing waste minimization practices, and local markets for recoverable waste materials; assessments of the capacities

of these methods, practices, and markets; and identification of potential and new resource recovery efforts and markets.

g. Identification of current solid waste management problems, evaluate solutions, and identify a course of action to solve those problems.

h. ~~How--the--district--will~~ Methods, procedures, or programs adequate to meet the following goals specified in ~~the--Act~~ North Dakota Century Code section 23-29-02:

(1) At least a ten percent reduction in volume of ~~municipal/solid~~ municipal waste deposited in landfills by 1995.

(2) At least a twenty percent reduction in volume of ~~municipal/solid~~ municipal waste deposited in landfills by 1997.

(3) At least a forty percent reduction in volume of ~~municipal/solid~~ municipal waste deposited in landfills by 2000.

i. Future solid waste management issues which may require adjustments to adopted solid waste management plans.

j. Implementation plan and schedule and a funding mechanism for the activities and strategies in the plan.

k. Existing local ordinances and rules and a strategy for the district's compliance with the plan.

l. Ensure and document public involvement and acceptance of the plan.

m. Resolution of adoption of the plan by the district.

n. Provision to review, amend, update, and submit solid waste management plans to the department every five years.

3. As required by ~~the--Act~~ North Dakota Century Code section 23-29-06, the districts must submit plans to the department for approval.

History: Effective April 1, 1992; amended effective October 1, 1994.
General Authority: NDCC 23-29-04
Law Implemented: NDCC 23-29-04

STAFF COMMENT: Chapter 33-20-19 contains all new material but is not underscored so as to improve readability.

CHAPTER 33-20-19
MUNICIPAL WASTE LANDFILL RELEASE COMPENSATION FUND

33-20-19-01. Definitions. The terms used in this chapter have the same meaning as in North Dakota Century Code section 23-29.1-04.

History: Effective October 1, 1994.
General Authority: NDCC 23-29.1-04
Law Implemented: NDCC 23-29.1-04

33-20-19-02. Landfill notification. Owners of active disposal units must include in the notification a landfill site survey plot delineating all closed disposal areas and the active disposal unit so as to allow detection of any release occurring from the active disposal unit.

History: Effective October 1, 1994.
General Authority: NDCC 23-29.1-04
Law Implemented: NDCC 23-29.1-04, 23-29.1-16

33-20-19-03. Compliance demonstration. Owners of active disposal units must demonstrate through written documentation required by section 33-20-03.1-04 and by chapters 33-20-04.1 and 33-20-06.1 that the disposal unit complies with this article. Owners of new disposal units may provide the demonstration through the permit application process required by chapter 33-20-03.1 and the certification required by subsection 1 of section 33-20-04.1-04. The required form will include a comprehensive compliance checklist which must be certified by the owner.

History: Effective October 1, 1994.
General Authority: NDCC 23-29.1-04
Law Implemented: NDCC 23-29.1-04, 23-29.1-15, 23-29.1-16

33-20-19-04. Notification of eligibility procedures. Once the department receives notification of a release, the department shall undertake or cause to be undertaken the following procedures:

1. Verify that the disposal unit is eligible.

2. Verify that a release has occurred from an eligible disposal unit through the provisions of chapter 33-20-13 and article 33-16.

3. Verify that the release was discovered and reported after April 1, 1994.

4. Verify that the owner or operator has paid all annual premium fees.

5. If the release did not occur from an eligible disposal unit or if the owner or operator is not in compliance under subsections 1, 2, 3, or 4, send a letter of ineligibility to the owner or operator.

6. Develop and implement a plan for corrective action through the provisions of article 33-16.

7. Purchase of financial assurance in the amount of one hundred thousand dollars, or so much thereof as necessary, through the provisions of section 33-20-14-05.

History: Effective October 1, 1994.
General Authority: NDCC 23-29.1-04
Law Implemented: NDCC 23-29.1-04, 23-29.1-15, 23-29.1-16, 23-29.1-17, 23-29.1-18

33-20-19-05. Reimbursement procedures.

1. No payment will be made from the fund unless a completed application has been received by the department. The application must contain, but is not limited to, the following information:

   a. Name and address of the owner or operator.

   b. Street or highway description of the release location.

   c. The legal description of the release location.

   d. The date the release was discovered.

   e. Name, address, and telephone number of the contact person.

   f. A narrative description of the release.

   g. A narrative description of the correction action.

h. Expense documentation.

2. Payment must be made for eligible costs. Eligible costs for a corrective action include the following:

   a. Labor.

   b. Testing.

   c. Use of machinery.

   d. Materials and supplies.

   e. Professional services.

   f. Consultant fees, if authorized by the department.

   g. Any other costs the department deems to be reasonable and necessary to remedy the release.

3. Payment will not be made for costs which are not eligible. The following are not eligible costs:

   a. The costs of making improvements to the disposal unit beyond those that are required for corrective action.

   b. Decreased property value.

   c. Bodily injuries or property damages.

   d. Attorney's fees.

   e. Costs associated with preparing, filing, and prosecuting an application for reimbursement or assistance.

   f. Any costs resulting from negligence or misconduct on the part of the owner or operator.

   g. Costs in excess of those deemed reasonable by the department.

4. No payment will be made until the owner or operator has submitted complete expense documentation along with legible copies of invoices, providing a description of:

   a. Any work performed.

   b. Who performed the work.

   c. Where the work was performed.

   d. The date the work was performed.

e. Time and materials.

f. The unit cost.

g. The total amount.

5. No payment will be made until the owner or operator has submitted evidence that the amounts shown on expense documentation for which the payment is requested to have either:

   a. Been paid in full; or

   b. If an assignment of payment has been signed by the owner or operator, that a contractor hired by the owner or operator has expended time and materials for which payment must be made.

   c. The submitted evidence must be accompanied by either:

      (1) Business receipts indicating payments received;

      (2) Canceled checks;

      (3) The certification of a certified public accountant that the expenses for which reimbursement is requested have been paid in full; or

      (4) Unpaid invoices from a contractor for time and materials expended broken out by unit costs.

6. No payment will be made until the owner or operator has demonstrated payment of the first one hundred thousand dollars of the costs of corrective action.

7. The department may provide partial payments if it is determined the corrective action is proceeding according to the proposed plan. The payment may be made to the owner or operator or the owner's or operator's assigned representative if an assignment is completed and submitted to the department.

8. Prior to payment, the department must be satisfied that the corrective action taken has met all state, federal, and local laws or regulations and that the corrective action has adequately addressed the release in terms of public health, welfare, and environment resources.

9. All payments are subject to the availability of funds in the municipal waste landfill release compensation fund.

History: Effective October 1, 1994.
General Authority: NDCC 23-29.1-04
Law Implemented: NDCC 23-29.1-04, 23-29.1-05, 23-29.1-08, 23-29.1-09, 23-29.1-11, 23-29.1-17, 23-29.1-18, 23-29.1-19, 23-29.1-22, 23-29.1-25

TITLE 37

Department of Transportation

CHAPTER 37-03-01

37-03-01-01. Definitions. The terms herein shall have the meaning as provided in North Dakota Century Code chapters 39-01 and 39-16, with the latter chapter controlling in cases of conflict, except:

1. "Approved course" means any defensive driving course approved by the national safety council and any driving while intoxicated counterattack program approved by the director.

2. "Approved facility" means any hospital or facility for the treatment of alcoholism, drug-dependent persons, or mental health or retardation service as approved by the director.

3. "Director" means the commissioner's duly appointed and acting director of the drivers license division of the ~~state--highway~~ department of transportation, or the director's duly authorized agent, or licensing authority as that term is used in North Dakota Century Code chapter 39-06, 39-06.1, or 39-06.2.

4. "Good cause to believe" or "sufficient evidence" means any information received by the director in writing from:

   a. Federal, state, or local authorities;

   b. Licensed physicians~~,--including-psychiatrists~~;

   c. Any official as to admissions or adjudication of traffic offense;

   d. Any court as to a conviction of a traffic offense;

e. Any state or private hospital;

f. Any facility for the treatment of alcoholics and drug-dependent persons approved by the state department of health and consolidated laboratories;

g. Any facility licensed as an addiction hospital by the state department of health and consolidated laboratories;

h. Any mental health and retardation service unit;

i. Any federal or state court which indicates that a person may be physically or mentally unable to safely operate a motor vehicle on the highways of the state of North Dakota;

j. Any person who has relevant information in regard to the ability of an applicant for a license, a licensee, or permittee to safely operate a motor vehicle; or

k. Any person on an application for an operator's license, instructional permit, or renewal thereof.

5. "Licensee" means any person who holds a valid operator's license, under the laws of this state.

6. "Policy of insurance" means a motor vehicle liability policy in the amount of ~~ten~~ twenty-five thousand dollars for bodily injury to or death of one person in any one accident, and subject to said limit for one person, in the amount of ~~twenty~~ fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of ~~five~~ twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.

7. "Security" means a cash bond not to exceed twenty-five thousand dollars.

8. "Security requirements" means evidence of proof of compliance by the driver of filing security, obtaining a policy of insurance or a bond as required by North Dakota Century Code chapter 39-16 or 39-16.1.

9. "Underlying suspension" when used in a statute relating to driver's license sanctions means the basic or essential fact or occurrence upon which a suspension has been or may be ordered. Whenever a suspension has two or more concurrent

causes, one of which is for an alcohol-related offense or occurrence, the alcohol-related suspension is the underlying suspension.

History: Effective January 1, 1979; amended effective July 1, 1983; May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06, 39-06.1, 39-16-02, 39-16-05

37-03-01-02. Disclosure of mental or ~~physical~~ medical information. The director shall include, as a part of the application for an original operator's license or any renewal thereof or an instruction permit, questions as to the existence of ~~physical~~ medical or mental conditions which may impair the ability of the person to operate a motor vehicle safely. If the answers to such questions indicate the existence of any ~~physical~~ medical or mental disability which the director believes may inhibit or prohibit the safe operation of a motor vehicle by such person, the director may require an examination of such person by a licensed physician ~~or psychiatrist~~ as a prerequisite to the issuance of an operator's license or instructional permit. Such examination or examinations shall be completed on a form furnished by the director. The expense of such examination shall be borne by the person whose fitness to operate a motor vehicle safely is in question.

History: Effective January 1, 1979; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06-03, 39-06-07, 39-06-17

37-03-01-03. Proof of birth ~~---Applicants born in North Dakota~~. All persons ~~who were born in North Dakota and~~ make an original or duplicate application for an operator's license or nondriver photo identification card shall furnish proof of name and birth date by ~~obtaining a verification of proof of birth form from the director. Such form shall be completed by the applicant and submitted to the division of vital records of the state department of health for verification. Upon return of the form from the division of vital records, the applicant shall attach it to the completed application for an operator's license and submit both to the director.~~ the use of the following documents:

1. Birth certificate, original or certified copy, issued by the state of birth;

2. Out-of-state, county, city, or state-issued birth certificates that are signed by or certified by an official of the respective jurisdiction;

3. The United States department of justice birth certificate;

4. The United States department of defense birth certificate;

5. District court identification card;

6. Passport or visa with photo;

7. Out-of-state drivers license or permit;

8. Immigration and naturalization identification, certified with photo;

9. Divorce or annulment decree when full name and date of birth are given;

10. State-issued photo identification cards; or

11. North Dakota pistol permit with photo, full name, and date of birth.

History: Effective January 1, 1979; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06-07, 39-06-07.1, 39-06-14

37-03-01-04. Licensee to report physical impairment. Any licensee who suffers permanent loss of use of a hand, arm, foot, leg, or eye shall make a report thereof to the director before operating any motor vehicle on the highways in this state. Except as provided in North Dakota Century Code section 39-08-21, the driver of a commercial class A, B, or C motor vehicle shall comply with the federal motor carrier regulations, pursuant to 49 CFR section 391.41 paragraphs (a), and (b)(1) and (b)(2). The director may require an examination pursuant to the provisions of section 37-03-01-05.

History: Effective January 1, 1979; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06-14~~(6)~~(4)

37-03-01-05. ~~Epileptics~~ Operators not to be licensed - Exceptions and requirements.

1. The privilege of holding a motor vehicle operator's license shall be denied to any person who has experienced ~~episodes of disturbance of or loss of consciousness due to epilepsy,~~ convulsions, seizures, blackouts or fainting spells due to a cardiovascular condition, epilepsy, or ~~episodes of disturbance of or loss of body control caused~~ by metabolic diseases, including diabetes mellitus, ~~or by cardiovascular diseases~~ in which loss of consciousness occurred. The denial shall ~~be either by denial~~ occur at the time of ~~licensing upon~~ application, pursuant to North Dakota Century Code section 39-06-03, or through license ~~cancellation~~ suspension, pursuant to North Dakota Century Code ~~section~~ sections 39-06-24, 39-06-32, and 39-06-34.

2. A person who has experienced the episodes described in subsection 1 may be issued a restricted operator's license or permit pursuant to North Dakota Century Code sections 39-06-06 and 39-06-17, if:

   a. The person has been free of the episodes for at least ~~six~~ three consecutive months and submits a ~~sworn~~ statement to that effect to the director; and

   b. The person submits to the director a written certification from the person's treating physician indicating that:

      (1) The condition causing the episodes is adequately controlled;

      (2) The person has been free of episodes for at least ~~six~~ three months; and

      (3) Operation of a motor vehicle by the person will not be inimical to public safety or welfare.

   Every permit or license issued under this subsection may be periodically reviewed by the director until the person has been free of episodes for at least ~~twelve~~ six months.

3. A person who has been free of the episodes described in subsection 1 for at least ~~twelve~~ six consecutive months will be granted an operator's license if:

   a. The person submits a ~~sworn~~ statement to the director indicating that the person has been free of episodes for at least ~~twelve~~ six consecutive months; and

   b. The person submits to the director a written certification from the person's treating physician indicating that, based upon an examination of the person, the items required in paragraphs 1 and 3 of subdivision b of subsection 2 have been met by the person, the person has been free of episodes for at least ~~twelve~~ six consecutive months, and that the physician is of the opinion that the person is able and willing to cooperate in the treatment of the conditions causing the episodes.

4. Any person issued an operator's license or permit pursuant to subsection 2 or 3 shall submit to the director a periodic reevaluation form available from the director. The reevaluation form shall be submitted to the director every twelve months, or more often if required by the director, after issuance of a license or permit under subsection 2 or 3. The form shall contain the information prescribed by the director, and the person shall be required to furnish all information requested. The form shall include provision for the opinion of the person's treating physician that the

person's condition continues to be controlled and that the operation of a motor vehicle by the person will not be inimical to public safety or welfare.

5. A person having had the episodes described in subsection 1 will not be required to submit further periodic reevaluation forms if the person:

   a. Submits to the director a ~~sworn~~ statement that the person has not taken any medication to control episodes for ~~five~~ three consecutive years, and has had no episodes for ~~five~~ three consecutive years; and

   b. Submits to the director a written certification from the person's treating physician or physicians that, for ~~five~~ three consecutive years, the person has not had any episodes~~,-and-that-no-medication-was--prescribed--for--the person's--condition~~. The total of the treatment periods, if more than one physician has treated the person, must equal ~~five~~ three consecutive years without episodes ~~or medication~~.

6. A single episode of the type described in subsection 1 shall be treated as only an isolated occurrence if the opinion of the treating physician establishes that it was an isolated incident and not likely to recur. The director shall consider the opinion of the treating physician in determining whether, upon all the evidence, it is safe to permit or license the person for the operation of a motor vehicle without the ~~six month~~ three-month waiting period.

7. The director shall use the reports required to be filed under this section to make determinations on licensure. Episodes medically induced shall not be considered in determining whether to license a person under this section. When the records of the director show lack of compliance with the requirements of this section by any person, the director may ~~cancel~~ suspend forthwith the license of that person pursuant to North Dakota Century Code ~~section--39-06-24~~ sections 39-06-32 and 39-06-34.

8. Except as provided in North Dakota Century Code section 39-08-21, the driver of a commercial class A, B, or C motor vehicle shall comply with the federal motor carrier regulations in 49 CFR sections 391.41(a) and 391.41(b) paragraphs (3) through (9) and (11) through (13).

History: Effective January 1, 1979; amended effective July 1, 1981; May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06-03, ~~39-06-24~~ 39-06-34

37-03-02-04. Inimical operator - Determination and return of privileges. The director shall have good cause to believe that a person is inimical to public safety or welfare if that person has demonstrated a course of conduct in the operation of a motor vehicle through a conviction or convictions of traffic offenses or admissions and adjudications, evincing such hazard; or has a physical or mental disability which may inhibit or prohibit the safe operation of a motor vehicle. In determining whether a person is inimical to the public safety or welfare in the operation of a motor vehicle, the director will consider~~,-but-shall-not--be--limited--to,~~ at a minimum the type of conviction, convictions, admissions, or adjudications; the number of convictions, admissions, or adjudications; the total number of points assessed against the driving record of the operator during the preceding three years; whether the events giving rise to the charge that lead to the conviction, admission, or adjudication resulted in death or serious personal injury, requiring professional medical care, or serious property damage. The period of suspension shall be until the person can show, to the director's satisfaction, that the person's driving behavior has improved. The director may allow temporary driving privileges for school or work purposes or reinstatement of driving privileges upon a showing of all of the following:

1. That the person has not been convicted of a traffic offense for a period of at least the length of suspension.

2. Letters of recommendation submitted from the person's employer, citizens in the community, and law enforcement advising of the person's conduct and driving behavior for the past two years.

3. Successful completion of a defensive driving course approved by the director.

4. That the person has liability insurance required by North Dakota Century Code section 39-08-20.

5. Payment of the reinstatement fee required by North Dakota Century Code section 39-06-35.

History: Effective January 1, 1979; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06-03, 39-06-32

37-03-03-05. Suspension of license for point violation - Notice - Hearing. When the director has good cause to believe that a licensee has been convicted of a traffic offense or there has been an official determination that a traffic violation has been committed, the director shall enter the proper number of points on the driving record of the licensee based on the schedule contained in subsection 3 of North Dakota Century Code section 39-06.1-10. When the driving record of the licensee indicates a point total of twelve or more, or when the licensee is convicted of a violation of North Dakota Century Code section 39-08-01, the director shall send to said licensee a notice of intention to suspend license and opportunity for hearing. ~~Said notice~~

1. If the notice results from a point total of twelve or more, the notice shall specify the number of points assessed against the driving record of the licensee, the number of days of suspension based on seven days for each point over eleven and advise the licensee that the licensee has ten days from the date of said notice to make a written request for a hearing on the matter.

2. If the notice results from a violation of North Dakota Century Code section 39-08-01, the notice shall specify the number of days of suspension based on subsection 7 of North Dakota Century Code section 39-06.1-10 and advise the licensee that the licensee has ten days from the date of said notice to make a written request for a hearing on the matter.

History: Effective January 1, 1979; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06.1-10

37-03-03-06. Notice of hearing - Matters considered at hearing. If the licensee makes a written request for a hearing as specified in section 37-03-03-05, the director shall send a notice of hearing to the licensee specifying the time, date, and place for such hearing. The notice shall further specify that the matters considered at the hearing will be confined to the following:

1. If the licensee requests a hearing based on a point total of twelve or more:

   a. Whether the proper number of points have been assigned to the convictions, adjudications, or admissions of the licensee;

~~2.~~ b. Whether the proper period of suspension has been computed based upon the number of points assigned against the driving record of the licensee;

~~3.~~ c. Whether there was any failure to reduce the point total on the licensee's driving record ~~as follows: one point reduction for no convictions, admissions, or adjudications recorded against the licensee's record during a three-month period; three points reduction upon the completion of an approved course during a twelve-month period; and seven points reduction for successful completion of an alcoholism or narcotics treatment program approved by the state department of health~~; or

~~4.~~ d. Any other material matter relating to the suspension of the license deemed appropriate by the licensee.

2. If the licensee requests a hearing based on a violation of North Dakota Century Code section 39-08-01:

   a. Whether the information in the department records pertaining to the licensee is correct;

   b. Whether the proposed period of suspension is in accord with subsection 7 of North Dakota Century Code section 39-06.1-10.

At the hearing, the director shall not consider the substantive merits of any conviction, adjudication, or admission entered against the driving record of the licensee.

History: Effective January 1, 1979; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06.1-10

37-03-04-01.1. Temporary restricted operator's license - Criteria and procedure for issuance.

1. Where authorized by North Dakota Century Code section 39-06.1-11, a temporary restricted operator's license may be issued by the director according to the criteria in this section. In reviewing the person's record for the nature, frequency, and severity of violations and convictions entered thereon, the criteria considered will include:

   a. Availability of ~~public~~ other transportation.

   b. Number of drivers in the household.

   c. The nature of the driver's ~~primary~~ employment.

   d. Total number of moving violations for the last three years.

   e. Driving under suspension, revocation, or cancellation convictions.

   f. Number of previous temporary restricted licenses issued.

   A temporary restricted operator's license will be issued only to allow driving to, from, or during the person's ~~primary~~ employment, to and from an alcohol education or treatment program, to and from school ~~if the person is over eighteen years of age~~ where the need is shown ~~and the offense involved is alcohol related;~~ or for normal life maintenance needs if extenuating circumstances are shown.

2. The applicant for a temporary restricted operator's license shall make application only on the form provided by the director. The application form shall be completed, providing all of the information requested. Any incomplete application forms will be returned to the applicant for completion. The application shall:

   a. Explain the need for the temporary restricted operator's license.

   b. Provide a written statement from the applicant's employer, if any, or school authority, verifying the need for the temporary restricted operator's license.

   c. Identify the vehicles to be driven under the temporary restricted operator's license.

d. Include any other information deemed necessary by the director.

3. The temporary restricted operator's license will contain all limitations and restrictions deemed necessary by the director, including the days of the week, hours of the day, geographical area for driving, and the vehicles to be driven. The holder of the temporary restricted operator's license must notify the director of any changes in circumstances under which the temporary restricted operator's license was issued, and of any change in the vehicles desired to be driven.

4. If a temporary restricted operator's license has been denied, a reapplication may be made after thirty days have elapsed from the date of denial, if additional or changed information required for issuance becomes available.

5. No temporary restricted operator's license will be issued to an ~~alcohol-~~ alcohol-impaired or drug-impaired driver who has contributed to the cause of death or serious bodily injury of another person~~;--or--if--within--five--years--preceding---the violation--which--caused--the--need-to-apply-for-the-temporary restricted-operator's--license--the--person--has--had--license privileges--suspended-or-revoked-by-administrative-decision-of the--state--highway--commissioner---for---an---alcohol-related violation-or-occurrence~~.

History: Effective July 1, 1983; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06.1-11

37-03-05-03. Notice of hearing - Matters considered. If a driver makes a written request for a hearing as specified in section 37-03-05-02, the director shall send a notice of hearing to the driver specifying the time, date, and place for such hearing. The date set for such hearing shall be within ~~fifteen~~ sixty days, but not earlier than five days, after the request for the hearing has been received, unless otherwise agreed to by both the director and the person requesting such hearing. The decision in the matter must be made within thirty days of the completion of the hearing. The notice shall further specify that the matters considered at the hearing will be confined to the following:

1. Whether the accident resulted in bodily injury or death, or damage to the property of any one person in excess of the amount specified in North Dakota Century Code section ~~39-16-05~~ 39-08-09;

2. Whether the accident involved circumstances to which the financial responsibility requirements and suspension do not apply;

3. Whether the possibility exists that liability for bodily injuries or death, or property damage in excess of ~~three hundred~~ one thousand dollars could be imposed against the driver;

4. If the possibility exists that liability may be imposed against the driver, the dollar amount of the potential liability and manner in which that amount may be secured by the driver in order to maintain the driver's license, or nonresident's operating privileges; and

5. Any other material matter relating to the suspension of the license deemed appropriate by the driver.

If a hearing is conducted with respect to a proposed suspension, the director shall give notice of the decision by mail to the driver.

History: Effective January 1, 1979; amended effective July 1, 1981; May 1, 1994.
General Authority: NDCC 28-32-02, 39-16-02
Law Implemented: NDCC 39-16-05

37-08-01-03. Visual acuity requiring road test. Visual acuity of ~~20/60~~ 20/70 or less requires a road test regardless of the corrective or special visual device being used.

History: Effective December 1, 1988; amended effective May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06-03(7)

37-08-01-05. Minimum vision requirements and restrictions. Applicants and operators requesting or maintaining a North Dakota license or permit and who meet the following minimum vision standards, as established by the drivers license and traffic safety division, shall comply with the associated requirements and restrictions (which are nonexclusive):

	Minimum visual acuity	Requirements and restrictions with or without corrective or special device.
1.	20/30 ~~one-eyed individual~~ for person having single-eye vision	(a, h, j).
2.	20/40 each eye	(a, h).
3.	20/50 each eye	(b, c, d, h).
4.	20/50 better eye 20/60 or less other eye	(b, c, d, f, h).
5.	20/60 better eye 20/60 or less other eye	(b, c, d, f, ~~g~~ h, k).
6.	20/60 better eye 20/70 or less other eye	(b, c, d, e, ~~g~~ h, k).
7.	Less than 20/60 in each eye, but better than 20/70 in each eye	(b, c, d, e, g, h, i, k).
8.	20/70 better eye 20/80 - 20/100 other eye	(b, c, d, e, g, h, i, k, l).
9.	20/80 better eye 20/80 - 20/100 other eye	(b, c, d, e, g, h, i, k, l).

10. Requirements and restriction code:

a. Minimum vision without corrective lenses.

b. Corrective or special visual device (when required).

c. Daylight driving only.

d. Vision specialist recommendations.

e. Vision recheck within one year.

f. Vision recheck within two years.

g. Road test.

h. Field of view report:

(1) If the binocular horizontal visual field 140 degrees or better - no operator's license restrictions.

(2) If the binocular horizontal visual field less than 140 degrees - operator's license restrictions.

(3) If the binocular horizontal visual field less than 120 degrees - no operator's license.

(4) ~~If one-eyed~~ For a single-eye vision applicant:

(a) A minimum horizontal visual field of 120 degrees:
Nasal - 50 degrees,
Temporal - 70 degrees.

(b) A minimum vertical field of:
Inferior - 50 degrees,
Superior - 25 degrees.

(c) If the applicant's superior or inferior visual field is impaired, the applicant's better eye must meet the ~~one-eyed~~ vertical field criteria for a person having single-eye vision.

i. Report any eye disease or injury.

j. Outside mirror.

k. Class ~~III~~ "D" or "M" noncommercial vehicles only.

l. Glare resistance and glare recovery (for daylight only).

11. Except as provided in North Dakota Century Code section 39-08-21, the driver of a commercial class A, B, or C motor

vehicle shall comply with the federal motor carrier regulations, pursuant to 49 CFR section 391.41(b)(10).

History: Effective December 1, 1988; amended effective March 1, 1992; May 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 39-06-03(7)

AUGUST 1994

STAFF COMMENT: Chapter 37-05-00 contains all new material but is not underscored so as to improve readability.

ARTICLE 37-05

OUTDOOR ADVERTISING ADJACENT TO HIGHWAYS

CHAPTER 37-05-00
DEFINITIONS

37-05-00-01. Definitions. As used in this article:

1. "Department" means the department of transportation.
2. "Director" means the director of the department of transportation or an authorized agent of the director.

3. "Federal-aid primary system" means the federal-aid primary system in existence on June 1, 1991, and any highway that is not on such system, but which is on the national highway system, constituting part of the state highway system.

4. "Sign" means any outdoor advertising sign as defined in subsection 5 of North Dakota Century Code section 24-17-02 but excludes directional and other official signs as described in chapter 37-05-04.

History: Effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

CHAPTER 37-05-01

37-05-01-01. Permit required. ~~Unless otherwise provided by this article, no~~ A person may not erect or maintain ~~any outdoor advertising~~ a sign ~~authorized by North Dakota Century Code chapter 24-17, or by this article,~~ along any portion of the right of way of any highway on the ~~interstate or~~ federal-aid primary ~~portions of the state highway~~ system, without having first obtained a written permit issued by the ~~state highway commissioner or the commissioner's authorized agent~~ director.

Outside urban areas, any sign visible from the main-traveled way and meeting any of the criteria listed below is a sign which has been erected with the purpose of its message being read from the main-traveled way of any highway on the ~~interstate or~~ federal-aid primary ~~portions of the state highway~~ system. These criteria apply to any sign regulated under North Dakota Century Code section 24-17-03.1. Where a sign is visible from the main-traveled way of more than one highway, one or more of which is a controlled highway under this article, the more stringent of the applicable control requirements applies. The criteria are:

1. The sign has any lettering one inch [2.54 centimeters] or more in height or width for each fifty feet [15.24 meters] of distance from the sign to the main-traveled way of a controlled highway, the distance from the sign to the main-traveled way being measured at right angles to the highway at the shortest distance between the sign and the centerline of the main-traveled way nearest the sign.

2. At least eighty percent of the total average daily traffic count of vehicles, as determined by ~~the state highway~~ department counts, on all highways from which the sign is visible is traveling in either or both directions along the main-traveled way of a highway ~~controlled by this article~~ on the federal-aid primary system.

3. The sign is visible from the main-traveled way of the highway for more than five seconds traveling at the posted speed limit, or for the time needed to read the whole message, whichever is less.

4. The sign is placed at an angle that makes it easily visible to traffic on the main-traveled way of the controlled highway.

5. The sign advertises a location not directly accessible from the noncontrolled highway, and is clearly intended for travelers on the main-traveled way of the controlled highway.

Unless the context otherwise requires, terms used herein are defined as in 23 CFR, part 750, subpart G.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-03, 24-17-03.1, 24-17-09

37-05-01-02. Application for permit. Permits may be applied for only on the form provided by the ~~highway--commissioner---or---the commissioner's--agent~~ director. All information on the application form must be provided in addition to any supplemental information required by the ~~commissioner~~ director prior to acting on the application. Incomplete applications will be returned to the applicant. All information on the permit applications shall be certified as correct by the applicant, under penalty of law. If the permit is not granted, the applicant will be given written notification of the reasons for the denial of the permit and the fee will be refunded.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-01-03. Permit duration and fee. Every application for a permit ~~shall~~ must be accompanied by a fee in the amount of ~~twenty-five~~ fifty dollars~~,~~ for a license period ~~of five years~~ covering the life of the sign. ~~Only signs in conforming areas need be licensed. All other signs may be tagged for identification by the highway commissioner. Permits are effective for five years from the date of issuance, and must be renewed as of their fifth anniversary. Renewals shall be by application and fee in the amount prescribed above. Any sign for which the permit is not renewed as of the fifth anniversary of its issuance is unlawful advertising and shall be removed upon the order of the commissioner or the commissioner's agent pursuant to North Dakota Century Code section 24-17-11.~~ Permits shall be applied for only on the application form provided by the ~~commissioner~~ director. ~~If the permit is not granted, the applicant will be given written notification of the reasons for the denial of the permit.~~

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-01-04. Permit number - Placement of sign. Each permit issued under this chapter shall have an identification number, and shall entitle the holder to erect only the advertising sign described in the application and only at the exact location authorized. ~~Within five days of erecting a sign pursuant to a permit, the holder of the permit shall deliver written notification to the commissioner or the commissioner's agent who signed the permit that the sign has been erected. If this written notification is not provided~~ the sign is not erected within ~~six~~

~~months~~ one year of the date of issuance of the permit, the permit is automatically void and revoked under this chapter, ~~and--any~~ unless additional time is granted by the director. Any sign subsequently erected at the location without the issuance of a permit with a new application and fee is unlawful advertising and shall be removed upon the order of the ~~commissioner--or--the--commissioner's--agent~~ director pursuant to North Dakota Century Code section 24-17-11.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-01-05. Permit license. ~~No~~ A person ~~shall~~ may not erect and maintain ~~any--outdoor--advertising~~ a sign unless there is securely fastened thereon a permit license tag as specified in this chapter. The erecting of any ~~outdoor-advertising~~ such sign without having affixed thereon a permit license tag is prima facie evidence that the sign has been erected and is being maintained in violation of the provisions of this chapter and is unlawful advertising and shall be removed upon the order of the ~~commissioner-or-the-commissioner's-agent~~ director pursuant to North Dakota Century Code section 24-17-11.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-01-06. Permit revocation. Upon the revocation of any permit issued under this chapter, the sign for which it was issued constitutes unlawful advertising under North Dakota Century Code section 24-17-11, and ~~shall~~ must be removed upon the order of the ~~commissioner or--the--commissioner's--agent~~ director. In addition to other reasons provided by law and this article, permits ~~will~~ may be revoked under circumstances, including the following:

1. If a sign is not erected within ~~six-months~~ one year of the date of issuance of the permit.

2. If any information on the permit application is found to be false and was false on the date submitted to the ~~commissioner or-the-commissioner's-agent~~ director.

3. If the sign is not erected at the location and in the manner authorized by the permit, or if the sign is otherwise not in accordance with this article.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-01-07. Leases and zoning.

1. Leases submitted with permit applications must be written leases showing on their face that the applicant is authorized by the landowner ~~in question~~ to erect a sign on the property ~~on the date of the application and for six months thereafter~~. If no written lease exists between the applicant and the landowner, the applicant may substitute a letter from the landowner authorizing erection of a sign on the property and showing the duration of the authority, or the landowner may sign the permit application. A landowner's letter or signature on the sign permit application must be used when no written lease exists between the applicant and the landowner either because none was drafted and executed or because the applicant claims to be a successor to the rights of a prior lessee.

2. In addition to other requirements and limitations provided by state and federal law and rules, signs may be erected and maintained only in areas zoned by local zoning authorities as industrial or commercial, under a comprehensive zoning plan, or in areas which are unzoned but are commercial or industrial in use pursuant to the agreement between the ~~commissioner~~ director and the United States secretary of transportation according to 23 U.S.C. 131. Zoned or unzoned areas will be as defined ~~and limited~~ by state and federal law ~~or~~, including administrative rules ~~on the subject, including North Dakota Century Code chapter 24-17; 23 U.S.C. 131; and 23 CFR part 750~~.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-03, 24-17-03.1, 24-17-09

37-05-02-01. Owner name to be displayed. ~~No~~ A sign ~~shall~~ may not be erected or maintained unless the name of the person owning or maintaining it is plainly displayed ~~thereon~~ on the sign. Any sign erected or maintained which does not contain the owner's name plainly displayed ~~thereon~~ on the sign is unlawful advertising and ~~shall~~ must be removed upon the order of the ~~commissioner or the commissioner's agent~~ director pursuant to North Dakota Century Code section 24-17-11.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-02-02. Placement and lighting. ~~No~~ A sign ~~shall~~ may not be erected or maintained in any of the following locations or positions or under any of the following conditions:

1. Within the right of way of any highway.

2. If visible from any highway and simulating or imitating any official directional, warning, danger, or traffic control sign, or if intended or likely to be construed as giving warning to traffic such as by the words "Stop" or "Slow Down".

3. If visible from any highway and displaying any red or blinking or intermittent light likely to be mistaken for a warning or danger signal.

4. If any illumination ~~thereon shall be~~ on this sign is of such brilliance or so positioned as to blind or dazzle the vision of travelers on the adjacent highways or create the impression that the lights are from oncoming or intersecting vehicles. Such conditions ~~shall~~ must be corrected within ten days of notification by the ~~highway commissioner or the commissioner's agent~~ director.

5. Except for on-premise signs, along a scenic highway as designated by the former highway corridor board, or nearer than one thousand feet [304.8 meters] from the designated start or finish of such highway outside the limits of municipalities.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-02-03. Damaged signs - Removal. Damaged, defaced, or poorly maintained conforming signs ~~shall~~ must be repaired within ~~ninety~~

one hundred eighty days after notice by the ~~highway commissioner or the commissioner's agent~~ director, and if not so repaired they will be deemed abandoned and unlawful advertising and ~~shall~~ must be removed upon the order of the ~~commissioner or the commissioner's agent~~ director pursuant to North Dakota Century Code section 24-17-11.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-02-05. Nonconforming signs - Maintenance, repair, alteration, abandonment. For purposes of this article a nonconforming sign is one which was lawfully erected, but which does not comply with the provisions of state or federal laws or rules passed at a later date or which later failed to comply with the law or rules due to changed conditions. Illegally erected or maintained signs are not nonconforming signs.

1. Nonconforming grandfathered signs permitted to remain in place pursuant to the January 19, 1972, agreement between the ~~highway commissioner~~ director and the United States secretary of transportation and pursuant to 23 CFR 750.707, may remain in a commercial or industrial area for their normal life, subject to reasonable maintenance and repair. Any nonconforming grandfathered sign improperly repaired or enlarged with better materials or otherwise maintained in violation of this section is unlawful and ~~shall~~ must be removed upon the order of the ~~commissioner or the commissioner's agent~~ director pursuant to North Dakota Century Code section 24-17-11.

2. Change of advertising copy is part of reasonable maintenance and repair, but the change of copy may not increase or expand the size of the original nonconforming use.

3. Change of facing or sign display area is part of reasonable maintenance and repair, but the change of facing and sign display area may not increase or expand the size of the original nonconforming use.

4. No nonconforming sign may be substantially altered in any manner which expands or increases the size of the sign in excess of the original nonconforming use.

5. ~~No~~ A change may not be made in the number of, type of, or material used for the support of a nonconforming sign, nor in any of its structural members or foundations, in excess of or improving upon the original nonconforming use.

6. Any nonconforming sign destroyed by the elements, taken in condemnation, or abandoned by any previous owner, is an abandoned sign and may not be reconstructed. If the

nonconforming sign is only damaged to an extent not greater than fifty percent of the replacement cost of the sign, then it may be repaired to its preexisting size, shape, and type and quality of materials. Replacement cost will be determined by the ~~commissioner's~~ director's sign cost schedule approved and effective on the date the sign was damaged.

7. A nonconforming sign toppled or blown over by wind or by vandalism may be reerected within one year. Any nonconforming sign not so reerected is abandoned and unlawful, may not be reerected, and ~~shall~~ must be removed pursuant to the order of the ~~commissioner or the commissioner's agent~~ director pursuant to North Dakota Century Code section 24-17-11.

8. A nonconforming sign that has not displayed advertising copy or display for one year or more is an abandoned sign, is unlawful advertising, and ~~shall~~ must be removed upon the order of the ~~commissioner or the commissioner's agent~~ director under North Dakota Century Code section 24-17-11, unless the owner can establish to the satisfaction of the ~~commissioner or the commissioner's agent~~ director that the cessation of use was beyond the owner's control because it was caused by an act of God. The definition of blank sign in section 37-05-02-04 applies to this subsection for determining lack of advertising copy or display.

9. ~~No~~ A sign may not be erected or reconstructed upon the site of an abandoned nonconforming sign, so long as the site continues to be in a nonconforming area.

10. Unless abandoned under this article, a nonconforming sign damaged or destroyed by vandalism or other criminal or tortious act may be reerected in kind, only at its preexisting size and shape, and only with the same type and quality of materials. The burden is on the sign owner to prove to the satisfaction of the ~~commissioner or the commissioner's agent~~ director that a nonconforming sign has been destroyed by vandals or by other criminal or tortious or unlawful action, rather than by the elements or by lawful action.

11. The requirements of this section apply to any nonconforming sign in existence, whether it became nonconforming before or after the effective date of this section.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-03-02. Spacing of signs.

1. ~~Interstate--and~~ Signs adjacent to the federal-aid primary ~~highway-signs~~ system may not be located in a manner as to obscure or otherwise physically interfere with the effectiveness of an official traffic sign, signal, or device or obstruct or physically interfere with the driver's view of approaching, merging, or intersecting traffic.

2. On interstate highways and expressways on the federal-aid primary system:

   a. ~~No--two~~ Two signs may not be placed less than five hundred feet [152.4 meters] apart.

   b. In areas outside of incorporated cities, ~~no~~ signs may not be located adjacent to or within five hundred feet [152.4 meters] of an interchange, intersection at grade, or safety rest area. The five hundred feet [152.4 meters] ~~shall~~ must be measured along the interstate or freeway from the beginning or ending of pavement widening at the ramp exit from or entrance to the main-traveled way.

3. On ~~nonexpress--federal--express--primary~~ highways, other than interstate or expressways, on the federal-aid primary system:

   a. Outside of incorporated cities, two signs may not be placed less than three hundred feet [91.44 meters] apart.

   b. Inside incorporated cities, ~~no~~ two signs ~~shall~~ may not be spaced less than one hundred feet [30.48 meters] apart.

4. The spacing between sign provisions of this section do not apply to signs separated by buildings or other obstructions in a manner that only one sign facing located within the above spacing distances is visible from the highway at any one time.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

37-05-03-03. Penalty. Any sign erected or maintained in violation of this article must be caused to conform to the article as directed by the ~~highway--commissioner--or--the--commissioner's--agent~~ director, and if it is not made to conform, it is unlawful advertising and the ~~commissioner-or-the-commissioner's-agent~~ director may order the owner to remove it and if the owner fails to remove the sign after thirty days, the ~~highway--commissioner--or--the--commissioner's-agent~~

director may cause it to be removed by state forces, the expense of which shall be billed to and paid by the owner of the sign.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

CHAPTER 37-05-04

37-05-04-01. Application of chapter. The standards contained in this chapter apply to directional and other official signs and notices which are erected and maintained in sight distance of the right of way of a highway on the ~~interstate or~~ federal-aid primary system, and which are visible from the main-traveled way of those highways. These standards do not apply to directional and other official traffic control signs within the highway right of way.

~~Except for farm directional signs which do not require a permit or fee, all other directional signs discussed in this chapter may be erected and maintained only pursuant to the permit and fee requirements of chapter 37-05-01.~~

A directional or other official sign in this chapter does not require a permit or fee.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-03, 24-17-03.1, 24-17-09

37-05-04-02. Definitions.

1. "Directional and other official signs and notices" include only official signs and notices, public utility signs, service club and religious notices, and directional signs.

2. "Directional signs" means signs containing directional information about cities; public places owned or operated by federal, state, or local government for their agency; publicly or privately owned natural phenomena, historic, cultural, scientific, educational, and religious sites; and areas of natural, scenic beauty or naturally suited for outdoor recreation, deemed to be in the interest of the traveling public.

3. "Official signs and notices" means signs and notices erected and maintained by public officers or public agencies ~~within their territorial or zoning jurisdiction and~~ pursuant to and in accordance with direction and authorization contained in federal, state, or local laws for the purposes of carrying out an official duty or responsibility. Historic markers authorized by state law and erected by state or local governmental agencies or nonprofit historical societies may be considered official signs.

4. "Public utility signs" means warning signs, informational signs, notices, or markers which are customarily erected and

maintained by public or privately owned utilities as essential to their operations.

5. "Service club and religious notices" means signs and notices authorized by law, relating to meetings of nonprofit service clubs or charitable associations or religious services~~;-which signs-may-not-exceed-eight-square-feet-[.74-square-meters]--in area~~.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-03, 24-17-03.1, 24-17-09

37-05-04-03. Criteria.

1. The following signs are prohibited as directional or other official signs:

   a. Signs advertising activities that are illegal under federal or state laws or regulations in effect at the location of those signs or at the location of those activities.

   b. Signs located in a manner as to obscure or otherwise interfere with the effectiveness of official traffic signs, signals, or devices, or obstruct or interfere with the driver's view of approaching, merging, or intersecting traffic.

   c. Signs which are erected or maintained upon trees or painted or drawn upon rocks or other natural features.

   d. Obsolete signs.

   e. Signs which are in disrepair.

   f. Signs which move or have any animated or moving parts.

   g. Signs located in rest areas, park lands, or scenic areas.

2. Directional and official signs are limited to the following size, including border and trim, but excluding supports:

   a. Maximum area - one hundred fifty square feet [13.94 square meters].

   b. Maximum height - twenty feet [6.10 meters].

   c. Maximum length - twenty feet [6.10 meters].

3. Spacing.

a. The location of each directional or official sign must be approved ~~and permitted~~ by the ~~state highway commissioner or the commissioner's agent~~ director as provided in this article.

b. Directional and other official signs must comply with all other criteria and rules provided in this article.

c. Directional or official signs may not be located within two thousand feet [609.6 meters] of a rest area, park land, or scenic area.

d. Any two directional or official signs facing the same direction of travel shall be spaced not less than one mile [1.61 kilometers] apart.

e. Not more than three directional or official signs pertaining to the same activity and facing in the same direction of travel may be erected along a single route approaching the activity.

f. Directional or official signs located adjacent to the interstate system shall be within seventy-five air miles [120.70 air kilometers] of the activity.

g. Directional or official signs located adjacent to the federal-aid primary system shall be within fifty air miles [80.47 air kilometers] of the activity.

4. The message on directional or official signs shall be limited to the identification of the attraction or activity and the directional information useful to the traveler in locating the attraction, such as mileage, route numbers, or exit numbers. Descriptive words or phrases, pictorial or photographic representations of the activity, its environs, or its logos are prohibited.

5. Directional sign criteria.

a. Privately owned activities or attractions eligible for directional signs are limited to the following: natural phenomena; scenic attractions; historic, educational, cultural, scientific, and religious sites; and outdoor recreational areas.

b. To be eligible for a ~~permit for~~ a directional sign, privately owned attractions or activities must be regionally known or known statewide, and of outstanding interest to the traveling public.

History: Effective July 1, 1983; amended effective August 1, 1994.
General Authority: NDCC 24-17-10
Law Implemented: NDCC 24-17-09

STAFF COMMENT: Article 37-11 contains all new material but is not underscored so as to improve readability.

ARTICLE 37-11

TOURIST-ORIENTED DIRECTIONAL SIGNS

CHAPTER 37-11-01
GENERAL POLICY

37-11-01-01. Definitions. As used in this article:

1. "Advance signs" means supplemental tourist-oriented directional signs that are placed in advance of regular tourist-oriented directional signs in instances where the tourist-oriented directional signs are difficult to see due to topographic or geometric roadway features.

2. "Department" means the department of transportation.

3. "Director" means the director of the department of transportation or an authorized agent of the director.

4. "Permittee" means the party to whom a tourist-oriented directional sign permit is issued.

5. "Person" includes every natural person, firm, copartnership, association, corporation, limited liability company, or limited partnership.

6. "Sight distance" means the distance provided to allow a driver to safely stop a car at the posted highway speed.

7. "Trail blazing signs" means signs placed along an entrance road when the motorist requires additional instruction after having left the state highway.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-01-02. Application. Every person requesting a tourist-oriented directional sign shall make application on a form prescribed by the director.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-01-03. Applicant requirements. A person applying for a tourist-oriented directional sign must:

1. Be engaged in a business, service, or activity as defined in North Dakota Century Code section 39-13-09.

2. Derive a major portion of income, or visitors, from tourists who do not reside in the immediate area of the business, service, or activity.

3. Provide trail blazing signs if needed.

4. Obtain local authorization when the sign is located within city limits.

5. Provide such other information as the director may require.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-01-04. Priority of applicants. If the applications for tourist-oriented directional signs exceed the number of sign face spaces available, the department will give priority to applications by the time they are received in the department central office in Bismarck, North Dakota, 608 east boulevard avenue. Those applications that cannot be honored will be returned to the applicant who may reapply when space is

available. The department will not hold applications pending available space nor provide notice of available space.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-01-05. Exclusions.

1. A person advertising on an illegal advertising device, as defined under North Dakota Century Code chapter 24-17 or 23 U.S.C. 131, which advertises the same business, service, or activity as the proposed tourist-oriented directional sign is not eligible for a permit.

2. A person conducting any illegal operations is not eligible for a permit.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-01-06. Time of operation. To be eligible for a permit a business, service, or activity must be open during normal hours of operation for a similar business, service, or activity in the locality or provide the hours of operation as a part of the tourist-oriented directional sign message.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-01-07. Seasonal closure. A business, service, or activity operating on a seasonal basis, or closed for more than fourteen consecutive days, shall remove the sign face or display a "CLOSED" message plate. The "CLOSED" message plate must be fabricated and installed in accordance with the specifications in this article. Removal or installation of sign faces or plates must be done by a qualified contractor or by a qualified contractor's authorized representative. Intermittent operation is not allowed unless the dates of operation are shown on the tourist-oriented directional sign.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

CHAPTER 37-11-02
PERMITS

37-11-02-01. Permit duration and fee. Every application must be accompanied by a fee in the amount of twenty-five dollars for a permit valid for the life of the sign. See section 37-11-01-03 regarding applicant requirements.

History: Effective August 1, 1994.
General Authority: NDCC 38-13-09
Law Implemented: NDCC 39-13-09

37-11-02-02. Permit ownership. Permits are not transferable and remain the property of the department. The permit does not convey any property right in the highway right of way.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-02-03. Permit revocation. A permit may be revoked for the following reasons:

1. If the department determines that a permittee is not legally entitled to the permit because the business, service, or activity is no longer available to tourists, or that the permittee has violated the terms of the permit, this article, or North Dakota Century Code chapter 39-13-09.

2. For failure to maintain a sign, which consists of the permittee's failure to repair or replace a sign face that has been damaged or defaced. The department shall give the permittee notice of the need to repair or replace the sign and the permittee shall have ninety days from the date of such notice to repair or replace the sign.

The department shall send notice of permit revocation to the permittee and set forth the basis for the revocation. The permittee shall have thirty days from the date of notice in which to remove the sign.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-02-04. Structure ownership. Sign structures become the property of the department upon erection on the highway right of way. The department has the authority to control the use of the structure by issuing up to four permits per sign face structure.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-02-05. Sign face ownership. The sign face remains the property of the permittee, unless abandoned or removed by the department. The permittee may remove a sign face at any time. If such removal is permanent, the permittee shall notify the department.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

CHAPTER 37-11-03
SIGN INSTALLATION AND RELOCATION

37-11-03-01. Location of signs. All tourist-oriented directional signs must be erected adjacent to the edge of the right-of-way line and on the ditch backslope. Tourist-oriented directional signs must be located more than two hundred feet [60.96 meters] in advance of the entrance road intersection and within ten miles [16.09 kilometers] of the business, service, or activity. Tourist-oriented directional signs may not be located, erected, or maintained in any place or manner as to obstruct or interfere with a free and clear view of merging or crossing traffic or otherwise create a hazard to the safety of the public.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-02. Urban locations. An applicant for a tourist-oriented directional sign located within the limits of a city must also obtain the written consent of the city to erect the sign. In addition, the location and erection of an urban tourist-oriented sign may not:

1. Block or obstruct the visibility of official traffic-control devices.

2. Hinder pedestrian or bicycle traffic.

3. Be located closer than two feet [.61 meters] to the face of a curb on a highway having curb and gutter.

The spacing requirements of section 37-11-03-06 do not apply to urban locations.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-03. Advance signing. The director may require the installation of advance tourist-oriented directional signs if the director determines, on the basis of traffic engineering criteria, that such signs improve traffic safety in the area of the intersection with the entrance road.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-04. Trail blazing signs. Trail blazing signs are required when the business, service, or activity cannot be readily located by a motorist from the highway intersection with the entrance road, or when the business, service, or activity is not located near an exit from a highway upon which tourist-oriented directional signs are permitted.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-05. Expressways. Tourist-oriented directional signs may be located on divided and undivided multilane expressways as on two-lane highways, except that a tourist-oriented directional sign may not be placed within two hundred feet [60.96 meters] of the ramp taper of an interchange or the turning lane of an at-grade intersection. No tourist-oriented directional sign may be located on the interstate highway system.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-06. Spacing. Tourist-oriented directional sign structures facing one direction of traffic shall be spaced not less than two hundred feet [60.96 meters] apart.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-07. Maximum number of signs. Only two sign structures, each containing a maximum of four individual sign faces, will be allowed for each direction of travel at the entrance road intersection.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-08. Limit on number of sign faces. A business, service, or activity may normally provide only one sign face for each direction of travel on the principal route from the highway to the business, service, or activity.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-09. Back-to-back mounting. Tourist-oriented directional signs must be mounted only as prescribed by this article and may not be mounted back-to-back with any other type of sign. Tourist-oriented directional signs erected and maintained in a manner other than as prescribed in this article are deemed illegal and subject to removal under section 37-11-03-10.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-03-10. Sign removal and relocation. The department reserves the right to remove or relocate any tourist-oriented directional sign in the event the location of such sign is needed for highway purposes or if the sign is deemed illegal or nonconforming.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

CHAPTER 37-11-04
CONTRACTORS AND SIGN MAINTENANCE

37-11-04-01. Contractor required. Tourist-oriented directional signs must be installed and maintained under an agreement between the permittee and a qualified contractor. The permittee is responsible for payment to the contractor for all services and materials rendered.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-04-02. Contractor qualifications. Contractors who install tourist-oriented directional signs must meet the following requirements:

1. The contractor must be licensed to do business in the state of North Dakota.

2. The contractor must carry public liability and property damage insurance as follows:

   a. Coverage. Protection against liability for bodily injury or death of persons and injury to or destruction of property which may be suffered by persons other than the contractor's employees as a result of construction operations in connection with construction of all highway projects.

   b. Limits of liability. The policy must provide a limit of not less than five hundred thousand dollars for all damages arising out of the bodily injuries or death of one person, and subject to that limit for each person, a total limit of not less than one million dollars for all damages arising out of the bodily injuries to or death of two or more persons in any one accident. The policy must further provide a limit of not less than five hundred thousand dollars for all damages to or destruction of property in any one accident and subject to that limit a total (or aggregate) limit of not less than one million dollars for all damages to or destruction of property during the policy period.

Such coverage must be extended to cover any subcontractor hired by the contractor.

3. The contractor shall use proper safety practices when installing or maintaining a sign and is responsible for any damages to the right of way resulting from the installation or maintenance of the sign.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-04-03. Maintenance requirements. The permittee is responsible for the maintenance of the sign structure and sign face. The following standards of maintenance must be observed:

1. Any damage must be promptly repaired.

2. Sign faces must be maintained in a legible condition. Sign faces that are badly weathered, peeling, vandalized, or damaged must be considered as requiring maintenance.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-04-04. Neglected maintenance. If maintenance is neglected, the department shall notify the permittee, in writing, of the type of maintenance required. If the maintenance is not provided within ninety days, the department may revoke the permit and confiscate the sign face.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-04-05. Joint responsibility. When more than one sign face is installed, the permittees have joint responsibility for the maintenance of the sign structure.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

CHAPTER 37-11-05
DESIGN AND COMPOSITION

37-11-05-01. Specifications. The furnishing, fabricating, and installation of a tourist-oriented directional sign must be in conformance with the following standards:

1. **Materials.**

   a. General. All materials furnished and used in this work item must be new and must meet the plans, the standard drawings, and the following requirements:

      (1) Signs, supporting structures, breakaway bases, anchor units, brackets, stringers, and hardware must be fabricated to meet the dimensions, metal gauge, and bolt holes set forth in the contract and standard drawings. All flat sheet sign backings must be aluminum with reflective sheeting applied as specified.

      (2) The traffic-control sign details not otherwise specified must meet the MUTCD published by the federal highway administration.

      (3) All sign faces must be according to the detail drawings and the alphabets shown in the MUTCD, standard highway signs, and standard alphabets, published by the federal highway administration. Sign faces not detailed in these publications must meet the detailed drawings shown in the supplementary standard highway signs booklet published by the department.

      (4) Regulatory, warning, and guide signs must be detailed and dimensioned according to detailed drawings of the standard highway signs booklet and department supplement. These detailed drawings are available to the sign fabricator upon request from the department. Signs not illustrated in these booklets must be as shown on the standard drawings. The last number in the sign numbers shown is the width of the sign required.

(5) Variable message sign dimensions have been computed by the department of transportation in order to draft these signs by mechanical means. These message computations have been tabulated and must be used to lay out these sign faces in the fabricator's shop. These tabulated sheets will be furnished to the contractor upon request after the contract has been awarded.

b. Concrete. Concrete used in this item of work must be class AE portland cement concrete mixed and proportioned as specified in section 802.

c. Reinforcing steel. The reinforcing steel must meet section 612.

d. Delineators. Delineators must meet section 894.06.

e. Hardware and fittings. Signs, supporting structures, breakaway bases, anchor units, brackets, stringers, and all hardware and fittings must meet section 894.05 A.

f. Overhead sign structures. Overhead structures must meet section 894.08.

g. Grout. Grout must meet section 806.

2. **Construction requirements.**

a. Locating and positioning signs and sign structures. Each sign and structure must be located according to the plans or, where necessary, for maximum effect of the sign. Installed signs and structures will be inspected at night for maximum effect and minimum specular reflection. If any sign exhibits specular reflection or is ineffective at night, the sign must be adjusted at the contractor's expense.

Signs and delineators located less than thirty feet [9.14 meters] from the pavement edge must be erected with the sign face truly vertical and turned ninety-three degrees away from the center and direction of travel of the lane that the facility serves. Signs located thirty feet [9.14 meters] or more from the edge of the pavement edge must be erected with the sign face truly vertical and aligned ninety degrees from the center and direction of travel of the lane that the offset sign serves. Special attention must be given to the location and positioning of signs and delineators at the point where lanes divide, or on curves, to avoid specular reflection and to obtain maximum effectiveness of the facility.

b. Sign fabrication.

(1) General. All sign backing for flat sheet signs must be aluminum unless noted otherwise, with reflective sheeting applied as specified in this chapter. On large variable message signs the messages, symbols, and borders must consist of directly applied reflective sheeting cut to desired shapes. The message, symbols, and border must be applied as specified by the sheeting manufacturer.

(2) Fabrication of sign backing. Sign backings must be cut to size and shape and must be free of buckles, warps, dents, cockles, burrs, and all defects resulting from fabrication. The surface of all signs must be plane surfaces.

All cutting, shearing, and drilling or punching of holes (except mounting holes for demountable letters, numerals, symbols, and borders) must be completed before metal degreasing and application of reflective sheeting.

(3) Cleaning and processing. Cleaning and processing of sign backing must take place before applying the reflective sheeting. Cleaning and processing must be performed using the sheeting manufacturer's instructions and recommendations as well as the requirements of section 894.

All metal sign backing material must be handled only by handling devices or clean canvas gloves between cleaning and applying reflective sheeting. Metal must not come in contact with greases, oils, or other contaminants before application of reflective sheeting. When backing materials are chromate-conversion coated beforehand and are allowed to set for several days before applying reflective sheeting, the application surface must be given a solvent wipe before reflective sheeting application.

(4) Fabrication of flat sheet signs. The background or message and border must be screened on reflective sheeting as specified by the manufacturer of the reflective material and as specified here. Colors must meet the requirements of the contract and as shown in the MUTCD. Care must be taken so screening inks are compatible with reflective sheeting backgrounds.

Reflective material must meet section 894.02.

The reflective sheeting used on flat sheet sign backings larger than the manufacturer's material must require splicing. All sheeting on one individual

sign must be from the same manufacturer's lot and must be spliced in one direction only. No more than one splice is permitted per sign. Vertical splices must be in the center of the sign. Horizontal splices, if used in lieu of the vertical splice, must be in the center of the sign with the top portion overlapping the bottom portion of the sheeting when it is in the upright position. Heat-activated, adhesive-coated, reflective sheeting may be overlapped not less than three-sixteenths of one inch [4.76 millimeters] or by a butted gap not to exceed one-thirty-second of one inch [0.79 millimeters]. Splices will be permitted only on sign screens processed with transparent colors. Pressure-sensitive, adhesive-coated, reflective sheetings must be overlapped not less than three-sixteenths of one inch [4.76 millimeters].

The overlapped splice must be made without screening paints between the reflective sheeting.

The sign face must be processed and finished with material as specified by the sheeting manufacturer. Processing of type III A or III B reflective sheeting with screened-on messages must be accomplished before applying to the sign backing. Processing of type II reflective sheeting may be accomplished before or after applying to the sign backing.

The finished signs must have a smooth, uniform surface. All letters and numbers must be clear cut and sharp.

(5) Fabrication of panel signs. The background must be applied to the panels as specified by the reflective sheeting manufacturer.

Reflective sheeting must be overlap spliced. The splice must be overlapped not less than three-sixteenths of one inch [4.76 millimeters], and sheeting applied to panels must extend over the edges and down the side legs a minimum of one-sixteenth of one inch [1.59 millimeters]. Splices must be at a ninety degree angle to the length of the panel. The splices must be uniformly and neatly made throughout their entire length. An individual panel may not have more than two splices, and the minimum distance between adjacent splices must be eight feet [2.44 meters].

(6) Date of fabrication. All signs receiving new sign facings must be dated with the month and year fabricated. The date must be placed on the back of

the metal backing on the lower corner of the sign near the edge closest to traffic so that it can be read from the ground. The dating layout must consist of one-fourth inch [6.35 millimeters] high numbers on a two and one-fourth inches [57.15 millimeters] long by one and three-fourths inches [44.45 millimeters] high pressure sensitive label. The numbers imprinted on the upper part of the label must be one through twelve, with the last two digits of four consecutive years printed across the bottom (as 92, 93, 94, 95). The month and year of fabrication must be punched out. The label must meet section 894.04. The cost of furnishing, fabricating, and installing labels must be included in the price bid for "flat sheet for signs type II and III A", "panel for signs type II and III A", "refacing signs type II and III A", or "overlay panel type II and III A".

c. Packaging, labeling, handling, and shipping. Completed signs must be dry before packaging or storing. Packaged signs that become wet before use may not be used. A warning label with instructions designed to prevent damage to the signs must be on the outside of the package, and an additional warning label must be placed in the packages between the first and second sign, before the last sign, and after each five signs in a package. Packaged signs may not be banded and must be stored and shipped on edge.

   Packaging must be done so that the signs are protected during storage, shipping, and handling. Packaged signs must be slipsheeted using the material and methods recommended by the sheeting manufacturer.

   Unmounted reflective sheeting may be stacked flat to a maximum height of five inches [127.0 millimeters] for temporary storage. Otherwise, they must be stored on edge. The sheeting on signs may not be exposed to temperatures above one hundred fifty degrees Fahrenheit [65.56 degrees Celsius]. The slipsheeting must be left on the sign face until mounted.

   Panel signs may be assembled or separated into sections for ease in handling, storing, and shipping. In lieu of packaging, the sign faces may be turned toward each other and fastened together firmly with sufficient spacers to prevent the sign faces from touching. Sign faces that cannot be protected by packaging or fastening face to face must have protective covers placed over them.

d. Label (handling, storage, and installation instructions). The label referred to in section 754.03 C must contain the following instructions:

(1) Loading on vehicles. Signs must be secured vertically in racks to prevent them from rubbing, scratching, or marring front surfaces. Signs that have protective wrappings or slipsheeting must be kept dry.

Signs must be carefully unloaded and stacked on edge off the ground in an upright position.

(2) Storage at jobsite. Signs must be stored indoors and upright on edge to prevent damage to the reflective sheeting.

Signs must be kept dry. Packaged signs that get wet will be rejected.

(3) Installation.

(a) Signs must be handled carefully and not scuffed or walked on.

(b) Nylon washers must be used between flat washers and sign face for all type III and IV reflective sheeted signs.

(c) When washing signs is necessary, a soft bristle brush or sponge and water must be used.

e. Erection of sign supports and delineators.

(1) General. The engineer shall verify the support lengths on all new sign supports prior to the materials being ordered by the contractor. All sign supports must be firmly set and plumb after erection. All concrete foundations must be constructed as specified, with the top sloped enough to drain away from the sign support. All exposed concrete above ground surface must be given a rubbed finish. Excess excavation material removed to set sign supports must be disposed of at the contractor's expense. A driving cap must be used when driving a sign support.

(2) Delineator posts. Delineator posts must be driven without being damaged. If the drilled or punched hole method is used, the hole must be large enough so the post may be set without damage. Any damage to utilities or structures as a result of construction operations must be repaired according to section 105.03.

(3) Anchor for telescoping perforated tubes and flange channel supports. Anchors for telescoping perforated tubes and flange channel supports must be driven.

The perforated tube anchor must be driven to a maximum of four inches [101.6 millimeters] above the ground or sidewalk and four inches [101.6 millimeters] maximum installed height aboveground or sidewalk for flange channel anchor.

Anchors must be installed at plan length, unless the engineer determines a shorter length is sufficient due to good soil bearing developed when driving the anchor. Anchor lengths may be reduced to a minimum of three feet [.91 meters]. When set in sidewalk, the anchor plate may be omitted.

The sidewalk must be cored to install the anchor unit and the cored area must be filled with new concrete to restore the sidewalk surface.

(4) Tubular sign supports. Tubular sign supports must be set in a class AE portland cement concrete base, constructed as shown on the plans. Breakaway base plates must be assembled with the bolts torqued to plan requirements. The plates must be carefully placed so the tapered bolt slot tapers toward approaching traffic. Either the stub post or the anchor bolt design may be used as detailed. If the anchor bolt design is used, a portland cement grout must be used to raise the top of the foundation to a snug fit under the base plate.

(5) Overhead sign structures. All overhead sign structures must be shop fabricated so only bolted assembly is required in the field. Drilling to fasten an overhead sign to a bridge is permitted, but field welding is not permitted.

Overhead sign structures, other than those fastened to bridges, must be set on class AE portland cement concrete foundations as required. The foundation may be constructed to grade elevation with the top surface level so the support set on it is truly vertical, or the foundation may be constructed below grade and leveling nuts used to level the base plate and bring it to grade. A portland cement grout must be used to fill the voids between the foundation and the base plate.

(6) Splicing. Splicing is permitted on telescoping and flange channel posts only to obtain the required post length. A splice must be more than five feet [1.52 meters] above the ground, and only one splice is permitted per post. Splicing costs must be at the contractor's expense. The weight of the splice may not be added to the post pay weight.

(7) W-shaped sign supports.

(a) W-shaped sign supports must be set in a class AE portland cement concrete base, constructed as shown on the plans. Breakaway base plates must be assembled with the bolt torqued to plan requirements. The plates must be carefully placed so the tapered bolt slot tapers toward approaching traffic. W-shaped supports must use the stub post design.

The contractor may install an H-pile footing in lieu of the concrete base. If the bearing capacity specified cannot be obtained, the contractor shall install the concrete base specified.

(b) Flame cutting of w-shaped posts. The gas cutting torch may be used for cutting metals or preparing joints. Carbon steel above 0.30 percent carbon, high alloy steels, heat-treated steel, and plated metals may not be flame cut unless subsequent corrective treatment is provided as approved by the materials and research engineer.

All flame cutting work must be done by the oxyacetylene gas method or other method approved by the engineer. The maximum permissible deviation from true lines is one-sixteenth of one inch [1.59 millimeters]. Repairs of edge defects shall be done according to section 3.2 of AWS structural welding code, as amended by AASHTO specifications for welding of structural steel highway bridges. In general, the roughness of flame cut surfaces may not be greater than an ANSI roughness value of one thousand microinches. All slag from flame cutting must be completely removed.

When flange plates or other members are cut to a curve, the curve must be uniform to the radius required. A series of straight cut tangent to the curve is not acceptable.

When ends of members, which are to take bearing, are cut with a torch a suitable allowance in their length must be made to permit proper milling or planing.

Joints for welding may be prepared by "flame cutting" or "flame gouging" provided all slag and oxidized metals are removed.

(c) Edge finishing. Members formed to specific size by shearing of structural steel plates having a thickness of one-half inch [12.7 millimeters] or more, must be machined or planed to correct size by removing not less than one-fourth inch [6.35 millimeters] of metal. All field splice plates and stiffeners less than one-half inch [12.7 millimeters] in thickness must have a minimum of one-eighth inch [3.18 millimeters] of metal removed by machining or planing after shearing.

f. Mounting flat sheet signs type III A and III B sheeting. Flat sheet signs must be bolted to the supports and must have a nylon washer between the flat washer and the sign face.

g. Removing and resetting signs and supports. Existing signs and supports must be removed and reset as specified. All signs and supports not to be reset must be stockpiled on the project right of way at designated locations. The stockpiled signs and supports remain the department's property.

Removed or reset signs and supports that become damaged during removing, resetting, or stockpiling must be replaced at the contractor's expense.

Existing signs and supports must be removed as construction progresses and must be immediately reset or installed. The contractor shall install new signs or reset signs as shown on the plans. All signs and supports must be on the project site at the time construction begins. The contractor may choose to temporarily reset existing signs, or temporarily install new signs. The cost of installing and resetting signs temporarily must be included in the price bid for other items. Any damaged signs or supports must be replaced at the contractor's expense.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-05-02. Sign face backing. The sign backing material must be one piece of flat sheet aluminum seventy-two inches [1.83 meters] by sixteen inches [406.4 millimeters] with a minimum thickness of 0.125 inches [3.18 millimeters].

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-05-03. Reflective sheeting material. The reflective sheeting material used for the sign face must be a standard blue background with a silver white border and message. Borders must be one inch [25.4 millimeters] wide. Letters must be six-inch [152.4-millimeter] series C, uppercase. Letter details are available from the department.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-05-04. Sign messages. Each sign face is allowed a maximum of two lines of legend. The content of the legend is limited to identification of the business, service, or activity, the distance thereto, directional information, a directional arrow, and the time of operation. Left-turn directional arrows and corresponding distance information must be placed to the left of the written message. Right-turn directional arrows and corresponding distance information must be placed to the right of the written message. Straight ahead arrows and corresponding distance information must be placed to the left of the written message. Symbols may be incorporated as alternates to word messages. Symbols must be either five inch [127.00 millimeters] square or twelve inch [304.80 millimeters] square and attached to the sign face. Symbol sign design must be in accord with department specifications. Proprietary logos for specific businesses, services, or activities may not be used. Sign face legends are subject to approval by the department and must be submitted with the permit application.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-05-05. "Closed" plate. The "closed" plate must meet the same requirements as the sign face backing and have blue reflective sheeting and a one-inch [25.4-millimeter] silver white border. The letters must be six-inch [152.4-millimeter], series C, uppercase. The plate shall be thirty inches [762.00 millimeters] by a minimum of ten inches [254.00 millimeters].

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

37-11-05-06. Height of sign. The tourist-oriented directional sign structure must be installed so that the top of the signposts are ten feet [3.05 meters] above the ground line.

History: Effective August 1, 1994.
General Authority: NDCC 39-13-09
Law Implemented: NDCC 39-13-09

TITLE 43

Industrial Commission

MAY 1994

CHAPTER 43-02-03

43-02-03-07. United States government leases. The commission recognizes that all persons drilling and producing on United States government land shall comply with the United States government regulations. Such persons shall also comply with all applicable state rules and regulations. Copies of the sundry notices ~~and~~, reports on wells, and ~~the well log~~ well data required by this chapter of the wells on United States government land shall be furnished to the commission at no expense to the commission. Federal forms may be used when filing such notices and reports except for reporting the plugging and abandonment of a well. In such instance, the plugging record (form 7) must be filed with the commission.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-14. Access to records. The commission, director, and their representatives shall have access to all well records wherever located. All owners, operators, drilling contractors, drillers, service companies, or other persons engaged in drilling, completing, producing, or servicing wells shall permit the commission, director, and their representatives to come upon any lease, property, well, or drilling rig operated or controlled by them, complying with state safety rules, and to inspect the records and operation of such wells, and to have access at all times to any and all records of wells. If requested, copies of such records must be filed with the commission. The confidentiality of any data submitted which is confidential pursuant to subsection 6 of

North Dakota Century Code section 38-08-04 and section 43-02-03-31 must be maintained.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-14.1. Verification of certified welders.

1. For the purposes of this section, "wellhead" means any equipment attached to the top of the tubular goods used in a well to support the tubular strings, provide seals between strings, and control production from the well.

2. Any welding on a wellhead must be done by a certified welder verified in accordance with this section.

3. Any certified welder requesting verification of the welder's certification shall submit sufficient documentation to the director to verify test results and testing procedures for a welder qualification test. All test welds must be prepared, welded, and tested in accordance with the requirements of section IX of the American society of mechanical engineers (ASME) code or American petroleum institute 1104 code. Tests on the welded specimen must be made by a certified testing laboratory. Any company qualification test procedure conforming to these codes can be used. Position six-G from section IX of the American society of mechanical engineers code must be used on all tests.

4. Upon verification by the director, the welder will be furnished a form to be presented to any operator requesting work. The form will contain the welder's name, address, verification number, and expiration date. The verification will expire thirty-six months from the date of issuance. Thereafter, the welder must be recertified and the process for verification repeated pursuant to this section.

5. It is the responsibility of the operator and owner of the wellhead to ensure that any welding done on the wellhead is done by a welder whose certification is verified in accordance with this section. The operator must promptly submit to the director a form 4 sundry notice of any welding done on any wellhead, listing the welder's name and verification number and giving a brief description of the work.

~~6.--All--persons--requesting-welder-verification-or-reverification shall-pay-a-twenty-five-dollar-fee.~~

History: Effective May 1, 1990; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-22

43-02-03-14.2. Oil and gas metering systems.

1. Application of section. This section is applicable to all metering stations measuring production from oil and gas wells within the state of North Dakota, including private, state, and federal wells. If these rules differ from federal requirements on measurement of production from federal oil and gas wells, the federal rules take precedence.

2. Definitions. As used in this section:

   a. "Allocation meter" means a meter used by the producer to determine the volume from an individual well before it is commingled with production from one or more other wells prior to the custody transfer point.

   b. "Calibration test" means the process or procedure of adjusting an instrument, such as a gas meter, so its indication or registration is in satisfactorily close agreement with a reference standard.

   c. "Custody transfer meter" means a meter used to transfer oil or gas from the producer to transporter or purchaser.

   d. "Gas gathering meter" means a meter used in the custody transfer of gas into a gathering system.

   e. "Meter factor" means a number obtained by dividing the actual volume of fluid (liquid or gaseous) passed through the meter during proving by the volume registered by the meter.

   f. "Metering proving" means the procedure required to determine the relationship between the true volume of a fluid (liquid or gaseous) measured by a meter and the volume indicated by the meter.

3. Inventory filing requirements. Within sixty days of adoption of these rules, the owner of metering equipment shall file with the commission an inventory of all meters used for custody transfer and allocation of production from oil or gas wells, or both. Inventories must be updated on an annual basis, and filed with the commission on or before the first day of each year. Inventories must include the following:

a. Well name and legal description of location or meter location if different.

b. North Dakota industrial commission well file number.

c. Meter information:

(1) Gas meters:

(a) Make and model.

(b) Differential, static, and temperature range.

(c) Orifice tube size (diameter).

(d) Meter station number.

(2) Oil meters:

(a) Make and model.

(b) Size.

(c) Meter number.

4. Installation and removal of meters. The commission must be notified of all custody transfer meters placed in service. The owner of the custody transfer equipment shall notify the commission of the date a meter is placed in service, the make and model of the meter, and the meter or station number. The commission must also be notified of all metering installations removed from service. The notice must include the date the meter is removed from service, and the meter or station number. The required notices must be filed with the commission within thirty days of the installation or removal of a meter.

All allocation meters must be approved prior to installation and use. The application for approval must include the make and model number of the meter, the meter or station number, the well name, its location, and the date the meter will be placed in service.

Meter installations for measuring production from oil or gas wells, or both, must be constructed to American petroleum institute (API) or American gas association (AGA) standards or to meter manufacturer's recommended installation. Meter installations constructed in accordance with American petroleum institute or American gas association standards in effect at the time of installation shall not automatically be required to retrofit if standards are revised. The commission will review any revised standards, and when deemed necessary will amend the requirements accordingly.

5. Registration of persons proving or testing meters. All persons engaged in meter proving or testing of oil and gas meters must be registered with the commission. Those persons involved in oil meter testing, by flowing fluid through the meter into a test tank and then gauging the tank, are exempted from the registration process. However, such persons must notify the commission prior to commencement of the test to allow a representative of the commission to witness the testing process. A report of the results of such test shall be filed with the commission within thirty days after the test is completed. Registration must include the following:

   a. Name and address of company.

   b. Name and address of measurement personnel.

   c. Qualifications, listing experience, or specific training.

   Any meter tests performed by a person not registered with the commission will not be accepted as a valid test. Registration must be within sixty days of the adoption of these rules or within thirty days of employment of test personnel.

6. Calibration requirements. Oil and gas metering equipment must be proved or tested to American petroleum institute or American gas association standards or to the meter manufacturer's recommended procedure to establish a meter factor or to ensure measurement accuracy. The owner of a custody transfer meter or allocation meter shall notify the commission at least ten days prior to the testing of any meter.

   a. Oil allocation meter factors shall be maintained within two percent of original meter factor. If factor change between provings or tests and is greater than two percent, the meter must be repaired or adjusted and tested within forty-eight hours of repair or replaced.

   b. Copies of all oil allocation meter test procedures are to be filed with and reviewed by the commission to ensure measurement accuracy.

   c. All gas meters must be tested with a minimum of a three point test for static and differential pressure elements and two points for temperature element test. The test reports must include an as-found and as-left test and a detailed report of changes.

   d. Test reports must include the following:

      (1) Producer name.

      (2) Lease name.

(3) Pipeline company or company name of test contractor.

(4) Test personnel's name.

(5) Station or meter number.

e. Minimum frequency of meter proving or calibration tests are as follows:

(1) Oil meters used for custody transfer, monthly.

(2) Oil meters used for custody transfer of nine hundred barrels or less per month, quarterly.

(3) Oil meters used for allocation of production, quarterly.

(4) Gas meters used for allocation production, quarterly.

(5) Gas meters in gas gathering, semiannual.

(6) Orifice meter primary element, five years.

(7) Orifice plates, semiannual.

f. Meter test reports must be filed within thirty days of completion of proving or calibration tests unless otherwise approved. Test reports are to be filed on, but not limited to, all meters used for allocation measurement of oil or gas and all meters used in crude oil custody transfer.

g. Accuracy of all equipment used to test oil or gas meters must be traceable to the standards of the national institute of standards and technology. The equipment must be certified as accurate either by the manufacturer or an independent testing facility. The certificates of accuracy must be made available upon request. Certification of the equipment must be updated as follows:

(1) All equipment used to test the pressure and differential pressure elements, annually.

(2) All equipment used to determine temperature, annually.

(3) All conventional pipe provers, biennially.

(4) All master meters, annually.

(5) Equipment used in orifice tube inspection, five years.

7. Variances. Variances from all or part of this section may be granted by the commission on the basis of economic necessity providing the variance does not affect measurement accuracy. All requests for variances must be in writing and receive written approval.

A register of variances requested and approved must be maintained by the commission.

History: Effective May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-15. Bond. Prior to commencing drilling operations, any person who proposes to drill a well for oil, gas, or injection shall submit to the commission, and obtain its approval, a surety bond or a ~~property or~~ cash bond in a form approved by the commission, conditioned as provided by law. The operator of such well shall be the principal on the bond covering the well. Each surety bond shall be executed by a responsible surety company authorized to transact business in North Dakota.

The bond shall be in the amount of fifteen thousand dollars when applicable to one well only. Wells drilled to a total depth of less than two thousand feet [609.6 meters] may be bonded in a lesser amount if approved by the director. When the principal on the bond is drilling or operating a number of wells within the state or proposes to do so, the principal may submit a blanket bond conditioned as provided above by law. A blanket bond covering ten wells or less shall be in the amount of fifty thousand dollars. A blanket bond covering all wells, which a person may at any time drill or operate within the state before the bond is released, shall be in the amount of one hundred thousand dollars, provided the bond shall be limited to ten dry holes, and abandoned wells pursuant to section 43-02-03-55 that have not been properly plugged and the sites reclaimed. A well with an approved temporary abandoned status shall have the same status as an oil, gas, or injection well. With regard to cash bonds, the commission may require higher amounts than those referred to in this section. Such additional amounts for cash bonds must be related to the expected cost of plugging and well site reclamation, as determined by the commission.

The bond herein required shall be conditioned upon full compliance with North Dakota Century Code chapter 38-08, and all administrative rules and orders of the commission. It shall be a plugging bond, as well as a drilling bond, and is to endure up to and including approved plugging of all oil, gas, and injection wells as well as dry holes. Approved plugging shall also include practical reclamation of the well site, and appurtenances thereto. If the principal does not satisfy the bond's conditions, then the surety shall either satisfy the conditions or forfeit to the commission the face value of the bond.

Transfer of property does not release the bond. In case of transfer of property or other interest in the well and the principal desires to be released from the bond covering a the well ~~or wells~~, such as producers, not ready for plugging, the principal should proceed as follows:

> ~~The holder of the approved permit to drill,~~ the The principal must notify the director, in writing, of all proposed transfers of well at least thirty days before the closing date of the transfer. The director may, for good cause, waive the requirement of at least thirty days' notice prior to transfer. The principal ~~on the bond,~~ shall notify the commission ~~in writing~~ on a form to be provided by the commission reciting that a certain well, describing each well by its location within the section, township, and range, ~~has or have been~~ is to be transferred to a certain transferee, naming such transferee, for the purpose of ownership or operation. ~~Such~~ The date of assignment or transfer must be ~~dated~~ stated and the form signed by a party duly authorized so to sign.
>
> On said transfer form the transferee shall recite the following: "The transferee has read the foregoing statement and does accept such transfer and does accept the responsibility of such well under the transferee's one-well bond or, as the case may be, does accept the responsibility of such wells under the transferee's blanket bond, said bond being tendered to or on file with the commission." Such acceptance must likewise be signed by a party authorized so to sign.

When the commission has passed upon the transfer and acceptance and accepted it under the transferee's bond, the transferor ~~is immediately~~ shall be released ~~of the plugging responsibility of~~ from the responsibility of plugging the well ~~or wells as the case may be, and if~~ and site reclamation. If such ~~well or~~ wells include all the wells within the responsibility of the transferor's bond, such bond will be released upon written notice by the commission to that effect.

The transferee of any oil, gas, or injection well ~~or~~, the new operator of any such well, shall be responsible for the plugging of any such well and for that purpose shall submit a new bond or, in the case of surety bond, produce the written consent of the surety of the original or prior plugging bond that the latter's responsibility shall continue. This section shall apply to transfers of any such wells made prior to the effective date of this section as well as thereafter. The original or prior bond shall not be released as to the plugging responsibility of any such transferor until the transferee shall submit to the commission an acceptable bond to cover such well. All liability on bonds shall continue until the plugging and site reclamation of such ~~well or~~ wells is completed and approved.

Prior to the commencement of operations, any person proposing to operate a treating plant must submit to the commission and obtain its

approval, of a surety, or cash bond conditioned as provided by law. The person responsible for the operation of the plant shall be the principal on the bond. The amount of the bond must be as prescribed in section 43-02-03-51. It is to remain in force until the operations cease, all equipment removed from the site, and the site reclaimed, or liability of the bond is transferred to another bond that provides the same degree of security.

The commission shall, in writing, advise the principal and any sureties on any bond as to whether the plugging and reclamation is approved~~,--in--order--that,--if-the-plugging-is~~. If approved, liability under such bond may be formally terminated.

The director is vested with the power to act for the commission as to all matters within this section.

History: Amended effective April 30, 1981; March 1, 1982; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-16. Application for permit to drill and recomplete. Before any person shall begin any well-site preparation for the drilling of any well other than surveying and staking, such person shall file an application for permit to drill (form 1) with the director, together with a permit fee of one hundred dollars. Verbal approval may be given for site preparation by the director in extenuating circumstances. No drilling activity shall commence until such application is approved and a permit to drill is issued by the director. Permits to drill or recomplete may contain such terms and conditions as the director deems necessary. The application must be accompanied by the bond pursuant to section 43-02-03-15 or the applicant must have previously filed such bond with the commission, otherwise the application is incomplete. An incomplete application received by the commission has no standing and will not be deemed filed until it is completed.

The application for permit to drill shall be accompanied by an accurate plat certified by a registered surveyor showing the location of the proposed well with reference to the nearest lines of a governmental section. Information to be included in such application shall be the proposed depth to which the well will be drilled, estimated depth to the top of important markers, estimated depth to the top of objective horizons, the proposed mud program, the proposed casing program, including size and weight thereof, the depth at which each casing string is to be set, and the proposed amount of cement to be used, including the estimated top of cement. The director may request additional information, if deemed necessary.

Prior to the commencement of recompletion operations, an application for permit shall likewise be filed with the director. Included in such application shall be the notice of intention (form 4) to reenter a plugged well, or to develop by deepening or plugging back

to any source of supply other than the producing horizon in an existing well. Such notice to recomplete any well shall include the name and file number and exact location of the well, the approximate date operations will begin, the proposed recompletion procedure, the estimated completed total depth, the casing program to be followed, and the original total depth and the total depth at which the well is to be recompleted. The director may request additional information, if deemed necessary.

The director shall deny an application for permit to drill if a well drilled in the location applied for would cause, or tend to cause, waste or violate correlative rights. The director of oil and gas shall state in writing to the applicant the reason for the denial of the permit. The applicant may appeal the decision of the director to the commission.

Unless a well is drilling, or has been drilled, below surface casing on the first anniversary of the date of issuance of the permit for the well, the permit shall in all things terminate and be of no further force and effect. Recompletion operations must commence within one year of the date of approval or permission to recomplete shall terminate and be of no further force and effect.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-05
Law Implemented: NDCC 38-08-05

43-02-03-18. ~~Well--spacing~~ Drilling units - Well locations. In the absence of an order by the commission setting spacing units for a pool:

1. a. ~~Oil~~ Vertical or directional oil wells projected to a true vertical depth of ten thousand feet [3048 meters] or less shall be drilled upon a governmental quarter-quarter section or equivalent lot, located not less than five hundred feet [152.4 meters] to the boundary of such governmental quarter-quarter section or equivalent lot, nor closer than one thousand feet [304.8 meters] to the nearest well permitted to or capable of producing from the same pool. No more than one well shall be drilled to the same pool on any such governmental quarter-quarter section or equivalent lot, except by order of the commission, nor shall any well be drilled on any such governmental quarter-quarter section or equivalent lot containing less than thirty-six acres [14.57 hectares] except by order of the commission.

   b. ~~Oil~~ Vertical or directional oil wells projected to ~~more~~ a true vertical depth greater than ten thousand feet [3048 meters] shall be drilled on a governmental quarter section or equivalent lots, located not less than six

hundred sixty feet [201.17 meters] to the boundary of such governmental quarter section or equivalent lots. No more than one well shall be drilled to the same pool on any such governmental quarter section or equivalent lots, except by order of the commission, nor shall any well be drilled on any such governmental quarter section or equivalent lots containing less than one hundred forty-five acres [58.68 hectares] except by order of the commission.

2. a. Horizontal wells projected to a true vertical depth of nine thousand feet [2743 meters] or less, with a horizontal displacement of the wellbore drilled at an angle of at least eighty degrees within the productive formation of at least three hundred feet [91.4 meters], must be drilled upon a tract described as two adjacent governmental quarter-quarter sections within the same quarter section or equivalent lots, located not less than five hundred feet [152.4 meters] to the outside boundary of such tract. No more than one well may be drilled to the same pool on any such tract, except by order of the commission.

   b. Horizontal wells projected to a true vertical depth of more than nine thousand feet [2743 meters], with a horizontal displacement of the well bore drilled at an angle of at least eighty degrees within the productive formation of at least five hundred feet [152.4 meters], must be drilled upon a tract described as two adjacent governmental quarter sections within the same section or equivalent lots, located not less than six hundred sixty feet [201.17 meters] to the outside boundary of such tract. No more than one well may be drilled to the same pool on any such tract, except by order of the commission.

3. No well shall be drilled for gas on a tract of land consisting of less than one hundred sixty surface contiguous acres [64.75 hectares] and which is not substantially in the form of a square, in accordance with legal subdivisions of the United States public land surveys or on a governmental quarter section containing less than one hundred forty-five acres [58.68 hectares], and no well shall be drilled closer than one thousand feet [304.8 meters] to any boundary line of the tract or closer than one thousand five hundred feet [457.2 meters] to the nearest well drilling to or capable of producing from the same pool. Provided, that in presently producing gas pools accessible to established gas transportation facilities and not controlled by orders heretofore or hereafter made, no well shall be drilled for gas on a tract consisting of less than one hundred sixty surface contiguous acres [64.75 hectares], and which is not substantially in the form of a square, in accordance with the legal subdivisions of the United States public land surveys or a square equivalent to a

tract of one hundred sixty acres [64.75 hectares], and no well shall be drilled closer than one thousand feet [304.8 meters] to any boundary line of the tract or closer than one thousand five hundred feet [457.2 meters] to a well drilling to or capable of producing from the same pool.

3. 4. Within thirty days, or a reasonable time thereafter, following the discovery of oil or gas in a pool not then covered by an order of the commission, a spacing hearing shall be docketed. Following such hearing the commission shall issue an order prescribing a temporary spacing pattern for the development of the pool. This order shall continue in force for a period of not more than eighteen months at the expiration of which time a hearing shall be held at which the commission may require the presentation of such evidence as will enable the commission to determine the proper spacing for the pool.

During the interim period between the discovery and the issuance of the temporary order, no permits shall be issued for the drilling of an offset well to the discovery well, unless approved by the director. Approval shall be consistent with anticipated spacing for the orderly development of the pool.

Any well drilled within one mile [1.61 kilometers] of an established field shall conform to the spacing requirements in that field except when it is apparent that the well will not produce from the same common source of supply. In order to assure uniform and orderly development, any well drilled within one mile [1.61 kilometers] of an established field boundary shall conform to the spacing and special field rules for the field, and for the purposes of spacing and pooling, the field boundary shall be extended to include the spacing unit for such well and any intervening lands. The foregoing shall not be applicable if it is apparent that the well will not produce from the same common source of supply as wells within the field.

4. 5. If the director denies an application for permit, the director shall advise the applicant immediately of the reasons for denial. The decision of the director may be appealed to the commission.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04, 38-08-07
Law Implemented: NDCC 38-08-04, 38-08-07

43-02-03-18.1. Exception location. If upon application for an exception location, the commission finds that a well drilled at the location prescribed by any applicable rule or order of the commission would not produce in paying quantities, that surface conditions would

substantially add to the burden or hazard of such well, or that the drilling of such well at a location other than the prescribed location is otherwise necessary either to protect correlative rights, to prevent waste, or to effect greater ultimate recovery from oil and gas, the commission may enter an order, after notice and hearing, permitting the well to be drilled at a location other than that prescribed and shall include in such order suitable provisions to prevent the production from that well of more than its just and equitable share of the oil and gas in the pool. The application for an exception well location shall set forth the names of the lessees ~~or owners~~ of adjoining properties and the names of any unleased mineral owners of the adjoining properties. The application shall be accompanied by ~~an acceptable~~ a plat or sketch accurately showing the property for which the exception well location is sought ~~and~~, the location of the proposed well, and ~~accurately showing~~ all other completed and drilling wells on this property and ~~accurately showing the ownership of all~~ on the adjoining ~~surrounding~~ properties ~~and the location of wells thereon~~. The applicant or its attorney shall certify that a copy of the application has been sent by certified or registered mail to all ~~owners or~~ lessees and all unleased mineral owners of properties adjoining the tract which would be affected by the exception location.

History: Effective January 1, 1983; amended effective May 1, 1990; May 1, 1994.
General Authority: NDCC 38-08-04, 38-08-07
Law Implemented: NDCC 38-08-04, 38-08-07

43-02-03-19.2. Disposal of waste. All waste associated with exploration or production of oil and gas must be properly disposed of in an authorized facility in accord with all applicable local, state, and federal laws and regulations.

This is not to be construed as requiring the offsite disposal of drilling mud or drill cuttings associated with the drilling of a well. However, ~~saltwater~~ top water remaining in the reserve pit used in the drilling and completion operations is to be removed from the reserve pit and disposed of in an authorized disposal well or used in ~~an authorized disposal facility~~ a manner approved by the director. The disposition or use of the water must be included on the sundry notice reporting the plan of reclamation pursuant to section 43-02-03-19.

History: Effective May 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-25. Deviation tests and directional surveys. When any well is drilled or deepened, tests to determine the deviation from the vertical shall be taken at least every one thousand feet [304.8 meters]. When the deviation from the vertical exceeds five degrees at any point, the director may require that the hole be straightened. Directional

surveys may be required by the director, whenever, in the director's judgment, the location of the bottom of the well is in doubt.

A directional survey shall be made and filed with the director on any well utilizing a whipstock or any method of deviating the well bore in a predetermined direction except to sidetrack junk in the hole, straighten a crooked hole, or to control a blowout. ~~Two copies of the survey must be filed~~ The survey contractor must file a certified survey with the director free of charge within thirty days of completion. However, the director may require the directional survey to be filed immediately after completion if the survey is needed to conduct the operation of the director's office in a timely manner. Special permits may be obtained to drill directionally in a predetermined direction as provided above, from the director.

If the director denies a request for a permit to directionally drill, the director shall advise the applicant immediately of the reasons for denial. The decision of the director may be appealed to the commission.

History: Amended effective April 1, 1980; April 30, 1981; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-31. Well log, completion, and workover reports. Within thirty days after the plugging of a well, a plugging record (form 7) shall be filed with the director. Within thirty days after the completion of a well, or recompletion of a well in a different pool, a completion report (form 6) shall be filed with the director, except a completion report shall be filed immediately after the completion or recompletion of a well in a pool or reservoir not then covered by an order of the commission. In no case shall oil or gas be transported from the lease prior to the filing of a completion report unless approved by the director. The operator shall cause to be run an electrical, radioactivity, or other similar log, or combination of logs, of the operator's choice, from which formation tops and porosity zones can be determined. The obligation to log may be waived by the director or other representative if hole conditions preclude the feasibility of such logging operation or if the well is a replacement well. ~~Such~~ The operator shall cause to be run a log from which the presence of cement can be determined in every well in which production or intermediate casing has been set. The obligation to log may be waived by the director if the necessity therefor can be demonstrated to the director's satisfaction. Waiver will be contingent upon such terms and conditions as the director deems appropriate. All logs run shall be available to the director at the well site prior to proceeding with plugging or completion operations. Within thirty days after completion, two copies of all logs and surveys run shall be submitted to the director free of charge. However, if the director finds that the directional survey of a well is needed for the timely conduct of business, the director may require the filing of the survey immediately after completion. In

addition, operators shall file two copies of drill stem test reports and charts, formation water analyses, porosity, permeability or fluid saturations, core analyses, and noninterpretive lithologic logs or sample descriptions if compiled by the operator.

All information furnished to the director shall be kept confidential for not more than six months if requested by the operator in writing. The six-month period must commence on the date the well is completed or the date the written request is received, whichever is earlier. If the written request accompanies the application for permit to drill or is filed after permitting but prior to spudding, the six-month period will commence on the date the well is spudded.

Approval must be obtained from the director prior to perforating or recompleting a well in a reservoir other than the reservoir in which the well was originally completed.

Upon the completion, recompletion of a well, the completion of any remedial work, or attempted remedial work such as plugging back or drilling deeper, acidizing, shooting, formation fracturing, squeezing operations, setting liner, perforating, reperforating, or other similar operations not specifically covered herein, a report on the operation shall be filed on a sundry notice (form 4) with the director. The report shall present a detailed account of all work done and the date of such work; the daily production of oil, gas, and water both prior to and after the operation; the size and depth of perforations; the quantity of sand, crude, chemical, or other materials employed in the operation; and any other pertinent information or operations which affect the original status of the well and are not specifically covered herein.

Upon the initial installation of pumping equipment, or change in type of pumping equipment designed to increase productivity in a well, the operator shall submit a sundry notice (form 4) of such installation. The notice shall include all pertinent information on the pump and the operation thereof including the date of such installation, and the daily production of the well prior to and after the pump has been installed shall also be included.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-36. Liability. The owner and operator of any well, core hole, or stratigraphic test hole, whether cased or uncased, shall be liable and responsible for the plugging and site reclamation thereof in accordance with the rules and regulations of the commission.

History: Amended effective January 1, 1983; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-47. Produced water. Monthly water production from each well must be determined through the use of properly calibrated meter measurements, tank measurements, or an alternate measurement method approved by the director. This includes allocating water production back to individual wells on a monthly basis, provided the method of volume determination and allocation procedure results in reasonably accurate production volumes. Operators shall report monthly to the director the amount of water produced by each well. The reports must be filed on or before the first day of the second month following that in which production occurred.

History: Amended effective January 1, 1983; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-48. Measurement of oil. Oil production may not be transported from a well premises or central production facility until its volume has been determined through the use of properly calibrated meter measurements or tank measurements. All meter and tank measurements, and volume determinations must conform to American petroleum institute (API) standards and be corrected to a base temperature of sixty degrees Fahrenheit [14.44 degrees Celsius].

~~All--allocation--and-sales-meters-must-be-reported-to-the-director prior-to-installation-and-use.--The-reports-must-include-the-name-of-the manufacturer-and-the-size-and-type-of-the-metering-equipment.~~

History: Amended effective April 30, 1981; March 1, 1982; January 1, 1983; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-50. Tank cleaning permit. No tank bottom shall be removed from any tank used for the storage of crude oil ~~unless-and-until application--for-a-tank-cleaning-permit-is-approved-by-the-director.--To obtain-approval,-the-owner-shall-submit-a--report--showing--an--accurate gauge--of--the--contents--of-the-tank-and-the-amount-of-merchantable-oil determinable-from-a-representative-sample-of--the--tank--bottom--by--the standard--centrifugal--test--as--prescribed--by--the--American-petroleum institute's-code,-number-25,-section-5,--for--measuring,--sampling,--and testing--crude--oil.--The-amount-of-merchantable-oil-shall-be-shown-as-a separate-item-on-the-report-and-shall-be-charged-against--the--allowable of--the--unit--or--units--producing--into--such--tank--or-pit-where-such merchantable-oil-accumulated.--Nothing-contained-in-this--section--shall apply--to--the--use-of-tank-bottoms-on-the-originating-lease-where-owner retains-custody-and-control-of-the-tank-bottom-or--to--the--treating--of tank--bottoms--by--an--operator--where-the-merchantable-oil-recovered-is disposed-of-through-a-duly-authorized-transporter-and-is-reported-to-the director~~ or a tank in which crude oil accumulates without prior approval by the director. Verbal approval may be given. All tank bottom waste must be disposed of in a manner authorized by the director and in

accordance with all applicable local, state, and federal laws and regulations. Within thirty days of completion of the tank bottom cleaning, the owner or operator shall submit a report showing an accurate gauge of the contents of the tank and the amount of merchantable oil determinable from a representative sample of the tank bottom by the standard centrifugal test as prescribed by the American petroleum institute's code for measuring, sampling, and testing crude oil. Nothing contained in this section shall apply to reclaiming of pipeline break oil or the treating of tank bottoms at a pipeline station, crude oil storage terminal, or refinery or to the treating by a gasoline plant operator of oil and other catchings collected in traps and drips in the gas gathering lines connected to gasoline plants and in scrubbers at such plants.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-59. Production from gas wells to be measured and reported. Gas production may not be transported from a gas well premises until its volume has been determined through the use of property calibrated measurement equipment. All measurement equipment and volume determinations must conform to American gas association (AGA) standards and corrected to a pressure of fourteen and seventy-three hundredths pounds per square inch absolute (psia) [1034.19 grams per square centimeters] at a base temperature of sixty degrees Fahrenheit [14.44 degrees Celsius]. Gas production reports shall be filed with the director on or before the fifth day of the second month succeeding that in which production occurs.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-60.1. Valuation of flared gas. The value of gas flared from an oil well in violation of North Dakota Century Code section 38-08-06.4 must be deemed ~~seventy-four~~ ninety-five cents per thousand cubic feet [28.32 cubic meters] (MCF). This valuation will be periodically reviewed by the industrial commission.

History: Effective October 1, 1990; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-06.4

43-02-03-60.2. Flaring exemption. The connection of a well to a natural gas gathering line is "economically infeasible" under North Dakota Century Code section 38-08-06.4, if the direct costs of

connecting the well to the line and the direct costs of operating the facilities connecting the well to the line during the life of the well, are greater than the amount of money the operator is likely to receive for the gas, less production taxes and royalties, should the well be connected. In making this calculation, the applicant may add ten percent to the amount of the cost of connecting the well and of operating the connection facilities used to determine whether a connection is economically infeasible. This ten percent may be added in consideration of the cost of money and other overhead costs that are not figured in the direct costs of connecting the well and operating the connecting facilities.

An applicant for an exemption under North Dakota Century Code section 38-08-06.4 must, at the minimum, present evidence covering the following areas:

1. Basis for the gas price used to determine whether it is economically infeasible to connect the well to a natural gas gathering line;

2. Cost of connecting the well to the line and operating the facilities connecting the well to the line;

3. Current daily rate of the amount of gas flared; and

4. The amount of gas reserves and the amount of gas available for sale.

History: Effective May 1, 1994.
General Authority: NDCC 38-07-04
Law Implemented: NDCC 38-08-06.4

43-02-03-80. Reports of purchasers and transporters of crude oil. On or before the first day of the second month succeeding that in which oil is removed, purchasers and transporters, including truckers, shall file with the director the appropriate monthly reporting forms. The purchaser shall file on form 10 and the transporter on form 10a the amount of all crude oil removed and purchased by them from each lease during the reported month. The transporter shall report the disposition of such crude oil on form 10b. All meter and tank measurements, and volume determinations of crude oil removed and purchased from a lease must conform to American petroleum institute (API) standards and corrected to a base temperature of sixty degrees Fahrenheit [14.44 degrees Celsius].

Prior to removing any oil from a lease, purchasers and transporters shall obtain an approved copy of a producer's certificate

of compliance and authorization to purchase and transport oil from lease (form 8) from either the producer or the director.

History: Amended effective April 30, 1981; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

43-02-03-88.1. Special procedures for pooling, flaring exemption, underground ~~disposal of saltwater~~ injection, commingling, converting mineral wells to freshwater wells, and central tank battery or central production facilities applications.

1. Applications for pooling under ~~subsection 1 of~~ North Dakota Century Code section 38-08-08, for a flaring exemption under North Dakota Century Code section 38-08-06.4 and section 43-02-03-60.2, for underground ~~disposal of saltwater~~ injection under chapter 43-02-05, for commingling in one well bore the fluids from two or more pools under section 43-02-03-42, for converting a mineral well to a freshwater well under section 43-02-03-35, and for establishing central tank batteries or central production facilities under section 43-02-03-48.1, must be accompanied by an affidavit signed by the applicant or the applicant's representative. The affidavit must contain or refer to attachments that contain all the information required by law as well as all the information the applicant wants the commission to consider in deciding whether to grant the application. The affidavit must designate an employee or representative of the applicant to whom the commission can direct inquiries regarding the application. ~~Five~~ Two copies of the application and affidavit and any accompanying materials must be submitted, unless the director consents to fewer copies.

2. The applications referred to in subsection 1 will be advertised and scheduled for hearing as are all other applications received by the commission. The applicant, however, unless required by the director, need not appear at the hearing scheduled to consider the application. The affidavit referred to in subsection 1 will be made an exhibit in the case unless the applicant fails to appear at the hearing after requested to do so by the director. Any interested party may appear at the hearing to oppose or comment on the application. Any interested party may also submit written comments on or objections to the application prior to the hearing date. Such submissions will be part of the record in the case.

3. The director is authorized, on behalf of the commission, to grant or deny the applications referred to in subsection 1.

4. In any proceeding under this section, the applicant, at the hearing, may supplement the affidavit required in subsection 1 by offering testimony and exhibits in support of the application.

5. In the event the applicant is not required by the director to appear at the hearing and an interested party does appear to oppose the application or submits a written objection to the application, the hearing officer shall continue the hearing to a later date, keep the record open for the submission of additional evidence, or take any other action necessary to ensure that the applicant, who does not appear at the hearing as the result of subsection 2, is accorded due process.

History: Effective May 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 38-08-04, 38-08-11
Law Implemented: NDCC 38-08-04, 38-08-08

43-02-03-90. Hearings - Complaint proceedings - Emergency proceedings - Other proceedings.

1. Except as more specifically provided in North Dakota Century Code section 38-08-11, the rules of procedure established in subsection 1 of North Dakota Century Code section 28-32-05 apply to contested case proceedings involving a complaint and a specific-named respondent.

2. For noncontested case proceedings or proceedings that do not involve a complaint and a specific-named respondent the commission shall give at least ~~fifteen~~ twenty days' notice (except in emergency) of the time and place of hearing thereon by one publication of such notice in a newspaper of general circulation in Bismarck, North Dakota, and in a newspaper of general circulation in the county where the land affected or some part thereof is situated, unless in some particular proceeding a longer period of time or a different method of publication is required by law, in which event such period of time and method of publication shall prevail. The notice shall issue in the name of the commission and shall conform to the other requirements provided by law.

3. In case an emergency is found to exist by the commission which in its judgment requires the making of a rule or order without first having a hearing, the emergency rule or order shall have the same validity as if a hearing with respect to the same had been held after notice. The emergency rule or order permitted by this section shall remain in force no longer than forty days from its effective date, and in any event, it shall expire when the rule or order made after due notice and hearing with respect to the subject matter of such emergency rule or order becomes effective.

Any person moving for a continuance of a hearing, and who is granted a continuance, shall submit twenty-five dollars to the commission to pay the cost of republication of notice of the hearing.

History: Amended effective March 1, 1982; January 1, 1983; May 1, 1990; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-11
Law Implemented: NDCC 28-32-05, 38-08-11

CHAPTER 43-02-05

43-02-05-01. Definitions. The terms used throughout this chapter have the same meaning as in chapter 43-02-03 and North Dakota Century Code chapter 38-08 except:

1. "Area of review" means an area encompassing a fixed radius around the injection well, field, or project of not less than one-quarter mile [402.34 meters].

2. "Underground injection" means the subsurface emplacement of fluids:

   a. Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with wastewaters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection.

   b. For enhanced recovery of oil or natural gas.

   c. For storage of hydrocarbons which are liquids at standard temperature and pressure.

3. "Underground source of drinking water" means an aquifer or any portion thereof which supplies drinking water for human consumption, or in which the ground water contains fewer than ten thousand milligrams per liter total dissolved solids and which is not an exempted aquifer.

History: Effective November 1, 1982; amended effective May 1, 1994.
General Authority: NDCC 38-08-04(2)
Law Implemented: NDCC 38-08-04(2)

43-02-05-04. Permit requirements.

1. No underground injection may be conducted without obtaining a permit from the industrial commission after notice and hearing. An application for a permit for underground injection shall be submitted to the commission at least thirty days prior to the hearing. The application shall be on forms provided by the commission and shall include at least the following information:

   a. The name and address of the operator of the injection well.

   b. A map showing the injection well for which a permit is sought and the applicable area of review. Within the area

of review, the map should show the number, or name, and location of all producing wells, injection wells, plugged wells, dry holes, and water wells. The map should also show faults, if known or suspected.

c. A tabulation of data on all wells of public record within the area of review which penetrate the proposed injection zone. Such data should include a description of each well's type, construction, date drilled, location, depth, record of plugging or completion, and any additional information the commission may require.

d. Average and maximum daily rate and volume of fluids to be injected.

e. Average and maximum injection pressure.

f. Appropriate analyses of fresh water from the two nearest freshwater wells. This requirement may be waived by the director in certain instances.

g. Source and appropriate analysis of injection fluid ~~if other than produced water~~, and compatibility with the receiving formation.

~~g.~~ h. Appropriate geological data on the injection zone and confining zones including lithologic description, geological name, thickness, and depth.

~~h.~~ i. Geologic name, and depth to bottom of all underground sources of drinking water which may be affected by the injection.

~~i.~~ j. Schematic drawings of the surface and subsurface construction details of the system.

~~j.~~ k. Proposed injection program.

~~k.~~ l. All available logging and testing data on the well.

~~l.~~ m. The need for corrective action on wells penetrating the injection zone in the area of review.

~~m.~~ n. The estimated fracture pressure of the confining zone.

~~n.~~ o. Certification that all landowners within the area of review have been notified of the proposed injection well and that a hearing will be held.

2. Permits may contain such terms and conditions as the commission deems necessary.

3. Any permit issued under this section may be revoked by the commission after notice and hearing if the permittee fails to comply with the terms and conditions of the permit or any applicable rule or statute.

4. Before a permit for underground injection will be issued, the applicant must satisfy the commission that the proposed injection well will not endanger any underground source of drinking water.

5. No person shall commence construction of an underground injection well until the commission has issued a permit for the well.

6. Permits are transferable only with approval of the commission.

7. Permits may be modified by the commission.

8. Before a permit for underground injection will be issued, the applicant must complete any needed corrective action on wells penetrating the injection zone in the area of review.

9. All injection wells permitted before November 1, 1982, shall be deemed to have a permit for purposes of this section; however, all such prior permitted wells are subject to all other requirements of this chapter.

History: Effective November 1, 1982; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04(2)
Law Implemented: NDCC 38-08-04(2)

43-02-05-08. Plugging of injection wells. The proper plugging of an injection well requires the well be plugged with cement or other types of plugs, or both, in a manner which will not allow movement of fluids into an underground source of drinking water. The operator shall file a notice of intention to plug (form 4) with the oil and gas division of the industrial commission and shall obtain the ~~chief~~ director's approval of the plugging method prior to the commencement of plugging operations.

History: Effective November 1, 1982; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04(2)
Law Implemented: NDCC 38-08-04(2)

43-02-05-12. Reporting and monitoring requirements.

1. The operator of an injection well shall meter or use an approved method to keep records and shall report monthly to the industrial commission, oil and gas division, the volume

and nature, i.e., produced water ~~or~~, makeup water, etc., of the fluid injected, the injection pressure, and such other information as the commission may require. The operator of each injection well shall, on or before the fifth day of the second month succeeding the month in which injection occurs, file with the director a sworn statement showing the amount of injection by each well upon forms furnished therefor, or approved computer sheets. The operator shall retain all records required by the industrial commission for at least three years.

2. Immediately upon the commencement of injection, the operator shall notify the oil and gas division of the injection date.

3. Within ten days after the discontinuance of injection operations, the operator shall notify the oil and gas division of the date of such discontinuance and the reason therefor.

4. The operator of an injection well shall conduct such monitoring and sampling as the commission may require.

5. The operator of an injection well shall report any noncompliance with regulations or permit conditions to the director orally within twenty-four hours followed by a written explanation within five days.

History: Effective November 1, 1982; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04(2)
Law Implemented: NDCC 38-08-04(2)

43-02-05-13. Access to records. The industrial commission and the commission's authorized agents shall have access to all injection well records wherever located. All owners, drilling contractors, drillers, service companies, or other persons engaged in drilling, completing, operating, or servicing injection wells shall permit the industrial commission, or its authorized agents, to come upon any lease, property, well, or drilling rig operated or controlled by them, complying with state safety rules, and to inspect the records and operation of wells and to conduct sampling and testing. Any information so obtained shall be public information. If requested, copies of injection well records must be filed with the commission.

History: Effective November 1, 1982; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04(2)
Law Implemented: NDCC 38-08-04(2)

43-02-07-08. Bond. Before any person receives a permit to drill, bore, excavate, or construct a geothermal energy extraction facility, the person shall submit to the commission and obtain its approval of a bond, on a form approved by the commission, conditioned as provided by law. At the discretion of the state geologist, an installation or facility bond may be required for the substantial modification of a geothermal energy extraction facility in existence prior to December 1, 1992. The state geologist has the discretion to waive the requirement for a facility bond if the applicant is an instrumentality of the state. Each such bond must be executed by a responsible surety company authorized to transact business in this state.

The amount and type of the bond is as follows:

1. **Shallow-well and horizontal-loop facilities.**

   a. The state geologist has the discretion to require a facility surety bond in the amount of fifteen thousand dollars for any shallow-well or horizontal-loop facility that, for any reason, constitutes a special threat to important ground water resources or the environment, or otherwise poses a significant public health hazard.

   b. An installation surety bond in the amount of ten thousand dollars is required of installers of all shallow-well and horizontal-loop facilities. This is a blanket bond and must cover all permits for shallow-well and horizontal-loop facilities issued in one year commencing on the date the first permit covered by the bond is issued. Alternately, at the discretion of the state geologist, an installation surety bond in the amount of one hundred dollars for each well (loop) installed per year may be submitted.

   c. In lieu of the installation surety bond in subdivision b, the state geologist has the discretion to accept a cash bond of two thousand five hundred dollars for the installation of up to twenty loops per year for shallow-well closed-loop facilities.

   d. ~~Liability--on--the-installation-bond-is-conditioned-on-the compliance-with-North-Dakota-Century--Code--chapter--38-19 and--the-rules-and-orders-of-the-commission.--Liability-on the-installation-bond-continues-until-construction-of--the geothermal--energy--extraction-facility-has-been-completed and-approved-by-the-state-geologist.--At-the-discretion-of the--state--geologist,-liability-may-be-terminated-earlier~~ The geothermal system installer must comply with North Dakota Century Code chapter 38-19 and all rules and orders

of the commission as a condition of the installer's bond. Any violation of either North Dakota Century Code chapter 38-19 or the rules or orders of the commission makes the installer liable under the bond and the bond shall be subject to immediate forfeiture. The installer remains liable under the installation bond until construction of the geothermal energy extraction facility has been completed and the work has been approved by the state geologist. At the discretion of the state geologist, the installer's liability under the bond may be terminated at an earlier date when it can be demonstrated that only minor interior work remains to be completed and when completion of this work is subject to inordinate delays beyond the control of the geothermal system installer.

2. **Deep-well facilities.** A facility bond is required for all deep-well facilities. The amount of the facility bond must be a five thousand dollar bond for a deep-well facility with one supply well. The bond must increase in five thousand dollar increments for each additional supply well and each injection well.

The owner of a geothermal energy extraction facility is responsible for obtaining the facility bond in subdivision a of subsection 1 and subsection 2.

~~Liability--on--the--facility-bond-in-subdivision-a-of-subsection-1 and-subsection-2-is-conditioned-on-compliance-with-North-Dakota--Century Code--chapter--38-19--and--the--rules--and-orders-of-the-commission,-and continues~~ The owner of the geothermal energy extraction facility who is required to obtain a facility surety bond under either subdivision a of subsection 1 or subsection 2 must comply with North Dakota Century Code chapter 38-19 and all rules and orders of the commission as a condition of the owner's bond. Any violation of either North Dakota Century Code chapter 38-19 or the rules or orders of the commission makes the owner liable under the facility surety bond, and the bond shall be subject to immediate forfeiture. The owner of the geothermal energy extraction facility remains liable under the bond until either of the following occurs: (1) the wells or loop systems have been satisfactorily plugged as provided in this chapter, the sites disturbed by any method of production of geothermal energy have been reclaimed in a manner approved by the state geologist, and all logs, plugging records, and other pertinent data required by statute or rules and orders of the commission are filed and approved; or (2) the liability on the bond has been transferred to another bond and such transfer approved by the commission.

The commission shall advise the surety and the principal when liability on a bond is terminated.

The state geologist is authorized to act for the commission as to all matters within this section.

History: Effective March 1, 1984; amended effective October 1, 1990; December 1, 1992; April 1, 1994; May 1, 1994.
General Authority: NDCC 38-19-03
Law Implemented: NDCC 38-19-03

CHAPTER 43-02-08

43-02-08-01. Definitions. The terms used throughout this chapter have the same meaning as in chapter 43-02-03 and North Dakota Century Code chapters 38-08 and 57-51.1, except:

1. "Commercial quantities" means production exceeding in value current operating costs.

2. "Condensate recovered in nonassociated production" means a liquid hydrocarbon recovered from a well classified as a gas well by the commission.

3. "Maximum efficient rate" means the maximum economic rate of production of oil which can be sustained under prudent operations, using sound engineering practices, without loss of ultimate recovery.

4. "Operator" means any person who owns a fee interest or an interest in an oil and gas leasehold, and has the right to produce oil therefrom.

5. "Qualifying period" means any preceding consecutive twelve-month period beginning after December 31, 1972, that the qualified maximum total production from a property did not exceed the production levels as specified in subsection 2 of section 43-02-08-03.

6. "Well depth" means the depth of the midpoint between the highest and lowest perforations (measured in feet from ground level) producing from the pool during the qualifying period. In the event there is more than one well on a property producing from the same pool during the qualifying period, "well depth" means the average depth of the midpoints between the highest and lowest perforations of all wells in the property.

History: Effective August 1, 1986; amended effective September 1, 1987; May 1, 1994.
General Authority: NDCC 38-08-04(5)
Law Implemented: NDCC 38-08-04(4), 57-51.1-01

43-02-08-02. Application for stripper well property determination. Any operator desiring to classify a property as a stripper well property for purposes of exempting production from the imposition of the oil extraction tax as provided under North Dakota Century Code chapter 57-51.1 shall file an application for stripper well property determination with the director and obtain a determination certifying the property as a stripper well property. The applicant has

the burden of establishing entitlement to stripper well property status and shall submit all data necessary for a determination by the director.

The application must include, but is not limited to, the following:

1. A fee in an amount to be set by the commission.

2. The name and address of the applicant and the name and address of the person operating the well, if different.

3. The legal description of the property for which a determination is requested.

4. The well name and number and legal description of each oil-producing well on the property during the qualifying period and at the time of application.

5. The depth of all perforations (measured in feet from ground level) from each producing well on the property during the qualifying period which produces from the same pool.

6. Designation of the property which the applicant requests to be certified as a stripper well property. Such designation must be accompanied by sufficient documentation for the director to determine (as set forth in section 43-02-08-02.1) that the property the applicant desires to be certified as a stripper well property constitutes a property as specified in subsection 34 of North Dakota Century Code section 57-51.1-01.

7. The monthly production of each oil-producing well on the property during the qualifying period.

8. An affidavit stating that all working interest owners of the property, and all purchasers of the crude oil produced from the property have been notified of the application by certified or registered mail.

If the application does not contain sufficient information to make a determination, the director may require the applicant to submit additional information.

History: Effective August 1, 1986; amended effective September 1, 1987; May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04(5)
Law Implemented: NDCC 38-08-04(4), 57-51.1-01

CHAPTER 43-02-09

43-02-09-01. Definitions. ~~The--following--definitions-apply-to this-chapter~~ The terms used throughout this chapter have the same meaning as in chapter 43-02-03 and North Dakota Century Code chapters 38-08 and 57-51.1, except:

1. "Continuous employment" means the specific period of time a workover rig has been obtained to perform a workover project on a qualifying well.

2. "Continuous production" means production in the latest six consecutive calendar months prior to filing the notice of intention to perform a workover project during which the well produced an average of at least fifteen days per month.

3. "Recompletion" means the subsequent completion of a well in a different pool from the pool in which it is completed at the time of the notice given pursuant to section 43-02-09-03.

4. "Reentry" means the entering of a well that has been plugged.

5. "Workover" means the employment of a workover rig and other services for the purpose of restoring or improving producing capability of a well from the pool in which it is presently completed.

6. "Workover project" means the continuous employment of a workover rig for workovers, recompletions, or reentries.

7. "Workover rig" means any rig used to perform work on a workover project.

Upon ~~order--of~~ approval by the commission, an applicant may obtain an exception to the definition of "continuous production" set forth in subsection 2 if it is shown that the well was produced an average of less than fifteen days per month because such method of operation was the most efficient and allowed for approximately the same amount of production as would have resulted had the well produced an average of fifteen or more days per month.

History: Effective May 1, 1990; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 57-51.1-03
Law Implemented: NDCC 57-51.1-03

43-02-09-02. Exemption from taxes. Production from a well with an average daily production of no more than fifty barrels of oil during the latest six calendar months of continuous production, upon which a workover project has been performed, is exempt from taxes imposed

pursuant to North Dakota Century Code chapter 57-51.1 for twelve months beginning with the first day of the third calendar month after the completion of a workover project if:

1. The commission has received a notice of intention to begin a workover project in accordance with section 43-02-09-03.

2. A workover project is performed on the well.

3. The cost of the workover project exceeds sixty-five thousand dollars, or ~~thirty--thousand--dollars~~ if the average daily production is increased at least fifty percent during the first ~~sixty-days~~ two months after completion of the workover project, based upon a comparison to the average daily production for the latest six calendar months of continuous production prior to the filing of the notice of intention to begin a workover project.

For the exemption from the oil extraction tax for workover projects pursuant to North Dakota Century Code section 57-51.1-03, the reentry of a plugged and abandoned well is a workover project provided the cost of the operation exceeds sixty-five thousand dollars.

History: Effective May 1, 1990; amended effective May 1, 1994.
General Authority: NDCC 57-51.1-03
Law Implemented: NDCC 57-51.1-03

43-02-09-03. Notice of intention to begin a workover project. If an exemption from taxation is sought pursuant to subsection 4 of North Dakota Century Code section 57-51.1-03, a notice of intention to begin a workover project must be filed by the well operator with the commission prior to commencement of the project. The notice of intention must be sent by certified mail to the following address:

North Dakota State Industrial Commission
Oil and Gas Division
600 East Boulevard
Bismarck, North Dakota 58505-0840

The notice of intention must include, but is not limited to, the following:

1. A sundry notice (form 4) upon which it is clearly indicated that it is a notice of intention to perform a workover project which may qualify production from the well for an exemption from taxation pursuant to subsection 4 of North Dakota Century Code section 51-51.1-03.

2. The sundry notice must contain a detailed description of the nature and scope of the workover project. The information provided must also include a description of all replacement equipment to be installed that is known to the well operator

at the time of filing, and whether such equipment is new or used.

3. The average daily production during the latest six calendar months of continuous production.

The operator of the well to be worked over shall make arrangements with the director to determine the crude oil inventory stored on the well premises immediately before the commencement of the workover. Also, all gauge tickets for the month must be submitted if required by the director.

Workover projects must be completed within one year after the initial notice of intention to perform a workover is filed. Thereafter such notice is null and void.

History: Effective May 1, 1990; amended effective May 1, 1994.
General Authority: NDCC 57-51.1-03
Law Implemented: NDCC 57-51.1-03

43-02-09-04. Application for workover project determination. The applicant has the burden of establishing entitlement to the exemption provided in North Dakota Century Code section 57-51.1-03 and upon completion of the workover project shall submit all information necessary for a determination by the director. The cost of a workover project includes only direct costs for material, equipment, services, and labor used in the workover project. Labor and services included must be performed onsite and materials and equipment must be used onsite. The value of capital equipment removed from the site must be deducted from the cost of the project.

The application must include the following:

1. A fee in the amount of one hundred dollars.

2. The name and address of the applicant and the name and address of the person operating the well, if different.

3. The well name and number and legal description of the well.

4. The dates during which the workover rig was in service actually performing work on the workover project, and the date the workover was completed.

5. A detailed list identifying all labor, services, and materials used and equipment replaced during the workover project, the cost of each item, and whether the replacement equipment was new or used. Also, the value of all of the equipment removed from service must be listed. The list must be verified by a person knowledgeable in the costs of workover projects and the value of used equipment. At any time the director may require

the applicant to submit actual invoices to verify any costs set forth in the application.

6. A sundry notice (form 4) detailing all work done.

7. The average daily oil production from the well during the first ~~sixty-days~~ two months after completion of the project, if the costs of the project did not exceed sixty-five thousand dollars. The project is completed and the ~~sixty-day~~ two-month period commences the first day of production through the wellhead equipment after the workover rig is removed from over the well.

8. All gauge tickets of oil produced in incomplete months during the first two months after completion of the workover, and the volume of oil stored on the well premises immediately prior to the commencement of the workover project.

If the application does not contain sufficient information to make a determination, the director will advise the applicant of the additional information that must be filed in order to make a determination. If the requested additional information is not received within fifteen working days after receipt of the request, the application must be returned to the well operator.

History: Effective May 1, 1990; amended effective May 1, 1992; May 1, 1994.
General Authority: NDCC 38-08-04, 57-51.1-03
Law Implemented: NDCC 57-51.1-03

CHAPTER 43-02-10

43-02-10-01. Definitions. The terms ~~of~~ used throughout this chapter have the same meaning as in chapter 43-02-03 and North Dakota Century Code chapters 38-08 and 57-51.1 except:

1. "New secondary recovery project" means a secondary recovery project which results in incremental production.

2. "Normal production" means production from a unit obtained in the same manner and from the same wells which produce approximately the same amount of time.

History: Effective May 1, 1992; amended effective May 1, 1994.
General Authority: NDCC 38-08-04
Law Implemented: NDCC 38-08-04

TITLE 46

Labor, Commissioner of

MAY 1994

CHAPTER 46-01-01

46-01-01-01. Organization of department of labor.

1. **History.** The 1965 legislative assembly established the department of labor. The department is headed by a commissioner of labor elected on the no-party ballot for a term of four years, with the first election being held in 1966. Prior to this time agriculture and labor were one department under the commissioner of agriculture and labor.

2. **Deputy commissioner of labor.** The deputy commissioner is appointed by the commissioner and is responsible to the commissioner for administering labor laws.

3. **Regulations and enforcement concerning labor matters.** Inquiries regarding wage payment, child labor, minimum wage, maximum hours, employment agencies, equal pay for equal work, discrimination because of age, race, color, religion, sex, or national origin, the presence of any mental or physical disability, or status with regard to marriage or public assistance, or participation in a lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, and labor disputes may be addressed to the commissioner:

Commissioner of Labor
State Capitol
Bismarck, North Dakota 58505

History: Amended effective November 1, 1981; October 1, 1987; November 1, 1989; August 1, 1991; February 1, 1993; May 1, 1994.
General Authority: NDCC 28-32-02.1
Law Implemented: NDCC 28-32-02.1

ARTICLE 46-02

OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDERS

CHAPTER 46-02-01

PUBLIC HOUSEKEEPING OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER ONE

[Repealed effective May 1, 1994]

CHAPTER 46-02-02

MANUFACTURING AND PROCESSING OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER TWO

[Repealed effective May 1, 1994]

CHAPTER 46-02-03

MERCANTILE OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER THREE

[Repealed effective May 1, 1994]

CHAPTER 46-02-04

PROFESSSIONAL, TECHNICAL, CLERICAL, AND SIMILAR OCCUPATIONS MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER FOUR

[Repealed effective May 1, 1994]

CHAPTER 46-02-05

AGRICULTURAL OCCUPATION NIMIMUM WAGE AND WORK CONDITIONS ORDER NUMBER FIVE

[Repealed effective May 1, 1994]

CHAPTER 46-02-06

MOTOR CARRIER EXEMPTION FROM OVERTIME PAY PROVISIONS

[Repealed effective May 1, 1994]

STAFF COMMENT: Chapters 46-02-07 and 46-02-08 contain all new material but are not underscored so as to improve readability.

CHAPTER 46-02-07
NORTH DAKOTA MINIMUM WAGE AND WORK CONDITIONS ORDER

46-02-07-01. Definitions. As used in this title:

1. "Administrative" means an employee employed in a bona fide administrative capacity, but is not exclusive to any employee whose primary duty consists of:

   a. The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customer; or

   b. Who customarily and regularly exercises discretion and independent judgment.

2. "Agricultural employment" means employment on a farm, for a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to carriers for transportation to market.

3. "Casual employment" means employment that is irregular or intermittent.

4. "Domestic service employment" means services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom the employee is employed.

5. "Engaged to wait" means when employees are required to remain on call on the employer's premises or so close thereto that they cannot use the time effectively for their own purposes and thus are considered to be working.

6. "Executive" means an employee employed in a bona fide executive capacity, but is not exclusive to any employee whose primary duty consists of:

a. The management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

b. Directing the work of two or more other employees therein; and

c. The authority to hire or fire other employees or whose suggestions as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight.

7. "Nonprofit" means a nonprofit corporation organized under the laws of this or another state.

8. "Occasional and sporadic" means infrequent, irregular, or occurring in scattered instances.

9. "Professional" means an employee employed in a bona fide professional capacity, but is not exclusive to any employee whose primary duty consists of:

a. Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

b. Work requiring the consistent exercise of discretion and judgment in its performance; and

c. Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

10. "Service employee" means any employee who is providing direct service to the customer and to whom that customer shows appreciation for that service by tipping that employee for the direct service. The employee must regularly and customarily provide personal face-to-face service to individual customers, which the customer would recognize as being performed for the customer's benefit. Services such as cooking and dishwashing are not included.

11. "Service industry" means an industry in which the principal activity is to provide goods and services directly to the consuming public.

12. "Tip credit" means the amount an employer is allowed to reduce the minimum wage for a tipped employee.

13. "Tip pooling" means when two or more tipped employees agree to pool their tips and split them as agreed upon.

14. "Tipped employee" means any service employee in an occupation in which the employee customarily and regularly receives more than thirty dollars a month in tips.

15. "Waiting to be engaged" means when employees are on call and not required to remain on the employer's premises, but are required to respond to a beeper or leave word at home or the employer's business where they may be reached. Employees in this status are not considered working.

16. "Week" means any seven-consecutive-day period.

History: Effective May 1, 1994.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12

46-02-07-02. Standards that apply.

1. The North Dakota minimum wage is no less than four dollars and twenty-five cents per hour and must be paid to all employees in every occupation in the state.

2. Overtime pay must be paid at one and one-half times the regular rate of pay to any employee for hours worked in excess of forty hours in any one week. Individuals employed as drivers by taxicab companies must be compensated at one and one-half times the regular rate of pay for all hours worked in excess of fifty hours in any one week. Hospitals and residential care establishments may adopt, by agreement with their employees, a fourteen-day overtime period in lieu of the usual seven-day workweek, if the employees are paid at least time and one-half their regular rate for hours worked over eight in a day or eighty in a fourteen-day work period, whichever is the greater number of overtime hours. The following types of employment are exempt from the overtime provisions of this subsection:

   a. Any employee employed in a bona fide executive, administrative, or professional capacity.

   b. Any employee engaged in an agricultural occupation.

   c. Any employee of a shelter, foster care, or other such related establishment whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.

d. Any employee employed in domestic service who resides in the household in which employed.

e. A straight commission salesperson in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than forty hours per week.

3. A minimum thirty-minute uninterrupted break must be provided to any employee desiring it in each shift exceeding five hours when there are two or more employees on duty. Collectively bargained agreements will prevail over this provision. Employees not allowed to leave the business location during the break period must be compensated at the regular rate of pay or provided with in-kind compensation (such as a meal) equal to or greater than the regular rate of pay.

4. Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all the following four criteria are met:

   a. Attendance is outside of the employee's regular working hours.

   b. Attendance is in fact voluntary.

   c. The course, lecture, or meeting is not directly related to the employee's job.

   d. The employee does not perform any productive work during such attendance.

   Training or education mandated by the state, federal government, or any political subdivision for a specific occupation need not be counted as worktime.

5. Ordinary travel from home to work need not be counted as worktime. Special and unusal one-day assignments performed for the employer's benefit and at the employer's request is worktime for the employee regardless of driver or passenger status. Travel away from home is worktime when performed during the employee's regular working hours. Time spent traveling on nonworking days during regular working hours is worktime. The time spent as a passenger on an airplane, train, bus, or automobile after normal working hours is not worktime. The driver of a vehicle is working at anytime when required to travel by the employer. Traveltime from jobsite to jobsite, or from office to jobsite, is worktime to be compensated.

6. Standby time on the premises, or "on call" as in an engaged to wait manner is worktime to be compensated. Waiting to be engaged is not required to be compensated as worktime.

7. If an employer is required to be on duty for twenty-four hours or more, the employer and the employee may agree to exclude bona fide meal periods and bona fide regularly scheduled sleeping periods of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted sleep. If the sleeping period is more than eight hours, only eight hours will be deducted from hours worked. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted as worktime.

8. Every employer must furnish to an employee each pay period a check stub or pay voucher that indicates hours worked, the rate of pay, and required state and federal deductions.

9. An employer may require an employee to purchase uniforms if the cost of such uniforms does not bring that employee's wage below the hourly minimum wage for all hours worked during that pay period.

10. Vacation pay and paid time off must be treated the same as wages upon separation from employment if the employee has earned vacation or paid time off and has been employed for at least one year. Earned vacation pay or paid time off under collectively bargained agreements must be paid the same as wages when a labor dispute lasts more than fifteen days.

11. The commissioner may grant subminimum wages for students enrolled in vocational education or related programs as long as the wage is not below three dollars and sixty cents per hour.

12. Any employee working on a casual basis for less than twenty hours per week for less than three consecutive weeks in domestic service employment providing babysitting services is exempt from minimum wage and overtime provisions.

13. The reasonable value not exceeding the employer's actual cost of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be treated as part of the wages, up to a maximum of fifteen dollars per day, if agreed to by a written agreement and if the employee's acceptance of facilities is in fact voluntary.

14. The common law test provided in subdivisions a and b of subsection 5 of section 27-02-14-01 will be used to determine whether or not an individual may be considered an employee or an independent contractor.

15. The entire employment relationship history existing between the employer and employee, including the employer's previous practices under similar circumstances, will be considered to determine when commissions should be paid to salespersons whose employment has ended.

History: Effective May 1, 1994.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12

46-02-07-03. Additional standards that apply to service and nonprofit industries.

1. A tip credit of thirty-three percent may be allowed for tipped employees. The employer may consider tips as part of wages, but such a tip credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must maintain written records showing that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined. The minimum cash wage payable to tipped employees is two dollars and eighty-five cents per hour.

2. Tip pooling is allowed only among the tipped employees. A vote of tipped employees to allow tip pooling must be taken, and it must be approved by fifty percent plus one of all tipped employees. A written record of each vote on tip pooling must be maintained by the employer, including names of employees voting and the vote totals.

3. Tipped employees employed in the nonprofit gaming industry means all employees with a gaming work permit issued by the North Dakota attorney general and who are employed as gaming attendants by a gaming organization licensed under North Dakota Century Code section 53-06.1-03.

   a. Gaming sites that regularly have four or fewer tipped employees on duty can require tip pooling among all tipped employees at the site.

   b. A gaming organization licensed under North Dakota Century Code section 53-06.1-03 may require tip pooling by blackjack (twenty-one) dealers at an authorized site as provided in North Dakota Century Code section 53-06.1-10. This tip pooling requirement only pertains to any employee, pit boss, or supervisor when actually dealing blackjack.

   c. Pit bosses or supervisors at gaming sites are not tipped employees and cannot be part of the tip pool when

performing functions of those positions other than dealing blackjack (twenty-one).

4. Nonprofit camps that are directly youth related, and intended for educational purposes are exempt from minimum wage and overtime rules.

History: Effective May 1, 1994.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12

46-02-07-04. Additional standards that apply to government entities.

1. Any two individuals employed by the state or any political subdivision in any occupation may agree to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime. If one employee works for another, each employee will be credited as if that employee had worked that employee's normal schedule. In order to qualify an agreement between individuals employed by the agency the agreement must be approved by the agency. The agency approval must be prior to the work being done. Each employee must be free to refuse to participate. The employee's decision to participate is valid only if freely made without coercion from the employer. A public agency that employs individuals who substitute or "trade time" under this section is not required to keep a record of the hours of the substitute work. This subsection must be interpreted in accordance with 29 CFR 553.31, as amended.

2. A state or political subdivision employee, solely at the employee's own option, may work occasionally or sporadically on a part-time basis for the same agency in a different capacity from the regular employment. The hours worked in the different jobs must not be combined for overtime purposes. This subsection must be interpreted in accordance with 29 CFR 553.30, as amended.

History: Effective May 1, 1994.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12

CHAPTER 46-02-08
MOTOR CARRIER EXEMPTION FROM OVERTIME PAY PROVISIONS

46-02-08-01. Motor carrier exemption from overtime pay provisions. The overtime pay provisions of this article do not apply to any employee exempted by section 13(b)(1) of the Fair Labor Standards Act [29 U.S.C. 213(b)(1)] from section 7 of the Fair Labor Standards Act [29 U.S.C. 207], as applied to covered employees of motor common, contract, and private carriers specified by the Motor Carriers Act [49 U.S.C. 3102]. These exemptions apply to the same occupations within the authority of the commissioner of labor as provided for in North Dakota Century Code chapter 34-36.

History: Effective May 1, 1994.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

TITLE 50

Medical Examiners, Board of

JULY 1994

CHAPTER 50-02-07

50-02-07-01. License fees. The fee for licensure in North Dakota whether it be by qualification, reciprocity, or endorsement, or special license is ~~one hundred fifty~~ two hundred dollars. The fee for a locum tenens license is ~~one~~ two hundred dollars, and the annual registration fee for all licensed physicians is ~~sixty~~ one hundred ten dollars.

History: Amended effective February 1, 1985; December 1, 1988; July 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-17-17, 43-17-21, 43-17-25

50-03-01-03. Supervision contract requirements. Upon undertaking the supervision of an a physician assistant as contemplated by this chapter, the physician shall file with the board a copy of the contract showing the following information:

~~1.--The--full--name--of--the-assistant-with-a-brief-summary-of-the assistant's-pertinent-education-and-experience.~~

2.--A a list of the specific tasks which that the physician contemplates may be assigned to the physician assistant, which. That contract and list of tasks must be approved by the North Dakota state board of medical examiners.

~~The--contract--should--be-renewed-annually,-and-the-state-board-of medical-examiners-should-be-advised-of-the-termination-of--the--contract within--seventy-two--hours--following--termination-of-the-contract.~~ The contract must be confirmed annually by completing and filing with the board such forms as are requested and provided by the board. The board must be notified within seventy-two hours of any contract termination or modification.

Every physician who supervises a physician assistant under this chapter must practice medicine in North Dakota.

History: Amended effective July 1, 1988; July 1, 1994.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-02(10)

50-03-01-05. Designation of substitute supervising physician. Under no circumstances shall the supervising physician designate the physician assistant to take over the physician's duties or cover the physician's practice. During any absence or temporary disability of ~~the~~ a supervising physician, it is mandatory that the supervising physician designate a substitute supervising physician to ~~cover--the supervising-physician's-practice-and-perform-the-supervising-physician's duties~~ assume all duties and responsibilities of the supervising physician. The physician assistant, during this period, will be responsible to the substitute physician. The designation of a substitute supervising physician must be in writing; signed by the supervising physician, the substitute supervising physician, and the physician assistant; and contain the following information:

1. The name of the substitute supervising physician.

2. The period during which the substitute supervising physician will assume the duties and responsibilities of the supervising physician.

3. Any substantive change in the physician assistant's duties or responsibilities.

The appointment of a substitute supervising physician does not become effective unless it is first approved by the board of medical examiners.

History: Amended effective July 1, 1988; November 1, 1993; July 1, 1994.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-02(10)

50-03-01-06. Assistant's functions limited. The physician assistant shall function only in those areas of medical practice where the supervising physician provides care for the physician's patients.

History: Amended effective July 1, 1988; November 1, 1993; July 1, 1994.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-02(10)

50-03-01-09.1. Physician assistant for more than one physician. A physician assistant may provide services for more than one physician in the following circumstances if each of the physicians for whom the physician assistant provides services has filed a proper contract under section 50-03-01-03:

1. In a group practice setting where one physician is designated as the primary supervising physician; the primary supervising physician will remain primarily responsible for the acts of the physician assistant even when the physician assistant is acting under the immediate supervision of another physician in the group; or

2. If two or more physicians who are not associated in practice require assistance on a part-time basis, each may contract with the physician assistant as a supervising physician provided that a physician assistant is not employed in more than three practice locations.

History: Effective July 1, 1994.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-02(10)

50-03-01-15. Forms of registration. The board of medical examiners may recognize the following forms of registration for a physician assistant and may issue certificates accordingly:

1. Permanent registration - which will continue in effect so long as the physician assistant meets all requirements of the board.

2. Locum tenens permit - which may be issued for a period not to exceed three months.

History: Effective July 1, 1994.
General Authority: NDCC 43-17-13
Law Implemented: NDCC 43-17-02(10)

TITLE 54

Board of Nursing

SEPTEMBER 1994

CHAPTER 54-02-01

54-02-01-06. Examination fees. The board shall set the fee for licensure by examination. The fee for licensure by examination shall be seventy-five dollars. The application is valid for a period of time not to exceed twelve months from the determination of eligibility and the fee is nonrefundable. The candidate shall be responsible for any payment of fees charged by the national council of state boards of nursing for use of the national council licensure examination.

History: Amended effective November 1, 1979; March 1, 1986; March 1, 1992; January 1, 1994; September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(3)

54-02-02-03. Failure of licensing examination. Candidates who fail the licensing examination shall file ~~an application to rewrite the licensing examination~~ a request for eligibility to retest and shall be responsible for payment of any fees charged by the national council of state boards for use of the national council licensure examination. The candidate's ~~application to rewrite the examination~~ request for eligibility to retest will be accepted dependent upon the timeframes established by the national council of state boards for use of the item pool and a valid application for licensure by examination.

History: Amended effective March 1, 1986; January 1, 1994; September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-10

54-02-05-04. Increased renewal fee. The relicensure fee for any practicing nurse will be doubled for any renewal application received in the board office postmarked after the expiration date. ~~The registered nurse shall pay one hundred twenty dollars and the licensed practical nurse shall pay one hundred dollars.~~

History: Amended effective November 1, 1979; June 1, 1982; July 1, 1987; November 1, 1990; September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(3)

54-02-05-05.1. Practice requirements for license renewal. Nursing practice for purposes of relicensure must meet or exceed ~~eighty hours per year or~~ five hundred hours within the preceding five years. ~~If an application for renewal and the applicant's records on file with the board show less than four hundred hours of nursing practice by the applicant within the preceding four calendar years, then a license will be issued, at a prorated fee, for only one calendar year.~~ Nursing practice is defined in subsections 5 and 6 of North Dakota Century Code section 43-12.1-02. Hours practiced in another regulated profession cannot be used for nursing practice hours.

History: Effective July 1, 1987; amended effective November 1, 1990; September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(13)

54-02-07-09. Practice without a license. A licensee who applies for renewal of licensure shall present evidence to the board that the licensee has not been engaged in the practice of nursing without a current license. If evidence is received by the board that the individual has been practicing nursing without a current license, the ~~licensee~~ individual will be offered an opportunity to enter into an administrative settlement for review. Entry into an administrative settlement shall be required of ~~a--licensee--making--application--for renewal--after--January--first--of--the--current--year~~ an individual who admits, without other evidence of noncompliance of North Dakota Century Code chapter 43-12.1 and this chapter, to practicing without a license and desires to have the board issue a current license. The administrative settlement is a written statement signed by the ~~licensee~~ individual identifying the circumstances of the practice without a license, an agreement to accept a public reprimand, and an agreement to remit the penalty fee ~~and-late-renewal-fee~~. Upon receipt of the written statement and correct fee, the executive director or executive director's authorized designee may issue a current license to practice. The written statement must be presented to the board at the next regular meeting for acceptance. If the board does not accept the administrative settlement, the licensee shall have the opportunity for a disciplinary hearing as outlined in North Dakota Century Code chapter 28-32 and this chapter.

History: Effective August 1, 1988; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-14

54-07-01-02. Definitions. The following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

1. ~~"Assistant to the nurse" means an individual who works under the direction of a licensed nurse, provides nursing or nursing-related tasks, meets the requirements of article 54-07, and is listed on the board registry or other state registries acknowledged by the board as meeting or exceeding the requirements of this article.~~

2. ~~"Consultative nursing" means that the licensed nurse provides guidance and information as a participant of the interdisciplinary team but is not individually responsible to direct the plan of care for the client.~~

3. 2. "Delegation" means the assignment by a licensed nurse to an ~~assistant to the~~ a nurse assistant performance of nursing tasks in selected situations. Delegation can be either global or specific in nature.

   a. "Global" delegation means the assignment by a licensed nurse to an ~~assistant to the~~ a nurse assistant the performance of the nursing task for all clients or persons to whom the ~~assistant to the~~ nurse assistant is assigned care responsibilities.

   b. "Specific" delegation means the assignment by a licensed nurse to an ~~assistant to the~~ a nurse assistant the performance of the selected nursing task for only the assigned client or person to whom the licensed nurse indicates.

4. 3. "Direct nursing" means that the licensed nurse determines the nature or extent of the nursing care that will be provided for an individual or group of individuals and is responsible and accountable for the care provided that has been delegated to those providing assistance to the nurse.

4. "Nurse assistant" means an individual who works as an assistant to the nurse under the direction of a licensed nurse, provides nursing or nursing-related tasks, meets the requirements of article 54-07, and is listed on the board registry or other state registries acknowledged by the board as meeting or exceeding the requirements of this article.

5. "Nurse assistant registry" means a listing of all persons who are authorized by the board or included on another state registry which has been recognized by the board to perform

nursing functions or nursing tasks legally delegated and supervised by a licensed nurse.

6. "Nursing task" is a task or function that has been assigned to ~~an--assistant--to--the~~ a nurse assistant following the determination of nursing needs by the licensed nurse.

7. "Supervision" means the provision of guidance or direction by the licensed nurse for the accomplishment of a nursing task or activity delegated to ~~an-assistant-to-the~~ a nurse assistant. The licensed nurse is responsible for the determination of the level of supervision required to ensure the safety and well-being of the client.

History: Effective November 1, 1992; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-02

54-07-01-03. Recognition of other state registries. The board will acknowledge placement on other state registries in lieu of the nurse assistant registry. Criteria for recognition of other state registries is as follows:

1. The registry is open to the public during normal business hours.

2. The registry contains information about the individual that meets or exceeds the requirements for the ~~nursing~~ nurse assistant registry.

3. The registry provides a mechanism for removal of the individual for cause, or marking of the registry of validated information regarding the individual's unsuitability to care for North Dakota residents.

4. The agency operating the registry has submitted sufficient documentation to the board of nursing to verify compliance with these requirements.

History: Effective November 1, 1992; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

CHAPTER 54-07-02

54-07-02-01. Nurse assistant registry. The board shall establish and maintain a nurse assistant registry. The board shall enter individual names on the nurse assistant registry upon receipt of information required.

1. An applicant shall submit a completed application and fee that includes an affidavit of training and competency determination by the employer. The affidavit must include validation of training and competency determination for those tasks and functions listed in section 54-07-03-03. A national ~~nursing~~ nurse assistant competency evaluation testing program may be used in lieu of the employer validation of competency.

2. Upon receipt of the required information, and a fee of five dollars, an initial registry listing card for a period of twenty-four months will be sent to the nurse assistant.

3. Registry listing is valid for twenty-four months and will be subject to renewal before the last day of the twenty-fourth month. Registry listing renewal requires verification of continued competency by the employer.

4. The renewal fee for the ~~assistant-to-the~~ nurse assistant will be five dollars.

History: Effective November 1, 1992; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

54-07-02-02. Disciplinary action of registry listing. The board has the authority to revoke, suspend, or deny a nurse assistant registry listing following disciplinary action if the ~~assistant-to-the~~ nurse assistant has been found to have completed any of the acts found in North Dakota Century Code section 43-12.1-14.1. The board shall use North Dakota Century Code chapter 28-32 as the process to determine the action to revoke, suspend, or deny the listing. Disciplinary action must be communicated to all health care agencies or providers of personal care in North Dakota.

History: Effective November 1, 1992; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-14.1

CHAPTER 54-07-03

54-07-03-01. Global delegation of nursing tasks and nursing functions. Global delegation of nursing tasks to ~~an assistant to the~~ a nurse assistant must comply with the following requirements:

1. The nursing task must be one that the ~~assistant to the~~ nurse assistant has been trained to carry out safely and is within the listing included in section 54-07-03-03.

2. The nursing task must be one that, in the opinion of the delegating licensed nurse, can be properly and safely performed by the ~~assistant--to-the~~ nurse assistant involved without jeopardizing the welfare of the recipient.

3. The licensed nurse must make an assessment of the patient's nursing care needs prior to delegating the nursing task.

4. The licensed nurse shall adequately supervise the performance of the delegated nursing task in accordance with the requirements of this chapter.

History: Effective November 1, 1992; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

54-07-03-02. Supervision of nursing tasks and nursing functions. The licensed nurse shall provide supervision of all nursing tasks delegated to the ~~assistant to the~~ nurse assistant in accordance with the following conditions:

1. The degree of supervision required must be determined by the licensed nurse after an evaluation of appropriate factors involved including, ~~but not limited to,~~ the following:

   a. The stability of the condition of the patient;

   b. The training and capability of the ~~assistant to the~~ nurse assistant to whom the nursing task is delegated;

   c. The nature of the nursing task being delegated; and

   d. The proximity and availability of the licensed nurse when the nursing task will be performed.

2. The licensed nurse providing the supervision is readily available to the ~~assistant-to-the~~ nurse assistant.

History: Effective November 1, 1992; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

54-07-03-04. Standards for specific delegation. Nursing tasks other than those identified in section 54-07-03-03 may be specifically delegated to ~~an-assistant-to-the~~ a nurse assistant caring for a specific client if the following criteria are met:

1. There are written agency policies identifying the process of specific delegation of nursing tasks, the training and supervision required, and the evaluation of the delegation of the specific nursing tasks.

2. The ~~assistant--to-the~~ nurse assistant has received additional preparation pertinent to the specific nursing task and the additional preparation is documented in the individual's personnel folder.

3. The ~~assistant-to-the~~ nurse assistant has completed a planned, supervised, onsite experience in the specific delegated nursing task.

History: Effective November 1, 1992; amended effective September 1, 1994.
General Authority: NDCC 43-12.1-08(18)
Law Implemented: NDCC 43-12.1-08(21)

STAFF COMMENT: Chapters 54-07-05 and 54-07-06 contain all new material but are not underscored so as to improve readability.

CHAPTER 54-07-05
MEDICATION ASSISTANT

54-07-05-01. Statement of intent. North Dakota Century Code chapter 43-12.1 allows the licensed nurse to delegate and supervise nursing tasks and nursing functions to individuals authorized by the board to perform those functions. Included in nursing tasks and nursing functions is the provision for the delivery of routine, regularly scheduled medications that in certain settings can safely be done by a nurse assistant with appropriate training and supervision. While the management of the medication regimen is the responsibility of licensed nurses and requires the knowledge, skills, and abilities of the licensed nurse to ensure public safety and accountability, nurse assistants with advanced prescribed training may perform the task of giving or applying certain medications to the patient in specific settings when such medications do not require determination of need, drug calculation, or dosage conversion as long as the licensed nurse is available to monitor the patient's progress and effectiveness of the prescribed medication regimen. Individuals to whom the task of giving the routine, regularly scheduled medication is delegated must complete a prescribed training program. The delivery of routine, regularly scheduled medications in acute care settings or settings where the patient population includes individuals with unstable or changing nursing care needs is specifically precluded by these rules.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-01

54-07-05-02. Definitions. The following words and terms, when used in these rules, have the following meanings, unless the context clearly indicates otherwise:

1. "Medication assistant" means an individual who has a current registration as a nurse assistant and has successfully completed an approved medication assistant program and has demonstrated competency in the administration of certain routine, regularly scheduled medications to individuals or groups of individuals in specific settings, and possesses a current registration from the board as a medication assistant.

2. "Medication assistant program" means a program of study and clinical practice in the administration of certain routine, regularly scheduled medications which meets board requirements.

3. "Routine, regularly scheduled medications" means the components of legally identified medication regimen of individuals or groups of individuals which are administered on a routine basis and do not require drug calculations, determination of need, or dosage conversion. Medications included in this definition may include those administered orally, topically, nasally, or instilled within the eye or ear. Medications excluded from this definition include any medications to be administered by injection, through a tube, or inserted into another body cavity, except when specifically delegated by a licensed nurse to a specific nurse assistant for a specific patient according to section 54-07-03-04. The licensed nurse may make the determination to exclude any medication from this definition.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-02

54-07-05-03. Medication management regimen. When the licensed nurse is responsible for the management of the medication regimen, either as a direct employee or as a consultant, then any delegation must conform to the provisions of this chapter.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-02

54-07-05-04. Requirements for supervision. The licensed nurse must be on unit and available for immediate direction in a licensed nursing facility, and the licensed nurse must be available by telephone in a licensed basic care facility. In any other setting where the licensed nurse delegates the task of giving medications to another

individual, the licensed nurse must establish in writing the process for providing the supervision in order to provide the recipient of the medication appropriate safeguards.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-02

54-07-05-05. Initial registration. An application for registration as a medication assistant and the required fee must be submitted by the applicant to the board office. Successful completion must be documented by the program. Upon receipt of the required materials, a medication assistant registration will be issued to correspond with the applicant's registration as a nurse assistant.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-02

54-07-05-06. Registration - Reregistration. The medication assistant registration expiration date must correspond to the individual's nurse assistant registration expiration date and must be renewable at the same time that the nurse assistant registration is renewed. Additional information regarding the individual's performance as a medication assistant will be requested by the board in the renewal process as satisfactory performance as a medication assistant must be validated by the employing agency prior to the issuance of the renewal registration. Failure to receive the application for renewal does not relieve the medication assistant of the responsibility of renewing the registration by the expiration date.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(21)

54-07-05-07. Reinstatement of lapsed medication assistant registration. A lapsed registration can be reinstated with verification of competency as a medication assistant and meeting all of the requirements for registration.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(21)

54-07-05-08. Removal of medication assistant registration. The registration issued to a nurse assistant, including the medication assistant registration, may be revoked, suspended, or denied based upon the provisions of chapter 54-07-04.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-14.1

CHAPTER 54-07-06
MEDICATION ASSISTANT PROGRAM REQUIREMENTS

54-07-06-01. Medication assistant program. The medication assistant program must include basic principles, techniques, and procedures of medication administration. The curriculum must meet the requirements of North Dakota Century Code section 15-20.1-11 and include, at a minimum:

1. The specific outcome objectives and clinical skill attainment for the course.

2. A minimal timeframe: forty hours theory, eight hours laboratory, and thirty-two hours clinical learning experience.

3. A competency-based method of evaluation for the theory, laboratory and clinical learning component.

4. A provision for persons who have prior learning or experience, or both.

Medication training programs conducted prior to July 1, 1994, in North Dakota service settings will have twenty-four calendar months to meet the requirements of this section.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(6)

54-07-06-02. Instructor requirements. The person responsible for the theory and laboratory component must be a registered nurse. All medication administration as a part of the clinical learning experience must be supervised by a licensed nurse.

History: Effective September 1, 1994.
General Authority: NDCC 43-12.1-08
Law Implemented: NDCC 43-12.1-08(6)

TITLE 59.5

State Personnel Board

MAY 1994

ARTICLE 59.5-02

GRIEVANCE PROCEDURES

[Repealed effective May 1, 1994]

CHAPTER 59.5-03-01

59.5-03-01-01. Scope of chapter. This chapter applies to any ~~applicant~~ nonprobationary employee in the classified service who has submitted a timely and properly completed application for a position within an agency, department, or institution required to comply with the standards for a merit system of personnel administration and who has been determined by the central personnel division to be disqualified for such position for failure to meet the minimum qualifications for a position as established by the central personnel division.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC 54-42-03
Law Implemented: NDCC 54-42-03

59.5-03-02-01.1. Definitions. The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except that "working days" means Monday through Friday exclusive of holidays.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-07(1)
Law Implemented: NDCC 54-44.3-07(3)

59.5-03-02-02. Classification appeals.

1. ~~Following the completion of a classification review by the central personnel division, the central personnel division shall notify the agency appointing authority and the employee in writing of the division's decision and the right to appeal. If either an employee or agency appointing authority perceives that a classification inequity exists, an appeal may be initiated by the proper completion and submission of an appeal form designated by the director, central personnel division. The completed appeal form must be postmarked no later than fifteen working days from the date on which the central personnel division's classification response was mailed. All required signatures and attachments must be complete when the appeal form is received by the central personnel division except as provided in subsection 2.~~

2. ~~When circumstances preclude the submission of a completed appeal form within the fifteen day time limit, the employee or the agency appointing authority shall submit a notice, in writing, within said fifteen working days that an appeal is to be commenced describing the circumstances which preclude completion of the appeal form within the fifteen working day limitation and the specific items which cannot be completed. The notice must also contain a reasonable date by which time the appeal form will be completed and received by the central personnel division. The central personnel division shall advise the appellant in writing whether the requested delay is approved. An appeal is not considered as received by the central personnel division until all information required on the appeal form is complete and all approved delays have expired.~~

3. ~~The director, central personnel division, has thirty working days from the receipt of the completed appeal form to review the appeal and provide a written response to the employee and agency.~~

~~4.--If--an-appellant-does-not-agree-with-the-final-response-of-the director,--central--personnel--division,--an--appeal--may---be commenced--by--filing--a--complaint--with--the-state-personnel board.--Such-complaint-must-be-in-writing-and-directed-to--the director,--central--personnel-division.--The-complaint-must-be postmarked-no-later-than-fifteen-working-days-from-the-date-of mailing--of--the--director's--final--response--to--the-initial appeal.~~ A nonprobationary employee in the classified service or an appointing authority may appeal a classification decision made by the director, central personnel division, concerning the class title assigned to a position to the state personnel board. The appeal must be submitted in writing within fifteen working days from the date of the written decision of the director. The appeal to the state personnel board must be mailed to the director, central personnel division.

~~5.~~ 2. Upon receipt of a written ~~complaint~~ appeal, the director, central personnel division, as secretary to the board, shall schedule the appeal for hearing before the board. The director, on behalf of the state personnel board, shall notify the employee and ~~agency~~ appointing authority in writing of the board hearing date ~~within-ten-working-days-from-receipt-of-the complaint--and~~ at least ten working days prior to the board hearing date.

~~6.~~ 3. The central personnel division shall provide each member of the state personnel board, the employee, and the agency appointing authority with a copy of each document to become a part of the appeal file. The appeal file must consist of, but is not limited to, copies of the following:

a. The original classification/reclassification request under appeal and all attachments ~~thereto~~.

b. The appeal form and all attachments ~~thereto~~.

c. All written correspondence relating to the original classification request and appeal, including written requests for extension and notices of extensions granted.

d. The written ~~complaint~~ appeal commencing the appeal before the state personnel board.

e. Other directly relevant and significant documents submitted by the employee, appointing authority, or the central personnel division.

~~7.~~ 4. The central personnel division shall disseminate the appeal file to all participating parties at least ten working days prior to the board hearing date. Documents submitted by any participant after the appeal file is disseminated may cause

the board to delay the hearing, generally to the next scheduled board meeting date.

8. 5. The employee, appointing authority, and their representatives may appear at the board meeting for the hearing of their classification appeal. The central personnel division shall first make an oral presentation relative to the matter under appeal followed by the employee, appointing authority, or their representatives. Such presentations should be limited to ten minutes and directly relate to the issues of the appeal. The board may ask questions of those making oral presentations. The employee's agency shall reimburse the appealing employee for the required time, travel, meals, and lodging expenses to appear before the board. The reimbursement may not exceed the amounts allowed state employees.

9. 6. The central personnel division shall notify the employee and appointing authority in writing of the board's decision within five working days following the ~~board's hearing of~~ date the board makes its decision regarding the appeal. Decisions which result in a classification either higher or lower than that previously established by the central personnel division are effective on the first day of the month in which the hearing is held.

10. 7. An ~~agency or applicant~~ employee or appointing authority who is dissatisfied with the decision of the state personnel board may petition the board for a ~~rehearing~~ reconsideration. The petition must be commenced with a written request to the board postmarked no later than fifteen days from the date the board's decision was mailed. The request must specify the reason for the ~~rehearing~~ reconsideration. The state personnel board may grant or deny the request based on the board's determination whether the reason specified has significant merit.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC ~~54-42-03, 54-44.3-07~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-42-03, 54-44.3-07, 54-44.3-12~~ 54-44.3-07(3)

59.5-03-02-03. Pay grade appeals.

1. ~~The director, central personnel division, shall act on the written requests from either an employee or an appointing authority to review the pay grade assigned to a class as promptly as possible, and in no event may the time to act exceed sixty days from receipt of a written request.~~ A nonprobationary employee in the classified service or an appointing authority may appeal the pay grade assigned to a class by the director, central personnel division, to the state personnel board. The appeal must be submitted in

writing within fifteen working days from the date of the written decision of the director. The appeal to the state personnel board must be mailed to the director, central personnel division.

2. ~~Unresolved--differences--between--the--director-of-the-central personnel-division,-and-the-employee-or--appointing--authority as--to--pay--grades--assigned--may--be--submitted-to-the-state personnel-board-for-a-hearing.~~ Upon receipt of a written appeal, the director, central personnel division, as secretary to the board, shall schedule the appeal for hearing before the board. The director, on behalf of the state personnel board, shall notify the employee and the appointing authority in writing of the board hearing date at least ten working days prior to the board hearing date.

3. ~~The--state--personnel-board,-after-considering-the-matter,-may approve---or---modify---the---central---personnel---division's recommendations--or--otherwise--resolve--the-differences.~~ The central personnel division shall provide each member of the state personnel board, the employee, and the agency appointing authority with a copy of each document to become a part of the appeal file. The appeal file must consist of, but is not limited to, copies of the following:

   a. The original pay grade review request under appeal and all attachments and responses.

   b. The written appeal and all attachments.

   c. All written correspondence relating to the original request and appeal, including written requests for extension and notices of extensions granted.

   d. The written appeal commencing the appeal before the state personnel board.

   e. Other directly relevant and significant documents submitted by the employee, by the appointing authority, or the central personnel division.

4. The central personnel division shall disseminate the appeal file to all participating parties at least ten working days prior to the board hearing date. Documents submitted by any participant after the appeal file is disseminated may cause the board to delay the hearing, generally to the next scheduled board meeting date.

5. The appointing authority, the employee, and their representatives may appear at the board meeting for the hearing of the pay grade appeal. The central personnel division shall first make an oral presentation relative to the matter under appeal followed by the employee, the appointing

authority, or their representatives. Such presentations should be limited to ten minutes and directly relate to the issues of the appeal. The board may ask questions of those making oral presentations. The employee's agency shall reimburse the appealing employee for the required time, travel, meals, and lodging expenses to appear before the board. The reimbursement may not exceed the amounts allowed state employees.

6. The central personnel division shall notify the employee and the appointing authority in writing of the board's decision within five working days following the date the board makes its decision regarding the appeal. Decisions that result in a pay grade either higher or lower than that previously established by the central personnel division are effective on the first day of the month in which the hearing is held.

7. An employee or appointing authority who is dissatisfied with the decision of the state personnel board may petition the board for reconsideration. The petition must be commenced with a written request to the board postmarked no later than fifteen days from the date the board's decision was mailed. The request must specify the reason for the reconsideration. The state personnel board may grant or deny the request based on the board's determination whether the reason specified has significant merit.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC ~~54-44.3-07~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44.3-07~~ 54-44.3-07(3), 54-44.3-12

CHAPTER 59.5-03-03

59.5-03-03-02. Definitions. The terms used throughout this title have the same meanings as in North Dakota Century Code chapter 54-44.3, except:

1. "Cause" ~~includes~~ means conduct related to the employee's job duties, job performance, or working relationships which is detrimental to the discipline and efficiency of the service in which the employee is or was engaged.

2. "Demotion" ~~includes~~ means an involuntary reduction ~~for disciplinary reasons~~ in the status of an employee from a position in one class to a position in a lower class resulting in a decrease in base salary.

3. "Dismissal" ~~includes~~ means an involuntary termination of an employee's employment ~~of an employee for cause~~.

4. "Forced relocation" ~~includes~~ means the involuntary transfer or reassignment of ~~a classified~~ an employee from one work location in the state to another work location in the state ~~when an~~ that requires the employee ~~is likely to need to relocate the employee's~~ move to a different place of residence.

5. "Reduction-in-force" ~~includes~~ means the loss of employment by ~~layoff of~~ an employee ~~from the employee's present position~~ as a result of ~~the elimination of a program, a reduction in the number of full-time equivalent positions by the legislative assembly~~ appropriations, lack of work, curtailment of work, ~~lack of funds, expiration of grants,~~ or reorganization.

6. "Reprisal action" ~~includes~~ means an unfavorable ~~adverse employment-related actions~~ action taken against an employee by an appointing authority for appealing to the state personnel board, for exercising the employee's rights under the State ~~and Political Subdivision~~ Public Employees Relations Act of 1985, for testifying before a legislative committee, or for requesting timely assistance under the employee assistance program.

7. "Suspension without pay" ~~includes~~ means an enforced unpaid leave of absence ~~for cause or pending an investigation~~.

8. "Waiver" ~~includes~~ means a written agreement between an employee and the appointing authority not to proceed with the internal agency grievance procedure and to permit an appeal to be made directly to the state personnel board ~~when the employee has been dismissed from employment~~.

9. "Working days" means Monday through Friday exclusive of holidays.

History: Effective December 1, 1985; amended effective May 1, 1987; May 1, 1989; May 1, 1994.
General Authority: NDCC 28-32-02, ~~54-44-3~~ 34-11.1, 54-44.3-07(1)
Law Implemented: NDCC ~~54-44-3~~ 54-44.3-07(3)

59.5-03-03-04. Demotion. The appointing authority, after giving ~~the~~ a classified employee a written notice of the reason, may demote ~~an~~ that employee for ~~disciplinary reasons~~ cause. ~~Classified employees~~ Only a classified employee who ~~have~~ has satisfactorily completed ~~their~~ the probationary ~~periods have~~ period has the right to appeal a demotion.

History: Effective December 1, 1985; amended effective May 1, 1987; May 1, 1994.
General Authority: NDCC ~~54-44-3~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44-3~~ 54-44.3-07(3)

59.5-03-03-05. Dismissal. The appointing authority, after giving ~~the~~ a classified employee a written notice of the ~~reasons~~ reason, may dismiss ~~an~~ that employee for cause. ~~Classified employees~~ Only a classified employee who ~~have~~ has satisfactorily completed ~~their~~ the probationary ~~periods have~~ period has the right to appeal a dismissal.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC ~~54-44-3~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44-3~~ 54-44.3-07(3)

59.5-03-03-06. Forced relocation. An appointing authority may, after giving written notice to ~~the~~ a classified employee, require ~~the~~ that employee to work in another location in the state when that relocation is necessary for the appointing authority to carry out operations of the agency, or when the appointing authority can show a work-related reason for the relocation. ~~Classified employees~~ Only a classified employee who ~~have~~ has satisfactorily completed ~~their~~ the probationary ~~periods have~~ period has the right to appeal a forced relocation ~~when the action taken is for punitive reasons or when there is not a work related reason for the relocation~~.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC ~~54-44-3~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44-3-07~~ 54-44.3-07(3)

59.5-03-03-07. Reduction-in-force. The appointing authority may, after giving written notice to ~~the~~ a classified employee, ~~lay off~~ terminate the employment of an employee as a result of a reduction-in-force. ~~Classified employees~~ Only a classified employee who ~~have~~ has satisfactorily completed ~~their~~ the probationary ~~periods have~~

period has the right to appeal a reduction-in-force, but that appeal may be made only on the basis that if the following four factors that are required to be included in an agency's reduction in force policy were not followed required by section 4-07-11-03 were not followed, or if the reduction-in-force was conducted in a discriminatory manner that would violate the state's policy against discrimination as stated in North Dakota Century Code section 14-02.4-01.

1. An analysis of the acquired knowledge, demonstrated skills, and versatility of their employees compared to the work to be done and the available funding. Employees lacking the necessary skills and versatility should be considered for reduction.

2. An analysis of the level of demonstrated work performance. Employees having a consistently low level of performance should be considered for reduction.

3. A review of the length of service of their employees. Appointing authorities should list the number of years and months employees have been in the classified service. Employees with the fewest years of service should be considered for reduction.

4. An analysis of the extent of required training needed to train a reassigned employee to full productivity in a different position. Employees requiring substantial retraining should be considered for reduction.

Agencies shall develop and retain written documentation of the required analysis and review.

An agency may not subject classified employees who have satisfactorily completed their probationary periods to reduction in force while there are emergency, temporary, provisional, or probationary employees serving in the same class in the same agency location. Classified employees who are subject to reassignment must possess the skills and abilities required to perform the other work after appropriate training.

Agencies shall conduct reductions in force in a nondiscriminatory manner and may not use such actions as a substitute for disciplinary measures.

History: Effective December 1, 1985; amended effective May 1, 1987; May 1, 1994.
General Authority: NDCC 54-44.3 54-44.3-07(1)
Law Implemented: NDCC 54-44.3-07 54-44.3-07(3)

59.5-03-03-08. Reprisal action. An appointing authority may not take a reprisal action against an a classified employee. A Only a

classified employee who has satisfactorily completed the probationary period has the right to appeal a reprisal action.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC ~~54-44.3~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44.3-07~~ 54-44.3-07(3)

59.5-03-03-09. Suspension without pay. The appointing authority, after giving ~~the~~ a classified employee a written notice of the reason, may suspend ~~any~~ that employee without pay for cause for a period not to exceed thirty calendar days. ~~Classified--employees~~ Only a classified employee who ~~have~~ has satisfactorily completed ~~their~~ the probationary ~~periods have~~ period has the right to appeal a suspension without pay.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC ~~54-44.3~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44.3~~ 54-44.3-07(3)

59.5-03-03-10. Notice to employee.

1. An appointing authority, taking an employer action of suspension without pay, demotion, ~~or~~ dismissal ~~which~~, forced relocation, or reduction-in-force that may be appealed to the state personnel board ~~under--these--rules~~, shall notify the employee in writing of the right to appeal within three working days, excluding weekends and state holidays, of the appealable employer action. Time limitations for commencing an appeal to the state personnel board do not begin until the agency gives this notice of the right to appeal to the employee.

2. The notice given by the appointing authority must ~~state as follows~~ contain the following information:

   a. ~~You--have~~ That the employee has the right to appeal ~~your {specify suspension without pay, demotion, or dismissal, etc.}~~ to the state personnel board.

   b. ~~In~~ That the employee, in order to start the appeals procedure ~~you~~, must first process a grievance through the agency internal grievance procedure ~~of the {list agency name)~~, or obtain a waiver.

   c. ~~For--information--regarding--how~~ How to start the agency internal grievance procedure~~,--you--should--contact--{list name,--title,-or-department-address-and-telephone-number}~~.

   d. ~~Failure--to~~ That the employee must start the internal grievance procedure within ~~ten~~ fifteen working days from ~~{the date of notice of employer action) may result in your~~

losing your or the employee loses the right to appeal to the state personnel board.

e. If you are That if the employee is not satisfied with the result of the internal grievance procedure, you the employee may further formally appeal to the state personnel board. The appeal to the state personnel board must be started no more than ten submitted within fifteen working days from the date you the employee received notice of the result of the internal grievance procedure.

f. For That for information regarding the appeals procedure before the state personnel board, you the employee should contact the Central Personnel Division, Office of Management and Budget, 600 East Boulevard Avenue, Bismarck, North Dakota 58505-0120, telephone (701) 224-3290, TDD (701) 224-4083.

3. g. An That an appeal may not be considered by the board more than one year from the date of the employer action.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC 54-44.3 54-44.3-07(1)
Law Implemented: NDCC 54-44.3 54-44.3-07(3)

59.5-03-03-11. Waiver. An A classified employee who has been dismissed and who has been given notice and the opportunity to respond to the reason for the dismissal may request a waiver from the requirement to complete the internal agency grievance procedure. The employee and appointing authority must both sign a written agreement to waive the internal agency grievance procedure within fifteen working days from the date of the employee was dismissed. An employee who has the written waiver may then employer action. Upon obtaining a written waiver, an employee may appeal directly to the state personnel board. The appeal must be commenced by the employee with a written complaint postmarked or delivered to the central personnel division no later than five fifteen working days from the date of the waiver.

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC 54-44.3 54-44.3-07(1)
Law Implemented: NDCC 54-44.3-12.2 54-44.3-07(3)

59.5-03-03-12. Appeals procedure.

1. Unless the employee and appointing authority have agreed to waive the requirements of the internal agency grievance procedure as provided for in section 59.5-03-03-10 59.5-03-03-11, an employee shall complete the employing agency's internal grievance procedure prior to submitting an appeal to the board for an appeal hearing.

2. An employee shall submit ~~a--written--notification-of-their intent-to-appeal~~ the properly completed prescribed appeal form to the state personnel board in care of the director, central personnel division, within fifteen working days of receipt of the results of the final step of the agency grievance procedure; or within fifteen working days from the date of a waiver. All required information must be entered at the time of filing the appeal form with the central personnel division. The director, central personnel division, serving as secretary to the state personnel board, shall ~~appoint~~ request a hearing officer from the office of administrative hearings who may conduct an evidentiary hearing on behalf of the state personnel board. The director, central personnel division, shall forward a copy of the appeal form to the appointing authority within one working day of receipt.

3. The hearing officer shall initially consider whether the appeal was filed within required time limitations. If the hearing officer believes the time limitations have not been met, the hearing officer shall prepare recommended findings of fact, conclusions of law, and a written proposed order dismissing the appeal and provide them to the parties and to the state personnel board.

4. The hearing officer shall ~~initially-determine~~ consider whether the state personnel board has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed prior to activating the final step in the grievance process. If the hearing officer is unable to establish whether the state personnel board has jurisdiction over the subject matter of the appeal, or whether the appropriate rules were followed, a hearing may be conducted which is limited to ascertaining the facts related to those issues. If ~~it-is-initially--determined~~ the hearing officer believes that the board does not have jurisdiction in the matter of the appeal, ~~within-ten-working-days-from-receipt--of the--appeal,~~ the hearing officer shall prepare recommended findings of fact, conclusions of law, and a written proposed order dismissing the ~~complaint--submitted--to--the--state personnel-board-must-be-provided-to-the-appellant~~ appeal and provide them to the parties and to the state personnel board. The state personnel board shall consider each proposed order of dismissal at ~~its-next~~ a regularly scheduled meeting, hear comments from the hearing officer, the agency, and the appellant, and decide whether to proceed with a hearing or issue an order of dismissal. ~~The-board-shall-provide--a--copy of--its--order--to-all-parties.--If-it-is-initially-determined that-the-board-has-jurisdiction-over-the--appeal--matter,--the hearing-officer-shall-arrange-a-hearing.~~

5. If the hearing officer recommends the appeal be dismissed for lack of jurisdiction, the board, after determining its findings, may order that:

a. The recommendation of the hearing officer be upheld and an order of dismissal be issued; or

b. The recommendation of the hearing officer be rejected in whole or in part and the office of administrative hearings be directed to conduct an evidentiary hearing. In such cases the board shall prepare its own findings of fact, conclusions of law, and order.

The board shall provide a copy of its order to all parties.

4. 6. ~~After the hearing officer has conducted the hearing and investigated and gathered all pertinent facts, the hearing officer shall make and present a summary of the facts and conclusions and a recommendation to the state personnel board for a decision.~~ If it is determined that the board has jurisdiction over the appeal, the hearing officer shall schedule a hearing. The hearing officer shall conduct the hearing and related proceedings, receive evidence related to the issues, and prepare recommended findings of fact, conclusions of law, and a recommended order for the state personnel board for its decision.

5. 7. The central personnel division shall provide to each member of the state personnel board, the appellant, and the agency appointing authority a copy of each document to become a part of the appeal file. Additionally, the members of the state personnel board or any party to the appeal, may review the recordings of the hearing. The appeal file must consist of, but is not limited to, copies of the following:

a. The ~~written complaint commencing the appeal before the~~ appeal form provided to the state personnel board.

b. The grievance form ~~and all~~, any attachments, or waiver.

c. All written correspondence relating to the original grievance including written requests for extension of time ~~frames~~ limitations and notices of extensions granted.

d. The hearing officer's ~~summary of facts~~ recommended findings of fact, conclusions of law, and ~~recommendation~~ order.

e. All exhibits presented at the hearing.

f. Any written briefs or statements by the parties concerned submitted to the hearing officer after the hearing.

6. 8. The appeal file must be disseminated to all participating parties at least ten working days prior to the board ~~hearing~~ meeting date.

~~7.~~ 9. At the scheduled meeting of the board, the board shall consider the appeal based on the content of the appeal file and no other documents or testimony will be taken during the board proceedings. Oral presentations relative to the matter under appeal may be made by the hearing officer, the appellant, and the appointing authority, or their representative. Such presentations must be limited to summarizing their written briefs or testimony and evidence presented at the hearing and may not exceed ten minutes in length. The employee's agency shall reimburse the appealing employee for the required time, travel, meals, and lodging expenses to appear before the board. The reimbursement may not exceed the amounts allowed state employees. Reimbursement may not be made to a dismissed employee unless the employee is reinstated.

10. The board, after determining its findings by a preponderance of the evidence, may order that:

a. The recommendation of the hearing officer be accepted, and the hearing officer's findings of fact, conclusions of law, and order be adopted by the board;

b. The recommendation of the hearing officer be rejected, in whole or in part, and the board must issue in writing its own findings of fact, conclusions of law, and order; or

c. The appeal be remanded back to the hearing officer for the receiving of additional evidence or to otherwise complete the record.

11. Remedy. If the board's decision is in favor of the appellant, the board may grant a remedy in accordance with subsection 3 of North Dakota Century Code section 54-44.3-07.

12. If the state personnel board orders reinstatement of an employee, the agency that is a party to the appeal may petition the board for a stay of reinstatement within fifteen working days from the date of the board's decision. The petition must contain the basis for the agency's request and a date by which the agency expects to comply with the board's order. The board shall meet within fifteen working days from the date the petition was received and consider the request.

~~8.~~ 13. The central personnel division shall notify the employee and the appointing authority in writing of the board's decision within fifteen working days of the ~~board's hearing of~~ date the board enters its written decision regarding the appeal by ~~mailing~~ sending them the findings of fact, conclusions of law, and order of the board. Notification must be delivered in person and an affidavit of service obtained or be sent by certified mail. The ~~appointing authority and the respective~~ agency parties shall implement the board's decision within the

time period specified by the board unless a stay has been ordered.

9. 14. An agency ~~or appellant who is dissatisfied with the decision of the state personnel board~~ or employee who was a party to the appeal and who disagrees with the board's decision may petition the board for a ~~rehearing~~ reconsideration. The petition must be commenced with a written request to the board postmarked no later than fifteen ~~working~~ days from the date the board's decision was mailed. The request must be mailed to the director, central personnel division, and it must specify the reason for the ~~rehearing~~ reconsideration. The state personnel board may grant or deny the request based on the board's determination as to whether the ~~reason specified has significant merit~~ reasons specified do or do not have significant merit. A request that is approved shall cause the director, central personnel division, as secretary to the board, to schedule the appeal for reconsideration before the board. The process will consist of the board's reconsideration of its previous decision. No new information may be presented to or be considered by the board.

History: Effective December 1, 1985; amended effective February 1, 1991; May 1, 1994.
General Authority: NDCC ~~54-44.3,-54-44.3-07~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44.3,-54-44.3-07~~ 54-44.3-07(3), 54-44.3-12

CHAPTER 59.5-03-04

59.5-03-04-01. Scope of chapter. This chapter applies to ~~job applicants for positions~~ nonprobationary employees in the classified service ~~and to classified employees regardless of status~~ who want to appeal discrimination in employment because of sex, race, color, religion, sex, national origin, age, ~~handicapped condition~~ the presence of any mental or physical disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, or ~~religious or~~ political opinions or affiliations. ~~Additionally, this chapter applies to job applicants and classified employees regardless of status in the merit system who want to appeal discrimination on any nonmerit factor.~~

History: Effective December 1, 1985; amended effective May 1, 1994.
General Authority: NDCC ~~54-44-03, 54-44.3~~ 54-44.3-07(1)
Law Implemented: NDCC ~~54-44.3-01, 54-44.3-03, 54-44.3-22~~ 54-44.3-07(3)

59.5-03-04-01.1. Definitions. The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except "working days" means Monday through Friday exclusive of holidays.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-07(1)
Law Implemented: NDCC 54-44.3-07(3)

59.5-03-04-02. Appeals procedure.

~~1. An employee shall complete the employing agency's internal grievance procedure prior to submitting an appeal to the board for an appeal hearing. Job applicants may appeal directly to the board.~~

~~2. An employee shall submit the properly completed prescribed grievance form to the state personnel board in care of the director, central personnel division, within ten working days of receipt of the notice of the final step of the agency grievance procedure. Job applicants shall submit a complaint to the state personnel board in care of the director, central personnel division, within ten working days of their knowledge of the discriminatory action. Job applicants and classified employees may also file a complaint directly with the North Dakota department of labor. The complaint must state the basis upon which the applicant maintains discrimination occurred. The director, central personnel division, serving as secretary to the state personnel board, shall appoint a~~

hearing-officer-who-may--conduct--an--evidentiary--hearing--on behalf-of-the-state-personnel-board.

3.--The--hearing--officer--shall--initially--determine-whether-the state-personnel-board-has-jurisdiction-over-the-subject-matter of--the--appeal,--and--in-the-case-of-an-employee,-whether-all rules-were-followed-prior-to-activating-the-final-step-in--the grievance--process.---If--the--hearing--officer--is--unable-to determine-whether-the-state-personnel-board--has--jurisdiction over--the--subject--matter--of--the--appeal,--a-hearing-may-be conducted-which-is-limited-to-ascertaining-the-facts-needed-to determine--jurisdiction.---If--it-is-determined-that-the-board does-not-have-jurisdiction-in-the--matter--of--the--appeal,--a written--proposed-order-dismissing-the-appeal-must-be-provided to-the-appellant-and-the-state--personnel--board.---The--state personnel---board---shall--consider--each--proposed--order--of dismissal-at-its-next-regularly--scheduled--meeting--and--hear comments-from-the-hearing-officer-and-the-appellant-and-decide whether-to-proceed--with--a--hearing--or--issue--an--order--of dismissal.--The-board-shall-provide-a-copy-of-its-order-to-all parties.--If-it-is-determined-that-the-board-has--jurisdiction over--the--appeal--matter,-the-hearing-officer-shall-arrange-a hearing.

4.--After--the--hearing--officer--has--conducted--the--hearing-and investigated-and-gathered-all--pertinent--facts,--the--hearing officer---shall---make--and--present--the--findings--of--fact, conclusions--of--law,--and--a--recommendation--to--the---state personnel-board-for-a-final-administrative-decision.

5.--The-central-personnel-division-shall-provide-to-each-member-of the-state-personnel--board,--the--appellant,--and--the--agency appointing--authority-a-copy-of-each-document-to-become-a-part of-the-appeal-file.--The-appeal-file-must-consist-of,--but--is not-limited-to,-copies-of-the-following:

a.--The-letter-of-appeal-to-the-state-personnel-board.

b.--The-grievance-appeal-form-and-all-attachments.

c.--All---written--correspondence--relating--to--the--original grievance-including--written--requests--for--extension--of timeframes-and-notices-of-extensions-granted.

d.--The--hearing--officer's--findings--of-fact,-conclusions-of law,-and-recommendation.

e.--All-exhibits-presented-at-the-hearing.

f.--Any--written--briefs--or--statements--submitted--after-the hearing.

~~6.--The--appeal--file--must--be--disseminated-to-all-participating parties-at-least-ten-working-days-prior-to-the--board--hearing date.~~

~~7.--At--the--scheduled--meeting--of--the--board,--the--board-shall consider-the-appeal-based-on-the-content-of--the--appeal--file and--no--other-documents-or-testimony-will-be-taken-during-the board-proceedings.--Oral-presentations-relative-to-the--matter under---appeal--may--be--made--by--the--appellant,--appointing authority,-or-their-representative.--Such--presentations--must be--limited--to--summarizing-their-written-briefs-or-testimony and-evidence-presented-at-the-hearing-and-may-not--exceed--ten minutes--in-length.--The-employee's-agency-shall-reimburse-the appealing-employee-for-the-required-time,-travel,--meals,--and lodging---expenses---to---appear---before---the---board.---The reimbursement--may--not--exceed--the--amounts--allowed---state employees.---Reimbursements--may--not--be--made-to-a-dismissed employee-unless-the-employee-is-reinstated.~~

~~8.--The--central--personnel-division-shall-notify-the-employee-and the-appointing-authority-in-writing-of--the--board's--decision within--fifteen--working--days--of--the-board's-hearing-of-the appeal-by-sending-them-the-findings-of--fact,--conclusions--of law,--and--order-of-the-board.--Notification-must-be-delivered in-person-or-sent-by-certified-mail.--The-appointing-authority and-the-respective-agency-shall-implement-the-board's-decision within-the-time-period-specified-by-the-board.~~

~~9.--An--agency--or-appellant-who-is-dissatisfied-with-the-decision of-the-state-personnel-board-may--petition--the--board--for--a rehearing.---The--petition--must--be--commenced-with-a-written request-to-the-board-postmarked-no-later-than-fifteen--working days--from--the--date--the--board's--decision-was-mailed.--The request-must-specify-the-reason-for-the-rehearing.--The--state personnel--board--may--grant--or-deny-the-request-based-on-the board's--determination--whether--the--reason---specified---has significant-merit.~~ Repealed effective May 1, 1994.

~~**History:** Effective--December-1,--1985;--amended--effective--February-1, 1991.~~
General Authority: ~~NDCC-54-44.3,-54-44.3-07~~
Law Implemented: ~~NDCC-54-44.3,-54-44.3-07,-54-44.3-12~~

59.5-03-04-03. Statutory definitions. Unless otherwise defined, or made inappropriate by context, all words used in this chapter have meanings given to them under North Dakota Century Code chapter 14-02.4.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-07(1)
Law Implemented: NDCC 54-44.3-07(3)

59.5-03-04-04. Waiver. A classified employee who has completed the probationary period and who has been discriminated against due to reasons included within the scope of this chapter may request a waiver from the requirement to complete the internal agency grievance procedure. The employee and the appointing authority must both sign a written agreement to waive the internal agency grievance procedure within fifteen working days from the date of the discriminatory action. Upon obtaining a written waiver, an employee may appeal directly to the state personnel board. The appeal must be postmarked or delivered to the central personnel division no later than fifteen working days from the date of the waiver.

History: Effective May 1, 1994.
General Authority: NDCC 54 44.3 07(1)
Law Implemented: NDCC 54 44.3 07(3)

59.5-03-04-05. Appeals procedure.

1. Unless the employee and appointing authority have agreed to waive the requirements of the internal agency grievance procedure as provided for in section 59.5-03-04-04, an employee shall complete the employing agency's internal grievance procedure prior to submitting an appeal to the board for an appeal hearing.

2. An employee shall submit the properly completed prescribed appeal form to the state personnel board in care of the director, central personnel division, within fifteen working days of receipt of the notice of the final step of the agency grievance procedure, or within fifteen working days from the date of a waiver. All required information must be entered at the time of filing the appeal form with the central personnel division. The director, central personnel division, serving as secretary to the state personnel board, shall request a hearing officer from the office of administrative hearings who may conduct an evidentiary hearing on behalf of the state personnel board. The director, central personnel division, shall forward a copy of the appeal form to the appointing authority within one working day of receipt.

3. The hearing officer shall initially consider whether the appeal was filed within required time limitations. If the hearing officer believes the time limitations have not been met, the hearing officer shall prepare recommended findings of fact, conclusions of law, and a written proposed order dismissing the appeal and provide them to the parties and to the state personnel board.

4. The hearing officer shall consider whether the state personnel board has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed prior to activating the final step in the grievance process. If the

hearing officer is unable to establish whether the state personnel board has jurisdiction over the subject matter of the appeal, a hearing may be conducted which is limited to ascertaining the facts related to that issue. If the hearing officer believes that the board does not have jurisdiction in the matter of the appeal, the hearing officer shall prepare recommended findings of fact, conclusions of law, and a written proposed order dismissing the appeal and provide them to the parties and to the state personnel board. The state personnel board shall consider each proposed order of dismissal at a regularly scheduled meeting and hear comments from the hearing officer, the agency, and the appellant and decide whether to proceed with a hearing or issue an order of dismissal.

5. If the hearing officer recommends the appeal be dismissed for lack of jurisdiction, the board, after determining its findings, may order that:

   a. The recommendation of the hearing officer be upheld and an order of dismissal be issued; or

   b. The recommendation of the hearing officer be rejected in whole or in part and the office of administrative hearings be directed to conduct an evidentiary hearing. In such cases the board shall prepare its own findings of fact, conclusions of law, and order.

   The board shall provide a copy of its order to all parties.

6. If it is determined that the board has jurisdiction over the appeal, the hearing officer shall schedule a hearing. The hearing officer shall conduct the hearing and related proceedings, receive evidence related to the issues, and prepare recommended findings of fact, conclusions of law, and a recommended order for the state personnel board for its decision.

7. The central personnel division shall provide to each member of the state personnel board, the appellant, and the agency appointing authority a copy of each document to become a part of the appeal file. Additionally, the members of the state personnel board or any party to the appeal, may review the recordings of the hearing. The appeal file must consist of, but is not limited to, copies of the following:

   a. The appeal form provided to the state personnel board.

   b. The grievance form, any attachments, or waiver.

   c. All written correspondence relating to the original grievance including written requests for extension of time limitations and notices of extensions granted.

d. The hearing officer's recommended findings of fact, conclusions of law, and order.

e. All exhibits presented at the hearing.

f. Any written briefs or statements submitted to the hearing officer after the hearing.

8. The appeal file must be disseminated to all participating parties at least ten working days prior to the board meeting date.

9. At the scheduled meeting of the board, the board shall consider the appeal based on the content of the appeal file and no other documents or testimony will be taken during the board proceedings. Oral presentations relative to the matter under appeal may be made by the hearing officer, the appellant, and the appointing authority, or their representative. Such presentations must be limited to summarizing their written briefs or testimony and evidence presented at the hearing and may not exceed ten minutes in length. The employee's agency shall reimburse the appealing employee for the required time, travel, meals, and lodging expenses to appear before the board. The reimbursement may not exceed the amounts allowed state employees. Reimbursements may not be made to a dismissed employee unless the employee is reinstated.

10. The board, after determining its findings by a preponderance of the evidence, may order that:

a. The recommendation of the hearing officer be accepted, and the hearing officer's findings of fact, conclusions of law, and order be adopted by the board;

b. The recommendation of the hearing officer be rejected, in whole or in part, and the board must issue in writing its own findings of fact, conclusions of law, and order; or

c. The appeal be remanded back to the hearing officer for the receiving of additional evidence or to otherwise complete the record.

11. Remedy. If the board's decision is in favor of the appellant, the board may grant a remedy in accordance with subsection 3 of North Dakota Century Code section 54-44.3-07.

12. If the state personnel board orders reinstatement of an employee, the agency who is a party to the appeal may petition the board for a stay of reinstatement within fifteen working days from the date of the board's decision. The petition must contain the basis for the agency's request and a date by which the agency expects to comply with the board's order. The

board must meet within fifteen working days from the date the petition was received and consider the request.

13. The central personnel division shall notify the employee and the appointing authority in writing of the board's decision within fifteen working days of the date the board enters its written decision regarding the appeal by sending them the findings of fact, conclusions of law, and order of the board. Notification must be delivered in person and an affidavit of service obtained or be sent by certified mail. The parties shall implement the board's decision within the time period specified by the board unless a stay has been ordered.

14. An agency or employee who was a party to the appeal and who disagrees with the board's decision may petition the board for reconsideration. The petition must be commenced with a written request to the board postmarked no later than fifteen days from the date the board's decision was mailed. The request must be mailed to the director, central personnel division, and it must specify the reason for the reconsideration. The state personnel board may grant or deny the request based on the board's determination as to whether the reasons specified do or do not have significant merit. A request that is approved to grant a rehearing shall cause the director, central personnel division, as secretary to the board, to schedule the appeal for reconsideration before the board. The process will consist of the board's reconsideration of its previous decision. No new information may be presented to or be considered by the board.

History: Effective May 1, 1994.
General Authority: NDCC 54-44.3-07(1)
Law Implemented: NDCC 54-44.3-07(3), 54-44.3-12

TITLE 60

Pesticide Control Board

CHAPTER 60-03-01

60-03-01-06. Application, storage, transportation, and disposal of pesticides.

1. **Application.**

   a. All pesticides shall be used in accordance with the label.

   b. Pesticide applicators and persons assisting with an application shall follow all safety precautions as specified on the container label.

   c. All equipment used in pesticide application must be operationally sound and properly calibrated to prevent unreasonable adverse effects on the environment.

   d. All pesticides that require posting on the label ~~or with a forty-eight-hour reentry period or greater must be posted by the applicator or the applicator's designate under contract~~ and pesticides from the following list must be posted by the farm operator or the farm operator's cooperating designee, which may include commercial applicators.

      (1) Methyl parathion.

      (2) Ethyl parathion.

      (3) Dyfonate post emergence foliar applications.

(4) Furadan post emergence foliar applications to corn and sorghum.

(5) Di-syston post emergence foliar application to corn and sorghum.

Any pesticide applicator applying posting-required pesticides for a farm operator is required to inform the farm operator within twenty-four hours in advance of the pesticide application, allowing the farm operator time to post the field before the application occurs. The farm operator is primarily responsible for posting the field. However, if the applicator does not contact the farm operator before the application, the applicator is responsible for posting the field. Pesticide applicators are responsible to inform farm operators if applications do not occur as scheduled.

There are two options for properly posting fields.

Option 1: The signs must be a minimum of eight inches by eleven inches [20.32 centimeters by 27.94 centimeters] with one-half-inch [1.270-centimeter] lettering and be easily readable. The signs must be posted at all normal entrances to the field and on all corners which are along normally traveled roads. These signs can be a maximum of one-half mile [.80 kilometer] apart. The signs must contain the following information: Danger - field sprayed with (pesticide name). The field is safe for reentry on (date).

Option 2: Flags used by aerial applicators when marking field areas that have been sprayed can be used for posting. Such flags must be at least four inches by eight feet [10.16 centimeters by 2.438 meters]. The lettering on the flags must be fluorescent with a white background and must be easily readable. The signs must be dropped outside the field boundaries within fifty feet [15.24 meters] of all normal entrances to the field and all corners along normally traveled roads. These signs can be a maximum of one-fourth mile [.402 kilometer] apart along normally traveled roads. The signs must contain the following language: DANGER - KEEP OUT - THIS FIELD SPRAYED WITH A PESTICIDE. BEFORE ENTRY, CONTACT (business name and phone number).

The business name and phone number can be printed on the flag or, if the flag gives directions to refer to the attached cardboard, the business name and phone number can be printed on the cardboard.

Along with the lettering a skull and crossbones must be printed on the flag in a larger size than the largest

lettering. The lettering for "Danger - Keep Out" must be at least three-fourths of an inch [1.905 centimeters]. The lettering for the remaining wording must be at least three-eighths of an inch [.953 centimeter].

2. **Storage.**

   a. All pesticides, except bulk pesticides, shall be stored in their original container and in accordance with label recommendations. All labels of stored pesticides shall be plainly visible. All pesticide containers must have a proper label affixed to them.

   b. All pesticides shall be stored in dry, well-ventilated spaces, and in a manner which will not endanger humans, animals, or the environment, nor contaminate food or feed.

   c. If a storage area contains a floor drain, it must be sealed or self-contained.

3. **Transportation.**

   a. All pesticides, except bulk pesticides, shall be transported in their original containers. All pesticides must be transported in a secure manner to avoid breakage of containers, spills, or any other manner of contamination.

   b. Pesticides shall not be transported with foodstuffs, feed, or any other product or material so as to pose a hazard to humans, animals, or the environment.

   c. Equipment contaminated in the transportation of pesticides shall be cleaned and decontaminated prior to any other use.

4. **Disposal.**

   a. Empty pesticide containers shall be stored in accordance with label recommendations and in a manner which will not endanger humans, animals, or the environment.

   b. Empty nonreturnable pesticide containers shall be triple-rinsed or equivalent. Secondary use of such containers which would endanger humans, animals, or the environment is prohibited.

c. Pesticide containers shall be disposed of in accordance with label directions and in a manner which will not endanger humans, animals, or the environment.

History: Amended effective April 15, 1985; October 1, 1990; July 1, 1992; May 1, 1994.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06, 4-35-20

60-03-01-07. Recordkeeping - Dealers and commercial and custom applicators and private applicators.

1. **Dealers.** Every pesticide dealer shall keep separate, accurate, and complete record of all purchases and sales of section 18 pesticides and restricted use pesticides. The record shall include the following for each pesticide purchased or sold:

   a. Purchases.

      (1) Dealer's name and address.

      (2) Pesticide name.

      (3) Volume of pesticide.

      (4) Date pesticide was shipped or received.

      (5) Distributor's name (person from whom the pesticide was received).

   b. Sales.

      (1) Dealer's name and address and identification of person making the sale.

      (2) Name, address, ~~license~~ certification number, and signature of private or commercial applicator.

      (3) Date of sale.

      (4) Trade name or common name and quantity of pesticide sold.

      (5) Running inventory by product.

      (6) Intended application site of purchaser for all section 18 pesticides.

2. **Commercial and custom applicators.** Commercial and custom applicators shall keep a record of all pesticide applications. A copy of the records must be provided to the client or the

applicator must have on file a signed letter giving the applicator permission to keep the records for the client. The record shall 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. Time the pesticide was applied (month, day, year, hour of the day).

e. Person who supplied the pesticide which was applied.

f. ~~Trade~~ Specific trade name ~~or common name~~ of the pesticide applied and environmental protection agency registration number of the restricted used 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 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].

(2) Percentage or pounds [kilograms] of active ingredient.

(3) Pounds [kilograms] or gallons [liters] of tank mix applied per acre [.40 hectare].

i. Specific crops, commodities, and total acreage [hectarage] to which the pesticide was applied.

j. Description of equipment used in application.

k. Certification number of applicator, if any, and signature.

3. Private applicators. Private applicators shall keep a record of all restricted use pesticide applications. The records 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 the pesticide was applied (month, day, year, hours 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].

(2) Total amount applied.

e. Specific crops, commodities, and total acreage [hectarage] or other common identifying unit of measure, to which the pesticide was applied.

f. Certification number of applicator, if any, and 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.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06, 4-35-16

60-03-01-08. Unlawful acts. The commissioner may, after opportunity for a hearing, take any appropriate administrative or judicial enforcement action against any person if the commissioner finds that such person has committed any of the following acts, each of which is declared to be a violation of this chapter:

1. Made false or fraudulent claims through any media, misrepresenting the effect of materials or methods to be utilized, or advertised a pesticide without reference to its classification.

2. Made a pesticide recommendation, application, or use inconsistent with the labeling or other restrictions prescribed by the board.

3. Applied materials known by the person to be ineffective or improper.

4. Operated faulty or unsafe equipment.

5. Operated in a faulty, careless, or negligent manner.

6. Neglected or, after notice, refused to comply with the provisions of North Dakota Century Code chapter 4-35 and this chapter, or of any lawful order of the commissioner.

7. Refused or neglected to keep and maintain the records required by this chapter, or to make reports when and as required.

8. Made false or fraudulent records, invoices, or reports.

9. Aided or abetted a certified or an uncertified person to evade the provisions of North Dakota Century Code chapter 4-35 or this chapter, or conspired with such a certified or uncertified person to evade the provisions of North Dakota Century Code chapter 4-35 or this chapter.

10. Knowingly made false statements during or after an inspection.

11. Impersonated any federal, state, county, or city inspector or official.

12. Distributed any restricted use pesticide to any person who is required by law or regulations promulgated under such law to be certified to use or purchase such restricted use pesticides unless such person or such person's agent to whom distribution is made is certified to use or purchase that kind of restricted use pesticide.

13. Bought, used, or supervised the use of any restricted use pesticide without first complying with the certification requirements of North Dakota Century Code chapter 4-35, unless otherwise exempted therefrom.

14. Refused or neglected to post fields as required by the label or as required by this chapter.

15. Refused or neglected to inform farm operators of the posting requirement as required by this chapter.

History: Amended effective October 1, 1990; May 1, 1994.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-15, 4-35-24

60-03-01-10. Registration, packaging, repackaging, storage, and transportation of bulk pesticides for each business location.

1. **Registration - Establishment number requirements.**

   a. Any person that repackages bulk pesticides must have an environmental protection agency establishment number.

   b. Any person that makes a mix of any quantity of pesticide, to be applied by another person, and holds the mix in inventory, must have an environmental protection agency establishment number.

The person making the mix must supply the person applying the mix with end-use labeling for each pesticide in the mix. The end-use labeling must have the facilities establishment number printed on it.

c. The environmental protection agency establishment number and end-use labeling must be attached to bulk pesticide storage tanks.

d. The environmental protection agency establishment number and end-use labeling must accompany or be attached to the mobile bulk pesticide container.

e. Any person that custom blends any quantity of pesticide to be applied by another person must ensure that end-use labeling for all pesticides in the blend accompanies the blend to the point of end use. No establishment number is required for the blending facilities.

2. **Storage and transportation.**

a. The transportation and storage of all bulk pesticides must be in compliance with the manufacturer's label requirements.

b. The transportation of bulk pesticides must meet all applicable standards of state and United States department of transportation rules and regulations.

c. Bulk pesticide storage containers must be made of materials and so constructed to be compatible with the pesticide stored and the conditions of storage, including any specifications that may appear on the pesticide labels and labeling.

d. Bulk storage containers and loading areas must be constructed and located on a site in a manner so that pesticides will not contaminate streams and water supplies.

e. All permanent bulk storage containers must be equipped with a locking withdrawal valve or must be stored in a secure locked area. The valves or storage area must be locked during nonbusiness hours.

f. Bulk pesticide storage containers that are going to be refilled with a different pesticide must be cleaned and rinsed according to both the repackager's and manufacturer's agreed upon written instructions and all former labeling must be removed.

3. **Liquid bulk pesticides.**

a. Outdoor storage:

(1) Liquid bulk pesticide storage containers must be on a site which has an additional containment structure. The structure must be constructed of sufficient size and material, approved by the pesticide registrant, so as to contain any spilled or discharged materials. Any outdoor liquid bulk pesticide storage facility constructed after June 5, 1992, must have a containment capacity of a minimum of one hundred twenty-five percent of the single largest bulk pesticide storage container.

(2) Contaminated rainwater must be collected within this structure. Rainwater and contaminated rainwater cannot accumulate beyond twenty-five percent of the secondary containment's capacity or seven days, whichever comes first.

b. Indoor storage. Liquid bulk pesticide storage facilities located within an enclosed structure must be on a site which has an additional containment structure. The structure must be constructed of sufficient size and material, approved by the pesticide registrant, so as to contain any spilled or discharged materials. Any indoor liquid bulk pesticide storage facility must have a capacity of a minimum of one hundred ten percent of the single largest bulk pesticide storage container.

4. **Dry bulk pesticides.**

a. Outdoor storage facilities:

(1) Bulk dry pesticide storage facilities must have a six-inch [15.24-centimeter] high curb as an additional containment structure. No storage container may be placed closer than three feet [91.44 centimeters] from the curb. Except during loading, stored dry bulk pesticide must be covered by a roof or tarpaulin that will exclude precipitation from the pesticide. Storage containers must be placed on a concrete or other impervious surfaced floor, on pallets or on a raised platform to prevent water from contacting the pesticide.

(2) Contaminated rainwater must be collected within this structure. Rainwater and contaminated rainwater cannot accumulate beyond twenty-five percent of the secondary containment's capacity or seven days, whichever comes first.

b. Indoor storage facilities. Storage facilities located in an enclosed structure must have a minimum of a six-inch

[15.24-centimeter] curb as an additional containment structure. No storage container may be placed closer than three feet [91.44 centimeters] from the curb, except where the curb is adjacent to a facility wall.

5. **Prohibitions.**

   a. The transfer of bulk pesticides must be under the control of the repackager. Filling or refilling of containers is prohibited unless they are capable of holding, in undivided quantities, ~~fifty-five--United--States--gallons [208.2--liters]--or--greater,-or-two-hundred-pounds-[90.72 kilograms]--net-dry-weight~~ the capacity as specified by the environmental protection agency.

   b. Bulk pesticide storage tanks may not be placed underground.

   c. Repackaging at any location that does not have an environmental protection agency producer establishment number is prohibited.

   d. Repackaging of pesticides without the written agreement of the manufacturing company is prohibited.

   e. Repackaging at any location other than at a loading site is prohibited.

   f. Repackaging into improperly labeled containers is prohibited.

   g. Repackaging into containers not designated as reusable by the chemical and container manufacturer is prohibited.

   h. ~~Repackaging--into--containers--with~~ Containers used for repackaging must have a capacity ~~less--than--fifty-five gallons--[208.2--liters]~~ as specified by the environmental protection agency or repackaging is prohibited.

   i. Repackaging for resale from a nonpermanent bulk storage tank is prohibited.

History: Effective April 15, 1985; amended effective October 1, 1990; July 1, 1992; May 1, 1994.
General Authority: NDCC 4-35-06
Law Implemented: NDCC 4-35-06, 4-35-15, 4-35-20

TITLE 70

Real Estate Commission

SEPTEMBER 1994

CHAPTER 70-02-03

70-02-03-04. Listings. ~~All~~ In instances where residential real property consists of separate dwelling units for one through four families, the licensee shall obtain a signed listing ~~agreements shall be~~ agreement in writing from the seller, properly identifying the listed property and containing all of the terms and conditions under which the property is to be sold; including the price, the commission to be paid, the signatures of all parties concerned, and definite expiration date prior to the time that the property is advertised or offered for sale. It shall contain no provision requiring a party signing the listing to notify the broker of the party's intention to cancel the listing after such definite expiration date. An "exclusive agency" listing or "exclusive right to sell" listing shall clearly indicate in the listing agreement that it is such an agreement and a copy shall be given to the owner at the time of signing. If the licensee chooses to represent both buyers and sellers in the same transaction, a separate dual agency disclosure statement must be provided in accordance with the provisions of section 70-02-03-15.1.

History: Amended effective September 1, 1994.
General Authority: NDCC ~~43-23-11.1(1)~~ 28-32-02.2
Law Implemented: NDCC ~~43-23-11.1(1)~~ 43-23-05

70-02-03-05.1. Buyer's broker agreements. In instances where residential real property consists of separate dwelling units for one through four families, a licensee must obtain a signed buyer's broker agreement from a buyer before performing any act as a buyer's representative. All buyer's broker agreements must be in writing and must include:

1. A definite expiration date.

2. The amount of commission or other compensation.

3. A clear statement explaining the services to be provided to the buyer, and the events or condition that will entitle the licensee to a commission or other compensation.

4. If the licensee chooses to represent both buyers and sellers in the same transaction, a separate dual agency disclosure statement in accordance with the provisions of section 70-02-03-15.1.

History: Effective September 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-23-05

70-02-03-15. Agency disclosure required. In all real estate transactions the licensee is the agent of the seller unless all parties otherwise agree in writing. The agency relationship must be disclosed in writing to the parties before the signing of a written contractual agreement. The disclosure language must state at least the following information in substantially this form:

"I _____, a real estate licensee, stipulate that I am representing the _____ (Buyer/Seller) in this transaction.

_____
Licensee"

Each licensee in the transaction shall make such a disclosure.

This section applies only to transactions involving agricultural and commercial property, residential property that provides separate dwelling units for five or more families, and commercial leaseholds. Residential property that provides separate dwelling units for one through four families is subject to the agency disclosure requirement of section 70-02-03-15.1.

History: Effective January 1, 1988; amended effective September 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC ~~43-23-11.1(1)(d)~~ 43-23-05

70-02-03-15.1. Licensee to disclose agency relationships - Duty of confidentiality.

1. As used in this section, unless the context or subject matter otherwise requires:

a. "Dual agency" means a situation in which a licensee owes a duty to more than one party to the real estate transaction. Dual agency is established as follows:

(1) When one licensee represents both the buyer and the seller in a real estate transaction; or

(2) When two or more licensees, licensed to the same broker, each represent a party to the real estate transaction.

b. "Party to the real estate transaction" includes any individual or individuals who are a seller or buyer, or potential seller or buyer.

c. "Real estate transaction" means any transaction involving residential real property that consists of separate dwelling units for one through four families. "Real estate transaction" does not include transactions involving agricultural or commercial property, residential property that provides separate dwelling units for five or more families, or commercial leaseholds.

2. In all real estate transactions in which the licensee represents any party to a real estate transaction, the licensee must make an affirmative written disclosure identifying which party that person represents in the transaction. The disclosure must be made at the time of the first substantive contact between the licensee and any party to the real estate transaction. The disclosure must be represented by a separate written document, and offered to the party to the real estate transaction for signature. True copies of the disclosure form must be retained in the broker's file. As used in this subsection, the term "substantive contact" means:

a. When representing the seller, prior to the signing of a listing agreement.

b. When representing a buyer, prior to the signing of a buyer's broker agreement.

c. As to all other parties, such as potential buyers or sellers, who are not represented by the licensee, prior to the discussion of personal financial information or the commencement of negotiations, which could affect that party's bargaining position in the transaction. However, a licensee shall have complied with the provisions of this subsection if, in those circumstances where it is impossible as a practical matter to obtain a signed written disclosure statement from a party at the time of the first substantive contact, such as telephone contact with an absent party, the licensee orally discloses the

status of the licensee's representation and, as soon as practicable thereafter, makes the written disclosure required by this subsection.

d. As to any change in the licensee's representation, including dual agency, that makes the initial disclosure of representation incomplete, misleading, or inaccurate, a new disclosure must be made at once to any party to the transaction.

e. Nothing in this section requires written notice to each prospective buyer who comes to an open house display of real property; provided, however, the licensee, by sign, poster, distributed listing literature, or property description form, conspicuously discloses the licensee's agency relationship.

3. Each licensee owes a duty of confidentiality to a party being represented in a real estate transaction. The following information may not be disclosed without the informed, written consent of the party being represented:

a. That the party being represented is willing to pay more than the purchase price or lease price offered for the property.

b. That the party being represented is willing to accept less than the purchase price or lease price being asked for the property.

c. What the motivating factors are for the buying, selling, or leasing of the property by the party being represented.

d. That the party being represented will agree to terms for financing of the property other than those which are offered.

4. A licensee shall also keep confidential all information received from a party being represented, which has been made confidential by request or instruction of that party.

5. The obligation of confidentiality set forth in subsections 3 and 4 continues in effect during the time a party is being actively represented, and continues on after the termination, expiration, or completion of the representation until one of the following occurs:

a. The party being represented permits the disclosure by subsequent word or conduct.

b. Disclosure is required by law, by court order, or order of the commission.

c. The information is made public through disclosure from a source other than the licensee.

6. The provisions of subsections 3 and 4 do not serve to permit or require a licensee to keep confidential any material defects in the property of which the licensee is aware or which would constitute fraudulent misrepresentation unless disclosed.

7. The written disclosure required by this section must advise a party to the real estate transaction of the different types of representation that are available. The explanation must include information pertaining to how that party's interest shall be represented if the party chooses the licensee to act as the owner's agent, the buyer's agent, or as a dual agent. The written disclosure forms, in clearly understood terms, must inform the party to the transaction as follows:

a. If the party chooses seller representation, it must be explained that this relationship typically arises from entering into a listing agreement, or by agreeing to act as a subagent through the listing agency. A subagent may work in a different real estate office. A listing agent or subagent can assist the buyer but does not represent that party. A listing agent or subagent is required to place the interest of the owner first, and a buyer should not tell a listing agent or subagent anything that the buyer would not want the owner to know, because the listing agent or subagent must disclose any material information to the owner.

b. If the party chooses buyer representation, it must be explained that the licensee typically becomes the buyer's agent by entering into an agreement for such representation. A buyer's agent may assist the owner but does not represent the owner. A buyer's agent must place the interest of the buyer first, and the owner should not tell a buyer's agent anything the owner would not want the buyer to know because the buyer's agent must disclose any material information to the buyer.

c. If the party selects dual agency, it must be explained that the licensee must enter into a written agreement obtaining the consent of both parties before such representation is authorized. This agreement must set forth who will be responsible for paying the licensee's fee. Under this arrangement, the licensee is required to treat both parties honestly and impartially so as not to favor one over the other. Unless written permission from the appropriate party is obtained, the licensee is prohibited from disclosing that the owner will accept less than the asking price, that the buyer will pay a price greater than that submitted in the written offer, or any

other information of a confidential nature or which the party has instructed the licensee not to disclose. Potential conflicts exist when the licensee represents more than one party, and the licensee's activities may be more limited. The licensee is required to inform each party of any facts that would affect a party's decision to permit representation of both the owner and buyer. This includes any arrangement by which the licensee will or expects to represent a party in a future transaction.

d. That a duty of loyalty and faithfulness are owed to the party or parties to the transaction with whom the licensee has an agency relationship, and the licensee must inform that party of all important information which might affect a decision concerning the real estate transaction. This includes disclosure of any material facts to the buyer that may adversely and significantly affect that person's use or enjoyment of the property. It also includes disclosure of any information to either party which may indicate that one of the parties may not perform in accordance with the terms of the purchase agreement or any other written agreement or obligation.

e. No licensee may deal unfairly with any party to a real estate transaction, regardless of whether the party is represented by that licensee.

8. No person required to be licensed by North Dakota Century Code chapter 43-23 may maintain any action to recover any commission, fee, or other compensation with respect to the purchase, sale, lease, or other disposition or conveyance of real property, or with respect to the offer, negotiation, or attempt to negotiate any sale, lease, purchase, or other disposition, unless that person's agency relationship has been disclosed to the party or parties to the transaction in accordance with the requirements of this section.

9. The commission may approve a specific form or forms to implement the provisions of this section.

History: Effective September 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-23-05

TITLE 71

Retirement Board

JULY 1994

CHAPTER 71-01-02

71-01-02-02. Eligible voters.

1. All active employees of the state of North Dakota and political subdivisions which participate in the North Dakota public employees retirement system are eligible to cast one vote for each active member vacancy on the retirement board.

2. All persons receiving retirement benefits or who are eligible to receive deferred vested retirement benefits are eligible to cast one vote for a retiree member vacancy on the retirement board.

3. Persons participating in the health insurance program but not in the retirement system are ineligible to cast votes in retirement board elections.

History: Effective April 1, 1992; amended effective July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-17(5)
Law Implemented: NDCC 54-52-03

71-01-02-03. Candidate eligibility.

1. Any active employee of a department of the state of North Dakota, or a political subdivision, who participates in the North Dakota public employees retirement system may become a candidate for election to the board if that department or political subdivision is not currently represented on the retirement board by a board member not up for election.

2. Any person, as of the first day of July of ~~that~~ the election year, who ~~will receive~~ is receiving a retirement ~~benefits~~ benefit or who is eligible to receive deferred vested retirement benefits, may become a candidate for the retiree member to the board.

History: Effective April 1, 1992; amended effective July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-17(5)
Law Implemented: NDCC 54-52-03

CHAPTER 71-02-01

71-02-01-01. Definitions. As used in North Dakota Century Code chapter 54-52 and this article:

1. "Accumulated contributions" means the total of all of the following:

   a. The employee account fund balance accumulated under the prior plan as of June 30, 1977.

   b. The vested portion of the employee's "vesting fund" accumulated under the prior plan as of June 30, 1977.

   c. The member's mandatory contributions made after July 1, 1977.

   d. The interest on the sums determined under subdivisions a, b, and c, compounded annually at the rate of five percent from July 1, 1977, to June 30, 1981, six percent from July 1, 1981, through June 30, 1986, and one-half of one percent less than the actuarial interest assumption from July 1, 1986, to the member's termination of employment or retirement.

   e. The sum of any employee purchase or repurchase payments.

2. "Actuarial equivalent" means a benefit calculated to be of equal value to the benefit otherwise payable when computed on the basis of assumptions and methods adopted for this purpose by the board.

3. "Alternative retirement system" means the teachers' fund for retirement, the highway patrolmen's retirement system, and the teachers' insurance and annuity association of America.

4. "Beneficiary" means any person in receipt of a benefit provided by this plan or any person designated by a participating member to receive benefits.

5. "Bonus" means cash compensation for services performed in addition to base salary excluding commission and shift differentials. Bonus does not include lump sum payments of sick leave provided under North Dakota Century Code section 54-06-14 or lump sum payments of annual leave or vacation pay.

6. "Claim" means the right to receive a monthly retirement allowance, the receiving of a retirement allowance, or the receiving of a disability benefit.

7. "Continuously employed" means any period of employment uninterrupted by voluntary or involuntary termination or discharge. A member who has taken a leave of absence approved by the member's employer, not to exceed a year unless approved by the executive director, and returns to employment shall be regarded as continuously employed for the period.

8. "Contribution" means the payment into the fund of nine and twelve-hundredths percent of the salary of a member.

9. "County judge" means a judge who was elected pursuant to North Dakota Century Code section 27-07.1-01 or an individual holding the position of county judge, county justice, or judge of county court prior to the general election in 1982, who meet all the eligibility requirements established under chapter 54-52.

10. "Interruption of employment" is when an individual is inducted (enlists or is ordered or called to active duty into the armed forces of the United States) and leaves an employment position with a state agency or political subdivision, other than a temporary position. The individual must have left employment to enter active duty and must make application for reemployment within ninety days of discharge under honorable conditions.

~~10.~~ 11. "Leave of absence" means the period of time up to one year for which an individual may be absent from covered employment without being terminated. At the executive director's discretion, the leave of absence may be extended not to exceed two years.

12. "Medical consultant" means a person or committee appointed by the board of the North Dakota public employees retirement system to evaluate medical information submitted in relation to disability applications, recertifications, and rehabilitation programs or other such duties as assigned by the board.

~~11.~~ 13. "Office" means the administrative office of the public employees retirement system.

~~12.~~ 14. "Participating employer" means an employer who contributes to the North Dakota public employees retirement system.

~~13.~~ 15. "Pay status" means a member is receiving a retirement allowance from the fund.

~~14.~~ 16. "Permanent and total disability" means the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected

to last for a continuous period of not less than twelve months.

~~15.~~ 17. "Plan administrator" means the executive director of the North Dakota public employees retirement system or such other person or committee as may be appointed by the board of the North Dakota public employees retirement system from time to time.

~~16.~~ 18. "Plan year" means the twelve consecutive months commencing July first of the calendar year and ending June thirtieth of the subsequent calendar year.

~~17.~~ 19. "Prior plan" means the state employees' retirement system which existed from July 1, 1966, to June 30, 1977.

~~18.~~ 20. "Retiree" means an individual receiving a monthly allowance pursuant to chapter 54-52.

~~19.~~ 21. "Service credit" means increments of time to be used in the calculation of retirement benefits. Service credit may be earned as stated in section 71-02-03-01 or may be purchased or repurchased according to section 71-02-03-02.1.

~~20.~~ 22. "Substantial gainful activity" is to be based upon the totality of the circumstances including: consideration of an individual's training, education, experience, their potential for earning at least seventy percent of their predisability earnings; and other items deemed significant on a case-by-case basis. Eligibility is based on an individual's employability and not actual employment status.

~~21.~~ 23. "Termination of employment" means a severance of employment by not being on the payroll of a covered employer for a minimum of one month. Approved leave of absence does not constitute termination of employment.

History: Amended effective September 1, 1982; November 1, 1990; September 1, 1991; January 1, 1992; September 1, 1992; June 1, 1993; July 1, 1994.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52

71-02-03-02.1. Purchase of additional service **credit and repurchase of** past **service** ~~benefit~~. In order to purchase additional credit or repurchase past service, a participating member, or participating member of an alternative retirement system, must ~~complete and submit a purchase or repurchase application to the executive director~~ notify the office, in writing, of the service for which they wish to receive credit. In addition to ~~an application for purchase of additional credit~~ the written request, the following information must be submitted if applicable:

1. Verification by the former employer of previous North Dakota or out-of-state public service.

2. Documentation of military service by submitting a DD214 or NGB22 ~~or other appropriate verification~~.

3. Certification of approval by the member's employer of any leave of absence and length of that leave.

4. Verification of current ~~annual~~ average monthly salary and current service credit by the employer of members participating in an alternative retirement system.

5. Statement from employee or former employer that service credit being applied for does not qualify for retirement benefits under another retirement system.

History: Effective November 1, 1990; amended effective July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-02.6, 54-52-17.4
Law Implemented: NDCC 54-52-02.6, 54-52-17.2, 54-52-17.4

71-02-03-02.2. Payment. ~~The participating member or member of an alternative retirement system must pay nine and twelve hundredths percent of their present monthly salary times the number of months to be purchased or repurchased.~~ The total dollar amount for the purchase or repurchase may be paid in a lump sum or on a monthly, quarterly, semiannual, or annual basis. Payments must begin within ninety days of the date the written cost confirmation is prepared for the participating member or participating member of an alternative retirement system. If the installment method is used, the following conditions apply:

1. Simple interest at the actuarial rate of return will accrue monthly on the unpaid balance.

2. A minimum payment of fifty dollars per month is required.

3. The installment schedule ~~can be~~ may not exceed a maximum term of ~~five~~ ten years.

4. There is no penalty for early payoff.

5. Installment payments can be made by a payroll deduction where available. However, it is the responsibility of the member to initiate and terminate the payroll ~~reduction~~ deduction. ~~The first payment is due within ninety days of notice by the public employees retirement system of the total amount due or the amount due pursuant to the installment method selected.~~ Payments are due by the fifteenth of the month to be credited for the month.

6. Payments may only be received from participating members or participating members of an alternative retirement system. Payments from separating or retiring members may only be received up until the fifteenth of the month in which the member's last retirement contribution is received.

History: Effective November 1, 1990; amended effective July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-02.6, 54-52-17.4
Law Implemented: NDCC 54-52-02.6, 54-52-17.2, 54-52-17.4

71-02-03-02.3. Delinquent payment. If no payment is received within thirty days of the due date, the ~~executive director~~ public employees retirement system shall send a letter to the participating member or member of an alternative retirement system advising them of the delinquency. If no payment is received within sixty days after the due date, the account must be closed. Payments received on any closed account will be returned to the member.

History: Effective November 1, 1990; amended effective July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-02.6, 54-52-17.2, 54-52-17.4
Law Implemented: NDCC 54-52-02.6, 54-52-17.2, 54-52-17.4

71-02-03-02.4. Crediting purchased or repurchased service. Service purchased or repurchased will be credited in the following manner:

1. The employee's record will be updated with the ~~credited benefit~~ additional service credit once the account is paid in full.

2. If the member or member of an alternative retirement system terminates, retires, or the member's account is closed due to delinquency, service credit will be granted in proportion to the actual payments.

3. For members converting service under the public employees retirement system to service under the judge's retirement system, each month of county judge service under the public

employees retirement system will be converted to one month of judicial service credit.

History: Effective November 1, 1990; amended effective July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-02.6, 54-52-17.4
Law Implemented: NDCC 54-52-02.6, 54-52-17.4

71-02-03-02.5. Costs. The cost will be calculated by applying actuarial factors to the amount of retirement and prefunded retiree health benefits being purchased by the participating member or member of an alternative retirement system. The member's current age, average salary as calculated under subsection 2 of North Dakota Century Code section 54-52-17, and current credited service on record with the North Dakota public employees retirement system in the month in which the member's written request is received will be used in the cost calculation. The amount of retirement and prefunded retiree health benefits being purchased will be calculated using the benefit formulas in place at the time the written request is received from the member. When calculating the cost, enhancements to the benefit formula will be considered to be in place at the time the law is signed by the governor.

The retirement board will adopt actuarial assumptions necessary to determine the actuarial factors for the cost calculation. The assumptions will be reviewed concurrently with the assumptions for the retirement program.

Upon receipt of the written request from the member, and all required documentation, a written cost confirmation will be prepared and mailed to the member. The cost stated in the confirmation letter will be valid for a period of ninety days from the date of the letter.

History: Effective July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-02.6, 54-52-17.2, 54-52-17.4
Law Implemented: NDCC 54-52-02.6, 54-52-17.2, 54-52-17.4

CHAPTER 71-02-04

71-02-04-01. ~~Normal--and--early-retirement~~ Retirement benefits - Application. Except as provided in section 71-02-04-02 for retirement options, a member shall file an application with the office for ~~normal or--early~~ retirement benefits at least thirty days before ~~normal~~ retirement date or before the commencement of ~~early~~ retirement benefits.

History: Amended effective November 1, 1990; July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-17
Law Implemented: NDCC 54-52-17

71-02-04-03. Payment date - ~~Regular-early-and-normal-retirement~~ Retirement benefits. Except for retirement options provided in section 71-02-04-02, a member's ~~normal--or--early~~ retirement benefit shall commence on the first day of the month which follows the member's eligibility for the benefit and which is at least thirty days after the date on which the member filed an application with the office.

History: Amended effective November 1, 1990; July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-17
Law Implemented: NDCC 54-52-17

71-02-04-04. Optional benefits. A member may elect, as provided in section 71-02-04-02, to receive one of the following optional benefits in lieu of the regular ~~early-or-normal~~ single life retirement benefit.

1. **One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. ~~Should-the-member-remarry-and wish--to--change--such-designation,-a-new-actuarial-retirement benefit--will--be--calculated.~~ Payments of benefits to a member's surviving spouse shall be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate, and death certificate, and is still living. Benefits shall terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option shall be canceled and the member's benefit shall be returned to the single life amount. Payment of the single life amount shall commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.

2. **Fifty percent joint and survivor benefit.** A member shall receive an actuarially reduced retirement benefit during the member's lifetime and after the member's death one-half the rate of the reduced benefit will be continued to the member's surviving spouse during the spouse's lifetime~~;--and-shall terminate-in-the-month-the-death-of--the--beneficiary--occurs~~. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse shall be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits shall terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option shall be canceled and the member's benefit shall be returned to the single life amount. Payment of the single life amount shall commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.

3. **Level social security option.** ~~A-member-who-retires-prior-to the-member's-normal-retirement-date-with-an--early--retirement benefit;--may--elect-a-social-security-adjustment-option.--The member-will-receive-such-early-retirement-benefit--actuarially adjusted-for-the-years-before-and-after-the-member-attains-age sixty-two;-or-before-and-after-the-member--retires;--if--later than--age--sixty-two--but--before--age-sixty-five;-so-that-the monthly-benefit-payments-until-such-date-will-be-substantially the--same--as--the-monthly-benefit-payments-plus-the-amount-of primary--benefits--under--the--federal--Social--Security---Act expected--to--become--payable--to--the--member.~~ A member who retires prior to receiving social security benefits may elect the level social security option. Under this option, the member's monthly benefit is adjusted so the combined benefits received from the fund and social security remain level before, and after, the date social security benefits begin. The adjusted benefit payable from the fund must be determined on an actuarial equivalent based on either of the following ages as chosen in writing by the member:

a. Age sixty-two; or

b. Full retirement age as specified by the social security administration.

A member is not eligible for the level social security option if it results in a benefit payment of less than one hundred dollars per month.

A member shall submit an estimated benefit from social security that was computed no more than six months before ~~retirement-or-termination~~ commencement of retirement benefits.

4. **Five-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a five-year or ten-year certain feature, as designated by the member.

History: Amended effective September 1, 1982; November 1, 1990; July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-17
Law Implemented: NDCC 54-52-17

71-02-04-06. Lack of a designated beneficiary. ~~If no beneficiary is designated by a member, any benefits due and payable shall be paid to the estate. If the member has elected a joint and survivor option, and the designated beneficiary predeceases the member, the option shall be canceled and the member's benefit shall be returned to its unreduced amount.~~ Repealed effective July 1, 1994.

General Authority: ~~NDCC 54-52-04, 54-52-17~~
Law Implemented: ~~NDCC 54-52-17~~

71-02-04-08. Assignment or alienation of plan benefits. Benefits provided under the plan may not be assigned or alienated except as provided in North Dakota Century Code section 54-52-17.6.

History: Effective July 1, 1994.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52-17, 54-52-17.6

71-02-05-06. Determination of disability - Procedures.

1. **Application.**

   a. If the member is unable or unwilling to file an application, the member's legal representative may file the member's disability application.

   b. The application must explain the cause of the disability, the limitations caused by the disability, the treatment being followed, and the effect of the disability on the individual's ability to be engaged in any gainful occupation for which the person is, or could become, reasonably fitted by education, training, or experience.

   c. The application must be filed with the executive director.

2. ~~Plan-administrator~~ Medical consultant.

   a. The board may retain a ~~plan--administrator~~ medical consultant to evaluate and make recommendations on disability retirement applications.

   b. The ~~plan-administrator~~ medical consultant shall review all medical information provided by the applicant.

   c. The ~~plan--administrator~~ medical consultant is responsible to determine eligibility for disability benefits for applicants not approved for social security disability benefits and shall advise the executive director of the decision in writing. Applicants who become eligible for disability benefits under the Social Security Act and who meet the requirements of subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 are eligible for benefits under subdivision e of subsection 4 of North Dakota Century Code section 54-52-17 without submitting further medical information to the medical adviser, but are subject to recertification requirements specified in this chapter.

   d. The executive director shall notify the applicant in writing of the decision. If the applicant is determined not to be eligible for disability benefits, the executive director shall advise the applicant of the appeal procedure. If the applicant is deemed eligible for disability benefits, benefits must be paid pursuant to subsection 5.

3. **Medical examination.**

a. The applicant for disability retirement shall provide the ~~plan-administrator-with~~ medical examination reports as requested by the medical consultant.

b. The member is liable for any costs incurred by the member in undergoing medical examinations and completing and submitting the necessary medical examination reports, medical reports, and hospital reports necessary for initial determination of eligibility for benefits.

If determined to be eligible for disability benefits, the member must be reimbursed up to four hundred dollars for the cost of medical examinations specifically requested by the medical adviser and the executive director.

4. **Appeal.**

a. The applicant may appeal an adverse determination to the board by providing a written notice of appeal within sixty days of the date that the plan administrator mailed the decision.

b. The board shall consider all appeals at regularly scheduled board meetings. The applicant must be notified of the time and date of the meeting and may attend or be represented by legal counsel. The executive director shall provide to the board for its consideration a case history brief that includes membership history, medical examination summary, and the plan administrator's conclusions and recommendations. The board shall make the determination for eligibility at the meeting unless additional evidence or information is needed. The discussion concerning disability applications must be confidential and closed to the general public.

5. **Payment of annuity.** If awarded, the disability annuity is payable on, or retroactive to, the first day of the month following the member's termination from covered employment minus any early retirement benefits that have been paid.

6. **Redetermination and recertification.**

a. A disabled annuitant's eligibility must be recertified eighteen months after the date the first check is issued and thereafter as specified by the ~~plan-administrator~~ medical consultant. The ~~plan--administrator~~ executive director may waive the necessity for a recertification, ~~if the-facts-warrant-this-action~~ based on the recommendation of the medical consultant.

b. The ~~plan--administrator~~ executive director will send a recertification form by certified mail with return receipt to the disabled annuitant to be completed and sent back to

the ~~fund~~ office. If completed recertification has not been received by the recertification date set in ~~subdivision a~~ the recertification request, benefits will be suspended effective the first of the month following that date. Benefits will be reinstated the first of the month following recertification by the ~~plan administrator~~ medical consultant.

c. The ~~plan administrator~~ medical consultant may require the disabled annuitant to be reexamined by a doctor ~~at the annuitant's own expense~~. The submission of medical reports by the annuitant, and the review of those reports by the board's medical consultant, may satisfy the reexamination requirement. Upon recertification, the disabled annuitant must be reimbursed up to four hundred dollars for the cost of the required reexamination if deemed necessary by the medical consultant and the executive director.

d. The ~~plan administrator~~ medical consultant will make the recertification decision. The decision may be appealed to the board within ninety days of receiving the written recertification decision.

e. Benefit payments must be suspended immediately upon notice received from the medical consultant that the annuitant does not meet recertification requirements. The executive director shall notify the annuitant of the suspension of benefits by certified mail and shall reinstate benefits back to date of suspension if the annuitant is subsequently found to meet recertification requirements.

f. If it is determined that the disability annuitant was not eligible for benefits during any time period when benefits were provided, the executive director may do all things necessary to recover the erroneously paid benefits.

History: Effective January 1, 1992; amended effective July 1, 1994.
General Authority: NDCC 54-52-17
Law Implemented: NDCC 54-52-17, 54-52-26

71-02-05-07. Optional benefits. An individual deemed eligible for a disability benefit may elect, as provided in this section, to receive one of the following optional benefits in lieu of the regular disability benefit. Under no circumstances is an option available if the calculation of the optional benefit to which the member is entitled results in an amount which is less than one hundred dollars.

1. **One hundred percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit ~~during the member's lifetime~~ as long as the member remains eligible for benefits under subdivision e of

subsection 3 of North Dakota Century Code section 54-52-17 and after the member's death the same amount will be continued to the member's surviving spouse during the spouse's lifetime. The designated beneficiary is limited to the member's spouse. ~~Should the member remarry and wish to change such designation, a new actuarial retirement benefit will be calculated.~~ Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, provided the beneficiary has supplied a marriage certificate, and death certificate, and is still living. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option must be canceled and the member's benefit must be returned to the single life amount. Payment of the single life amount must commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.

2. **Fifty percent joint and survivor benefit.** A member shall receive an actuarially reduced disability retirement benefit ~~during the member's lifetime~~ as long as the member remains eligible for benefits under subdivision e of subsection 3 of North Dakota Century Code section 54-52-17 and after the member's death one-half the rate of the reduced benefit will be continued to the member's surviving spouse during the spouse's lifetime, ~~and terminates in the month the death of the beneficiary occurs~~. The designated beneficiary is limited to the member's spouse. Payments of benefits to a member's surviving spouse must be made on the first day of each month commencing on the first day of the month following the member's death, providing the beneficiary has supplied a marriage certificate and death certificate and is still living. Benefits terminate in the month in which the death of the beneficiary occurs. In the event the designated beneficiary predeceases the member, the option must be canceled and the member's benefit must be returned to the single life amount. Payment of the single life amount must commence on the first day of the month following the spouse's death providing written notification of death and a death certificate has been submitted.

3. **Five-year or ten-year certain option.** A member may elect an option which is the actuarial equivalent of the member's normal, early, or deferred vested retirement pension payable for life with a five-year or ten-year certain feature, as designated by the member.

History: Effective January 1, 1992; amended effective July 1, 1994.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52-17

71-02-06-02. Effect of return. Refund of accumulated contributions shall cancel all service credit accumulated prior to the refund and shall extinguish the right to any benefits provided by North Dakota Century Code chapter 54-52 ~~(except--as--provided--in--section 71-02-07-01)~~. Any former member returning their refund, with interest at the actuarial rate of return, within sixty days from withdrawal must be reinstated.

History: Amended effective November 1, 1990; July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-17
Law Implemented: NDCC 54-52-17

71-02-06-06. Employer payment of employee contributions.

1. A written election submitted under subsection 3 of North Dakota Century Code section 54-52-05 may not be revoked for the remainder of the biennium. The option choice selected must remain in effect unless a change has been submitted to the board, in writing, by June fifteenth of each odd-numbered year.

2. An employer may not discriminate between eligible participating employees as to its contribution under North Dakota Century Code section 54-52-05.

History: Effective July 1, 1994.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52-05

71-02-06-07. Employer contribution - National guard security officers and firefighters. As part of its annual actuarial evaluation, the board shall determine the amount required to support the level of benefits for national guard security officers and firefighters specified in North Dakota Century Code section 54-52-17. The board shall set the employer's contribution rate on a biennial basis, but may adjust that rate if it is actuarially necessary to maintain appropriate funding levels.

History: Effective July 1, 1994.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52-06.2

71-02-07-03. Return to service - Disabled member. If the recipient of a disability benefit under North Dakota Century Code chapter 54-52 returns to work, said member is responsible for reporting employment to the public employees retirement system.

1. If a member is working in a permanent full-time position and is eligible to participate in the public employees retirement system, monthly benefits from the public employees retirement system must be suspended. If the individual is not able to continue employment for at least nine months as a result of the disability and continues to meet eligibility requirements under the plan, said member may resume disability status with the public employees retirement system.

2. If a member returns to substantial gainful activity or employment not covered under the public employees retirement system, the disability benefit ~~will~~ may continue for up to nine months. If the individual is not able to continue employment for at least nine months as a result of the disability and continues to meet eligibility requirements under the plan, the member may continue disability status with the public employees retirement system.

History: Effective November 1, 1990; amended effective September 1, 1992; July 1, 1994.
General Authority: NDCC 54-52-04, 54-52-17
Law Implemented: NDCC 54-52-17

71-02-10-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the ~~board~~ executive director shall send an initial notice to each person named therein, including the member and the alternate payee named in the order, together with an explanation of the procedures followed by the fund.

2. Upon receipt of a domestic relations order, the ~~board~~ executive director shall, if the account is in pay status or begins pay status during the review, ~~segregate~~ order funds segregated in a separate account of the fund or in an escrow account ~~amounts~~ which the alternate payee would be entitled to by direction of the order, if ~~any~~ ascertainable from the proposed order.

3. Upon receipt of a domestic relations order, the ~~board~~ executive director shall review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.

4. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.

5. If the order becomes qualified ~~within-eighteen-months-of-the-initial-receipt~~, the executive director shall:

   a. Send notice to all persons named in the order and any representatives designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.

   b. Comply with the terms of the order.

   c. If a segregated account or an escrow account has been established for an alternate payee, distribute the amounts, plus interest ~~at-a-rate-determined-by-the-board~~, as provided under subdivision d of subsection 1 of section 71-02-01-01 to the alternate payee.

~~5.~~ 6. ~~In--the--event--that~~ If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months of receipt of such order, the ~~board~~ executive director shall~~:~~

a.--Send send written notification of such termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

b. a. If a segregated account or an escrow account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account or escrow account, plus interest at a rate determined by the board, to the person or persons who would be entitled to receive such amount in the absence of an order.

c. b. If determined after the expiration of the eighteen-month period the order ~~(as--modified,--if--applicable)~~ is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

History: Effective November 1, 1990; amended effective July 1, 1994.
General Authority: NDCC 54-52-04
Law Implemented: NDCC 54-52-17.6

CHAPTER 71-03-03

71-03-03-01. Enrollment. Eligible employees are entitled to coverage the first of the month following the month of employment, provided the employee submits an application for coverage within the first thirty-one days of employment.

Eligible employees of qualifying political subdivisions are entitled to individual coverage provided the political subdivision with which the employee is employed does not offer a group health plan.

History: Effective October 1, 1986; amended effective July 1, 1994.
General Authority: NDCC 54-52.1-08
Law Implemented: NDCC 54-52.1-03

71-03-03-05. Enrollment for retirees. An eligible employee who retires and elects to take a monthly retirement benefit is eligible for coverage with the group health insurance program. The employee must submit application within thirty-one days of the ~~last day of employment~~ month in which the member turns age sixty-five or becomes eligible for medicare; the month in which the member's spouse turns age sixty-five or becomes eligible for medicare; the month in which the member terminates employment; the month in which the member receives the first qualified monthly benefit from one of the eligible retirement systems outlined in subsection 3; the month in which the member's spouse receives the first qualified monthly benefit from one of the eligible retirement systems outlined in subsection 3; the month in which an eligible employee who is covered through a spouse's plan becomes ineligible for the spouse's plan due to divorce, death, loss of employment, reduction in hours or other events which may cause loss of coverage as determined by the board; or the month in which the retiring member or spouse is no longer eligible for employer sponsored insurance, including the Consolidated Omnibus Budget Reconciliation Act. Coverage will become effective on the first day of the month following the ~~date of retirement~~ month in which the qualifying event took place. If the application is not submitted on time and subsequent coverage is desired, the retiree must submit evidence of insurability and coverage may be denied. If coverage is accepted, coverage will become effective on the first day of the month following approval by the carrier.

1. Individuals eligible for the health plan, regardless of interruption of coverage include:

   a. A retired employee receiving a retirement allowance from the public employees retirement system, travelers retirement system of job service of North Dakota, teachers' fund for retirement, or teachers insurance and annuity association-college retirement equities fund.

b. A surviving spouse receiving a retirement allowance from the public employees retirement system, travelers retirement system of job service of North Dakota, teachers' fund for retirement, or teachers insurance and annuity association-college retirement equities fund.

c. Deferred retirees and their spouses.

2. A surviving spouse not receiving a retirement allowance, but whose spouse had received a retirement allowance from the public employees retirement system, travelers retirement system of job service of North Dakota, teachers' fund for retirement, or teachers insurance and annuity association-college retirement equities fund, will be eligible for the health plan, provided, there is no interruption of coverage.

3. Individuals not eligible for the health plan include:

a. A terminated employee who received a refund of the employee's retirement account.

b. A nonspouse beneficiary (eligible for Consolidated Omnibus Budget Reconciliation Act).

c. A formerly deferred retiree who received a refund of his or her retirement account.

History: Effective October 1, 1986; amended effective November 1, 1990; July 1, 1994.
General Authority: NDCC 54-52.1-08
Law Implemented: NDCC 54-52.1-03

71-03-04-05. Premium for basic one thousand two hundred fifty **dollar term life insurance.** All state departments and those political subdivisions that elect to participate in the group life insurance program shall pay the board the full premium for the basic one thousand two hundred fifty dollar term life insurance for each of its eligible employees.

History: Effective October 1, 1986; amended effective July 1, 1994.
General Authority: NDCC 54-52.1-08
Law Implemented: NDCC 54-52.1-01(7)

71-03-04-06. Minimum requirements for political subdivisions. An eligible political subdivision may extend the benefits of the group insurance program to its eligible employees subject to minimum requirements established by the board and a minimum period of participation of sixty months. If the political subdivision withdraws from participation before completing sixty months of participation, the political subdivision shall make payment to the board equal to the expenses incurred on behalf of that entity's employees which exceed the income received by the board on behalf of that entity's employees during the time of participation.

For purposes of this section:

1. "Expenses incurred" means:

   a. Claims incurred by the political subdivision during the enrolled period and paid during or within three months after the enrolled period and includes capitated payments to providers;

   b. Reasonable administrative expenses as incurred by the public employees retirement system and the claims administrator as set forth in the master contract; and

   c. The cost of any premium buy-down provided.

2. "Income received" means all premiums paid by the political subdivision.

Payment is due within three months of notice from the executive director, unless an alternative payment schedule has been approved by the board. Late payment will be assessed five and one-half percent per annum higher than the current cost of money as reflected by the average

rate of interest payable on United States treasury bills maturing in six months in effect for North Dakota for the six months immediately prior to the month of deficiency.

History: Effective July 1, 1994.
General Authority: NDCC 54-52.1-03
Law Implemented: NDCC 54-52.1-03.1

CHAPTER 71-04-01

71-04-01-01. Definitions. The terms used throughout this title have the same meaning as in North Dakota Century Code section 54-52.2-04, except:

1. "Beneficiary" means an individual designated by the participant in the participant agreement to receive benefits under the plan in the event the participant dies.

2. "Compensation" means the total annual remuneration for employment or contracted services received by the participant from the employer.

3. "Deferred compensation" means the amount of compensation not yet earned which the participant and the employer shall mutually agree shall be deferred from current monthly salary in accordance with the provisions of the plan.

4. "Eligible state deferred compensation plan" means a plan established and maintained by this state that complies with the Internal Revenue Code (IRC) 457(b).

5. "Employer" means the state of North Dakota or any of its political subdivisions, institutions, departments, or agencies.

6. "~~Includable~~ Includible compensation" means ~~the remuneration~~ compensation for service performed for the employer which is currently ~~includable~~ includible in gross income. Includible compensation is reduced by amounts deferred under any other salary reduction agreements under the 457 program or 403(b) TSA plans, 401(k), 125, or 414(h) plans.

7. ~~"Independent contractor participant" means individuals who perform services of the employer but does not include partnerships or corporations.~~

8. "Participant" means any permanent employee of an employer who the employer designates as eligible to participate, and who executes a participant agreement.

~~9.~~ 8. "Participant agreement" means a written agreement between the employer and a participant setting forth certain provisions and elections relative to the plan, incorporating the terms of the plan and establishing the participant's deferral and participation in the plan.

~~10.~~ 9. "Provider" means any insurance company, federally insured financial institutions, Bank of North Dakota, or registered dealer under North Dakota Century Code chapter 10-04

authorized by the retirement board to provide investment vehicles to employees.

~~11.~~ 10. "Retirement" means ~~severance of the participant's contract or employment~~ separation from service with the employer or on a date coincidental with the normal, postponed, early, or disability retirement dates as described in North Dakota Century Code chapter 54-52-17.3.

~~12.~~ 11. "Retirement board" means the ~~five~~ seven persons described in North Dakota Century Code chapter 54-52-03.

12. "Separation from service" means that term as defined under Internal Revenue Code section 402(d)(4)(A)(3i) and includes severance of employment with the employer by reason of death, disability, retirement, resignation, or discharge.

13. "State" means the state of North Dakota, or any department, institution, or separate agency thereof acting as an employer of the participant.

14. ~~"Termination of service" means the separation from service with the employer by reason of death, disability, retirement, or termination of employment.~~

~~15.~~ "Unforeseeable emergency" means a severe financial hardship to the participant resulting from a sudden and unexpected illness or accident of the participant, the participant's spouse, or dependent of the participant, loss of the participant's property due to casualty, or other similar extraordinary andunforeseeable circumstances arising as a result of events beyond the control of the participant.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-03-05. Unforeseeable emergency. A participant who, prior to ~~termination of employment~~ separation from service, ~~has a sudden and unexpected financial need~~ experiences an unforeseeable emergency as defined in ~~chapter 71-04-01~~ section 71-04-01-01 may apply for a partial distribution of the participant's deferred compensation account to the extent reasonably needed to satisfy the financial need. The participant may make application by completing a financial hardship form and delivering it to the retirement board offices.

The application will be reviewed by the deferred compensation committee of the board and the recommendation of the committee will be sent to the retirement board for a decision at the board's next regularly scheduled meeting.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03~~; IRC 457 (d)(A)~~, 54-52.2-03.2

71-04-03-06. Termination of participation. Participation in the plan may be terminated at any time by completion of a participant agreement indicating an elimination of monthly deferrals. Distribution of assets may be made only ~~at termination of employment, death, disability, retirement~~ upon separation from service as defined in section 71-04-01-01, or in accordance with section 71-04-03-05.

In the event of a ~~termination of employment or retirement~~ separation from service, the participant shall complete a benefit selection form to apply for immediate or deferred benefits under the plan.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-04-07. ~~Termination~~ Separation from service. The retirement board shall design and provide participants with a benefit selection form to facilitate payment of benefits under the plan.

The benefit selection forms may allow the participant the ability to select from the various payment options granted by providers, and to determine the starting date of benefit payments.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-04-08. Authorization. The executive director or the executive director's designee is authorized to sign all provider agreements, employer agreements, payroll deduction authorizations, or benefit applications or benefit selection forms that meet the requirements under article 71-04 and under North Dakota Century Code chapter 54-52.2.

History: Effective July 1, 1994.
General Authority: NDCC 54-52.2-03.2
Law Implemented: NDCC 54-52.2-01, 54-52.2-02, 54-52.2-03.2

71-04-04-09. Provider suspension. The board shall suspend a provider that does not meet the requirements under article 71-04 or North Dakota Century Code chapter 54-52.2. The board may apply either of the following two types of suspension:

1. Loss of active provider status. Under this type of suspension, the provider may not enroll any new participants. The provider may continue to receive contributions from existing members.

2. Loss of provider status. Under this type of suspension, the provider may not enroll any new participants nor receive any further contributions from existing members.

At least thirty days prior to suspension, the board shall send a certified letter to the provider indicating the board's intent to suspend and the reasons for the suspension. Any response from the provider must be reviewed by the board at the board's next scheduled meeting. A letter of intent does not need to be sent if the provider fails to meet the requirements of section 71-04-06-11. If the board

decides to suspend a provider, the board shall send a certified letter of suspension to the provider stating the reasons for the suspension and the type of suspension.

History: Effective July 1, 1994.
General Authority: NDCC 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03.2

71-04-05-03. ~~Monthly~~ Semiannual report. The employer shall provide the retirement board with a listing of all employees actively participating in the deferred compensation plan. The listing must be prepared for January first through June thirtieth and July first through December thirty-first and remitted to the retirement board within thirty days after the end of the reporting period to which it relates. The listing must contain the employee's name, social security number, ~~monthly-deduction-amount~~ deductions for the previous reporting period, and provider used.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-05-06. ~~Termination~~ Separation from service notice. The employer shall notify the retirement board within thirty days of an employee's ~~termination--of--employment~~ separation from service. The retirement board shall then notify the former employee of the payment options under the plan and have the former employee complete a benefit selection form.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-06-05. Employee statements. Participants in the provider's investment options shall receive, at least quarterly, account statements, sent to their home address, detailing each participant's activity and account balance.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-06-06. Retirement board report. The provider shall deliver semiannual reports to the retirement board detailing the activity of each participant's account. The semiannual report must be delivered within forty-five days of the end of the reporting period and must include~~;--but--is--not--limited--to;-name~~ an alphabetical listing of the ~~participant~~ participants, social security ~~number~~ numbers of the ~~participant~~ participants, the provider's contract number for the ~~participant~~ participants (if any), type of account for each participant, beginning account balance ~~at--the-beginning-of-the~~ forwarded from the previous reporting period, contributions made by the ~~participant~~ participants for the current reporting period, investment earnings or losses added to the account (if any for the reporting period), any withdrawals made during the reporting period, administrative charges assessed against the account during the reporting period, and the account balance at the end of the reporting period~~;-and-must-be-in alphabetical-order~~. The report columns must be totaled.

The semiannual report must include active, inactive, and retired participants and be for all payroll divisions for the plan. ~~The--report may-be-submitted-on-microfiche-plates-or-on-a-computer-printout.~~

History: Effective April 1, 1989; amended effective November 1, 1990; July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-06-07. Account transfer. The provider shall allow any participant who so requests, the ability to transfer the participant's account to another provider on a tax-free basis. The request to the provider must be made in writing by the retirement board or its designated representative. The transfer must be made within thirty days of the provider's receipt of the transfer request.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03~~;-IRC-457(e)(10)~~

71-04-06-11. Provider reporting failure - Penalty. Should the provider fail to deliver the required report within a sixty-day period beyond the end of a calendar reporting period, notice must be given by certified mail of the provider's failure to comply. The provider shall then have ~~fifteen~~ thirty days from the date of the certified letter to comply with the reporting requirement.

If the provider fails to deliver the required report within the ~~fifteen~~-day thirty-day period, the provider is in violation of the administrative agreement and shall lose active provider status as described under subsection 1 of section 71-04-04-09.

If the provider has not filed the report within five months of loss of active provider status, the provider shall lose provider status as described under subsection 2 of section 71-04-04-09. Loss of ~~active~~ provider status results in all current contributions of active participants being suspended effective in the next payroll cycle. The retirement board will notify all participants of the company's failure to deliver the required reports. Current participants will be required to either select a new provider for future contributions, or ~~allow~~ have their account ~~to~~ go into a dormant status with the company losing provider status. The provider will ~~then~~ remain on ~~an inactive~~ loss of provider status for a period of twelve months. At ~~that time~~ the conclusion of the suspension period, ~~an inactive~~ the provider may reapply for active ~~provider~~ status by signing a new administrative agreement.

History: Effective April 1, 1989; amended effective November 1, 1990; July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03, 54-52.2-03.2

71-04-06-12. Provider ~~termination~~ suspension - Employee account transfers. Should the provider be in violation of the administrative agreement, employees shall have the option of transferring their individual accounts to another qualified provider. The employee shall also have the option of leaving the account with the provider, in a dormant status, to be dealt with by the employee ~~at termination of employment~~ upon separation from service.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03~~; IRC 457(e)(10)~~, 54-52.2-03.2

71-04-06-13. Dormant accounts. The employee may elect to leave the employee's account with the provider after ~~termination of employment~~ separation from service.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03

71-04-06-14. Product disclosure. The provider shall report annually in a form and manner specified by the board, such information the board may require related to the provider's investment products. Should the provider fail to deliver the required report within a sixty-day period following the date of request, the provider is in violation of the administrative agreement and subject to the action set forth in section 71-04-04-09.

History: Effective July 1, 1994.
General Authority: NDCC 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03.2

71-04-07-01. Application. The participant upon ~~termination of~~ separation from service may apply for settlement of the participant's account by completion of a benefit selection form. Application for benefits ~~should~~ must be completed within ~~thirty~~ sixty days of ~~termination of employment~~ separation from service. If no application is received by the public employees retirement system within sixty days, a letter will be sent to the provider directing that the funds be distributed to the member within sixty days. A copy of the letter will be sent by certified mail to the participant. If the participant sends an application to the public employees retirement system prior to distribution, the executive director shall inform the provider to distribute the funds in a manner consistent with the application.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-05

71-04-07-03. Benefit commencement. A participant may ~~elect~~ make an irrevocable election to begin benefit payments immediately upon ~~termination of employment~~ separation from service or defer payments until a later date. Such election must be made pursuant to section 71-04-07-01. Payments of amount deferred must begin not later than April first of the calendar year following the year in which the participant attains age seventy and one-half ~~or, beginning by such date, over the life of the participant, the lives of the participant and a designated beneficiary, or a period certain not extending beyond the life expectancy of the participant, or the joint life expectancy of the participant and a designated beneficiary.~~ The entire interest of the participant will be distributed beginning not later than the required beginning date and in accordance with Internal Revenue Code regulations, over the life of the participant or over the lives of the participant and a designated beneficiary, or a period not extending beyond the life expectancy of the participant and a designated beneficiary. Distributions must be made primarily for the benefit of the participant and any distributions payable to a beneficiary should be no more than incidental.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03~~; IRC 457(d)~~

71-04-07-04. Participant benefits. ~~The benefit option selected by the participant must distribute at least two-thirds of the total amount payable to the participant over the participant's expected lifetime.~~ Repealed effective July 1, 1994.

History: ~~Effective April 1, 1989.~~
General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 54-52.2-03; IRC 457(d)(B)~~

71-04-07-05. Beneficiary benefits before commencement of payments. ~~If the participant dies while employed with employer or terminates his or her employment and dies before payments begin under this plan, the participant's entire amount deferred, including any death benefit payable under a life insurance policy purchased on the life of the participant, must be paid to his beneficiary, over a period not in excess of (a) the life of the beneficiary, if the beneficiary is the participant's surviving spouse; or (b) fifteen years, if the beneficiary is not the participant's surviving spouse. If the designated beneficiary is the participant's spouse, payments are not required to begin until the date on which the participant would have attained age seventy and one-half.~~ If the participant dies before distribution of the participant's account has commenced, or separates from service and dies before payments have begun, the entire interest of the participant's account will be distributed to the participant's designated beneficiary. Any distributions payable for more than one year must be in substantially nonincreasing amounts. If the designated beneficiary is the surviving spouse, distributions must commence no later than December thirty-first of the year thereafter unless the surviving spouse irrevocably elects to defer distribution to a future date; however, a distribution can be deferred no later than April first of the calendar year following the year in which the participant would have attained age seventy and one-half. Benefits must be paid for a period not to exceed the life expectancy of the surviving spouse.

If the designated beneficiary is not the spouse, distribution must commence no later than December thirty-first of the year following the year of the participant's death and must be made within a time period not to exceed fifteen years.

History: Effective April 1, 1989; amended effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03; ~~IRC 457(d)(B)~~

71-04-07-06. Beneficiary benefits after commencement of payments. If the participant dies after distribution of the participant's account has commenced, the remaining account balance will be distributed to the participant's designated beneficiary. Benefits must continue at least

as rapidly as the method selected by the participant before death. Distributions to a nonspouse beneficiary must be made in a time period not to exceed fifteen years.

History: Effective July 1, 1994.
General Authority: NDCC 28-32-02, 54-52.2-03.2
Law Implemented: NDCC 54-52.2-03

71-05-08-02. Qualified domestic relations orders procedures.

1. Upon receipt of a proposed domestic relations order, the ~~board~~ executive director shall send an initial notice to each person named therein, including the member and the alternate payee named in the order, together with an explanation of the procedures followed by the fund.

2. Upon receipt of a domestic relations order, the ~~board~~ executive director shall, if the account is in pay status or begins pay status during the review, ~~segregate~~ order funds segregated in a separate account of the fund or in an escrow account ~~amounts~~ which the alternate payee would be entitled to by direction of the order, if ~~any~~ ascertainable from the proposed order.

3. Upon receipt of a domestic relations order, the ~~board~~ executive director shall review the domestic relations order to determine if it is a qualified order as established by the model language format specified by the board.

4. The domestic relations order shall be considered a qualified order when the executive director notifies the parties the order is approved and a certified copy of the court order has been submitted to the office.

5. If the order becomes qualified ~~within-eighteen-months-of-the initial-receipt~~, the executive director shall:

   a. Send notice to all persons named in the order and any representatives designated in writing by such person that a determination has been made that the order is a qualified domestic relations order.

   b. Comply with the terms of the order.

   c. If a segregated account or an escrow account has been established for an alternate payee, distribute the amount, plus interest ~~at--a--rate--determined--by--the-board~~, as provided under subdivision d of subsection 1 of section 71-02-01-01 to the alternate payee.

~~5.~~ 6. a. ~~In--the--event~~ If the order is determined not to be a qualified domestic relations order or a determination cannot be made as to whether the order is qualified or not qualified within eighteen months ~~or~~ of receipt of such order, the ~~board~~ executive director shall:

a.--Send send written notification of such termination of review to all parties at least forty-five days prior to the end of the eighteen-month review period. At the end of the eighteen-month review period, the proposed order is deemed to be withdrawn and of no legal effect.

b. If a segregated account or an escrow account has been established for an alternate payee, the executive director shall distribute the amounts in the segregated account or escrow account, plus interest at a rate determined by the board, to the person or persons who would be entitled to receive such amount in the absence of an order.

c. If determined after the expiration of the eighteen-month period the order ~~(as--modified,--if--applicable)~~ is a qualified domestic relations order, the qualified domestic relations order must be applied prospectively only.

History: Effective October 1, 1991; amended effective July 1, 1994.
General Authority: NDCC 39-03.1-06
Law Implemented: NDCC 39-03.1-14.2

STAFF COMMENT: Chapter 71-05-09 contains all new material but is not underscored so as to improve readability.

CHAPTER 71-05-09
INDEXING FINAL AVERAGE SALARY FOR VESTED TERMINATED CONTRIBUTORS

71-05-09-01. Calculation of final average salary increase for deferred vested contributors. Final average salary used for calculating deferred vested retirement benefits for contributors who terminate with ten or more years of service in the highway patrol retirement system must be increased on an annual basis following the contributor's termination date until the date the contributor begins to receive retirement benefits.

The increase must be approximately equal to or less than the annual salary increase provided by law to state employees at a rate set by the board upon the recommendation of the plan's actuary.

If the increase is for a period of less than twelve months, the increase must be in proportion to the number of months in the period.

History: Effective July 1, 1994.
General Authority: NDCC 39-03.1-06
Law Implemented: NDCC 39-03.1-11(5)

71-05-09-02. Multiple plan members. If a contributor has a combination of ten years of cumulative service with the public employees retirement system, the teachers' fund for retirement, and the highway patrol retirement system, a contributor's final average salary for the highway patrol retirement system must be increased in the manner provided for in section 71-05-09-01.

History: Effective July 1, 1994.
General Authority: NDCC 39-01.1-11, 39-03.1-06
Law Implemented: NDCC 39-03.1-11(5), 39-03.1-14.1(1)

TITLE 75

Department of Human Services

MAY 1994

CHAPTER 75-02-02

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code chapter 75-02-02, Medical Services.

A public hearing was conducted on November 3, 1993, concerning proposed amendments to North Dakota Administrative Code, chapter 75-02-02, Medical Services, specifically adding a new subsection 6 to section 75-02-02-08, Amount, Duration, and Scope of Medical Assistance, concerning the implementation of managed care requirements for certain Medicaid recipients.

The amendments to section 75-02-02-08 were adopted as interim final rules effective July 1, 1994. Emergency rulemaking was necessary because a delay in rulemaking was likely to cause a loss of federal revenues appropriated to support the administration of the Medicaid program, a duty imposed upon the Department of Human Services by North Dakota Century Code section 50-06-05.1 and North Dakota Century Code chapter 50-24.1, if the effective date of the amendment was May 1, 1994, as would be likely if diligent nonemergency rulemaking was pursued.

During the period before the effective date, the unamended rule would not conform to the requirements of a waiver issued by the Health Care Financing Administration, a division of the United States Department of Health and Human Services, pursuant to 42 U.S.C. § 1396r(b)(1), of requirements imposed pursuant to 42 U.S.C. Chapter 7, Subchapter XIX, which requires the state of North Dakota to operate a primary care case management program beginning January 1, 1994. If the department did not conform the Medicaid program to this federal requirement, it may not lawfully claim federal funds otherwise available to provide Medicaid benefits for the period beginning January 1, 1994, and ending May 1, 1994.

Section 75-02-02-08(6): Adds a new subsection 6 to implement managed care requirements for families and children receiving Medicaid benefits, but not to persons who are over age 65, blind, or disabled, and requires a recipient to identify a particular physician as a primary care physician.

75-02-02-08. Amount, duration, and scope of medical assistance.

1. Within any limitations which may be established by rule, regulation, or statute and within the limits of legislative appropriations, eligible recipients may obtain the medical and remedial care and services which are described in the approved state plan for medical assistance in effect at the time the service is rendered and which may include:

   a. Inpatient hospital services (other than services in an institution for mental diseases). "Inpatient hospital services" are those items and services ordinarily furnished by the hospital for the care and treatment of inpatients provided under the direction of a physician or dentist in an institution maintained primarily for treatment and care of patients with disorders other than tuberculosis or mental diseases and which is licensed or formally approved as a hospital by an officially designated state standard-setting authority and is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation; and which has in effect a hospital utilization review plan applicable to all patients who receive medical assistance under title XIX of the Act.

   b. Outpatient hospital services. "Outpatient hospital services" are those preventive, diagnostic, therapeutic, rehabilitative, or palliative items or services furnished by or under the direction of a physician or dentist to an outpatient by an institution which is licensed or formally approved as a hospital by an officially designated state standard-setting authority and is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation.

   c. Other laboratory and x-ray services. "Other laboratory and x-ray services" means professional and technical laboratory and radiological services ordered by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law, and provided to a patient by, or under the direction of, a physician or licensed practitioner, in an office or similar facility other than a hospital outpatient department or a clinic, and provided to a patient by a laboratory that is

qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation.

d. Skilled nursing home services (other than services in an institution for mental diseases) for individuals twenty-one years of age or older. "Skilled nursing home services" means those items and services furnished by a licensed and otherwise eligible skilled nursing home or swing-bed hospital maintained primarily for the care and treatment of inpatients with disorders other than mental diseases which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law.

e. Intermediate nursing care (other than services in an institution for mental diseases). "Intermediate nursing care" means those items and services furnished by a currently licensed intermediate care facility or swing-bed hospital maintained for the care and treatment of inpatients with disorders other than mental diseases which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law.

f. Early and periodic screening and diagnosis of individuals under twenty-one years of age, and treatment of conditions found. Early and periodic screening and diagnosis of individuals under the age of twenty-one who are eligible under the plan to ascertain their physical or mental defects, and health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby. Federal financial participation is available for any item of medical or remedial care and services included under this subsection for individuals under the age of twenty-one. Such care and services may be provided under the plan to individuals under the age of twenty-one, even if such care and services are not provided, or are provided in lesser amount, duration, or scope to individuals twenty-one years of age or older.

g. Physician's services, whether furnished in the office, the patient's home, a hospital, a skilled nursing home, or elsewhere. "Physician's services" are those services provided, within the scope of practice of the physician's profession as defined by state law, by or under the personal supervision of an individual licensed under state law to practice medicine or osteopathy.

h. Medical care and any other type of remedial care recognized under state law, furnished by licensed

practitioners within the scope of their practice as defined by state law. This term means any medical or remedial care or services other than physicians' services, provided within the scope of practice as defined by state law, by an individual licensed as a practitioner under state law.

i. Home health care services. "Home health care services" in addition to the services of physicians, dentists, physical therapists, and other services and items available to patients in their homes and described elsewhere in these definitions, are any of the following items and services when they are provided on recommendation of a licensed physician to a patient in the patient's place of residence, but not including as a residence a hospital or a skilled nursing home:

(1) Intermittent or part-time nursing services furnished by a home health agency.

(2) Intermittent or part-time nursing services of a professional registered nurse or a licensed practical nurse when under the direction of the patient's physician, when no home health agency is available to provide nursing services.

(3) Medical supplies, equipment, and appliances recommended by the physician as required in the care of the patient and suitable for use in the home.

(4) Services of a home health aide who is an individual assigned to give personal care services to a patient in accordance with the plan of treatment outlined for the patient by the attending physician and the home health agency which assigns a professional registered nurse to provide continuing supervision of the aide on the aide's assignment. "Home health agency" means a public or private agency or organization, or a subdivision of such an agency or organization, which is qualified to participate as a home health agency under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation.

j. Private duty nursing services. "Private duty nursing services" are nursing services provided by a professional registered nurse or a licensed practical nurse, under the general direction of the patient's physician, to a patient in the patient's own home or extended care facility when the patient requires individual and continuous care beyond that available from a visiting nurse or that routinely provided by the nursing staff of the hospital, nursing home, or extended care facility.

k. Dental services. "Dental services" are any diagnostic, preventive, or corrective procedures administered by or under the supervision of a dentist in the practice of the dentist's profession and not excluded from coverage. Such services include treatment of the teeth and associated structures of the oral cavity, and of disease, injury, or impairment which may affect the oral or general health of the individual. "Dentist" means a person licensed to practice dentistry or dental surgery. Any procedure related to the preparation of "fixed bridgework" which involves the use of crowns and bridgework materials in concert with one another, but not including single crowns, is excluded from coverage unless a prior treatment authorization request, submitted by the attending dentist and approved by the department's dental consultant, describes a condition or combination of conditions which render the use of dentures impracticable or which may be more economically ameliorated by fixed bridgework than by dentures.

l. Physical therapy and related services. "Physical therapy and related services" means physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders, and the use of such supplies and equipment as are necessary.

(1) "Physical therapy" means those services prescribed by a physician and provided to a patient by or under the supervision of a qualified physical therapist. A qualified physical therapist is a graduate of a program of physical therapy approved by the council on medical education of the American medical association in collaboration with the American physical therapy association, or its equivalent, and where applicable, is licensed by the state.

(2) "Occupational therapy" means those services prescribed by a physician and provided to a patient and given by or under the supervision of a qualified occupational therapist. A qualified occupational therapist is registered by the American occupational therapy association or is a graduate of a program in occupational therapy approved by the council on medical education of the American medical association and is engaged in the required supplemental clinical experience prerequisite to registration by the American occupational therapy association.

(3) "Services for individuals with speech, hearing, and language disorders" are those diagnostic, screening, preventive, or corrective services provided by or under the supervision of a speech pathologist or audiologist in the practice of the pathologist's or

audiologist's profession for which a patient is referred by a physician. A speech pathologist or audiologist is one who has been granted the certificate of clinical competence in the American speech and hearing association, or who has completed the equivalent educational requirements and work experience necessary for such a certificate, or who has completed the academic program and is in the process of accumulating the necessary supervised work experience required to qualify for such a certificate.

m. Prescribed drugs, prosthetic devices, and dentures where a request is submitted by the attending dentist and granted prior approval by the department's dental consultant; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select.

(1) "Prescribed drugs" are any simple or compounded substance or mixture of substances prescribed as such or in other acceptable dosage forms for the cure, mitigation, or prevention of disease, or for health maintenance, by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's professional practice as defined and limited by federal and state law. With respect to "prescribed drugs" federal financial participation is available in expenditures for drugs dispensed by licensed pharmacists and licensed authorized practitioners in accordance with North Dakota Century Code chapter 43-17. When dispensing, the practitioner must do so on the practitioner's written prescription and maintain records thereof.

(2) "Dentures" means artificial structures prescribed by a dentist to replace a full or partial set of teeth and made by, or according to the directions of, a dentist. The term does not mean those artificial structures, commonly referred to as "fixed bridgework", which involve the use of crowns and bridgework materials in concert with one another.

(3) "Prosthetic devices" means replacement, corrective, or supportive devices prescribed for a patient by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law for the purpose of artificially replacing a missing portion of the body, or to prevent or correct physical deformity or malfunction, or to support a weak or deformed portion of the body.

(4) "Eyeglasses" are lenses, including frames when necessary, and other aids to vision prescribed by a physician skilled in diseases of the eye, or by an optometrist, whichever the patient may select, to aid or improve vision.

n. Other diagnostic, screening, preventive, and rehabilitative services.

(1) "Diagnostic services" other than those for which provision is made elsewhere in these definitions, include any medical procedures or supplies recommended for a patient by the patient's physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law, as necessary to enable the physician or practitioner to identify the existence, nature, or extent of illness, injury, or other health deviation in the patient.

(2) "Screening services" consist of the use of standardized tests performed under medical direction in the mass examination of a designated population to detect the existence of one or more particular diseases or health deviations or to identify suspects for more definitive studies.

(3) "Preventive services" are those provided by a physician or other licensed practitioner of the healing arts, within the scope of the physician's or practitioner's practice as defined by state law, to prevent illness, disease, disability, and other health deviations or their progression, prolong life, and promote physical and mental health and efficiency.

(4) "Rehabilitative services" in addition to those for which provision is made elsewhere in these definitions, include any medical remedial items or services prescribed for a patient by the patient's physician or other licensed practitioner of the healing arts, within the scope of the physician's or practitioner's practice as defined by state law, for the purpose of maximum reduction of physical or mental disability and restoration of the patient to the patient's best possible functional level.

o. Care and services in a certified mental institution for individuals under twenty-one years of age or sixty-five years of age or over.

p. Any other medical care and any other type of remedial care recognized under state law, specified by the secretary.

This term includes, but is not limited to, the following items:

(1) Transportation, including expenses for transportation and other related travel expenses, necessary to securing medical examinations or treatment when determined by the agency to be necessary in the individual case. "Travel expenses" are defined to include the cost of transportation for the individual by ambulance, taxicab, common carrier, or other appropriate means; the cost of outside meals and lodging en route to, while receiving medical care, and returning from a medical resource; and the cost of an attendant may include transportation, meals, lodging, and salary of the attendant, except that no salary may be paid a member of the patient's family.

(2) Family planning services, including drugs, supplies, and devices, when such services are under the supervision of a physician. There will be freedom from coercion or pressure of mind and conscience and freedom of choice of method, so that individuals can choose in accordance with the dictates of their consciences.

(3) Whole blood, including items and services required in collection, storage, and administration, when it has been recommended by a physician and when it is not available to the patient from other sources.

(4) Skilled nursing home services, as defined in subdivision d, provided to patients under twenty-one years of age.

(5) Emergency hospital services which are necessary to prevent the death or serious impairment of the health of the individual and which, because of the threat to the life or health of the individual, necessitate the use of the most accessible hospital available which is equipped to furnish such services, even though the hospital does not currently meet the conditions for participation under title XVIII of the Social Security Act, or definitions of inpatient or outpatient hospital services set forth in subdivisions a and b.

2. The following limitations exist with respect to medical and remedial care and services covered or provided under the medical assistance program.

   a. Coverage will not be extended and payment will not be made for diet remedies prescribed for eligible recipients.

b. Coverage will not be extended and payment will not be made for alcoholic beverages prescribed for eligible recipients.

c. Coverage will not be extended and payment will not be made for orthodontia prescribed for eligible recipients, except for orthodontia necessary to correct serious functional problems.

d. Coverage and payment for eye examinations and eyeglasses for eligible recipients shall be limited to examinations and eyeglass replacements necessitated because of visual impairment. Coverage and payment for eyeglass frames is available for a reasonable number of frames, and in a reasonable amount, not to exceed limits set by the department. The department shall make available to all practitioners dispensing eyeglass frames, and to anyone else who may make inquiry, information concerning established limits. No coverage exists, and no payment will be made, for eyeglass frames which exceed the limits.

e. Coverage and payment for home health care services and private duty nursing services must be limited to a monthly amount determined by taking the monthly charge, to the medical assistance program, for the most intensive level of nursing care in the most expensive nursing home in the state and subtracting therefrom the cost, in that month, of all medical and remedial services furnished to the recipient (except physician services and prescribed drugs). For the purposes of determining this limit, remedial services include, but are not limited to, home and community-based services, service payments to the elderly and disabled, homemaker and home health aide services, and rehabilitative services, regardless of the source of payment for such services. This limit may be exceeded, in unusual and complex cases, if the provider has submitted a prior treatment authorization request describing each medical and remedial service to be received by the recipient, stating the cost of that service, describing the medical necessity for the provision of the home health care services or private duty nursing services, and explaining why less costly alternative treatment will not afford necessary medical care; and has had the request approved.

f. Coverage and payment for the following transportation services is limited to:

(1) Twenty cents per mile for travel in a private motor vehicle;

(2) Seventeen dollars per day for meals en route to, while receiving medical care, and while returning

from a medical resource, for the person receiving medical care, and where medically necessary, an attendant; provided that days during which meals are provided by the medical resource are not counted; and

(3) Thirty-five dollars per night, in state, and fifty dollars per night, out of state, for lodging en route to, while receiving medical care, and while returning from a medical resource, for the person receiving medical care, and where medically necessary, an attendant; provided that nights during which lodging is provided by the medical resource are not counted.

g. Coverage and payment for physician's services furnished in the physician's office are subject to a copayment of two dollars for each office visit unless the medicaid recipient receiving the service:

(1) Lives in a nursing facility, intermediate care facility for the mentally retarded, the state hospital, or the Anne Carlsen school-hospital;

(2) Receives swing bed services in a hospital;

(3) Has not reached the age of twenty-one years;

(4) Is pregnant;

(5) Is entitled to have a portion of the cost of the visit paid for by medicare;

(6) Requires emergency services; or

(7) Receives family planning services during the visit.

3. Remedial services provided by residential facilities such as licensed homes for the aged and infirm, licensed foster care homes or facilities, and specialized facilities are not covered services but expenses incurred in securing such services must be deducted from countable income in determining financial eligibility. For the purposes of this chapter, "remedial services" means those services, provided in the above-identified facilities, which produce the maximum reduction of physical or mental disability and restoration of a recipient to the recipient's best possible functional level.

4. The department may refuse payment for any covered service or procedure for which a prior treatment authorization request is required but not secured, but shall consider making payment if the vendor demonstrates that the failure to secure the required prior treatment authorization request was the result of oversight and the vendor has not failed to secure a required prior treatment authorization request within the

twelve months prior to the month in which the services or procedures were furnished.

5. A vendor of medical services which provides a covered service but fails to receive payment due to the operation of subsection 4, and which attempts to collect from the eligible recipient or the eligible recipient's responsible relatives any amounts which would have been paid by the department but for the operation of subsection 4, has by so doing breached the agreement referred to in subsection 4 of section 75-02-02-10.

6. a. Effective January 1, 1994, and for so long thereafter as the single state agency may have in effect a waiver (issued pursuant to 42 U.S.C. 1396n(b)(1)) of requirements imposed pursuant to 42 U.S.C. chapter 7, subchapter XIX, no payment may be made, except as provided in this subsection, for otherwise covered services provided to otherwise eligible recipients:

   (1) Who are required by this subsection to select, or have selected on their behalf, a primary care physician, but who have not selected, or have not had selected on their behalf, a primary care physician; or

   (2) By a provider who is not the primary care physician selected by or on behalf of the recipient or who has not received a referral of such a recipient from the primary care physician.

   b. A primary care physician must be selected by or on behalf of the members of a medical assistance unit which includes:

      (1) Persons who are receiving cash assistance payments through aid to families with dependent children.

      (2) Persons who are deemed to be recipients of aid to families with dependent children, including:

         (a) Persons denied an aid to families with dependent children payment solely because the amount would be less than ten dollars;

         (b) Persons whose aid to families with dependent children payments are reduced to zero by reason of recovery of overpayment of aid to families with dependent children funds; and

         (c) Families who were receiving aid to families with dependent children cash assistance payments in at least three of the six months immediately

preceding the month in which they became ineligible as a result (wholly or partly) of the collection or increased collection of child or spousal support and are deemed to be recipients of aid to families with dependent children, and continue eligible for medicaid for four calendar months following the month for which the final cash payment was made.

(3) Families that received aid to families with dependent children payments in at least three of the six months immediately preceding the month in which the family became ineligible for aid to families with dependent children solely because of increased hours of, or income from, employment of the caretaker relative; or which became ineligible for aid to families with dependent children solely because a member of the family lost one of the time-limited aid to families with dependent children earned income disregards (the thirty dollar earned income disregard and the disregard of one-third of earned income).

(4) Pregnant women whose pregnancy has been medically verified and who would be eligible for an aid to families with dependent children cash payment on the basis of the income and asset requirements of the state-approved aid to families with dependent children plan.

(5) Children born to eligible pregnant women who have applied for and been found eligible for medicaid on or before the day of the child's birth, for sixty days after the day of the child's birth and for the remaining days of the month in which the sixtieth day falls.

(6) Persons who are members of families who would be eligible for aid to families with dependent children if that program did not limit, under 42 U.S.C. 607(b)(2)(B)(i), the number of months with respect to which a family receives such aid.

(7) All individuals under age twenty-one who are not receiving aid to families with dependent children, but whose income and assets are at or below the aid to families with dependent children program limits.

(8) Eligible caretaker relatives and individuals under age twenty-one in aid to families with dependent children families who do not meet financial or certain technical aid to families with dependent children requirements (i.e., work requirements) for a

cash payment, but meet medically needy income and asset standards.

(9) All individuals under the age of twenty-one who qualify for and require medical services on the basis of insufficient income and assets, but who do not qualify as categorically needy, including children in stepparent families who are ineligible for aid to families with dependent children, but not including children in foster care.

(10) Pregnant women whose pregnancy has been medically verified and who, except for income and assets, would be eligible as categorically needy.

(11) Pregnant women whose pregnancy has been medically verified and who qualify on the basis of financial eligibility.

(12) Eligible pregnant women who applied for medicaid during pregnancy, and for whom recipient liability for the month was met no later than on the date each pregnancy ends, continue to be eligible, as though pregnant, for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

(13) Pregnant women whose pregnancy has been medically verified and who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level.

(14) Eligible pregnant women who applied for medicaid during pregnancy who continue to be eligible, as though pregnant, for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

(15) Children under the age of six who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level.

(16) Children, age six or older, born after September 30, 1983, who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred percent of the poverty level.

c. Physicians practicing in the following specialties, practices, or locations may be selected as primary care physicians:

(1) Family practice;

(2) Internal medicine;

(3) Obstetrics;

(4) Pediatrics;

(5) Osteopathy;

(6) General practice;

(7) Physicians employed at rural health clinics;

(8) Physicians employed at federally qualified health centers; and

(9) Physicians employed at Indian health clinics.

d. A recipient identified in subdivision b need not select, or have selected on the recipient's behalf, a primary care physician if:

(1) Aged, blind, or disabled;

(2) The period for which benefits are sought is prior to the date of application;

(3) Despite diligent effort, the recipient is unable to find a physician willing to act as primary care physician;

(4) Receiving foster care or subsidized adoption benefits; or

(5) Receiving home and community-based services.

e. Payment may be made for the following medically necessary covered services whether or not provided by, or upon referral from, a primary care physician:

(1) Certified family nurse practitioner services;

(2) Certified pediatric nurse practitioner services;

(3) Early and periodic screening of recipients under twenty-one years of age;

(4) Family planning services;

(5) Certified nurse midwife services;

(6) Podiatric services;

(7) Optometric services;

(8) Chiropractric services;

(9) Clinic services;

(10) Dental services;

(11) Intermediate care facility services for the mentally retarded;

(12) Emergency services;

(13) Transportation services;

(14) Case management services;

(15) Home and community-based services;

(16) Nursing facility services;

(17) Prescribed drugs;

(18) Phychiatric services;

(19) Ophthalmic services;

(20) Obstetrical services; and

(21) Psychological services.

f. A primary care physician must be selected for each recipient.

g. Primary care physicians may not be changed more often than once every six months without good cause. Good cause for changing primary care physicians less than six months after a previous selection of a primary care physician exists if:

(1) The recipient relocates;

(2) Significant changes in the recipient's health require the selection of a primary care physician with a different specialty;

(3) The primary care physician relocates or is reassigned;

(4) The selected physician refuses to act as a primary care physician or refuses to continue to act as a primary care physician; or

(5) The department, or its agents, determine, in the exercise of sound discretion, that a change of primary care physician is necessary.

History: Amended effective September 1, 1978; September 2, 1980; February 1, 1981; November 1, 1983; May 1, 1986; November 1, 1986; November 1, 1987; January 1, 1991; July 1, 1993; January 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: NDCC 50-24.1-04; 42 USC 1396n(b)(1); 42 CFR 431.53, 42 CFR 431.110, 42 CFR 435.1009, 42 CFR Part 440, 42 CFR Part 441, subparts A, B, & D, 45 CFR 435.732

CHAPTER 75-02-02.1

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code chapter 75-02-02.1, Eligibility for Medicaid.

A public hearing was conducted on November 3, 1993, concerning proposed amendments to North Dakota Administrative Code chapter 75-02-02.1, Eligibility for Medicaid, concerning covered groups, spousal impoverishment prevention, trusts, and disqualifying transfers.

The amendments to section 75-02-02.1-05(1)(j) were adopted as interim final rules effective January 1, 1994. The remaining amendments to chapter 75-02-02.1 were adopted as interim final rules effective October 1, 1993. Emergency rulemaking was necessary because a delay in rulemaking was likely to cause a loss of federal revenues appropriated to support the administration of the Medicaid program, a duty imposed upon the Department of Human Services by North Dakota Century Code section 50-06-05.1 and North Dakota Century Code chapter 50-24.1, if the effective date of the amendment was May 1, 1994, as would be likely if diligent nonemergency rulemaking was pursued.

During the period before the effective dates, the remaining unamended rules would not conform to 42 U.S.C. section 1396p, as amended by section 13611 of the Omnibus Budget Reconciliation Act of 1994, effective October 1, 1993, which requires states administering Medicaid programs to apply certain procedures and requirements concerning the transfers of assets made after August 1, 1993, and the treatment of certain trusts established after August 10, 1993, to all Medicaid eligibility determinations made on or after October 1, 1993. If the department did not conform the Medicaid program to this federal requirement, it may not lawfully claim federal funds otherwise available to provide Medicaid benefits.

75-02-02.1-05(1)(j): Describes a newly covered group of qualified family members.

75-02-02.1-24, Spousal Impoverishment Prevention: Describes the showing required of a community spouse who seeks an asset allowance in excess of the community spouse countable asset allowance.

75-02-02.1-31, Trusts: Provides that the section applies to any trust not subject to section 75-02-02.1-31.1.

75-02-02.1-31.1, Trusts Established by Applicants, Recipients, or Their Spouses After August 10, 1993: A new section which describes the Medicaid eligibility treatment of trusts established by applicants, recipients, or their spouses after August 10, 1993.

75-02-02.1-33, Disqualifying Transfers: Amends the provisions under which a transfer of assets is presumed to have been intended to create Medicaid eligibility.

75-02-02.1-33.1, Disqualifying Transfers Made After August 10, 1993: A new section which describes the Medicaid eligibility treatment of transfers of assets or income by Medicaid applicants, recipients, or their spouses, made after August 10, 1993.

75-02-02.1-01. Definitions. For the purposes of this chapter:

1. "Agency" means the North Dakota department of human services.

2. "Aid to families with dependent children" means a program administered under North Dakota Century Code chapter 50-09 and title IV-A of the Social Security Act [42 U.S.C. 601 et seq.].

3. "Asset" means any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.

4. "Blind" has the same meaning as the term has when used by the social security administration in the supplemental security income program.

5. "Child" means a person, under twenty-one, or, if blind or disabled, under age eighteen, who is not living independently.

6. "Contiguous" means real property which is not separated by other real property owned by others. Roads and other public rights of way which run through the property, even if owned by others, do not affect the property's contiguity.

7. "County agency" means the county social service board.

8. "Department" means the North Dakota department of human services.

9. "Disabled" has the same meaning as the term has when used by the social security administration in the supplemental security income program.

10. "Disabled adult child" means a disabled or blind person over the age of twenty-one who became blind or disabled before age twenty-two.

11. "Earned income" means income which is currently received as wages, salaries, commissions, or profits from activities in which an individual or family is engaged through either employment or self-employment. There must be an appreciable amount of personal involvement and effort, on the part of the individual or family, for income to be considered "earned".

12. "Full calendar month" means the period which begins at midnight on the last day of the previous month and ends at midnight on the last day of the month under consideration.

13. "Good faith effort to sell" means an honest effort to sell in a manner which is reasonably calculated to induce a willing buyer to believe that the property offered for sale is actually for sale at a fair price. A good faith effort to sell includes, at a minimum, making the offer at a stated minimum price equal to seventy-five percent of fair market value (sixty-six and two-thirds percent of fair market value with respect to determination of qualified disabled and working individual benefits under section 75-02-02.1-23), in the following manner:

    a. To any coowner, joint owner, possessor, or occupier of the property, and, if no buyer is thereby secured;

    b. To the regular market for such property, if any regular market exists, or, if no regular market exists;

    c. By public advertisement for sale in a newspaper of general circulation, the circulation area of which includes the location of any property resource offered for sale, which advertisement was published successively for two weeks if the newspaper is a weekly publication and for one week if the newspaper is a daily publication, and which includes a plain and accurate description of the property and the name, address, and telephone number of a person who will answer inquiries and receive offers.

14. "Home" includes, when used in the phrase "the home occupied by the medicaid unit", the land on which the home is located, provided that the acreage [hectarage] does not exceed one hundred sixty contiguous acres [64.75 hectares] if rural or two acres [.81 hectares] if located within the established boundaries of a city.

15. "Institutionalized person" or "institutionalized individual" means a person who is an inpatient in a nursing facility, the state hospital, an accredited residential treatment center for children, or the Anne Carlsen school-hospital, or who receives swing bed care in a hospital.

16. "Living independently" means, in reference to a child under the age of twenty-one or, if blind or disabled, under the age of eighteen, a status which arises in any of the following circumstances:

    a. The applicant or recipient has served a tour of active duty with the armed services of the United States and lives separately and apart from the parent.

    b. The applicant or recipient has married, even though that marriage may have been dissolved or annulled in a court of law.

c. The applicant or recipient has lived separately and apart from both parents for at least six consecutive months after the date the applicant or recipient left a parental home, continues to live separately and apart from both parents, and has received no support or assistance from either parent while living separately and apart. For purposes of this subdivision, periods when the applicant or recipient is attending an educational or training facility, receiving care in a specialized facility, or is an institutionalized person are deemed to be periods when the applicant or recipient was living with a parent.

d. Both parents from whom support could ordinarily be sought, and the property of such parents, is outside the jurisdiction of the courts of the United States or any of the United States.

17. "Medicaid" means a program implemented pursuant to North Dakota Century Code chapter 50-24.1 and 42 U.S.C. 1396 et seq. to furnish medical assistance, as defined in 42 U.S.C. 1396d(a), to persons determined eligible for medically necessary, covered medical, and remedial services.

18. "Medicaid unit" means an individual, a married couple, or a family with children under twenty-one years of age (or, with respect to a blind or disabled child, under eighteen years of age), whose income and assets are considered in determining eligibility for any member of that unit, without regard to whether the members of the unit all physically reside in the same location.

19. "Medicare cost sharing" means the following costs:

a. (1) Medicare part A premiums; and

(2) Medicare part B premiums;

b. Medicare coinsurance;

c. Medicare deductibles; and

d. Twenty percent of the allowed cost for medicare covered services where medicare covers only eighty percent of the allowed costs.

20. "Occupied" means, when used in the phrase "the home occupied by the medicaid unit", the home the medicaid unit is living in or, if temporarily absent from, possessed with an intention to return and the capability of returning within a reasonable length of time. Property is not occupied if the right to occupy has been given up through a rental or lease agreement, whether or not that rental or lease agreement is written. Property is not occupied by an individual in long-term care or

the state hospital, with no spouse, disabled adult child, or child under age twenty-one at home, unless a physician has certified that the individual is likely to return home within six months.

21. "Persons deemed to be receiving aid to families with dependent children" means those persons who are not receiving an aid to families with dependent children money payment, but who must be treated as recipients of such benefits because federal law or regulations so provides.

22. "Pre-need funeral service contract" has the same meaning provided for in subsection 2 of North Dakota Century Code section 43-10.1-01.

23. "Property which is essential to earning a livelihood" means property which the applicant or recipient owns, and which the applicant or recipient is actively engaged in using to earn income, and where the total benefit of such income is derived for the applicant or recipient's needs. An applicant or recipient is actively engaged in using the property of that individual contributes significant current personal labor in using the property for income-producing purposes. The payment of social security taxes on the income from such current personal labor is an indicator of the active use of the property. Property from which an applicant or recipient is merely receiving rental or lease income is not essential to earning a livelihood. With respect to determination of qualified medicare beneficiary benefits under section 75-02-02.1-22, qualified disabled and working individual benefits under section 75-02-02.1-23, and benefits determined by applying section 75-02-02.1-24, concerning spousal impoverishment prevention, liquid assets may be included as property essential to earning a livelihood. The amount of a liquid asset used exclusively in a trade or business, which is essential to earning a livelihood, is limited to an amount reasonably necessary for the continuation of the business. Liquid assets may not otherwise be treated as property essential to earning a livelihood.

24. "Property which is not saleable without working an undue hardship" means property which the owner has made a good faith effort to sell which has produced no buyer willing to pay an amount equaling or exceeding seventy-five percent of the property's fair market value (sixty-six and two-thirds percent of the property's fair market value with respect to determination of qualified disabled and working individual benefits under section 75-02-02.1-23), and which is continuously for sale. Property may not be included within this definition at any time earlier than the first day of the first month in which a good faith effort to sell is begun.

25. "Regulation", as used in 42 CFR 431.210, 431.244, and 435.912, includes any written statement of federal or state law or policy, including, but not limited to, federal and state constitutions, statutes, regulations, rules, policy manuals or directives, policy letters or instructions, and relevant controlling decisions of federal or state courts.

26. "Remedial services" means those services, provided in specialized facilities, which produce the maximum reduction of physical or mental disability and restoration of the facilities' residents to the residents' best possible level of functioning.

27. "Residing in the home" refers to individuals who are physically present, individuals who are temporarily absent, individuals attending educational facilities, individuals receiving acute medical care, and individuals receiving services in a specialized facility.

28. "Specialized facility" means a residential facility, including a basic care facility, a licensed family foster care home for children or adults, a licensed group foster care home for children or adults, a transitional living facility, a facility established to provide quarters to clients of a sheltered workshop, and any other facility determined by the department to be a provider of remedial services, but does not mean an acute care facility or a nursing facility.

29. "State agency" means the North Dakota department of human services.

30. "Supplemental security income" means a program administered under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].

31. "The act" means the Social Security Act [42 U.S.C. 301 et seq.].

32. "Title II" means title II of the Social Security Act [42 U.S.C. 401 et seq.].

33. "Title IV-A" means title IV-A of the Social Security Act [42 U.S.C. 601 et seq.].

34. "Title IV-D" means title IV-D of the Social Security Act [42 U.S.C. 651 et seq.].

35. "Title IV-E" means title IV-E of the Social Security Act [42 U.S.C. 670 et seq.].

36. Title XVI" means title XVI of the Social Security Act [42 U.S.C. 1381 et seq.].

37. "Unearned income" means income which is not earned income.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; October 1, 1993.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-01

75-02-02.1-05. Covered groups. Within the limits of legislative appropriation, four broad coverage groups are included under the medicaid program. Within each coverage group, one or more aid categories is established. These coverage groups do not define eligibility for medicaid benefits. Any person who is within a coverage group must also demonstrate that all other eligibility criteria are met.

1. Categorically needy groups include:

   a. Persons who are receiving cash assistance payments through aid to families with dependent children.

   b. Persons who are deemed to be recipients of aid to families with dependent children including:

      (1) Individuals denied an aid to families with dependent children payment solely because the amount would be less than ten dollars;

      (2) Individuals whose aid to families with dependent children payments are reduced to zero by reason of recovery of overpayment of aid to families with dependent children funds;

      (3) Families who were receiving aid to families with dependent children cash assistance payments in at least three of the six months immediately preceding the month in which they became ineligible as a result (wholly or partly) of the collection or increased collection of child or spousal support and are deemed to be recipients of aid to families with dependent children, and continue eligible for medicaid for four calendar months following the month for which the final cash payment was made;

      (4) Children for whom adoption assistance maintenance payments are made under title IV-E;

      (5) Children for whom foster care maintenance payments are made under title IV-E;

      (6) Children who are living in North Dakota and are receiving title IV-E adoption assistance payments from another state; and

(7) Children in a foster care placement in North Dakota and receiving a title IV-E foster care payment from another state.

c. Families which received aid to families with dependent children payments in at least three of the six months immediately preceding the month in which the family became ineligible for aid to families with dependent children solely because of increased hours of, or income from, employment of the caretaker relative; or which became ineligible for aid to families with dependent children solely because a member of the family lost one of the time-limited aid to families with dependent children earned income disregards (the thirty dollar earned income disregard and the disregard of one-third of earned income).

d. Pregnant women whose pregnancy has been medically verified and who would be eligible for an aid to families with dependent children cash payment on the basis of the income and asset requirements of the state-approved aid to families with dependent children plan.

e. Eligible pregnant women who applied for medicaid during pregnancy continue to be eligible, as though they were pregnant, for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

f. Children born to eligible pregnant women who have applied for and been found eligible for medicaid on or before the day of the child's birth, for sixty days after the day of the child's birth and for the remaining days of the month in which the sixtieth day falls.

g. Aged, blind, or disabled individuals who are receiving supplemental security income payments or who appear on the state data exchange as zero payment as a result of supplemental security income's recovery of an overpayment or who are suspended because the individuals do not have a protective payee, provided that the more restrictive medicaid criteria is met.

h. Individuals who meet the more restrictive requirements of the medicaid program and qualify for supplemental security income benefits under section 1619(a) or 1619(b) of the Act [42 U.S.C. 1382h(a) or 1382h(b)].

i. Essential spouses of, or persons essential to, individuals who received benefits, in December 1973 under the state's approved plan for title XVI of the Social Security Act (repealed), who were grandfathered into the supplemental security income program and who have continuously received

benefits under the supplemental security income program and the medicaid program since the inception of the supplemental security income program, but only if the essential spouse of, or person essential to, the individual continues to reside with the individual.

j. Members of families who would be eligible for aid to families with dependent children if that program did not limit, under 42 U.S.C. 607(b)(2)(B)(i), the number of months with respect to which a family receives such aid.

2. Optional categorically needy groups include:

a. All individuals under age twenty-one who are not receiving aid to families with dependent children, but whose income and assets are at or below the aid to families with dependent children program limits.

b. All individuals under age twenty-one who are residing in adoptive homes and who have been determined under the state-subsidized adoption program to be eligible as provided in state law and in accordance with the requirements of the department.

c. All individuals under age twenty-one who qualify on the basis of financial eligibility for medicaid and who are residing in foster homes or private child care institutions licensed or approved by the department, irrespective of financial arrangements, including children in a "free" foster home placement.

3. Medically needy groups include:

a. Eligible caretaker relatives and individuals under age twenty-one in aid to families with dependent children families who do not meet financial or certain technical aid to families with dependent children requirements (i.e., work requirements) for a cash payment, but meet medically needy income and asset standards.

b. All individuals under the age of twenty-one who qualify for and require medical services on the basis of insufficient income and assets, but who do not qualify as categorically needy, including children in stepparent families who are ineligible for aid to families with dependent children or children in non-IV-E foster care.

c. Pregnant women whose pregnancy has been medically verified and who, except for income and assets, would be eligible as categorically needy.

d. Pregnant women whose pregnancy has been medically verified and who qualify on the basis of financial eligibility.

e. Eligible pregnant women who applied for medicaid during pregnancy, and for whom recipient liability for the month was met no later than on the date each pregnancy ends, continue to be eligible, as though pregnant, for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

f. Aged, blind, or disabled individuals who would be eligible for supplemental security income benefits or certain state supplemental payments, but who have not applied for cash assistance or have sufficient income or assets to meet their maintenance needs.

g. Individuals under age twenty-one (who have been certified as needing the service) or age sixty-five and over in the state hospital who qualify on the basis of financial eligibility.

4. Poverty level groups include:

a. Pregnant women whose pregnancy has been medically verified and who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level.

b. Eligible pregnant women who applied for medicaid during their pregnancy who continue to be eligible for sixty days after the day each pregnancy ends, and for the remaining days of the month in which the sixtieth day falls.

c. Children under the age of six who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred thirty-three percent of the poverty level.

d. Children, age six or older, born after September 30, 1983, who meet the nonfinancial and asset requirements of the medicaid program and whose family income is at or below one hundred percent of the poverty level.

e. Qualified medicare beneficiaries are aged, blind, or disabled individuals who are entitled to medicare part A benefits, meet the medically needy nonfinancial criteria, have assets no greater than twice the supplemental security income resource standards, and have income at or below one hundred percent of the poverty level.

f. Qualified disabled and working individuals are individuals entitled to enroll in medicare part A under section 1818a of the Social Security Act [42 U.S.C. 1395i-2(a)], have income no greater than two hundred percent of the federal

poverty level, have assets no greater than twice the supplemental security income resource standard, and are not eligible for medicaid under any other provision. The supplemental security income program income and asset methodologies must be used and none of the more restrictive 209b criteria may be applied.

g. Special low-income medicare beneficiaries are aged, blind, or disabled individuals who are entitled to medicare part A benefits, meet the medically needy nonfinancial criteria, have assets no greater than twice the supplemental security income resource standards, and have income above one hundred percent of the poverty level, but not in excess of one hundred ten percent of the poverty level until January 1, 1995, and thereafter, not in excess of one hundred twenty percent of the poverty level.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; January 1, 1994.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02

75-02-02.1-24. Spousal impoverishment prevention.

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

   a. "Community spouse" means the spouse of an institutionalized spouse.

   b. "Family member" means only minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse. For purposes of applying this definition, a family member is dependent only if he or she is, and may properly be, claimed as a dependent on the federal income tax return filed by the institutionalized spouse or the community spouse, or filed jointly by both.

   c. "Institutionalized spouse" means an individual who:

      (1) Is receiving swing bed care in a hospital or is in the state hospital or a nursing facility and, at the beginning of his or her institutionalization, is likely to be in the facility for at least thirty consecutive days (even though he or she does not actually remain in the facility for thirty consecutive days); and

      (2) Is married to a spouse who is not receiving swing bed care in a hospital or care in the state hospital or a nursing facility.

d. "Monthly maintenance needs allowance" means for a community spouse, the maximum amount permitted under 42 U.S.C. 1396r-5(d)(3)(C), as adjusted pursuant to 42 U.S.C. 1396r-5(g).

2. **Treatment of countable assets.**

a. Assessment. At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization of the institutionalized spouse, and upon receipt of relevant documentation of resources, the total value described in subdivision b shall be assessed and documented.

b. Total joint countable assets. There shall be computed, as of the beginning of the first continuous period of institutionalization of the institutionalized spouse:

(1) The total value of the countable assets to the extent either the institutionalized spouse or the community spouse has an ownership interest; and

(2) A spousal share, which is equal to all countable assets up to the maximum amount permitted under 42 U.S.C. 1396r-5(f)(2)(A)(ii)(II), as adjusted pursuant to 42 U.S.C. 1396r-5(g).

c. In determining the assets of the institutionalized spouse at the time of application, all countable assets held by the institutionalized spouse, the community spouse, or both, must be considered available to the institutionalized spouse to the extent they exceed the community spouse countable asset allowance.

d. During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this chapter, no countable assets of the community spouse may be deemed available to the institutionalized spouse.

e. The institutionalized spouse is not ineligible by reason of assets determined under subdivision c to be available for the cost of care where:

(1) The institutionalized spouse has assigned to the state any rights to support from the community spouse; or

(2) It is determined that a denial of eligibility would work an undue hardship because the presumption described in subsection 4 of section 75-02-02.1-25 has been rebutted.

f. An institutionalized spouse is allowed the medically needy asset limit of three thousand dollars.

g. An institutionalized spouse is asset eligible if the total value of all countable assets of the community spouse and the institutionalized spouse is less than the total of the community spouse asset limit and the institutionalized spouse asset limit. The assets may be owned by either spouse provided that the institutionalized spouse complies with the requirements of subdivision h.

h. Permitting transfer of assets to community spouse. Transfers from spouse to spouse do not disqualify an applicant from receipt of medicaid benefits. In order to facilitate such transfers from an institutionalized spouse to a community spouse, where necessary to maximize the community spouse asset allowance, a brief period of time is permitted for such transfers after the institutionalized spouse is determined eligible for medicaid. During this period, such assets are not counted as available to the institutionalized spouse even though the assets are not yet transferred.

(1) An institutionalized spouse may transfer an amount equal to the community spouse countable asset allowance, but only to the extent the assets of the institutionalized spouse are transferred to, or for the sole benefit of, the community spouse.

(2) A transfer under paragraph 1 must be made by the end of the third calendar month after the month in which the eligibility decision is made.

(3) When an eligible institutionalized spouse exceeds the asset limits due to an increase in the value of assets or the receipt of assets not previously owned, an institutionalized spouse may transfer additional assets to the community spouse equal to no more than the current maximum community spouse countable asset allowance less the total value of assets transferred to, or for the sole benefit of, the community spouse, under paragraph 1 or previously transferred under this paragraph.

(4) A transfer under paragraph 3 must be made by the end of the third calendar month of a period which begins with the month in which the institutionalized spouse exceeded the asset limit.

(5) If a transfer made under paragraph 1 or 3 causes the total value of all assets owned by the community spouse immediately prior to the transfer under paragraph 1, plus the value of all assets transferred

under paragraph 1, plus the value of all assets transferred under paragraph 3, equals or exceeds the current maximum community spouse asset allowance, no further transfer may be made under paragraph 3.

(6) If a court has entered an order against an institutionalized spouse for the support of a community spouse, assets required by such order to be transferred, by the institutionalized spouse to the community spouse, may not be counted as available to the institutionalized spouse even though the assets are not yet transferred.

3. **Community spouse countable asset allowance.** A community spouse may retain or receive assets, which do not exceed the community spouse countable asset allowance, for purposes of determining the medicaid eligibility of the institutionalized spouse. The community spouse countable asset allowance means the spousal share determined under paragraph 2 of subdivision b of subsection 2, plus:

   a. Any additional amount transferred under a court order in the manner and for the purpose described in paragraph 5 of subdivision h of subsection 2; or

   b. Any additional amount established through a fair hearing conducted under subsection 7.

4. **Countable and excluded assets.** Countable assets include all assets which are not specifically excluded. Excluded assets are:

   a. A residence occupied by the community spouse. For purposes of this subdivision, "residence" includes all contiguous lands, including mineral interests, upon which it is located. The residence may include a mobile home suitable for use, and being used, as a principal place of residence. Rural property contiguous to the residence is excluded, even if rented or leased to a third party. The residence is excluded during temporary absence of the community spouse from the residence, so long as the community spouse intends to return.

   b. Household goods, personal effects, and an automobile or other vehicle primarily used for personal transportation.

   c. A burial fund of up to one thousand five hundred dollars, plus earnings on excluded burial funds earned after July 1, 1987. Burial funds may consist of revocable burial contracts; revocable burial trusts; other revocable burial arrangements, including the value of installment sales contracts for burial spaces; cash; financial accounts such as savings or checking accounts; or other

financial instruments with a definite cash value, such as stocks, bonds, and certificates of deposit. The fund must be unencumbered and available for conversion to cash on very short notice. The fund may not be commingled with nonburial-related assets and must be identified as a burial fund by title of account or signed statement. Term burial insurance, irrevocable trusts, or any other irrevocable arrangement for burial must be considered at face value for meeting the burial fund exclusion. Combined face value of an individual's life insurance policies, which have any cash surrender value, with a total face value of one thousand five hundred dollars or less must be considered toward this exclusion. Cash surrender value of an individual's life insurance with a total face value in excess of one thousand five hundred dollars may be applied towards the burial fund exclusion.

d. A burial space or agreement which represents the purchase of a burial space held for the individual, the individual's spouse, or any other member of the individual's immediate family. The burial space exclusion is in addition to the burial fund exclusion set forth in subdivision c. Only one item intended to serve a particular burial purpose, per individual, may be excluded. For purposes of this subdivision:

(1) "Burial space" means a burial plot, gravesite, crypt, or mausoleum; a casket, urn, niche, or other repository customarily and traditionally used for a deceased's bodily remains; a vault or burial container; a headstone, marker, or plaque; and prepaid arrangements for the opening and closing of the gravesite or for care and maintenance of the gravesite.

(2) "Held for" means the individual currently has title to or possesses a burial space intended for the individual's use or has a contract with a funeral service company for specified burial spaces for the individual's burial, such as an agreement which represents the individual's current right to use of the items at the amount shown.

(3) "Other members of the individual's immediate family" means the individual's parents, minor or adult children, siblings, and the spouses of those persons, whether the relationship is established by birth, adoption, or marriage, except that a relationship established by marriage ends if the marriage ends.

e. At the option of the institutionalized spouse, and in lieu of (but not in addition to) the burial fund described in subdivision c and the burial space or agreement described

in subdivision d, any prepayments or deposits which total three thousand dollars or less, and the interest accrued thereon after July 1, 1987, made under a pre-need funeral service contract for the institutionalized spouse. The institutionalized spouse must verify that the deposit is made in a manner such that the institutionalized spouse may obtain the deposit within five days after making a request directly to the financial institution, and without furnishing documents maintained by the funeral establishment or writing for the financial institution to secure permission from the funeral establishment.

f. Property essential to self-support.

(1) "Property essential to self-support" means:

(a) Property which the community spouse or the institutionalized spouse owns, with an equity value not exceeding six thousand dollars, which produces annual income at least equal to six percent of equity value, and which neither spouse is actively engaged in using to produce income. Two or more properties may be excluded if each such property produces at least a six percent return and the combined equity value does not exceed six thousand dollars. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars and is a countable asset if it produces an annual return of less than six percent of equity. The property must be in current use, or, if not in current use, there must be a reasonable expectation that the use will resume, and the annual return test will be met within twelve months of the last use or, if the nonuse is due to the disabling condition of the community spouse or the institutionalized spouse, within twenty-four months of the last use. If the property produces less than a six percent return, the property may nonetheless be excluded, for a period of no more than twenty-four months, beginning with the first day of the tax year following the one in which the return dropped below six percent, only if the lower return is for reasons beyond the control of the community spouse or institutionalized spouse and there is a reasonable expectation that the property will again produce a six percent return.

(b) Nonbusiness property which the community spouse or the institutionalized spouse owns, up to an equity value of six thousand dollars, when used

to produce goods or services essential to daily activities, or, for instance, when used to grow produce or livestock solely for consumption in the community spouse's household. Equity in such property is a countable asset to the extent that equity exceeds six thousand dollars. The property must be in current use or, if not in current use, the asset must have been in such use and there must be a reasonable expectation that the use will resume within twelve months of the last use or, if the nonuse is due to the disabling condition of the community spouse or institutionalized spouse, within twenty-four months of the last use.

(c) Property which is essential to earning a livelihood. Such property may be excluded only during months when it is in current use or, if not in current use, when the asset has been in such use and there is a reasonable expectation that the use will resume within twelve months of the last use or, if the nonuse is due to the disabling condition of the applicant or recipient, within twenty-four months of the last use. Liquid assets used in the operation of a trade or business excluded under this subparagraph are also excluded provided that those liquid assets are exclusively so used and are not commingled with any liquid asset not so used.

(2) Except as provided in subparagraph c of paragraph 1, liquid assets are not property essential to self-support.

g. Stock in regional or village corporations held by natives of Alaska during the twenty-year period in which the stock is inalienable pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1606(h) and 1606(c)].

h. Assistance received under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.] or other assistance provided pursuant to a federal statute on account of a catastrophe which is declared to be a major disaster by the president, and interest received on such assistance for a nine-month period beginning on the date such funds are received. When retained, this asset must be identifiable and not commingled with other assets.

i. Any amounts received from the United States which are attributable to underpayments of benefits due for one or more prior months, under title II or title XVI of the Act

[42 U.S.C. 401 et seq. and 1381 et seq.] for a six-month period beginning on the date such amounts are received.

j. The value of assistance, paid with respect to a dwelling unit occupied by the community spouse, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].

k. For the nine-month period beginning with the month in which received, any amount received by the applicant or recipient, or the community spouse, from a fund established by a state to aid victims of crime, to the extent that the applicant or recipient, or the community spouse, demonstrates that such amount was paid in compensation for expenses incurred or losses suffered as a result of a crime.

l. For the nine-month period beginning after the month in which received, relocation assistance provided by a state or local government to an applicant or recipient, or to a community spouse, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.] which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636].

m. For the month of receipt and the following month, any refund of federal income taxes made to an applicant or recipient, or to the community spouse, by reason of section 32 of the Internal Revenue Code of 1986 (relating to earned income tax credit) and any payment made to an applicant or recipient, or to the community spouse, by an employer under section 3507 of the Internal Revenue Code of 1986 (relating to advance payment of earned income credit).

n. Life insurance or burial insurance that generates a cash surrender value, if the face value of all such life insurance or burial insurance policies on the life of that person total one thousand five hundred dollars or less.

o. Property which is excluded under subsections 1, 2, 4, 6 through 10, and 12 of section 75-02-02.1-28.

5. **Treatment of income.** Income calculations to determine medicaid eligibility for an institutionalized spouse must consider income in the manner provided for in section 75-02-02.1-34, income considerations; sections 75-02-02.1-36, disregarded income; section 75-02-02.1-37, unearned income;

section 75-02-02.1-38, earned income; and section 75-02-02.1-39, income deductions, except:

a. No income of the community spouse may be deemed available to the institutionalized spouse during any month in which an institutionalized spouse is in the institution.

b. After an institutionalized spouse is determined or redetermined to be eligible for medicaid, in determining the amount of the institutionalized spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the institutionalized spouse's monthly income the following amounts in the following order:

(1) A personal needs allowance.

(2) A community spouse monthly income allowance, but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(3) A family allowance, for each family member, equal to one-third of an amount, determined in accordance with 42 U.S.C. 1396r-5(d)(3)(A)(i), less the monthly income of that family member.

(4) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse.

6. **Medicaid eligibility application.** The provisions of this section describing the treatment of income and assets for the community spouse do not describe that treatment for the purposes of determining medicaid eligibility for the community spouse or for children of the community spouse.

7. **Notice and fair hearing.**

a. Notice must be provided of the amount of the community spouse income allowance, of the amount of any family allowances, of the method of computing the amount of the community spouse countable asset allowance, and of the right to a fair hearing respecting ownership or availability of income and assets, and the determination of the community spouse monthly income or countable asset allowance. The notice must be provided, upon a determination of medicaid eligibility of an institutionalized spouse, to both spouses, and upon a subsequent request by either spouse or a representative acting on behalf of either spouse, to the spouse making the request.

b. Fair hearing. A community spouse or an institutionalized spouse is entitled to a fair hearing under chapter 75-01-03 if application for medicaid has been made on behalf of the institutionalized spouse and either spouse is dissatisfied with a determination of:

(1) The community spouse monthly income allowance;

(2) The amount of monthly income otherwise available to the community spouse as determined in calculating the community spouse monthly income allowance;

(3) The computation of the spousal share of countable assets;

(4) The attribution of countable assets; or

(5) The determination of the community spouse countable asset allowance.

c. Any hearing respecting the determination of the community spouse countable asset allowance must be held within thirty days of the request for the hearing.

d. If either spouse establishes that the community spouse needs income, above the level provided by the monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, the monthly maintenance needs allowance for that spouse must be increased to an amount adequate to provide necessary additional income.

e. (1) If either spouse establishes that the assets included within the community spouse countable asset allowance generate an amount of income inadequate to raise the community spouse's income to the monthly needs allowance, to the extent that total assets permit, the community spouse countable asset allowance ~~for that--spouse~~ must be increased to an amount adequate to provide such a monthly maintenance needs allowance.

(2) To establish a need for an increased asset allowance under this subdivision, the applicant or recipient must:

(a) Provide verification of all income and assets of the community spouse; and

(b) Provide three estimates of the cost of the annuity described in paragraph 3.

(3) The amount of assets adequate to provide a monthly maintenance needs allowance for the community spouse must be based on the cost of a single premium lifetime annuity that provides monthly payments equal to the difference between the monthly maintenance needs allowance and other income of both spouses not generated by either spouse's nonexempt assets.

(4) The monthly maintenance needs allowance amount upon which calculations under this subdivision are made must be the amount in effect upon filing of the appeal.

(5) An average of the estimates of the cost of an annuity described in paragraph 3 must be substituted for the amount of assets attributed to the community spouse if the amount of assets previously determined is less than the average of the estimates. If the amount of assets attributed to the community spouse prior to the hearing is greater than the average of the estimates of the cost of an annuity described in paragraph 3, the attribution of assets to the community spouse made prior to the hearing must be affirmed.

(6) No applicant, recipient, or community spouse is required to purchase an annuity as a condition of the applicant or recipient's eligibility for medicaid benefits.

8. Any transfer of an asset or income is a disqualifying transfer under section 75-02-02.1-33 or 75-02-02.1-33.1, whether made by a community spouse or an institutionalized spouse, unless specifically authorized by this section. The income that may be received by or deemed provided to an ineligible community spouse, and the asset amounts that an ineligible community spouse may retain, are intended to allow that community spouse to avoid impoverishment. They are not intended to allow the community spouse to make transfers of assets or income, for less than adequate consideration, which would disqualify the institutionalized spouse, if made by the institutionalized spouse.

History: Effective December 1, 1991; amended effective December 1, 1991; July 1, 1993; October 1, 1993.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396r-5

75-02-02.1-31. Trusts. A trust is an arrangement whereby a person (the "grantor" or "trustor") gives property to another (the "trustee") with instructions to use the property for the benefit of a third person (the "beneficiary"). The property placed in trust is

called the "principal" or "corpus". The positions of grantor, trustee, and beneficiary occur in all trusts, but it is not uncommon for a single trust to involve more than one grantor, trustee, or beneficiary. It is also not uncommon for a grantor to establish a trust where the grantor is also a beneficiary or where the trustee is also a beneficiary. Trusts are often very individualized arrangements, and generalizations about them can prove inaccurate. However, the trust may have an effect on eligibility whether the applicant is a grantor, trustee, or beneficiary.

1. **Revocable - irrevocable.** Trusts may be categorized in many ways, but the revocability of a trust is a fundamental one. A revocable trust is one where someone, usually the grantor, has the power to remove the property from the trust, or otherwise end the trust. An irrevocable trust is one where that power does not exist. The determination of trust revocability is not based solely on a trust declaration of irrevocability. A trust where a power to amend is reserved to the grantor, or granted to some other person, is treated as a revocable trust. Even a trust which, on its face, appears clearly to be irrevocable, may be revoked with the consent of the grantor and the beneficiaries.

   a. If the grantor of a trust is also the sole beneficiary, trust assets are treated as the grantor's assets for medicaid purposes.

   b. If the grantor of a trust and all trust beneficiaries are part of a medicaid unit, trust assets are treated as the grantor's assets for medicaid purposes.

   c. Trust assets of a revocable trust are treated as the grantor's assets for medicaid purposes.

   d. The amount from an actually irrevocable trust deemed available to a beneficiary of that trust is the greater of the amount which must be distributed to the beneficiary under the terms of the trust, whether or not that amount is actually distributed, and the amount which is actually distributed (unless the trust is a medicaid-qualifying trust or a support trust).

2. **Medicaid-qualifying trusts.**

   a. For purposes of this subsection:

      (1) "Medicaid-qualifying trust" means a trust established, other than by will, by an individual or the individual's spouse, under which the individual may be the beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one or more trustees who are

permitted to exercise any discretion with respect to the distribution to the individual.

(2) "A trust established by an individual or the individual's spouse" includes trusts created or approved by courts or by the individual or the individual's spouse where the property placed in trust is intended to satisfy or settle a claim made by or on behalf of the individual or the individual's spouse against any third party.

b. The amount from an irrevocable medicaid-qualifying trust deemed available to the grantor or the grantor's spouse is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of this subdivision, "grantor" means the individual referred to in paragraph 1 of subdivision a.

c. This subsection applies:

(1) Even though the medicaid-qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medicaid; and

(2) Whether or not the discretion described in paragraph 1 of subdivision a is actually exercised.

3. **Support trust.**

a. For purposes of this subsection, "support trust" means a trust which has, as a purpose, the provision of support or care to a beneficiary. The purpose of a support trust is indicated by language such as "to provide for the care, support, and maintenance of . . ."; "to provide as necessary for the support of . . ."; or "as my trustee may deem necessary for the support, maintenance, medical expenses, care, comfort, and general welfare". No particular language is necessary, but words such as "care", "maintenance", "medical needs", or "support" are usually present. The term includes trusts which may also be called "discretionary support trusts" or "discretionary trusts", so long as support is a trust purpose. This subsection applies without regard to:

(1) Whether or not the support trust is irrevocable or is established for purposes other than to enable a beneficiary to qualify for medicaid or any other benefit program where availability of benefits requires the establishment of financial need; or

(2) Whether or not the discretion is actually exercised.

b. Except as provided in subdivisions c and d, the amount from a support trust deemed available to the beneficiary, the beneficiary's spouse, and the beneficiary's children is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the beneficiary, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the beneficiary.

c. A beneficiary of a support trust, under which the distribution of payments to the beneficiary is determined by one or more trustees who are permitted to exercise any discretion with respect to that distribution, may show that the amounts deemed available under subdivision b are not actually available by:

(1) Commencing proceedings against the trustee or trustees in a court of competent jurisdiction;

(2) Diligently and in good faith asserted in the proceeding that the trustee or trustees is required to provide support out of the trust; and

(3) Showing that the court has made a determination, not reasonably subject to appeal, that the trustee must pay some amount less than the amount determined under subdivision b.

d. If the beneficiary makes the showing described in subdivision c, the amount deemed available from the trust is the amount determined by the court.

e. Any action by a beneficiary or the beneficiary's representative, or by the trustee or the trustee's representative, in attempting a showing under subdivision c, to make the department, the state of North Dakota, or a county agency a party to the proceeding, or to show to the court that medicaid benefits may be available if the court limits the amounts deemed available under the trust, precludes the showing of good faith required under subdivision c.

4. **Discretionary trusts.**

a. For purposes of this subsection, "discretionary trust" means any trust in which one or more trustees is permitted to exercise any discretion with respect to distribution to the beneficiary, but does not include any trust within the definition of a "support trust", as that term is defined in subsection 3.

8. This section applies to any trust not subject to the provisions of section 75-02-02.1-31.1.

History: Effective December 1, 1991; amended effective December 1, 1991; October 1, 1993.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396a(k)

75-02-02.1-31.1. Trusts established by applicants, recipients, or their spouses after August 10, 1993.

1. For purposes of determining an individual's eligibility under this chapter, subject to subsection 4, this section shall apply to a trust established by such individual after August 10, 1993.

2. a. For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established that trust other than by will:

(1) The individual;

(2) The individual's spouse;

(3) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or

(4) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

b. In the case of a trust the corpus of which includes assets of an individual (as determined under subdivision a) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

c. Subject to subsection 4, this section shall apply without regard to:

(1) The purposes for which a trust is established;

(2) Whether the trustees have or exercise any discretion under the trust;

(3) Any restrictions on when or whether distributions may be made from the trust; or

(4) Any restrictions on the use of distributions from the trust.

3. a. In the case of a revocable trust:

(1) The corpus of the trust shall be considered assets available to the individual;

(2) Payments from the trust to or for the benefit of the individual shall be considered income of the individual; and

(3) Any other payments from the trust shall be considered income or assets disposed of by the individual for purposes of section 75-02-02.1-33.1.

b. In the case of an irrevocable trust:

(1) If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered available to the individual, and payments from that portion of the corpus or income:

(a) To or for the benefit of the individual, shall be considered income of the individual; and

(b) For any other purpose, shall be considered a transfer of income or assets by the individual subject to section 75-02-02.1-33.1; and

(2) Any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be income or assets disposed by the individual for purposes of section 75-02-02.1-33.1, and the value of the trust shall be determined for purposes of section 75-02-02.1-33.1 by including the amount of any payments made from such portion of the trust after such date.

4. This section shall not apply to:

a. A trust containing the assets of an individual under age sixty-five who is disabled and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if, under the terms of the trust, the department will receive all amounts remaining in the trust upon the death of such

individual up to an amount equal to the total medicaid benefits paid under North Dakota Century Code chapter 50-24.1 on behalf of the individual; or

b. A trust containing the assets of a disabled individual that meets the following conditions:

(1) The trust is established and managed by a nonprofit association;

(2) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts;

(3) Accounts in the trust are established solely for the benefit of a disabled individual by the parent, grandparent, or legal guardian of the individual, by the individual, or by a court; and

(4) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the department from such remaining amounts in the account an amount equal to the total amount of medicaid benefits paid under North Dakota Century Code chapter 50-24.1 on behalf of the beneficiary.

5. The department may waive application of this section if the individual establishes that some other person, not currently receiving medicaid, food stamps, aid to families with dependent children, or low-income home energy assistance program benefits, would become eligible for such benefits because of and upon application of this section, and that the cost of those benefits, provided to that other person, exceeds the cost of medicaid benefits available to the individual if application is waived.

6. For purposes of this section:

a. "Income" and "assets" include all income and assets of the individual and of the individual's spouse, including any income or assets that the individual or the individual's spouse is entitled to, but does not receive because of action:

(1) By the individual or the individual's spouse;

(2) By a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or

(3) By any person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

b. "Trust" includes any legal instrument or device, whether or not written, which is similar to a trust.

7. A trust is established, with respect to any asset that is a part of the trust corpus, on the date that asset is made subject to the trust by an effective transfer to the trustee.

History: Effective October 1, 1993.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396p(d)

75-02-02.1-33. Disqualifying transfers made on or before August 10, 1993.

1. a. Except as provided in subsection 2, a person is ineligible for nursing facility services, swing bed services, and medicaid waivered services for a period of time, determined under this subsection, following the disposal of any asset by the person or the person's spouse for less than fair market value.

b. The period of ineligibility begins with the month in which such assets were transferred, and the number of months in the period is equal to the lesser of:

(1) Thirty months; or

(2) The total uncompensated value of the assets so transferred, divided by the average monthly cost of nursing facility care in North Dakota in the year of application.

c. A person is not ineligible because of subdivision a to the extent that the asset was the person's home and the home was transferred to:

(1) The person's spouse;

(2) The person's son or daughter who is under age twenty-one or blind or disabled;

(3) The person's brother or sister who has an equity interest in the home and who was residing in the home for a period of at least one year immediately before the date the person became an institutionalized person;

(4) The person's son or daughter (other than a child described in paragraph 2) who was residing in the person's home for a period of at least two years immediately before the date the person became an institutionalized person, and who provided care to the person which permitted the person to reside in the person's home, rather than in an institution or facility.

d. A person is not ineligible because of subdivision a to the extent that the assets were transferred:

(1) To the person's child described in paragraph 2 of subdivision c; or

(2) In trust for the sole benefit of the person's spouse, or the person's child described in paragraph 2 of subdivision c.

e. A person is not ineligible because of subdivision a to the extent that the person shows that:

(1) He or she intended to dispose of the assets either at fair market value or other valuable consideration, and makes a satisfactory showing that he or she had an objectively reasonable belief that adequate consideration was received;

(2) The assets were transferred exclusively for a purpose other than to qualify for medicaid; or

(3) A denial of eligibility would work an undue hardship, with respect to periods after the asset is returned, because the assigned or transferred asset has been returned to the assignor or transferor.

f. A person is not ineligible because of subdivision a to the extent that the asset transferred was:

(1) Household goods, personal effects, or an exempt motor vehicle.

(2) A burial fund of up to one thousand five hundred dollars, plus earnings on the burial fund.

(3) A burial space or agreement which represents the purchase of a burial space held for the transferor, the transferor's spouse, or any other member for the transferor's immediate family.

(4) Property essential to self-support, which means:

(a) Property which the transferor owns, to the extent the equity value does not exceed six thousand dollars, which produces annual income at least equal to six percent of equity value, and which the transferor is not actively engaged in using to produce income;

(b) Nonbusiness property which the transferor owns, to the extent the equity value does not exceed six thousand dollars when used to produce goods or services essential to daily activities or, for instance, when used to grow produce or livestock solely for consumption in the transferor's household; and

(c) Property which is essential to earning a livelihood.

(5) Assets set aside, by a blind or disabled (but not an aged) transferor, as a part of a plan approved by the social security administration, for the transferor to achieve self-support.

(6) Assistance received under the Disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288], or other assistance provided pursuant to a federal statute on account of a catastrophe which is declared to be a major disaster by the president, and interest earned on that assistance, but only for nine months following receipt of that assistance.

(7) Any amounts received from the United States which are attributable to underpayments of benefits due from one or more prior months, under title II or title XVI of the Act [42 U.S.C. 401 et seq. and 1381 et seq.], but only for six months following receipt of those amounts.

(8) The value of assistance, paid with respect to a dwelling unit occupied by the transferer, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)].

(9) Any amounts received by the transferor from a fund established by a state to aid victims of crime, to the extent that the transferor demonstrates that the amount was paid in compensation for expenses incurred or losses suffered as a result of a crime, but only for nine months following receipt of the amount.

(10) Relocation assistance amounts provided by a state or local government to the transferor, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.], which is subject to the treatment required by section 216 of such Act [42 U.S.C. 4636], but only for nine months following receipt of the amounts.

g. There is a presumption that a transfer for less than adequate consideration was made for purposes which include the purpose of qualifying for medicaid:

(1) In any case in which the person's assets remaining after the transfer produce income which, when added to other income available to the person, totals an amount insufficient to meet all living expenses and medical costs reasonably anticipated to be incurred in the month of transfer and in the twenty-nine months following the month of the transfer;

(2) In any case in which an ~~application or~~ inquiry about medicaid benefits was made by or on behalf of the person ~~and the individual making inquiry was informed of medicaid asset limits; or~~, to any other person, before the date of the transfer;

(3) In any case in which the person was an applicant for or recipient of medicaid ~~at the time the transfer was made.~~ before the date of the transfer;

(4) In any case in which a transfer is made by or on behalf of the person's spouse, if the value of the transferred asset, when added to the value of the person's other assets, exceeds asset limits; or

(5) In any case in which the transfer was made, on behalf of the person or the person's spouse, by a guardian, conservator, or attorney in fact, to the guardian, conservator, or attorney in fact or to any spouse, child, grandchild, brother, sister, niece, nephew, parent, or grandparent, by birth, adoption, or marriage, of the guardian, conservator, or attorney in fact.

h. An applicant or recipient who claims that an asset was transferred exclusively for a purpose other than to qualify for medicaid must show that a desire to receive medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subdivision g. The fact, if it is a fact, that the person would be eligible for the medicaid benefits described in subdivision a of subsection 1, had the person's spouse not

transferred assets for less than fair market value, is not evidence that the assets were transferred exclusively for a purpose other than to qualify for medicaid.

i. For purposes of this section:

(1) "Adequate consideration" means:

(a) In the case of an asset which is not subject to reasonable dispute concerning its value, such as cash, bank deposits, stocks, and fungible commodities, one hundred percent of fair market value; and

(b) In the case of an asset which is subject to reasonable dispute concerning its value, seventy-five percent of fair market value.

(2) "Person" means an applicant for or recipient of medicaid.

(3) "Uncompensated value" means the difference between fair market value and the value of any consideration received.

2. The provisions of subsection 1 may not be applied to deny, to qualified medicare beneficiaries, special low-income medicare beneficiaries, and qualified disabled and working individuals, benefits available solely due to their status as qualified medicare beneficiaries, special low-income medicare beneficiaries, or qualified disabled and working individuals.

3. Where the assignee or transferee is a relative of the assignor or transferor, services or assistance furnished by the assignee or transferee to the assignor or transferor may not be treated as consideration for the transferred property unless provided pursuant to a valid written contract entered into prior to the rendering of the service or assistance.

4. This section is applicable to all transfers made on or before August 10, 1993. This section is repealed effective February 1, 1996.

History: Effective December 1, 1991; amended effective December 1, 1991; June 1, 1992; July 1, 1993; October 1, 1993.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396p(c)

75-02-02.1-33.1. Disqualifying transfers made after August 10, 1993.

1. a. Except as provided in subsections 2 and 9, an individual is ineligible for nursing facility services, swing-bed services, and medicaid-waivered services if the individual or the spouse of the individual disposes of assets or income for less than fair market value on or after the look-back date specified in subdivision b.

b. The look-back date specified in this subdivision is a date that is thirty-six months (or, in the case of payments from a trust or portions of a trust that are treated as income or assets disposed of by an individual, sixty months) before the date on which the individual is both an institutionalized individual and has applied for benefits under this chapter, without regard to the action taken on the application.

c. The period of ineligibility begins the first day within the first month during or after which income or assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this section or section 75-02-02.1-33.

d. The number of months of ineligibility under this subdivision for an individual shall be equal to the total, cumulative uncompensated value of all income and assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subdivision b, divided by the average monthly cost of nursing facility care in North Dakota at the time of application.

2. An individual shall not be ineligible for medicaid by reason of subsection 1 to the extent that:

a. The assets transferred were a home, and title to the home was transferred to:

(1) The individual's spouse;

(2) The individual's son or daughter who is under age twenty-one, blind, or disabled;

(3) The individual's brother or sister who has an equity interest in the individual's home and who was residing in the individual's home for a period of at least one year immediately before the date the individual became an institutionalized individual; or

(4) The individual's son or daughter (other than a child described in paragraph 2) who was residing in the individual's home for a period of at least two years immediately before the date the individual became an institutionalized individual, and who provided care to the individual which permitted the individual to

reside at home rather than in an institution or facility;

b. The income or assets:

(1) Were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;

(2) Were transferred from the individual's spouse to another for the sole benefit of the individual's spouse;

(3) Were transferred to, or to a trust established solely for the benefit of, the individual's child who is blind or disabled; or

(4) Were transferred to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled;

c. The individual makes a satisfactory showing that:

(1) The individual intended to dispose of the income or assets, either at fair market value or other valuable consideration, and the individual had an objectively reasonable belief that fair market value or its equivalent was received;

(2) The income or assets were transferred exclusively for a purpose other than to qualify for medicaid; or

(3) For periods after the return, all income or assets transferred for less than fair market value have been returned to the individual;

d. The individual shows that the total cumulative uncompensated value of all income and assets transferred for less than fair market value by the individual (or the individual's spouse) is less than the actual cost of those nursing facility services, swing-bed services, and medicaid-waivered services, provided after the transfer was made, for which payment has not been made and which are not subject to payment by any third party, provided that such a showing may only be made with respect to periods when the individual is otherwise eligible for medicaid; or

e. The asset transferred was:

(1) Household goods, personal effects, or an exempt motor vehicle;

(2) A burial fund of up to one thousand five hundred dollars, plus earnings on the burial fund;

(3) A burial space or agreement which represents the purchase of a burial space held for the transferor, the transferor's spouse, or any other member for the transferor's immediate family;

(4) Property essential to self-support, which means property which the transferor owns, to the extent the equity value does not exceed six thousand dollars, which produces annual income at least equal to six percent of equity value, and which the transferor is not actively engaged in using to produce income; and nonbusiness property which the transferor owns, to the extent the equity value does not exceed six thousand dollars when used to produce goods or services essential to daily activities or, for instance, when used to grow produce or livestock solely for consumption in the transferor's household; but which does not mean cash or any other liquid asset;

(5) Property that is essential to earning a livelihood;

(6) Assets set aside, by a blind or disabled (but not an aged) transferor, as a part of a plan approved by the social security administration, for the transferor to achieve self-support;

(7) Assistance received under the disaster Relief and Emergency Assistance Act of 1974 [Pub. L. 93-288], or other assistance provided pursuant to a federal statute on account of a catastrophe declared to be a major disaster by the president, and interest earned on that assistance, but only for nine months following receipt of that assistance;

(8) Any amounts received from the United States attributable to underpayments of benefits due from one or more prior months, under title II or title XVI of the Act [42 U.S.C. 401 et seq. and 1381 et seq.], but only for six months following receipt of those amounts;

(9) The value of assistance, paid with respect to a dwelling unit occupied by the transferor, under the United States Housing Act of 1937 [42 U.S.C. 1437 et seq.], the National Housing Act [12 U.S.C. 1701 et seq.], section 101 of the Housing and Urban Development Act of 1965, title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or section 202(h) of the Housing Act of 1959 [12 U.S.C. 1701q(h)];

(10) Any amounts received by the transferor from a fund established by a state to aid victims of crime, to the extent that the transferor demonstrates that the amount was paid in compensation for expenses incurred or losses suffered as a result of a crime, but only for nine months following receipt of the amount; or

(11) Relocation assistance amounts provided by a state or local government to the transferor, comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 [42 U.S.C. 4621 et seq.], which are subject to the treatment required by section 216 of such Act [42 U.S.C. 4636], but only for nine months following receipt of the amounts.

3. There is a presumption that a transfer for less than fair market value was made for purposes that include the purpose of qualifying for medicaid:

a. In any case in which the individual's assets (and the assets of the individual's spouse) remaining after the transfer produce income which, when added to other income available to the individual (and to the individual's spouse) totals an amount insufficient to meet all living expenses and medical costs reasonably anticipated to be incurred by the individual (and by the individual's spouse) in the month of transfer and in the thirty-five months (fifty-nine months in the case of a transfer to a trust) following the month of transfer;

b. In any case in which an inquiry about medicaid benefits was made, by or on behalf of the individual to any person, before the date of the transfer;

c. In any case where the individual or the individual's spouse was an applicant for or recipient of medicaid before the date of transfer;

d. In any case in which a transfer is made by or on behalf of the individual's spouse, if the value of the transferred income or asset, when added to the value of the individual's other assets, would exceed asset limits; or

e. In any case where the transfer was made, on behalf of the individual or the individual's spouse, by a guardian, conservator, or attorney in fact, to the guardian, conservator, or attorney in fact or to any spouse, child, grandchild, brother, sister, niece, nephew, parent, or grandparent, by birth, adoption, or marriage, of the guardian, conservator, or attorney in fact.

4. An applicant or recipient who claims that income or assets were transferred exclusively for a purpose other than to qualify for medicaid must show that a desire to receive medicaid benefits played no part in the decision to make the transfer and must rebut any presumption arising under subsection 3. The fact, if it is a fact, that the individual would be eligible for the medicaid benefits described in subdivision a of subsection 1, had the individual's spouse not transferred income or assets for less than fair market value, is not evidence that the income or assets were transferred exclusively for a purpose other than to qualify for medicaid.

5. In the case of a transfer by an individual's spouse which results in a period of ineligibility under this section for the individual, if the spouse otherwise becomes an institutionalized spouse who is eligible for medicaid, the period of ineligibility shall be apportioned equally between the spouses. Any months remaining in the period of ineligibility must be assigned or reassigned to the spouse who remains institutionalized if one spouse dies or is no longer institutionalized.

6. If the transferee of any income or asset is the child, grandchild, brother, sister, niece, nephew, parent, or grandparent of the individual or the individual's spouse, services or assistance furnished by the transferee to the individual or the individual's spouse may not be treated as consideration for the transferred income or asset unless the transfer is made pursuant to a valid written contract entered into prior to rendering the services.

7. A transfer is complete when the individual (or the individual's spouse) making the transfer has no lawful means of undoing the transfer or requiring a restoration of ownership.

8. For purposes of this section:

   a. Fair market value is received:

      (1) In the case of an asset that is not subject to reasonable dispute concerning its value, such as cash, bank deposits, stocks, and fungible commodities, when one hundred percent of apparent fair market value is received;

      (2) In the case of an asset that is subject to reasonable dispute concerning its value, when seventy-five percent of estimated fair market value is received; and

      (3) In the case of income, when one hundred percent of apparent fair market value is received.

b. "Uncompensated value" means the difference between fair market value and the value of any consideration received.

9. The provisions of this section may not be applied to deny, to qualified medicare beneficiaries, benefits available due to their status as qualified medicare beneficiaries.

10. This section is applicable to all transfers made after August 10, 1993.

History: Effective October 1, 1993.
General Authority: NDCC 50-06-16, 50-24.1-04
Law Implemented: NDCC 50-24.1-02; 42 USC 1396p(c)

CHAPTER 75-02-09

AGENCY SYNOPSIS: Regarding proposed new North Dakota Administrative Code chapter 75-02-09, Ratesetting for Accredited Residential Treatment Centers for Children.

A public hearing was conducted on November 3, 1993, concerning proposed new North Dakota Administrative Code chapter 75-02-09, Ratesetting for Accredited Residential Treatment Centers for Children.

The proposed new chapter establishes, in 18 sections, a ratesetting methodology. The methodology requires the facility to file an annual report of its costs. Those costs are used to project the costs likely to be incurred in the rate year. Adjustments are made to recognize anticipated inflation of costs. Costs may be disallowed if they are not related to providing care, and for other reasons specified in the rules. Recordkeeping requirements are imposed and provision is made for a facility to appeal a rate decision if it is dissatisfied.

STAFF COMMENT: Chapter 75-02-09 contains all new material but is not underscored so as to improve readability.

CHAPTER 75-02-09
RATESETTING FOR ACCREDITED RESIDENTIAL TREATMENT CENTERS FOR CHILDREN

75-02-09-01. Definitions.

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. "Adjustment factors" means indices used to adjust reported costs for inflation or deflation based on economic forecasts for the rate year.

3. "Allowable cost" means the center's actual and reasonable cost after adjustments required by department rules.

4. "Center" means a licensed residential treatment center for children that has been accredited by the joint commission on accreditation of hospitals as a psychiatric facility.

5. "Cost category" means the classification or grouping of similar or related costs for purposes of reporting and the determination of cost limitations.

6. "Cost report" means the department-approved form for reporting costs, statistical data, and other relevant information to the department.

7. "Department" means the department of human services.

8. "Depreciation" means an allocation of the cost of an asset over its estimated useful life.

9. "Education" means the cost of activities related to academic and vocational training generally provided by a school district.

10. "Final rate" means the rate established after any adjustments by the department, including adjustments resulting from cost report reviews and audits.

11. "Fringe benefits" means workers' compensation insurance, group health, dental or vision insurance, group life insurance, payment towards retirement plans, uniform allowances, employer's share of Federal Insurance Contributions Act, unemployment compensation taxes, and medical services furnished at center expense.

12. "Generally accepted accounting principles" means the accounting principles approved by the American institute of certified public accountants.

13. "Interest" means cost incurred for the use of borrowed funds.

14. "Rate year" means the twelve-month period beginning the seventh month after the end of a center's fiscal year.

15. "Reasonable cost" means the cost that must be incurred by an efficiently and economically operated center to provide services in conformity with applicable state and federal laws, rules, and quality and safety standards. Reasonable cost takes into account that the center seeks to minimize its costs and that its actual costs do not exceed what a prudent and cost-conscious buyer pays for a given item or service.

16. "Related organization" means an organization that a center is, to a significant extent, associated with, affiliated with, able to control, or controlled by; and which furnishes services, facilities, or supplies to the center. Control exists when an individual or organization has the power, directly or indirectly, to significantly influence or direct the policies of an organization or center.

17. "Report year" means the center's fiscal year.

18. "Resident day" means a day for which service is actually provided or for which payment is ordinarily sought.

19. "Special rate" means a desk rate or a final rate adjusted for nonrecurring or initial costs not included in the historical cost basis.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-02. Financial reporting requirements.

1. Records.

   a. The center shall maintain on the premises census records and financial information sufficient to provide for a proper audit or review. For any cost being claimed on the cost report, sufficient data must be available as of the audit date to fully support the report item.

   b. If several centers are associated with a group and their accounting and reports are centrally prepared, added information must be submitted for those items known to be lacking support at the reporting center prior to the audit or review of the center. Accounting or financial information regarding a related organization must be readily available to substantiate cost.

   c. Each center shall maintain, until any rate based upon a cost report is final and not subject to any appeal, but in

any event, for a period of not less than three years following the date of submission of the cost report to the state agency, accurate financial and statistical records of the period covered by the cost report in sufficient detail to substantiate the cost data reported. Each center shall make the records available upon reasonable demand to representatives of the department.

2. Accounting and reporting requirements.

a. The accrual basis of accounting, in accordance with generally accepted accounting principles, must be used for cost reporting purposes. Ratesetting procedures will prevail if conflicts occur between ratesetting procedures and generally accepted accounting principles. A center may maintain its accounting records on a cash basis during the year, but adjustments must be made to reflect proper accrual accounting procedures at yearend and when subsequently reported.

b. To properly facilitate auditing, the accounting system should be maintained in a manner that will allow cost accounts to be grouped by cost category and readily traceable to the cost report.

c. The cost report must be submitted on or before the last day of the third month following the center's fiscal yearend. The report must contain all actual costs of the provider, adjustments for nonallowable costs, and resident days.

d. The department may impose a nonrefundable penalty of ten percent of any amount claimed for services furnished after the due date if the center fails to file the cost report on or before the due date. The penalty may be imposed on the first day of the fourth month following the center's fiscal yearend and continues to the end of the month in which the statement or report is received.

e. Upon request, the following information must be made available:

(1) A statement of ownership including the name, address, and proportion of ownership of each owner;

(2) Copies of leases, purchase agreements, appraisals, financing arrangements, and other documents related to the lease or purchase of the center or a certification that the content of those documents remains unchanged since the most recent statement given pursuant to this subsection;

(3) Supplemental information reconciling the costs on the financial statements with costs on the cost report; or

(4) Copies of leases, purchase agreements, and other documents related to the acquisition of equipment, goods, and services claimed as allowable costs.

f. The center must make all adjustments and allocations necessary to arrive at allowable costs. The department may reject any cost report when the information filed is incomplete or inaccurate. If a cost report is rejected, the department may impose the penalties described in subdivision d.

g. The department may grant an extension of the reporting deadline to a center. To receive an extension, a center must submit a written request to the department's medical services division.

3. The department will perform an audit of the latest available report year of each center at least once every six years and retain for at least three years all audit-related documents, including cost reports, working papers, and internal reports on rate calculations used and generated by audit staff in the performance of audits and in the establishment of rates. Audits must meet generally accepted governmental auditing standards.

4. Penalties for false reports.

a. A false report is one where a center knowingly supplies inaccurate or false information in a required report that results in an overpayment. If a false report is received, the department may:

(1) Immediately adjust the center's payment rate to recover the entire overpayment within the rate year;

(2) Terminate the department's agreement with the center;

(3) Prosecute under applicable state or federal law; or

(4) Use any combination of the foregoing actions.

b. The department may determine a report is a false report if a center claims previously adjusted costs as allowable costs. Previously adjusted costs being appealed must be identified as nonallowable costs. The center may indicate

that the costs are under appeal and not claimed under protest to perfect a claim should the appeal be successful.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-03. General cost principles.

1. For ratesetting purposes, a cost must:

   a. Be ordinary, necessary, and related to resident care;

   b. Be no more than an amount a prudent and cost-conscious business person would pay for the specific good or service in the open market in an arm's-length transaction; and

   c. Be for goods or services actually provided in the center.

2. The cost effects of transactions which circumvent these rules are not allowable under the principle that the substance of the transaction prevails over the form.

3. Reasonable resident-related costs will be determined in accordance with the ratesetting procedures set forth in this chapter and instructions issued by the department.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-04. Ratesetting.

1. The established rate is based on prospective ratesetting procedures. The establishment of a rate begins with historical costs. Adjustments are then made for claimed costs not includable in allowable costs. Adjustment factors are then applied to allowable costs. No retroactive settlements for actual costs incurred during the rate year exceeding the final rate will be made unless specifically provided for in this chapter.

2. The department will establish a desk rate, based on the cost report, which will be effective the first day of the seventh month following the center's fiscal yearend.

   a. The desk rate will continue in effect until a final rate is established.

b. The cost report will be reviewed taking into consideration the prior year's adjustments. Centers will be notified by telephone or mail of any desk adjustments based on the desk review. Within seven working days after notification, the center may submit information to explain why a desk adjustment should not be made. The department will review the submitted information, make appropriate adjustments, including adjustment factors, and issue the desk rate.

c. No reconsideration will be given by the department for the desk rate unless the center has been notified that the desk rate is the final rate.

d. A desk rate may be adjusted at any time if subsection 4 applies to the center.

3. The cost report may be field audited to establish a final rate. If no field audit is performed, the desk rate will become the final rate upon notification to the center from the department.

a. The final rate will be effective beginning the first day of the seventh month following the center's fiscal yearend.

b. The final rate will include any adjustments for nonallowable costs, errors, or omissions that result in a change from the desk rate of at least twenty-five cents per day.

c. Adjustments, errors, or omissions found after a final rate has been established will be included as an adjustment in the report year the adjustments, errors, or omissions are found.

d. The final rate may be adjusted at any time if subsection 4 applies.

4. Special rates will be established for centers providing services for the first time, whose rates were established under chapter 75-03-20 prior to accreditation, changing ownership, having a capacity increase or major renovation or construction, or having changes in services or staff.

a. The rate for a center providing first-time services purchased by the department will be established using this subdivision for the first two fiscal years of the center if that period is less than twenty-four months.

(1) The center shall submit a budget, to the department's medical services division, for the first twelve months of operation. A final rate based on the

budget and adjustments, if any, will be established for a rate period beginning on the first of the month in which the center begins operation. This rate will remain in effect for eighteen months. No adjustment factors will be included in the first year final rate. No retroactive settlements will be made.

(2) Upon completion of the first twelve months of operation, the center must submit a cost report for the twelve-month period regardless of the fiscal yearend of the center.

(a) The twelve-month cost report is due on or before the last day of the third month following the end of the twelve-month period.

(b) The twelve-month cost report will be used to establish a rate for the remainder of the second rate year. Appropriate adjustment factors will be used to establish the rate.

(3) The center shall submit a cost report that will be used to establish rates in accordance with subsections 2 and 3 after the center has been in operation for the entire twelve months of the center's fiscal year.

b. Centers receiving accreditation by the joint commission on accreditation for hospitals and which had a desk or final rate established under chapter 75-03-20 prior to the accreditation will receive a rate established based on the cost report submitted under chapter 75-03-20, and the provisions of this chapter.

c. For centers changing ownership, the rate established for the previous owner will be retained until the end of the rate year in which the change occurred. The rate for the second rate year after a change in ownership occurs will be established as follows:

(1) For a center with four or more months of operation under the new ownership during the report year, a cost report for the period since the ownership change occurred will be used to establish the rate for the next rate year; and

(2) For a center with less than four months of operation under the new ownership in the reporting year, the prior report year's costs as adjusted for the previous owner will be indexed forward using appropriate adjustments.

d. For centers that increase licensed capacity by twenty percent or more or have renovation or construction projects in excess of fifty thousand dollars, the desk or final rate established for the period after the licensed increase occurs or the construction or renovation is complete may be adjusted to include projected property costs.

(1) For the rate year in which the capacity increase occurs or construction or renovation is completed, an adjusted rate will be calculated based on a rate for historical costs, exclusive of property costs, as adjusted, divided by historical census, plus a rate for property costs based on projected property costs divided by projected census. The adjusted rate will be effective on the first day of the month in which the renovation or construction is complete or when the capacity increase is approved if no construction or renovation is necessary.

(2) For the rate year immediately following the rate year in which the capacity increase occurred or construction and renovation was completed, a rate will be established based on historical costs, exclusive of property costs, as adjusted for the report year, divided by reported census plus a rate for property costs, based on projected property costs, divided by projected census.

e. The department may provide for an increase in the established rate for additional costs necessary to add services or staff to the existing program.

(1) The center must submit information, to the department's medical services division, supporting the request for the increase in the rate. Information must include a detailed listing of new or additional staff or costs associated with the increase in services.

(2) The department will review the submitted information and may request additional documentation or conduct onsite visits. The established rate will be adjusted if an increase in costs is approved. The effective date of the rate increase will be the later of the first day of the month following approval by the department or the first day of the month following the addition of services or staff. The adjustment will not be retroactive to the beginning of the rate year and will exclude adjustment factors provided for in subsection 8.

(3) For the rate year immediately following a rate year in which a rate was adjusted under paragraph 2, the center may request consideration be given to additional costs. The center must demonstrate to the department's satisfaction that historical costs do not reflect twelve months of actual costs of the additional staff or added services in order to adjust the rate for the second rate year. The additional costs would be based on a projection of costs for the remainder of a twelve-month period, exclusive of adjustment factors provided for in subsection 8.

5. The final rate must be considered as payment for all accommodations that include items identified in section 75-02-09-06. For any resident whose rate is paid in whole or in part by the department, no payment may be solicited or received from the resident or any other person to supplement the rate as established.

6. When a center terminates its participation in the program, whether voluntarily or involuntarily, the department may authorize the center to receive continued payment until residents can be relocated.

7. Limitations.

   a. The department may accumulate and analyze statistics on costs incurred by accredited and nonaccredited residential treatment centers. These statistics may be used to establish reasonable ceiling limitations and incentives for efficiency and economy based on reasonable determination of standards of operations necessary for efficient delivery of needed services. These limitations and incentives may be established on the basis of cost of comparable centers and services and may be applied as ceilings on the overall costs of providing services or on specific areas of operations. Limitations and incentives are effective upon notification of a center by the department.

   b. Allowable administration costs to be included in the established rate are the lesser of the actual cost of administration as direct costed or allocated to the center or an amount equal to fifteen percent of the total allowable costs, exclusive of administration costs, for the center.

8. Adjustment factors may be applied to adjust historical allowable costs. The department will determine the appropriate adjustment factor to be applied. The following cost components may have individual adjustment factors calculated at the point in time when the cost report is due for each rate year:

a. Salaries and fringe benefits;

b. Food;

c. Utilities; and

d. Other costs exclusive of property costs.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-05. Resident census.

1. A daily census record must be maintained by the center. Any day services are provided or for which payment is ordinarily sought for an available bed must be counted as a resident day. The day of admission or death will be counted. The day of discharge will be counted if payment is sought for that day. For medical assistance residents, payment may not be sought for any day on which the resident was not in the facility or for the day of discharge.

2. The daily census records must include:

   a. Identification of the resident;

   b. Entries for all days, and not just by exception; and

   c. Identification of type of day, i.e., in-house or hospital day.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-06. Allowable costs by cost category.

1. Administration costs are those allowable costs of activities performed by the staff in which the direct recipient of the activity is the organization itself, including fiscal activities, statistical reporting, recruiting, and general office management indirectly related to reimbursable services provided. Administration personnel includes administrators, regional directors, program directors, accounting personnel, clerical personnel, secretaries, receptionists, data processing personnel, purchasing personnel, and security personnel. Costs directly assignable to the center must be reported as center administration. Costs not directly assignable to the center must be reported as other administration. Costs for administration include:

a. Salary and fringe benefits for individuals who provide services administrative in nature or not included in any other cost category;

b. Office supplies;

c. Insurance, except property insurance and insurance included as a fringe benefit;

d. Postage and freight;

e. Professional fees for services such as legal, accounting, and data processing;

f. Central or home office costs;

g. Personnel recruitment costs;

h. Management consultants and fees;

i. Dues, license fees, and subscriptions;

j. Travel and training for employees;

k. Interest on funds borrowed for working capital;

l. Startup costs;

m. Telephone service not included in other cost categories; and

n. All other costs not identified in other cost categories.

2. Direct care costs are those allowable costs incurred for providing services for the maximum reduction of physical or mental disability and restoration of a resident to the best possible functional level and for providing for the personal needs of the resident. Those services may include any medical or remedial service recommended by a physician or other licensed practitioner of the healing arts, within the scope of the practitioner's practice under state law. Direct care costs include:

a. Salaries and fringe benefits for individuals providing treatment or supervision of residents;

b. Personal supplies used by an individual resident;

c. Clothing necessary to maintain a resident's wardrobe;

d. School supplies and activity fees, when not provided by or at the expense of the school;

e. Costs incurred for providing recreation to the residents including subscriptions, sports equipment, and admission fees to sporting, recreation, and social events;

f. All costs related to transporting residents, and transportion costs that may include actual expenses of center-owned vehicles or mileage paid to employees for use of personal vehicle; and

g. The cost of services purchased and not provided at the center, including case management, addiction, psychiatric, psychological, and other clinical evaluations, medication review, and partial care or day treatment.

3. Dietary costs are those allowable costs associated with the preparation and serving of food. Dietary costs include:

   a. Salaries and fringe benefits for all personnel involved with the preparation and delivery of food;

   b. Food; and

   c. Dietary supplies and utensils including paper products and noncapitalized dietary equipment.

4. Laundry costs are those allowable costs associated with gathering, transporting, sorting, and cleaning of linen and clothing. Laundry costs include:

   a. Salaries and fringe benefits of personnel who gather, transport, sort, and clean linen and clothing;

   b. The cost of laundry supplies; and

   c. Contracted laundry services.

5. Plant and housekeeping costs are those allowable costs related to repairing, cleaning, and maintaining the center's physical plant. Plant and housekeeping costs include:

   a. Salaries and fringe benefits of personnel involved in cleaning, maintaining, and repairing the center;

   b. Supplies necessary to maintain the center, including such items as cleaning supplies, paper products, and hardware goods;

   c. Utility costs, including heating and cooling, electricity, water, sewer, garbage, and cable television;

   d. Local telephone service to the living quarters and long distance telephone service directly related to providing treatment; and

e. Routine repairs and maintenance of property and equipment, including maintenance contracts and purchased services.

6. Property costs are those allowable capital costs associated with the physical plant of the center. Property costs include:

   a. Depreciation;

   b. Interest;

   c. Lease costs on equipment and buildings;

   d. Property taxes; and

   e. Property insurance on buildings and equipment.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-07. Cost allocation.

1. Direct costing of allowable center costs must be used whenever possible. If direct costing is not possible, the allocation methods for center and noncenter operations described in this subsection must be used.

   a. Salaries for direct care employees, which cannot be reported based on direct costing, must be allocated using time studies. Time studies must be conducted at least semiannually for a two-week period or quarterly for a one-week period. The time study must represent a typical period of time when employees are performing normal work activities in each of their assigned areas of responsibility. Allocation percentages based on the time studies must be used starting with the next pay period following completion of the time study or averaged for the report year.

   b. Salaries of supervisory personnel must be allocated based on full-time equivalents of the employees supervised or on a ratio of salaries.

   c. Fringe benefits must be allocated based on the ratio of salaries to total salaries.

   d. Plant and housekeeping expenses must be allocated based on square footage.

   e. Property costs must be allocated based on square footage.

f. Administration costs must be allocated on the basis of the percentage of total costs, excluding the allocable administration costs.

g. Dietary costs must be allocated based on meals served.

h. Laundry costs must be allocated on the basis of pounds of laundry.

i. Vehicle expenses must be allocated based on mileage logs. Mileage logs must include documentation for all miles driven and purpose of travel. If sufficient documentation is not available to determine which cost category vehicle expenses are to be allocated, vehicle expenses must be allocated in total to administration.

j. Costs not direct costed or allocable using methods identified in subdivisions a through i must be included as administration costs.

2. If the center cannot use any of the allocation methods described in subsection 1, a waiver request may be submitted to the department's medical services division. The request must include an adequate explanation as to why the referenced allocation method cannot be used by the center. The center shall also provide a rationale for the proposed allocation method.

Based on the information provided, the department will determine the allocation method used to report costs.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-08. Nonallowable costs. Nonallowable costs include:

1. Promotional, publicity, and advertising expenses, exclusive of personnel procurement;

2. Political contributions;

3. Salaries or expenses of a lobbyist;

4. Basic research;

5. Fines or penalties including interest charges on the penalty, bank overdraft charges, and late payment charges;

6. Bad debts;

7. Compensation and expenses for officers, directors, or stockholders, except as provided for in section 75-02-09-15;

8. Contributions or charitable donations;

9. Costs incurred for activities directly related to influencing employees with respect to unionization;

10. Costs of membership or participation in health, fraternal, or social organizations such as eagles, country clubs, or knights of columbus;

11. Corporate costs such as organization costs, reorganization costs, costs associated with acquisition of capital stock, costs relating to the issuance and sale of capital stock or other securities, and other costs not related to resident services;

12. Home office costs that would be nonallowable if incurred directly by the center;

13. Stockholder servicing costs incurred primarily for the benefit of stockholders or other investors, including annual meetings, annual reports and newsletters, accounting and legal fees for consolidating statements, stock transfer agent fees, and stockbroker and investment analyses;

14. The cost of any equipment, whether owned or leased, not exclusively used by the center except to the extent the center demonstrates to the satisfaction of the department that any particular use of equipment was related to resident care;

15. Costs, including by way of illustration and not by way of limitation, for legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies, attributed to the negotiation or settlement of the sale or purchase of any capital assets, whether by sale or merger, when the cost of the asset has been previously reported and included in the rate paid to any center;

16. Depreciation expense for center assets not related to resident care;

17. Personal expenses of owners and employees for items or activities including vacation, boats, airplanes, personal travel or vehicles, and entertainment;

18. Costs not adequately documented (adequate documentation includes written documentation, date of purchase, vendor name, listing of items or services purchased, cost of items purchased, account number to which the cost is posted, and a breakdown of any allocation of costs between accounts or centers);

19. The following taxes, when levied on providers:

    a. Federal income and excess profit taxes, including any interest or penalties paid thereon;

    b. State or local income and excess profit taxes;

    c. Taxes in connection with financing, refinancing, or refunding operations such as taxes in the issuance of bonds, property transfers, issuance or transfer of stocks, etc., which are generally either amortized over the life of the securities or depreciated over the life of the asset, but not recognized as tax expense;

    d. Taxes such as real estate and sales tax for which exemptions are available to the center;

    e. Taxes on property not used in the provision of covered services; and

    f. Taxes such as sales taxes, levied, collected, and remitted by the center;

20. The unvested portion of a center's accrual for sick or annual leave;

21. Expenses or liabilities established through or under threat of litigation against the state of North Dakota or any of its agencies, provided that reasonable insurance expenses may not be limited by this subsection;

22. Fringe benefits, not within the definition of that term, which have not received written prior approval of the department;

23. Fringe benefits that discriminate in favor of certain employees, excluding any portion that relates to costs that benefit all employees;

24. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose;

25. Funeral and cemetery expenses;

26. Travel not directly related to professional conferences, state or federally sponsored activities, or resident services;

27. Items or services such as telephone, television, and radio located in a resident's room and furnished solely for the convenience of the resident;

28. Value of donated goods and services;

29. Religious salaries, space, and supplies;

30. Miscellaneous expenses not related to resident services;

31. Premiums for top management personnel life insurance policies, except that the premiums shall be allowed if the policy is included within a group policy provided for all employees, or if a policy is required as a condition of a mortgage or loan and the mortgagee or lending institution is listed as the beneficiary;

32. Travel costs involving the use of vehicles not exclusively used by the center unless:

    a. Vehicle travel costs do not exceed the amount established by the internal revenue service;

    b. The center supports vehicle costs related to resident care with sufficient documentation, including mileage logs for all miles, purpose of travel, and receipts for purchases; and

    c. The center documents all costs associated with a vehicle not exclusively used by the center;

33. Vehicle and aircraft costs not directly related to center business or resident services;

34. Nonresident-related operations and the associated administrative costs;

35. Costs related to income-producing activities regardless of the profitability of the activity;

36. Costs incurred by the center's subcontractors or by the lessor of property the center leases, and which become an element in the subcontractor's or lessor's charge to the center, if such costs would not have been allowable had they been incurred by a center directly furnishing the subcontracted services or owning the leased property;

37. All costs for services paid directly by the department to an outside provider;

38. Depreciation on the portion of assets acquired with government grants;

39. Costs incurred due to management inefficiency, unnecessary care or services, agreements not to compete, or activities not commonly accepted in the industry;

40. The cost of consumable food products, in excess of income from employees, guests, and nonresidents offset in accordance with subsection 1 of section 75-02-09-16, consumed by persons other than residents or direct care personnel;

41. Payments to residents, whether in cash or in kind, for work performed or for bonuses or rewards based on behavior; and

42. In-house education costs including:

    a. Compensation for teachers and teacher aides who provide academic training to residents in-house;

    b. Property and plant operation expenses for space used to provide in-house academic training to residents; and

    c. The cost of supplies and equipment used in a classroom normally provided by a school district as part of the academic training.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-09. Depreciation.

1. Ratesetting principles require that payment for services should include depreciation on all depreciable type assets used to provide necessary services. This includes assets that may have been fully or partially depreciated on the books of the center, but are in use at the time the center enters the program. The useful lives of such 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 used in a normal standby or emergency capacity. 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 center and must be included as a gain or loss on the cost report.

2. Depreciation methods.

    a. The straight-line method of depreciation must be used. All accelerated methods of depreciation including depreciation options made available for income tax purposes, such as those offered under the asset depreciation range system, are unacceptable. The method and procedure for computing depreciation must be applied on a basis consistent from year to year, and detailed schedules of individual assets must be maintained. If the books of account reflect depreciation different than that submitted on the cost report, a reconciliation must be prepared by the center.

    b. Centers must use a minimum composite useful life of ten years for all equipment and land improvements, and four

years for vehicles. Buildings and improvements to buildings are to be depreciated over the length of the mortgage or a minimum of twenty-five years, whichever is greater.

3. Acquisitions.

   a. If a depreciable asset has at the time of its acquisition historical cost of at least one thousand dollars for each item, its cost must be capitalized and depreciated over the estimated useful life of the asset except as provided for in subsection 3 of section 75-02-09-11. Costs, such as architectural, consulting and legal fees, and interest, incurred during the construction of an asset must be capitalized as a part of the cost of the asset.

   b. All repair or maintenance costs in excess of five thousand dollars per project on equipment or buildings must be capitalized and depreciated over the remaining useful life of the equipment or building or one-half of the original estimated useful life, whichever is greater.

4. Proper records must provide accountability for the fixed assets and also provide adequate means by which depreciation can be computed and established as an allowable resident-related cost. Tagging of major equipment items is not mandatory, but alternate records must exist to satisfy audit verification of the existence and location of the assets.

5. Basis for depreciation.

   a. Determination of the cost basis of a center and its depreciable assets, which have not been involved in any programs funded in whole or in part by the department, depends on whether or not the transaction is a bona fide sale. Should the issue arise, the purchaser has the burden of proving that the transaction was a bona fide sale. Purchases where the buyer and seller are related organizations are not bona fide.

      (1) If the sale is bona fide, the cost basis will be the lower of the actual cost of the buyer or the fair market value of the facility or asset at the time of the sale.

      (2) If the sale is not bona fide, the cost basis will be the seller's cost basis less accumulated depreciation.

   b. Cost basis of a center and its depreciable assets purchased as an ongoing operation will be the seller's cost basis less accumulated depreciation.

c. Cost basis of a center and its depreciable assets used in any programs funded in whole or in part by the department will be the cost basis used by the other program less accumulated depreciation.

d. Sale and leaseback transactions will be considered a related party transaction. The cost basis of a center and its depreciable assets purchased and subsequently leased to a provider who will operate the center will be the seller's cost basis less accumulated depreciation.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-10. Interest expense. 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. Repayment of operating loans must be made within two years of the borrowing.

2. Identifiable in the center'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 center. Necessary means that the interest be incurred on a loan made to satisfy a financial need of the center and for a purpose reasonably related to resident care. Proper means that the interest be incurred at a rate not in excess of what a prudent borrower would have had to pay in an arm's-length transaction. In addition, the interest must be paid to a lender not related to the center through common ownership or control.

5. Unrelated to funds borrowed to finance costs of assets in excess of the depreciable cost of the asset as recognized in "depreciation".

6. If it is necessary to issue bonds for financing, any bond premium or discount will be amortized on a straight-line basis over the life of the bond issue.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-11. Taxes.

1. Taxes assessed against the center in accordance with the levying enactments of the several states and lower levels of government and for which the center is liable for payment are allowable costs except for those taxes identified as nonallowable in section 75-02-09-08.

2. Whenever exemptions to taxes are legally available, the center is to take advantage of them. If the center does not take advantage of available exemptions, the expense incurred for such taxes is not an allowable cost.

3. 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 they are billed by the taxing authority.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-12. Home office costs.

1. Home offices of chain organizations vary greatly in size, number of locations, staff, mode of operations, and services furnished to their member facilities. Although the home office of a chain is normally not a center in itself, it may furnish to the individual center central administration or other services such as centralized accounting, purchasing, personnel, or management services. Only the home office's actual costs of providing services is includable in the center's allowable costs under the program.

2. Costs not allowed in the center are not allowed as home office costs allocated to the center.

3. Any service provided by the home office included in costs as payments by the center to an outside vendor or which duplicates costs for services provided by the center is a duplication of costs and is not allowed.

4. Where the home office makes a loan to or borrows money from one of the components of a chain organization, the interest paid is not an allowable cost and interest income is not used to offset interest expense.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-13. Related organizations.

1. Costs applicable to services, facilities, and supplies furnished to a center by a related organization may not exceed the lower of the costs to the related organization or the price of comparable services, facilities, or supplies purchased elsewhere primarily in the local market. Centers must identify such related organizations and costs. If any such costs are allocated, the allocation methods and statistics supporting the allocations must be submitted with the cost report.

2. A center may lease buildings or equipment from a related organization within the meaning of ratesetting principles. In such a case, the rent paid to the lessor by the center is not allowable as cost unless the rent paid is less than the allowable costs of ownership. If rent paid exceeds the allowable costs of ownership, the center may include only the allowable costs of ownership. These costs are property

   insurance, depreciation, interest on the mortgage, real estate taxes, and plant operation expenses incurred by the lessor.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-14. Startup costs. In the first stages of operation, a new center incurs certain costs in developing its ability to care for residents prior to their admission. Staff is obtained and organized, and other operating costs are incurred during this time of preparation which cannot be allocated to resident care during that period because there are not residents receiving services. Such costs are commonly referred to as startup costs. The startup costs are to be capitalized and will be recognized as allowable administration costs amortized over sixty consecutive months on a straight-line basis starting with the month the first resident is admitted.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-15. Compensation. Reasonable compensation for a person with a minimum of five percent ownership, persons on the governing board, or family members of top management personnel, including spouses and persons in the following relationship to top management personnel or their spouses: parent, stepparent, child, stepchild, grandparent, stepgrandparent, grandchild, stepgrandchild, brother, sister, half-brother, half-sister, stepbrother, and stepsister will be considered an allowable cost if services are actually performed and required to be performed. The amount allowed must be in an amount not

to exceed the average of salaries paid to individuals in like positions in all accredited and nonaccredited licensed residential treatment centers that are nonprofit organizations and have no top management personnel who have a minimum of five percent ownership or are on the governing board. Salaries used to determine the average will be based on the latest information available to the department. Reasonableness also requires that functions performed be necessary in that, had the services not been rendered, the center would have to employ another person to perform them.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-16. Revenue offsets. Centers must identify income to offset costs when applicable in order that state financial participation not supplant or duplicate other funding sources. Any income whether in cash or in any other form received by the center, with the exception of the established rate and income from payment made under the Job Training Partnership Act, will be offset up to the total of the appropriate actual costs. If actual costs are not identifiable, income will be offset in total to the appropriate cost category. If costs relating to income are reported in more than one cost category, the income must be offset based on the ratio of costs in each of the cost categories.

1. Income received from or on behalf of employees, guests, or other nonresidents for meals or snacks and received for food and related costs from other government programs such as the United States department of agriculture or the department of public instruction must be offset to dietary costs.

2. Income received from the sale of beverages, candy, or other food items must be offset to dietary costs.

3. Any amount received from insurance for a loss incurred must be offset against the appropriate cost category regardless of when the cost was incurred if the center did not adjust the basis for depreciable assets.

4. Any refund, rebate, or discount received for a reported cost must be offset against the appropriate cost.

5. Any amount received for use of the center's vehicles must be offset to transportation costs.

6. Gain on the sale of an asset must be offset against depreciation expense.

7. Revenue received from outside sources for the use of center buildings or equipment will be offset to property expenses.

8. Any amount received by the center from outside sources for services provided by center employees will be offset to salaries.

9. Revenue from investments will be offset against interest expense.

10. Grants, gifts, restricted donations, and awards from the federal, state, local, or philanthropic agencies will be offset to allowable costs.

11. Gifts or endowment income designated by a donor for paying specific operating costs incurred in providing contract services must be offset to costs in the year the cost is incurred regardless of when the gift or endowment is received.

12. Other cost-related income or miscellaneous income, including amounts generated through the sale of a previously expensed item, e.g., supplies or equipment, must be offset to the cost category where the item was expensed.

13. Other income to the center from local, state, or federal units of government may be determined by the department to be an offset to costs.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-17. Private pay rates.

1. The medical assistance rate will not exceed the full rate charged to nonmedical assistance residents for the same service. The rate being charged nonmedical assistance residents at the time the services were provided will govern. In cases where the residents are not charged a daily rate, a daily rate will be computed by dividing the total nonmedical assistance charges for each month by the total nonmedical assistance census for each month.

2. If the established rate exceeds the rate charged to nonmedical assistance residents for a service, on any given date, the center shall immediately report that fact to the department and charge the department at the lower rate. If payments were received at the higher rate, the center shall, within thirty days, refund the overpayment. The refund will be the difference between the established rate and the rate charged to nonmedical assistance residents times the number of medical assistance resident days paid during the period in which the established rate exceeded the nonmedical assistance rate plus interest calculated at two percent over the Bank of North

Dakota prime rate on any amount not repaid within thirty days. Interest charges on these refunds are not allowable costs.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

75-02-09-18. Reconsiderations and appeals.

1. **Reconsiderations.**

   a. A center dissatisfied with the final rate established must request a reconsideration of the final rate before a formal appeal may be made. Any requests for reconsideration must be filed with the department's medical services division within thirty days of the date of the rate notification.

   b. The department's medical services division will make a determination regarding the reconsideration within forty-five days of receiving the reconsideration filing and any requested documentation.

2. **Appeals.**

   a. A center dissatisfied with the final rate established may appeal upon completion of the reconsideration process as provided for in subsection 1. This appeal must be filed with the department within thirty days of the date of the written notice of the determination by the department's medical services division with respect to the request for reconsideration.

   b. An appeal under this section is timely perfected only if accompanied by written documents including:

      (1) A copy of the letter received from the department's medical services division advising of that division's decision on the request for reconsideration;

      (2) A statement of each disputed item and the reason or basis for the dispute;

      (3) A computation and the dollar amount which reflects the appealing party's claim as to the correct computation and dollar amount for each disputed item;

      (4) The authority in statute or rule upon which the appealing party relies for each disputed item; and

(5) The name, address, and telephone number of the person upon whom all notices will be served regarding the appeal.

History: Effective May 1, 1994.
General Authority: NDCC 50-24.1-04
Law Implemented: 42 USC 1396a(a)(30)(A)

JULY 1994

CHAPTER 75-02-06

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care.

A public hearing was conducted on January 7, 1994, concerning proposed amendments to North Dakota Administrative Code chapter 75-02-06, Ratesetting for Nursing Home Care, which governs the setting of rates for nursing facilties in North Dakota. The three primary purposes of the amendemtns are to implement changes to section 75-02-06-16, Rate Determinations; to implement provisions of North Dakota Century Code section 50-24.4-19.2, concerning residents with extraordinary needs, as required by 1993 Senate Bill 2331; and to conform the rules to the requirements of 42 U.S.C. § 1396r(e)(7)(F), as required by final federal regulations published in 57 Fed. Reg. 56450 (Nov. 30, 1992).

The amendments also incorporate a number of changes made possible by amendments to North Dakota Century Code section 28-32-02(7). Prior to August 1, 1993, this statute provided that "the attorney general may not approve any rule as to legality when the rule merely repeats or paraphrases the text of the statute purported to be implemented by the rule." Under that law, the department could not incorporate provisions of North Dakota Century Code chapter 50-24.4 into North Dakota Administrative Code chapter 75-02-06, even though both addressed the same subject. Changes were made to incorporate relevant statutory provisions into the Administrative Code so as to create a single document which is more easily used.

The amendments to North Dakota Administrative Code section 75-02-06-16 reflect the fact that nursing home rates are being "rebased" effective January 1, 1994. Also changed is the process by which base year costs are applied to establish limitations on rates set for nursing

facilities. In addition to altering the limits, amendments to this section specify the economic change index to be the consumer price index increase. This section is also altered to provide a means by which facilities which successfully appeal a rate are able to avoid the loss of proper rate payments due from private-paying residents during the period pending the appeal decision. This change implements North Dakota Century Code section 50-24.4-18.1, as created by 1993 Senate Bill No. 2404.

The former section 75-02-06-19, Refinancing Incentives, has been replaced with a new section: "Appeal from Facility Transfer or Discharge." The removed language was obsolete. The replacement language conforms to the requirements of 42 U.S.C. § 1396r(3)(7)(F). It implements amendments to 42 CFR Parts 431, 433, and 483 concerning appeals from nursing facility decisions to transfer or discharge residents. This activity has been undertaken by the North Dakota State Department of Health and Consolidated Laboratories under North Dakota Administrative Code section 33-07-33.1-39. Federal regulations now require that the appeals process be maintained as a part of the Medicaid agency's fair hearing process.

A new North Dakota Administrative Code section 75-02-06-21, Specialized Rates for Extraordinary Medical Care, is created. This rule implements North Dakota Century Code section 50-24.4-19.2, which became effective March 26, 1993. The rule establishes the criteria for determining if a specialized rate for an individual with extraordinary medical needs may be established. The new section also describes a manner in which the specialized rate is to be calculated.

There are numerous minor and technical changes contained in amendments affecting all remaining sections except 75-02-06-02.3, Other Direct Care Costs; 75-02-06-04.1, Funded Depreciation; 75-02-06-06, Return on Investment; 75-02-06-07, Related Organization; and 75-02-06-20, Resident Personal Funds. For the sake of clarity, those sections without amendments were included in the published proposal.

These amendments constitute a significant change in the department's methods and standards for setting payment rates for services furnished to nursing facilities.

The amendments to chapter 75-02-06 were adopted as interim final rules effective November 22, 1993. Emergency rulemaking was necessary because a delay in rulemaking was likely to cause a loss of $5,493,800 in federal revenues appropriated to support the administration of the Medicaid program, a duty imposed upon the Department of Human Services by North Dakota Century Code section 50-06-05.1 and North Dakota Century Code chapter 50-24.1, if the effective date of this amendment is July 1, 1994, as would be likely if diligent nonemergency rulemaking was pursued.

During the period before the effective date, the unamended rule would cause rates to be established at higher levels for the 1994 rate year. The excess cost of the higher level rates would cause the department to

spend all funds appropriated for payment of nursing care services provided to Medicaid eligible nursing facility residents for the 1993-95 biennium, by June 17, 1995. Nursing facility services are a mandated Medicaid service under 42 U.S.C § 1396a(a)(10)(A). If the department did not conform the Medicaid program to this federal requirement, it may not lawfully claim federal funds otherwise available to provide Medicaid benefits for the period beginning June 17, 1995, and ending June 30, 1995.

75-02-06-01. 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. "Actual rate" means the facility rate for each cost category calculated using allowable historical operating costs and adjustment factors.

3. "Adjustment factors" means indices used to adjust reported costs for inflation or deflation based on forecasts for the rate year.

4. "Admission" means any time a resident is admitted to the facility from an outside location, including readmission resulting from a ~~resident being hospitalized~~ discharge.

5. "Allowable cost" means the facility's actual cost after appropriate adjustments as required by medical assistance regulations.

6. "Chain organization" means a group of two or more health care facilities which are owned, leased, or, through any other device, controlled by one business entity. This includes not only proprietary chains, but also chains operated by various religious and other charitable organizations. A chain organization may also include business organizations which are engaged in other activities not directly related to health care.

7. "Community contribution" means contributions to civic organizations and sponsorship of community activities. It does not include donations to charities.

8. "Cost category" means the classification or grouping of similar or related costs for purposes of reporting, the determination of cost limitations, and determination of rates.

9. "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 facility are divided for purposes of cost assignment and allocations.

10. "Cost report" means the department approved form for reporting costs, statistical data, and other relevant information of the facility.

11. "Department" means the department of human services.

12. "Depreciable asset" means any building, furniture, fixture, or equipment for which the cost must be capitalized for ratesetting purposes.

13. "Depreciation" means an allocation of the cost of an asset over its estimated useful life.

~~13.~~ 14. "Desk audit rate" means the rate established by the department based upon a review of the cost report submission prior to an actual audit of the cost report.

15. "Direct care costs" means the cost category for allowable nursing and therapy costs.

~~14.~~ 16. "Direct costing" means identification of actual costs directly to a facility or cost category without use of any means of allocation.

17. "Discharge" means the voluntary or involuntary release of a bed by a resident when the resident vacates the nursing facility premises.

~~15.~~ 18. "Employment benefits" means fringe benefits, other employee benefits including vision insurance, disability insurance, long-term care insurance, employee assistance programs, and employee child care benefits, and payroll taxes.

~~16.~~ 19. "Established rate" means the rate paid for services.

~~17.~~ 20. "Facility" means a nursing facility not owned or administered by state government or a nursing facility, owned or administered by state government, which agrees to accept a rate established under this chapter. It does not mean an intermediate care facility for the mentally retarded.

~~18.~~ 21. "Fair market value" means value at which an asset could be sold in the open market in a transaction between informed, unrelated parties.

22. "Final decision rate" means the amount, if any, determined on a per day basis, by which a rate otherwise set under this chapter is increased as a result of a request for reconsideration, a request for an administrative appeal, or a

request for judicial appeal taken from a decision on an administrative appeal.

23. "Final rate" means the rate established after any adjustments by the department, including adjustments resulting from cost report reviews and audits.

~~19.~~ 24. "Freestanding facility" means a nursing facility which does not share basic services with a hospital-based provider.

25. "Fringe benefits" means workers' compensation insurance, group health or dental insurance, group life insurance, retirement benefits or plans, uniform allowances, and medical services furnished at nursing facility expense.

~~20.~~ 26. "Highest market driven compensation" means the highest compensation given to an employee of a freestanding facility who is not an owner of the facility or is not a member of the governing board of the facility.

27. "Historical operating costs" means the allowable operating costs incurred by the facility during the report year immediately preceding the rate year for which the established rate becomes effective.

~~21.~~ 28. "Hospital leave day" means any day that a resident is not in the facility, but is in an acute care setting as an inpatient.

29. "Indirect care costs" means the cost category for allowable administration, plant, housekeeping, medical records, chaplain, pharmacy, and dietary, exclusive of food costs.

~~22.~~ 30. "In-house resident day" for nursing facilities means a day that a resident was actually residing in the facility and was not on therapeutic leave or in the hospital. "In-house resident day" for hospitals means an inpatient day.

~~23.~~ 31. "Limit rate" means the rate established as the maximum allowable rate for a cost category.

~~24.~~ 32. "Lobbyist" means any person who in any manner, directly or indirectly, attempts to secure the passage, amendment, defeat, approval, or veto of any legislation, attempts to influence decisions made by the legislative council, and is required to register as a lobbyist.

~~25.~~ 33. "Medical assistance program" means the program which pays the cost of health care provided to eligible recipients pursuant to North Dakota Century Code chapter 50-24.1.

~~26.~~ 34. "Medical records costs" means costs associated with the determination that medical record standards are met and with the maintenance of records for individuals who have been

discharged from the facility. It does not include maintenance of medical records for in-house residents.

35. "Other direct care costs" means the cost category for allowable activities, social services, laundry, and food costs.

36. "Payroll taxes" means the employer's share of Federal Insurance Contributions Act (FICA) taxes, governmentally required retirement contributions, and state and federal unemployment compensation taxes.

37. "Pending decision rate" means the amount, determined on a per day basis, by which a rate otherwise set under this chapter would increase if a nursing facility prevails on a request for reconsideration, on a request for an administrative appeal, or on a request for a judicial appeal taken from a decision on an administrative appeal; however, the amount may not cause any component of the rate to exceed rate limits established under this chapter.

38. "Private-pay resident" means a nursing facility resident on whose behalf the facility is not receiving medical assistance payments and whose payment rate is not established by any governmental entity with ratesetting authority, including veterans' administration or medicare.

~~27.~~ 39. "Private room" means a room which is equipped for use by only one resident.

~~28.~~ 40. "Property costs" means the cost category for allowable real property costs and other costs which are passed through.

~~29.~~ 41. "Provider" means the organization or individual who has executed the provider agreement with the department.

42. "Rate year" means the calendar year from January first through December thirty-first.

~~30.~~ 43. "Reasonable resident-related cost" means the cost that must be incurred by an efficiently and economically operated facility to provide services in conformity with applicable state and federal laws, regulations, and quality and safety standards. Reasonable resident-related cost takes into account that the provider seeks to minimize its costs and that its actual costs do not exceed what a prudent and cost-conscious buyer pays for a given item or services.

~~31.~~ 44. "Related organization" means an organization which a provider is, to a significant extent, associated with, affiliated with, able to control, or controlled by, and which furnishes services, facilities, or supplies to the provider. Control exists where an individual or an organization has the power,

directly or indirectly, to significantly ~~to~~ influence or direct the policies of an organization or provider.

45. "Report year" means the fiscal year from July first through June thirtieth of the year immediately preceding the rate year.

~~32.~~ 46. "Resident" means a person who has been admitted to the facility, but not discharged.

~~33.~~ 47. "Resident day" in a nursing facility means all days for which service is provided or for which payment is ordinarily sought, including hospital leave days and therapeutic leave days. The day of admission will be counted. The day of death ~~will--be counted;--but-not-the-day-of-discharge~~ is a resident day. The day of discharge is not a resident day. "Resident day" in a hospital means all inpatient days for which payment is ordinarily sought.

48. "Routine hair care" means hair hygiene which includes grooming, shampooing, cutting, and setting.

~~34.~~ 49. "Significant capacity increase" means an increase of fifty percent or more in the number of licensed beds or an increase of twenty beds, whichever is greater; but does not mean such an increase by a facility which reduces the number of its licensed beds and thereafter relicenses those beds, and does not mean an increase in a nursing facility's licensed capacity resulting from converting beds formerly licensed as basic care beds.

~~35.~~ 50. "Standardized resident day" means a resident day times the classification weight for the resident.

~~36.~~ 51. "Therapeutic leave day" means any day that a resident is not in the facility or in a hospital.

52. "Top management personnel" means owners, board members, corporate officers, general, regional, and district managers, administrators, and any other person performing functions ordinarily performed by such personnel.

History: Effective September 1, 1980; amended effective December 1, 1983; June 1, 1985; September 1, 1987; January 1, 1990; January 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-02. Financial reporting requirements.

1. **Records.**

   a. The facility shall maintain on the premises the required census records and financial information ~~which--will--be sufficient~~ in a manner sufficient to provide for a proper audit or review. For any cost being claimed on the cost report, sufficient data must be available as of the audit date to fully support the report item.

   b. Where several facilities are associated with a group and their accounting and reports are centrally prepared, added information must be submitted, for those items known to be lacking support at the reporting facility, with the cost report or must be provided to the local facility prior to the audit or review of the facility. Accounting or financial information regarding related organizations must be readily available to substantiate cost. Home office cost reporting and cost allocation must be in conformance with this chapter and HCFA-15 paragraphs 2150 and 2153.

   c. Each provider shall maintain, for a period of not less than five years following the date of submission of the cost report to the ~~state--agency~~ department, accurate financial and statistical records of the period covered by such cost report ~~which--are--accurate-and~~ in sufficient detail to substantiate the cost data reported. Each provider shall make such records available upon reasonable demand to representatives of the department or to the secretary of health and human services or representatives of the secretary.

2. **Accounting and reporting requirements.**

   a. The accrual basis of accounting, in accordance with generally accepted accounting principles, must be used for cost reporting purposes. A facility may maintain its accounting records on a cash basis during the year, but adjustments must be made to reflect proper accrual accounting procedures at yearend and when subsequently reported. ~~Generally--accepted-accounting-principles-will prevail--unless--alternative--treatment--is--provided---in ratesetting---procedures.~~ Ratesetting procedures will prevail if conflicts occur between ratesetting procedures and generally accepted accounting principles.

   b. To properly facilitate auditing, the accounting system shall be maintained in ~~such~~ a manner that will allow cost accounts ~~will~~ to be grouped by cost center and be readily traceable to the cost report.

c. The method for annual reporting of costs for ratesetting purposes shall be prescribed by the department. A cost report, for the report year, satisfying all departmental reporting requirements, must be filed with the management services division, provider audit unit on forms prescribed by the department, on or before October first of each year. The report must include:

(1) A complete statement of fees and charges for private-pay residents for the report year.

(2) A statement of ownership for the facility, including the name, address, and proportion of ownership of each owner.

(a) If a privately held or closely held corporation or partnership has an ownership interest in the facility, the facility shall report the name, address, and proportion of ownership of all owners of the corporation or partnership who have an ownership interest of five percent or more, except that any owner whose compensation or portion of compensation is claimed in the facility's cost report must be identified regardless of the proportion of ownership interest.

(b) If a publicly held corporation has an ownership interest of fifteen percent or more in the facility, the facility shall report the name, address, and proportion of ownership of all owners of the publicly held corporation who have an ownership interest of ten percent or more.

(3) Supplemental information reconciling the costs on the financial statements with costs on the cost report.

(4) A provider organization which operates more than one nursing facility may provide a consolidated audit report. <u>The information must be reconciled to each facility's cost report.</u>

(5) Information requested by the department, pursuant to subdivision d of subsection 1 of North Dakota Century Code section 50-24.4-23, must be furnished by financial statements, together with supplemental information which reconciles costs on the financial statement with costs on the cost report.

(6) The audited report provided pursuant to subdivision a of subsection 1 of North Dakota Century Code section 50-24.4-23 must be for the facility's fiscal year.

d. In the event a facility fails to file the required cost report on or before the due date, the ~~medical--services division~~ department may ~~certify a rate equal~~ reduce the current payment rate to eighty percent of the ~~established~~ rate in effect ~~for services provided after the due date~~ on October first. Reinstatement of the rate ~~shall~~ will occur ~~upon~~ on the first of the month beginning after receipt of the required ~~cost--report~~ information, but is not retroactive.

e. The facility shall make all adjustments, allocations, and projections necessary to arrive at allowable costs. The department may reject any cost report when the information filed is incomplete or inaccurate. If a cost report is rejected, the department may reduce the current payment rate to eighty percent of its most recently established rate until the information is completely and accurately filed.

f. Costs reported must include total costs and be adjusted to allowable costs. Adjustments required by the provider audit unit, to attain allowable cost, though not meeting the medicaid state agency or the state medicaid investigative group criteria of fraud or abuse on their initial identification, could, if repeated on future cost filings, be considered as possible fraud or abuse. The provider audit unit will forward all such items identified to the appropriate medicaid investigative group.

3. ~~Auditing.~~ The department will perform an audit of ~~at least~~ the latest available report year of each facility at least once every six years and retain for at least three years all audit-related documents, including cost reports, working papers, and internal reports on rate calculations ~~which are utilized~~ used and generated by audit staff in performance of audits and in ~~establishing~~ the establishment of rates. Audits will meet generally accepted governmental ~~audit~~ auditing standards.

4. ~~Claims on previously adjusted costs.--If a facility claims, as allowable costs, costs which have been previously adjusted, the department may determine that the report is a false report.~~ The department may determine a report is a false report if a facility claims previously adjusted costs as allowable costs. Previously adjusted costs ~~which are~~ being appealed must be identified as ~~unallowable~~ nonallowable costs.

The provider may indicate that the costs are under appeal and not claimed under protest to protect a claim should the appeal be successful.

History: Effective September 1, 1980; amended effective December 1, 1983; September 1, 1987; January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-02.1. General cost principles.

1. For ratesetting purposes, a cost must ~~satisfy the following criteria~~:

   a. ~~The cost is~~ Be ordinary, necessary, and related to resident care~~.~~;

   b. ~~The cost is~~ Be what a prudent and cost-conscious business person would pay for the specific good or service in the open market in an arm's-length transaction~~.~~; and

   c. ~~The cost is~~ Be for goods or services actually provided in the facility.

2. The cost effects of transactions which circumvent this chapter are not allowable under the principle that the substance of the transaction prevails over form.

3. Costs ~~that are~~ incurred due to management inefficiency, unnecessary care, unnecessary facilities, agreements not to compete, or activities not commonly accepted in the nursing facility industry are not allowable.

4. Reasonable resident-related costs will be determined in accordance with the ratesetting procedures of this chapter, instructions issued by the department, and health care financing administration manual 15 (HCFA-15). If conflicts occur between this chapter, the ratesetting manual, or instructions issued by the department and HCFA-15, this chapter, the ratesetting manual, or instructions issued by the department will prevail.

History: Effective January 1, 1990; amended effective November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-02.2. Direct care costs. Direct care costs include only those costs identified in this section.

1. **Therapies:**

a. Salary and employment benefits for speech, occupational, and physical therapists, or for personnel, who are not reported in subsection 2, performing therapy under the direction of a licensed therapist.

b. The cost of noncapitalized therapy equipment or supplies used to directly provide therapy, not including office supplies.

c. Training ~~which---is~~ required to maintain licensure, certification, or professional standards, and the related travel costs.

2. **Nursing:**

a. Salary and employment benefits for the director of nursing, nursing supervisors, inservice trainers for nursing staff, registered nurses, licensed practical nurses, quality assurance personnel, nurse aides, orderlies, and ward clerks.

b. Routine nursing care supplies including items ~~that are~~ furnished routinely and relatively uniformly to all residents; items stocked at nursing stations or on the floor in gross supply and distributed or ~~utilized~~ used individually in small quantities; and reusable items ~~utilized~~ used by individual residents which ~~are--reusable,~~ vary by the needs of an individual, and are expected to be available in the facility except for motorized, heavy-duty, specialized wheelchairs purchased at a cost in excess of one thousand dollars, and wheelchairs other than the type normally provided by the facility.

c. Training ~~which---is~~ required to maintain licensure, certification, or professional standards requirements, and the related travel costs.

d. Routine hair care~~,--including--grooming,-shampooing,-and cutting~~.

History: Effective January 1, 1990; amended effective January 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-02.4. Indirect care costs. Indirect care costs include all costs specifically identified in this section. Indirect care costs must be included in total, without direct or indirect allocation to other cost categories unless specifically provided for elsewhere.

1. **Administration:** Direct costs for administering the overall activities of the facility include, but are not limited to:

a. Salary and employment benefits for administrators, except that in a facility of sixty or fewer beds, part of an administrator's salary may be allocated to other cost categories provided adequate records identifying the hours and services provided are maintained by the facility.

b. Salary and employment benefits for assistant administrators, top management personnel, accounting personnel, clerical personnel, ~~admitting---personnel~~ secretaries and receptionists, data processing personnel, purchasing, receiving, and store personnel, medical director, security personnel, and of all personnel not designated in other cost categories.

c. Board of directors' fees and related travel expenses.

d. Security services.

e. Supplies except as specifically provided for in the direct care, other direct care, and other cost centers of the indirect care cost category.

f. Insurance, except insurance included as a fringe benefit and insurance included as part of related party lease costs.

g. Telephone and telegraph.

h. Postage and freight.

i. Membership dues and subscriptions.

j. Professional fees for services such as legal, accounting, and data processing.

k. Central or home office costs including property costs except as provided for in section 75-02-06-06.1.

l. Advertising and personnel recruitment costs.

m. Management consultants and fees.

n. Bad debts and collection fees as provided for in section 75-02-06-10.

o. Business meetings, conventions, association meetings, and seminars.

p. Travel, except as necessary for training programs for personnel required to maintain licensure, certification, or professional standards requirements.

q. Training, except for training for personnel ~~which is~~ required to maintain licensure, certification, or professional standards requirements.

r. Business office functions.

s. Any costs which cannot be specifically classified to other cost categories.

2. **Chaplain:**

a. Salary and employment benefits for all personnel assigned to meet the spiritual needs of the residents.

b. Supplies and other expenses related to meeting the spiritual needs of the residents.

3. **Pharmacy:** Compensation for pharmacy consultants.

4. **Plant operations:**

a. Salary and employment benefits for a director of plant operations, engineers, carpenters, electricians, plumbers, caretakers, vehicle drivers, and all other personnel performing tasks related to maintenance or general plant.

b. The cost of heating and cooling, electricity, water, sewer and garbage, and cable television.

c. Repairs and maintenance contracts and purchased services.

d. Supplies necessary for repairs and maintenance of the facility, including hardware, building materials and tools, other maintenance-related supplies, and noncapitalized equipment not included elsewhere.

e. Motor vehicle operating and resident transportation expenses.

5. **Housekeeping:**

a. Salary and employment benefits for a director of housekeeping, housekeepers, and other cleaning personnel.

b. Cost of cleaning supplies such as soaps, waxes, polishes, household paper products such as hand towels and toilet paper, and noncapitalized cleaning equipment.

c. Contracted services for housekeeping.

6. **Dietary:**

a. Salary and employment benefits for a director of dietary, nutritionists, dieticians, cooks, and kitchen personnel involved in the preparation and delivery of food.

b. The cost of dietary supplies and utensils including dietary paper products, silverware, and noncapitalized kitchen and dining equipment.

7. **Medical records:** Salary and employment benefits for medical records' personnel performing maintenance.

History: Effective January 1, 1990; amended effective November 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-02.5. Property costs. Property-related costs and other passthrough costs include only those costs identified in this section:

1. Depreciation.

2. Interest expense on capital and working capital debt.

3. Property taxes including special assessments as provided for in section 75-02-06-09.

4. Lease and rental costs.

5. Startup costs.

6. Reasonable legal expenses ~~which are~~:

   a. Incurred or as a result of a successful challenge to a decision by a governmental agency, made on or after January 1, 1990, regarding a rate year beginning on or after January 1, 1990;

   b. Related to legal services furnished on or after January 1, 1990; and

   c. In the case of a partially successful challenge, not in excess of an amount determined by developing a ratio of total amounts claimed successfully to total amounts claimed in the partially successful challenge and applying that ratio to the total legal expenses paid.

History: Effective January 1, 1990; amended effective November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-02.6. Cost allocations.

1. Direct costing of allowable costs will be used whenever possible. For facilities which cannot direct cost, the following allocation methods are to be used:

   a. For nursing facilities that are combined with a hospital or have more than one license (including basic care), the following allocation methods must be used:

      (1) Nursing salaries which cannot be reported based on actual costs are to be allocated using time studies. Time studies must be conducted at least semiannually for a two-week period or quarterly for a one-week period. The time study must represent a typical period of time when employees are performing normal work activities in each of their assigned areas of responsibilities. Allocation percentages based on the time studies are to be used starting with the next pay period following completion of the time study or averaged for the report year. The methodology used by the facility may not be changed without approval by the department. If time studies are not completed, nursing salaries will be allocated based on revenues for resident services.

      (2) Salaries for a director of nursing or nursing supervisors which cannot be reported based on actual costs or time studies must be allocated based on nursing salaries or full-time equivalents (FTEs) of nursing staff.

      (3) Salaries for cost center supervisors must be allocated based on cost center salaries or full-time equivalents (FTEs) of supervised staff.

      (4) Staff development or inservice trainer salaries must be allocated to nursing and therapies based on the ratio of nursing and therapy salaries to total salaries, to non-long-term care based on the ratio of non-long-term care salaries to total salaries, and to administration based on the ratio of total salaries less nursing salaries, therapy salaries, and non-long-term care salaries to total salaries.

   ~~(4)~~ (5) Other nursing costs must be allocated based on resident days.

   ~~(5)~~ (6) Therapy costs, other than therapy salaries and purchased services, must be allocated based on the ratio of therapy salaries and purchased services in the nursing facility to total therapy salaries and purchased services.

~~(6)~~ (7) Dietary and food costs must be allocated based on number of meals served or in-house resident days.

~~(7)~~ (8) Laundry costs must be allocated on the basis of pounds of laundry.

~~(8)~~ (9) Activity costs must be allocated based on in-house resident days.

~~(9)~~ (10) Social service costs must be allocated based on resident days.

~~(10)~~ (11) Housekeeping costs must be allocated based on weighted square footage.

~~(11)~~ (12) Plant operation costs must be allocated based on weighted square footage.

~~(12)~~ (13) Medical records costs must be allocated based on the number of admissions or discharges and deaths.

~~(13)~~ (14) Pharmacy costs for consultants must be allocated based on in-house resident days.

~~(14)~~ (15) Administration costs must be allocated on the basis of the percentage of total adjusted cost, excluding property, administration, and chaplain, in each facility.

~~(15)~~ (16) Property costs must be allocated first to a cost center based on square footage. The property costs allocated to a given cost center will then be allocated using the methodologies set forth in this section for that particular cost center.

~~(16)~~ (17) Chaplain costs must be allocated based on the percentage of total adjusted costs, excluding property, administration, and chaplain.

~~(17)~~ (18) Employment benefits must be allocated based on the ratio of salaries to total salaries.

b. If any of the allocation methods in subdivision a cannot be used by a facility, a waiver request may be submitted to the medical services division. The request must include an adequate explanation as to why the referenced allocation method cannot be used by the facility. The facility must also provide a rationale for the proposed allocation method. Based on the information provided, the department will determine the allocation method that will be used to report costs.

c. Malpractice, professional liability insurance, therapy salaries, and purchased therapy services must be direct costed.

d. The costs of operating a pharmacy must be included as non-long-term care costs.

e. For purposes of this subsection, "weighted square footage" means the allocation of the facility's total square footage, excluding common areas, identified first to a cost category and then allocated based on the allocation method described in this subsection for that cost category.

2. For nursing facilities that cannot directly identify salaries and employment benefits to a cost category, the following cost allocation methods must be used:

a. Salaries, excluding staff development and inservice trainer salaries, must be allocated using time studies. Time studies must be conducted semiannually for a two-week period or quarterly for a one-week period. The time study must represent a typical period of time when employees are performing normal work activities in each of their assigned areas of responsibilities. Allocation percentages based on the time studies are to be used starting with the next pay period following completion of time study or averaged for the reporting year. The methodology used by the facility may not be changed without approval by the department. If time studies are not completed, salaries and employment benefits will be allocated entirely to the indirect care costs, if any of the employee's job duties are included in this cost category. Otherwise, salaries and employment benefits will be other direct care costs.

b. Staff development and inservice trainer salaries must be allocated to nursing and therapies based on the ratio of nursing and therapy salaries to total salaries and to administration based on the ratio of total salaries less nursing and therapy salaries to total salaries.

c. Employment benefits must be allocated based on the ratio of salaries in the cost category to total salaries.

3. Nursing facilities which operate or are associated with nonresident-related activities, i.e., apartment complexes, shall allocate all costs, except administration costs, in the manner required by subsection 1, and shall allocate administration costs as follows:

a. If ~~the~~ total costs of ~~the~~ all nonresident-related activities exceed five percent of total nursing facility

cost, exclusive of property, administration, and chaplain costs, administration costs must be allocated on the basis of the percentage of total cost, excluding property, administration, and chaplain.

b. If ~~the~~ total costs of ~~the~~ all nonresident-related activities are less than five percent of total nursing facility costs, exclusive of property, administration, and chaplain costs, administration costs must be allocated to each such activity based on the percent gross revenues for the activity is of total gross revenues; provided, however, that the allocation will not be based on a percentage exceeding two percent for each activity.

c. If the provider can document, to the satisfaction of the department, that none of the nursing facility resources or services are used in connection with the nonresident-related activities, no allocation need be made.

d. The provisions of this subsection do not apply to the activities of hospital and basic care facilities associated with a nursing facility.

History: Effective January 1, 1990; amended effective January 1, 1992; November 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-03. Depreciation.

1. Ratesetting principles require that payment for services should include depreciation on all depreciable ~~type~~ assets ~~that--are~~ used to provide necessary services. 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 such 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. 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.

2. Depreciation methods.

   a. The straight-line method of depreciation must be used. All accelerated methods of depreciation, including depreciation options made available for income tax

purposes, are unacceptable. The method and procedure for computing depreciation must be applied on a basis consistent from year to year and detailed schedules of individual assets shall be maintained. If the books of account reflect depreciation different than that submitted on the cost report, a reconciliation must be prepared by the facility.

b. Providers shall project a useful life at least as long as the useful life guidelines published by the American hospital association. The provider may choose to use a composite useful life of ten years for all equipment and four years for vehicles. With the exception of assets purchased prior to July 1, 1989, all assets must be depreciated using the same methodology. Once the composite useful life methodology is chosen, the provider may not change to using the American hospital association guidelines without the approval of the department.

3. Acquisitions.

a. If a depreciable asset or special assessment has, at the time of its acquisition, a historical cost of at least one thousand dollars, its cost must be capitalized and depreciated over the estimated useful life of the asset. Cost during the construction of an asset, such as architectural, consulting and legal fees, interest, etc., should be capitalized as a part of the cost of the asset.

b. All repair or maintenance costs in excess of five thousand dollars per project on equipment or buildings must be capitalized and depreciated over the remaining useful life of the equipment or building repaired or maintained, or one-half of the original estimated useful life, whichever is greater.

4. Proper records will provide accountability for the fixed assets and also provide adequate means by which depreciation can be computed and established as an allowable resident-related cost. Tagging of major equipment items is not mandatory, but alternate records must exist to satisfy audit verification of the existence and location of the assets.

5. For purposes of this chapter, donated assets may be recorded and depreciated based on their fair market value. In the case where 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. The appraisal will be made by a recognized appraisal expert and will be accepted for depreciation purposes. The facility may elect to forego depreciation on donated assets thereby negating the need for a fair market value determination.

6. Purchase of a facility and its depreciable assets as an ongoing operation.

   a. Determination of the cost basis of a facility and its depreciable assets of an ongoing operation depends on whether or not the transaction is a bona fide sale. Should the issue arise, the purchaser has the burden of proving that the transaction was a bona fide sale. Purchases where the buyer and seller are related organizations are not bona fide. The cost basis of a facility and its depreciable assets acquired as an ongoing operation is limited to the lowest of the following:

      (1) Current reproduction cost of the assets, depreciated on a straight-line basis over its useful life to the time of the sale;

      (2) Price paid by the purchaser (actual cost);

      (3) Fair market value of the facility or asset at the time of the sale;

      (4) In a sale not bona fide, the seller's cost basis, less accumulated depreciation; or

      (5) With respect to sales made on or after July 18, 1984, the seller's cost basis less accumulated depreciation, plus recaptured depreciation.

      (6) In the case of assets ~~which have been~~ previously owned by a hospital, or facility, and for which such hospital or facility has received payment, for services provided to recipients of benefits under title XVIII (medicare) or XIX (medicaid) of the Social Security Act, at a rate which reflects depreciation expense concerning those assets, the allowable acquisition cost of such assets to the first owner on or after July 18, 1984.

   b. The seller shall always use the sale price in computing the gain or loss on the disposition of assets.

   c. Appraisal guidelines. To properly provide for costs or valuations of fixed assets, an appraisal will be required if the provider:

      (1) Has no historical cost records or has incomplete records of depreciable fixed assets; or

      (2) Prior to July 18, 1984, purchases a facility without designation of purchase price for the classification of assets acquired. Prior to having an appraisal made, the provider must inform the state that it

intends to have the appraisal made. At this time the provider shall also set forth the reasons for the appraisal and will make available to the department the agreement between the provider and the appraiser. The appraisal agreement should contain the appraisal date, the estimated date of completion, the scope of the appraisal, and the statement that the appraisal will conform to the current medicare regulation on principles of reimbursement for provider cost.

(3) Limitation. With respect to purchases occurring before July 18, 1984, the department will recognize appraised value not to exceed cost basis for tax purposes. In all cases of major change, proper authority for expenditure shall be obtained.

7. For rate years beginning on or after January 1, 1990, the department will recognize for depreciation purposes the difference of the actual purchase price of building and equipment for nonrelated party purchases finalized before July 1, 1987, and the cost basis established at the time of purchase. The department will continue to use the useful life and the cost basis established at the time the purchases were made in determining the basis of depreciation for a facility purchased as an ongoing operation on or after July 1, 1987. No adjustments will be allowed for any depreciable costs that exceeded the basis in effect for rate periods prior to January 1, 1990.

8. Recapture of depreciation.

a. At any time that the operators of a facility sell an asset, or otherwise remove that asset from service in or to the facility, any depreciation costs asserted after June 1, 1984, with respect to that asset, are subject to recapture to the extent that the sale or disposal price exceeds the undepreciated value. If the department determines that a sale or disposal was made to a related party, or if a facility terminates participation as a provider of services in the medicaid program, any depreciation costs asserted after June 1, 1984, with respect to that asset or facility, are subject to recapture to the extent that the fair market value of the asset or facility exceeds the depreciated value.

b. The seller and the purchaser may, by agreement, determine which shall pay the recaptured depreciation. If the depreciation recapture amount is not paid in full to the department within thirty days after the date of the sale, the department will offset the amount of depreciation to be recaptured against any amounts owed, or to be owed, by the department to the seller and buyer. The department will first exercise the offset against the seller, and

shall only exercise the offset against the buyer to the extent that the seller has failed to repay the amount of the recaptured depreciation, plus interest. If the depreciation recapture amount is not paid in full to the department within thirty days of the date of the sale, interest on the depreciation recapture amount from the date of sale is due to the department in addition to the depreciation recapture amount. The interest accrues at the rate at which interest accrues against the state of North Dakota, under the Cash Management Improvement Act of 1990, [Pub. L. 101-453; 31 U.S.C. 6501 et seq.] for refunds of federal medicaid funds received by the state, but not repaid to the federal agency, or six percent per annum, whichever is greater. Depreciation recapture amounts and interest payments made thereon to the department and the cost of borrowing for the purpose of repaying recaptured depreciation and interest on recaptured depreciation are not costs which are related to resident care.

History: Effective September 1, 1980; amended effective December 1, 1983; October 1, 1984; September 1, 1987; January 1, 1990; January 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-04. Interest expense.

1. To be allowable ~~under the program~~, interest must be:

   a. Supported by evidence of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required;

   b. Identifiable in the provider's accounting records;

   c. Related to the reporting period in which the costs are incurred;

   d. Necessary and proper for the operation, maintenance, or acquisition of the ~~provider's facilities~~ facility;

   e. Unrelated to funds borrowed to purchase assets in excess of the depreciable cost basis established at the time of purchase and recognized under the provisions of section 75-02-06-03; and

   f. When representative of borrowing for the purpose of making capital expenditures for assets that were owned by any other hospital or facility on or after July 18, 1984, limited to that amount of interest cost which such hospital or facility may have reported, for medicaid

ratesetting purposes, had the asset undergone neither refinancing nor a change of ownership.

2. In ~~such~~ cases where it was necessary to issue bonds for financing, any bond premium or discount shall be amortized over the life of the bond issue.

3. Interest paid by the provider to partners, stockholders, or related organizations of the provider is not allowable as a cost. Where the owner loans funds to a facility, the funds are considered capital, rather than borrowed funds.

4. If a facility incurs interest expense because of late payments for resident services and charges a service charge or interest for late payments, such income must be offset against interest expense. If no interest expense is incurred by the facility because of late payments for resident services, interest charges paid must be offset against administrative expense.

5. Repayment of operating loans must be made within three years of the borrowing.

6. For the purposes of this section~~,~~ ~~"necessary"~~:

   a. "Necessary" means that the interest is incurred on a loan made to satisfy a financial need of the facility and~~,~~ for a purpose reasonably related to resident care~~,~~; and

   b. ~~"proper"~~ "Proper" means that the interest is incurred at a rate not in excess of what a prudent borrower would be obliged to pay in an arm's-length transaction.

7. Interest must be paid to a lender that is not related to the borrower except for funds borrowed in accordance with section 75-02-06-04.1.

8. For refinanced or refunded debt, the total net aggregate allowable costs to be incurred for all reporting periods may not exceed the total net aggregate costs that would have been allowed had the refinancing or refunding not occurred. Annual allowable costs will be limited to the lesser of the costs which would have been allowed had the refinancing or refunding not occurred or the costs associated with the refinancing or refunding plus the portion, if any, of adjustments not recognized in prior cost reporting periods.

History: Effective September 1, 1980; amended effective December 1, 1983; October 1, 1984; September 1, 1987; January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-05. Compensation.

1. Compensation for top management personnel~~,-which-is-allocated or-directly-assigned-to-a-facility,~~ will be limited, prior to allocation, if any, to the highest market-driven compensation of an administrator employed by a freestanding facility during the base report year ~~as-indexed-forward~~.

2. ~~Items--which--are-considered-compensation-include,-but-are-not limited-to,-the-following~~ Compensation includes:

   a. Salary amounts paid for managerial, administrative, professional, and other services.

   b. Amounts paid by the facility for the personal benefits of the person, e.g., housing allowance, flat-rate automobile allowance.

   c. The cost of assets and services which the person receives from the facility.

   d. Deferred compensation (pension and annuities).

   e. Supplies and services for the personal use of the person.

   f. The cost of a domestic or other employee who works in the home of the person.

   g. Life and health insurance premiums paid for the person and medical services furnished at nursing facility expense.

3. Reasonable compensation for a person with a least five percent ownership, persons on the governing board, or any person related within the third degree of kinship to top management personnel must be considered an allowable cost if services are actually performed and required to be performed. The amount to be allowed must be an amount determined by the department to be equal to the amount normally required to be paid for the same services if provided by a nonrelated employee. Reasonableness also requires that functions performed be necessary in that, had the services not been rendered, the facility would have to employ another person to perform them. Reasonable compensation on an hourly basis may not exceed the amount determined to be the limitation in section 75-02-06-05.1, divided by two thousand eighty.

4. Costs otherwise nonallowable under this chapter may not be included as personal compensation.

History: Effective September 1, 1980; amended effective July 1, 1981; December 1, 1983; September 1, 1987; January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-06.1. Home office costs.

1. Home offices of chain organizations vary greatly in size, number of locations, staff, mode of operations, and services furnished to their member facilities. Although the home office of a chain is normally not a provider in itself, it may furnish central administration or other services such as centralized accounting, purchasing, personnel, or management services. To the extent that the home office furnishes services related to resident care to a facility, the reasonable resident-related costs, not to exceed actual costs of such services, are includable in the facility's cost report and are includable as part of the facility's rate.

2. Where the home office makes a loan to or borrows money from one of the components of a chain organization, the interest paid is not an allowable cost and interest income is not used to offset interest expense.

3. Home office costs incurred for expansion of a chain organization must be directly allocated to the appropriate component of the chain. The costs of abandoned plans are not allowable.

4. Central or home office costs representing services of consultants required by law in areas for social services, nursing, therapies, or activities and central, affiliated, or corporate office costs representing services of consultants not required by law in the areas of nursing or therapies may be allocated to the appropriate cost category of a facility according to subdivisions a through e.

   a. Only the salaries, fringe benefits, and payroll taxes associated with the individual performing the service may be allocated. No other costs may be allocated.

   b. The allocation must be based on direct identification and only to the extent justified in time distribution records that show the actual time spent by the consultant performing the services in the facility.

   c. The cost in subdivision a for each consultant must not be allocated to more than one cost category in the facility. If more than one facility is served by a consultant, all facilities shall allocate the consultant's cost to the same operating category.

   d. Top management personnel may not be considered consultants.

e. The consultant's full-time responsibilities must be to provide the services allocated under this section.

History: Effective January 1, 1990; amended effective November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-08. Rental expense paid to a related organization. A provider may lease a facility from a related organization within the meaning of ratesetting principles. In such case, the rent paid to the lessor by the provider is not allowable as cost unless the rent paid is less than the allowable costs of ownership. The provider, however, may include allowable costs of ownership of the facility. These costs are property insurance, depreciation, interest on the mortgage, and real estate taxes. Other operating expenses of the related organization are not includable by the provider as an allowable cost of ownership.

History: Effective September 1, 1980; amended effective December 1, 1983; September 1, 1987; January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-09. Taxes.

1. Taxes assessed against the provider, in accordance with the levying enactments of the several states and lower levels of government and for which the provider is liable for payment, are allowable costs. Tax expense may not include fines, penalties, or those taxes identified as nonallowable costs in section 75-02-06-12.1.

2. Whenever exemptions to taxes are legally available the provider is to take advantage of them. If the provider does not take advantage of available exemptions, the expense incurred for such taxes is not ~~recognized as an allowable cost under the program~~.

3. Special assessments in excess of one thousand dollars~~, which~~ are 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.

History: Effective September 1, 1980; amended effective December 1, 1983; January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-10. Bad debts.

1. Bad debts for charges incurred on or after January 1, 1990, and fees paid for the collection of those bad debts, are allowable provided all the requirements of this subsection are met:

   a. The bad debt results from nonpayment of the payment rate or part of the payment rate.

   b. The facility documents that reasonable collection efforts have been made, the debt was uncollectible, and there is no likelihood of future recovery. Reasonable collection efforts include pursuing all avenues of collection available to the facility, including liens and judgments. In instances where the bad debt is owed by a person determined to have made a disqualifying transfer or assignment of property for the purpose of securing eligibility for medical assistance benefits, the facility shall document that it has made all reasonable efforts to secure payment from the transferee, including the bringing of an action for a transfer in fraud of creditors.

   c. The collection fee does not exceed the amount of the bad debt.

   d. The bad debt does not result from the facility's failure to comply with federal and state laws, state rules, and federal regulations.

   e. The bad debt does not result from nonpayment of a private room rate in excess of the established rate or charges for special services ~~which~~ are not included in the established rate.

   f. The facility has an aggressive policy of avoiding bad debt expense which will limit potential bad debts. The facility shall document that the facility has taken action to limit bad debts for individuals who refuse to make payment. In no instances may allowable bad debt expense exceed one hundred twenty days of resident care for any one individual.

2. Finance charges on bad debts ~~which~~ are allowed in subsection 1 are allowable if the finance charges have been offset as interest income in prior years.

History: Effective September 1, 1980; amended effective December 1, 1983; January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-11. Startup costs. In the first stages of operation, a new facility incurs certain costs in developing its ability to care for

residents prior to admission. Staff is obtained, and organized, and other operating costs are incurred during this time of preparation which cannot be allocated to resident care during that period because there are no residents receiving services. Such costs are commonly referred to as startup costs. Actual allowable startup costs may be considered as deferred charges ~~under the program~~ and allocated over a number of periods which benefit from such costs. Where a facility has properly capitalized startup costs as a deferred charge, the startup costs will be recognized as allowable costs amortized over sixty consecutive months starting with the month in which the first resident is admitted.

History: Effective September 1, 1980; amended effective December 1, 1983; January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-12. Offsets to cost.

1. Several items of income, ~~whether in cash or in any other form,~~ will be considered as offsets against various costs as recorded in the books of the facility. Any income ~~which is~~, whether in cash or in any other form, received by the facility, with the exception of the established rate, income from payments made under the Job Training Partnership Act, and income from charges ~~to private pay residents~~ for private rooms or special services, will be offset up to the total of the appropriate actual allowable cost. If actual costs are not identifiable, income will be offset up to the total of costs described in this section. If costs relating to income are reported in more than one cost category, the income must be offset in the ratio of the costs in each cost category. These sources of income include, but are not limited to:

   a. "Activities income". Income from the activities department and the gift shop will be offset to activity costs.

   b. "Dietary income". Amounts received from or on behalf of employees, guests, or other nonresidents for lunches, meals, or snacks will be offset to dietary costs.

   c. "Drugs or supplies income". Amounts received from employees, doctors, or others not admitted as residents will be offset to nursing supplies. Medicare part B income for drugs and supplies must be offset to nursing supplies.

   d. "Insurance recoveries income". Any amount received from insurance for a loss incurred shall be offset against the appropriate cost category, regardless of when the cost was incurred, if the facility did not adjust the basis for depreciable assets.

e. "Interest or investment income". Interest received on investments, except amounts earned on funded depreciation or from earnings on gifts where the identity remains intact, shall be offset to interest expense.

f. "Laundry income". All amounts received for services rendered to or on behalf of employees, doctors, or others will be offset to laundry costs.

g. "Private duty nurse income". Income received for the providing of a private duty nurse will be offset to nursing salaries.

h. "Rentals of facility space income". Income received from outside sources for the use of facility space and equipment will be offset to property costs.

i. "Telegraph and telephone income". Income received from residents, guests, or employees will be offset to ~~indirect~~ administration costs. Income from emergency answering services need not be offset.

j. "Therapy income". Income from all therapy services will be offset to therapy costs. This includes income for nonresident-related therapy services not separately costed out and all medicare part A and B therapy income.

k. "Vending income". Income from the sale of beverages, candy, or other items will be offset to the cost of the vending items or, if the cost is not identified, all vending income will be offset to administrative costs.

l. "Bad debt recovery". Income for bad debts which have been previously claimed shall be offset to administrative costs in the year of recovery.

m. "Other cost-related income". Miscellaneous income, including amounts generated through the sale of a previously expensed or depreciated item, e.g., supplies or equipment, must be offset to the cost category where the item was expensed or depreciated.

2. Payments to a provider by its vendor will ordinarily be treated as purchase discounts, allowances, refunds, or rebates in determining allowable costs even though these payments may be treated as "contributions" or "unrestricted grants" by the provider and the vendor. However, such payments may represent a true donation or grant. Examples include, but are not limited to, when: (1) they are made by a vendor in response to building or other fundraising campaigns in which communitywide contributions are solicited; or (2) the volume or value of purchases is so nominal that no relationship to the contribution can be inferred. The provider must provide

verification, satisfactory to the department, to support a claim that a payment represents a true donation.

3. Where an owner or other official of a provider directly receives from a vendor monetary payments or goods or services for the owner's or official's own personal use as a result of the provider's purchases from the vendor, the value of such payments, goods, or services constitutes a type of refund or rebate and must be applied as a reduction of the provider's costs for goods or services purchased from the vendor.

4. Where the purchasing function for a provider is performed by a central unit or organization, all discounts, allowances, refunds, and rebates must be credited to the costs of the provider ~~in accordance with the instructions above. These should not~~ and may not be treated as income ~~of~~ by the central ~~purchasing function~~ unit or organization or used to reduce the administrative costs of ~~that function~~ the central unit or organization. ~~Such administrative costs are, however, properly allocable to the facilities serviced by the central purchasing function.~~

5. Purchase discounts, allowances, refunds, and rebates are reductions of the cost of whatever was purchased.

History: Effective September 1, 1980; amended effective December 1, 1983; October 1, 1984; September 1, 1987; June 1, 1988; January 1, 1990; January 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-12.1. Nonallowable costs. Nonallowable costs include~~, but are not limited to~~:

1. ~~Costs described as nonallowable under North Dakota Century Code section 50-24.4-07.~~ Political contributions;

2. Salaries or expenses of a lobbyist;

3. Advertising designed to encourage potential residents to select a particular facility;

4. ~~Interest charges on fines or penalties~~ Fines or penalties, including charges on the penalty, bank overdraft charges, and late payment charges~~.~~;

5. Legal and related expenses for challenges to decisions made by governmental agencies except for successful challenges as provided for in section 75-02-06-02.5;

6. Costs incurred for activities directly related to influencing employees with respect to unionization;

7. Cost of memberships in sports, health, fraternal, or social clubs or organizations, such as elks, country clubs, knights of columbus;

~~3.~~ 8. Assessments made by or the portion of dues charged by associations or professional organizations for lobbying costs, contributions to political action committees or campaigns, or litigation, except for successful challenges to decisions made by governmental agencies~~.--Where-the-breakdown-of-dues-charged to--a--facility--is--not--provided,---the---entire---cost---is nonallowable.~~ (including all dues unless an allocation of dues to such costs is provided);

~~4.~~ 9. Community contributions, employer sponsorship of sports teams, and dues to civic and business organizations, i.e., lions, chamber of commerce, or kiwanis, in excess of ~~fifteen~~ one thousand five hundred dollars per cost reporting period~~.~~;

~~5.~~ 10. Home office costs which would ~~be-nonallowable~~ not otherwise be allowable if incurred directly by a the facility~~.~~;

~~6.~~ 11. Stockholder servicing costs~~,--including,-but-not-limited-to,~~ incurred primarily for the benefit of stockholders or other investors which include annual meetings, annual reports and newsletters, accounting and legal fees for consolidating statements for security exchange commission proposes, stock transfer agent fees, and stockholder and investment analysis~~.~~;

~~7.~~ 12. Corporate costs ~~which--are~~ not related to resident care, including reorganization costs, costs associated with acquisition of capital stock, and costs relating to the issuance and sale of capital stock or other securities~~.~~;

~~8.~~ 13. The full cost of items or services such as telephone, radio, and television, including cable hookups or satellite dishes, located in resident accommodations, excluding common areas, ~~which-are~~ furnished solely for the personal comfort of the residents~~.~~;

~~9.~~ 14. Fundraising costs, including salaries, advertising, promotional, or publicity costs incurred for such a purpose~~.~~;

~~10.~~ 15. The cost of any equipment, whether owned or leased, not exclusively used by the facility except to the extent that the facility demonstrates, to the satisfaction of the department, that any particular use of equipment was related to resident care~~.~~;

~~11.~~ 16. Costs, including, by way of illustration and not by way of limitation, legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies, attributed to the negotiation or settlement of the sale or purchase of any capital assets, whether by sale or merger, when the cost

of the asset has been previously reported and included in the rate paid to any hospital or facility.;

~~12.~~ 17. Costs ~~which~~ are incurred by the provider's subcontractors, or by the lessor of property which the provider leases, and which become an element in the subcontractor's or lessor's charge to the provider, if such costs would not have been allowable had they been incurred by a provider directly furnishing the subcontracted services, or owning the leased property; provided, however, that no provider shall have a particular item of cost disallowed under this subsection if that cost arises out of a transaction which was completed before July 18, 1984.;

~~13.~~ 18. The cost, in excess of charges, of providing meals and lodging to facility personnel living on premises.;

~~14.~~ 19. Depreciation expense for facility assets ~~which~~ are not related to resident care.;

~~15.~~ 20. Nonnursing facility operations and associated ~~administrative~~ administration costs.;

~~16.~~ 21. Direct costs or any amount claimed to medicare for medicare utilization review costs.;

~~17.~~ 22. All costs for services paid directly by the department to an outside provider., such as prescription drugs;

~~18.~~ 23. Travel costs involving the use of vehicles not exclusively used by the facility ~~are allowable only within the limits of this subsection.~~ except to the extent:

a. ~~Vehicle travel costs may not exceed the standard mileage rate established by the internal revenue service.~~ The facility supports vehicle travel costs with sufficient documentation to establish that the purpose of the travel is related to resident care;

b. ~~The facility shall support vehicle travel costs with sufficient documentation to establish that the purpose of the travel is related to resident care.~~ Resident-care related vehicle travel costs do not exceed the standard mileage rate established by the internal revenue service; and

c. The facility ~~shall document~~ documents all costs associated with a vehicle not exclusively used by the facility.;

~~19.~~ 24. Travel costs other than vehicle-related costs ~~are allowable provided they are~~ unless supported, reasonable, and related to resident care.;

25. Additional compensation paid to employees, who are members of the board of directors, for service on the board;

~~20.~~ 26. ~~The--fees~~ Fees paid to members of a board of directors for meetings attended ~~must-be-allowed-in--an--amount--not~~ to the extent that the fees exceed the compensation paid, per day, to members of the legislative council, pursuant to North Dakota Century Code section 54-35-10~~.---No-additional-compensation will-be-allowed-for-service--of--employees--on--the--board--of directors~~.;

27. Travel costs associated with meetings of boards of directors ~~are-allowable~~ to the extent such meetings are held in a location where the organization has ~~a-nursing~~ no facility~~.~~;

~~21.~~ 28. The costs of deferred compensation and pension plans that discriminate in favor of certain employees, excluding the portion of the cost which relates to costs that benefits all eligible employees~~.~~;

~~22.~~ 29. Premiums for top management personnel life insurance policies, except that such premiums ~~must~~ shall be allowed if the policy is included within a group policy provided for all employees, or if such a policy is required as a condition of mortgage or loan and the mortgagee or lending institution is listed as the sole beneficiary~~.~~;

~~23.~~ 30. Personal expenses of owners and employees, such as vacations, boats, airplanes, personal travel or vehicles, and entertainment~~.~~;

~~24.~~ 31. Costs ~~which---are~~ not adequately documented~~.---Adequate documentation-includes~~ through written documentation, date of purchase, vendor name, listing of items or services purchased, cost of items purchased, account number to which the cost is posted, and a breakdown of any allocation of costs between accounts or facilities~~.~~;

~~25.~~ 32. The following taxes:

a. Federal income and excess profit taxes, including any interest or penalties paid thereon~~.~~;

b. State or local income and excess profit taxes~~.~~;

c. Taxes in connection with financing, refinancing, or refunding operation, such as taxes in the issuance of bonds, property transfers, issuance or transfer of stocks, etc. ~~Generally,-these--costs--are~~, which are generally either amortized over the life of the securities or depreciated over the life of the asset~~.---They--are~~, but not~~,-however,~~ recognized as tax expense~~.~~;

d. Taxes such as real estate and sales tax for which exemptions are available to the provider~~.~~;

e. Taxes on property ~~which is~~ not used in the provision of covered services~~.~~;

f. Taxes, such as sales taxes, levied against the residents and collected and remitted by the provider~~.~~;

g. Self-employment (FICA) taxes applicable to individual proprietors, partners, members of a joint venture, etc.;

~~26.~~ 33. The unvested portion of a facility's accrual for sick or annual leave~~.~~;

~~27.~~ 34. The cost, including depreciation, of equipment ~~which was~~ or items purchased with funds received from a local or state agency, exclusive of any federal funds~~.~~;

~~28.~~ 35. Hair care, other than routine hair care, ~~when requested by a resident.~~ furnished by the facility;

~~29.~~ 36. The cost of education unless:

a. The education was provided by an accredited academic or technical educational facility;

b. The expenses were for materials, books, or tuition;

c. The employee was enrolled in a course of study intended to prepare the employee for a position at the facility, and is in that position; and

d. The facility claims the cost of the education at a rate which does not exceed one dollar per hour of work performed by the employee in the position for which the employee received education at the facility's expense, provided that the amount claimed per employee may not exceed two thousand dollars per year, or an aggregate of eight thousand dollars, and in any event may not exceed the cost to the facility of the employee's education.

37. Interest expense on the portion of operating loans equal to nonallowable costs incurred for the current and prior reporting periods.

History: Effective January 1, 1990; amended effective January 1, 1992; November 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-14. Resident days.

1. A resident day is any day for which service is provided or for which payment is ordinarily sought for the available bed. The amount of remuneration has no bearing on whether a day should be counted or not. Examples of days that must be included are hospital days and therapeutic leave days. ~~Hospital-stay~~ Medical assistance hospital days in excess of fifteen consecutive days are not billable to the department and are not ~~counted as~~ resident days. Medical assistance hospital days in a public institution, i.e., the state hospital or ~~veteran's~~ veterans' administration hospital, which are not billable to the department by the nursing facility, are not resident days.

2. Adequate census records must be prepared and maintained on a daily basis by the facility to allow for proper audit of the census data. The daily census records must include:

   a. Identification of the resident~~.~~;

   b. Entries for all days~~.--Entries are not to be made~~, and not just by exception~~.~~;

   c. Identification of type of day, i.e., hospital, in-house~~.~~;

   d. Identification of the resident's classification~~.~~; and

   e. Monthly totals by resident, by classifications for all residents, and by type of day.

3. Residents admitted to the facility through a hospice program will be identified as private-pay residents for census and billing purposes.

History: Effective September 1, 1980; amended effective December 1, 1983; September 1, 1987; January 1, 1990; November 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-16. Rate determinations.

1. Each cost category actual rate is calculated using the allowable historical operating costs and adjustment factors provided for in subsection 4 divided by standardized ~~resident's~~ resident days for the direct care cost category and resident days for other direct care, indirect care, and property cost categories. The actual rate as calculated is compared to the limit rate for each cost category to determine the lesser of the actual rate or the limit rate. The lesser rate is given the rate weight of one. The rate weight of one for direct care is then multiplied times the weight for each classification in subsection 5 of section 75-02-06-17 to

establish the direct care rate for that classification. The lesser of the actual rate or the limit rate for other direct care, indirect care, and property costs, and the adjustments provided for in subsections 2 and 3 are then added to the direct care rate for each classification to arrive at the established rate for a given classification.

2. a. ~~Incentives.~~ For a facility with an acutal rate below the limit rate for indirect care costs, an incentive amount equal to seventy percent times the difference between the actual rate, exclusive of inflation indices, and the limit rate~~,-exclusive-of-inflation-indices-for-periods-after-the report~~ in effect at the end of the year immediately preceding the rate year, up to a maximum of two dollars and sixty cents will be included as part of the indirect care cost rate.

   b. ~~Operating--margins.~~ A facility will receive an operating margin of three percent based on the lesser of the actual direct care and other direct care rates, exclusive of inflation indices, or the limit rate ~~exclusive-of--current inflation--indices~~ in effect at the end of the year immediately preceding the rate year. The three percent operating margin will then be added to the rate for the direct care and other direct care cost categories.

   c. Notwithstanding the provisions of subdivisions a and b, for the last five months of the rate year beginning January 1, 1994, the limit rate used to determine the operating margin for the direct care cost category is thirty-one dollars and twenty-two cents, the limit rate used to determine the operating margin for the other direct care cost category is ten dollars and thirty-one cents, and the limit rate used to determine the incentive for the indirect care cost rate is twenty-three dollars and thirty-two cents.

3. Limitations.

   a. The department shall accumulate and analyze statistics on costs incurred by the nursing facilities. These statistics may be used to establish reasonable ceiling limitations and incentives for efficiency and economy based on reasonable determination of standards of operations necessary for efficient delivery of needed services. These limitations and incentives may be established on the basis of cost of comparable facilities and services and may be applied as ceilings on the overall costs of providing services or on specific areas of operations. It shall be the option of the department to implement the ceilings so mentioned at any time based upon the information available and under guidelines required within the regulations of title XIX.

b. The department will review, on an ongoing basis, aggregate payments to nursing facilities to determine that payments do not exceed an amount that can reasonably be estimated would have been paid for those services under medicare payment principles. If aggregate payments to nursing facilities exceed estimated payments under medicare, the department may make adjustments to rates to establish the upper limitations so that aggregate payments do not exceed an amount that can be estimated would have been paid under medicare payment principles.

c. ~~Limits.~~ All facilities except those nongeriatric physically handicapped facilities described in North Dakota Century Code section 50-24.4-13 will be used to establish a limit rate for the direct care, other direct care, and indirect care cost categories. ~~This limit rate will be established using allowable historical operating costs for the base year, and adjustment factors for the rate year as set forth in this subsection.~~ The ~~initial~~ base year is the report year ended June 30, ~~1988~~ 1992. ~~These limit rates may not be rebased prior to the rate periods beginning January 1, 1993. The department will review economic trends and factors affecting nursing facilities to determine when rebasing of the limits will occur.~~ Base year costs may not be adjusted in any manner or for any reason not provided for in this subsection.

(1) The limit rate for each of the cost categories will be established ~~using the median rate for the appropriate cost category plus a fixed percentage of the median rate. The fixed percentage is to be determined~~ as follows:

(a) Historical costs for the report year ended June 30, ~~1988~~ 1992, as adjusted, will be used to ~~set~~ establish rates for all facilities in the direct care, other direct care, and indirect care cost categories.

(b) ~~The~~ For the first seven months of the rate year beginning January 1, 1994, the rates as established in subparagraph a of this paragraph will be ranked from low to high for each cost category ~~will be ranked from low to high~~. The ~~ninetieth~~ eightieth percentile ranking will be determined for the direct care and other direct care cost categories, and the ~~seventy-fifth~~ sixtieth percentile ranking will be determined for the indirect care cost category. The rate of each facility so ranked will be multiplied times 1.05165 to establish the limit rate for each category.

(c) ~~The--fixed--percentage--will--be--determined--by subtracting-the-median-rate-from-the--percentile ranking--rate-and-dividing-the-difference-by-the median-rate.~~

~~(d)--The----fixed----percentage---established---under subparagraph-c-of-this-paragraph-will-be-used-to determine--limits--if--and--when-rebasing-of-the limit-year-occurs.~~ For the last five months of the rate year beginning January 1, 1994, the limit rate for the direct care cost category is thirty-two dollars and three cents, for the other direct care cost category is ten dollars and fifty-eight cents, and for the indirect care cost category is twenty-three dollars and ninety-three cents.

(d) For the rate year beginning January 1, 1995, the limit rates established in subparagraph c will be multiplied times the consumer price index increase (as described in subsection 4) to establish the limit rate for each cost category.

(e) For rate years beginning on or after January 1, 1996, the limit rate set for each cost category for the previous rate year will be multiplied times the consumer price index increase (as described in subsection 4), if any, to establish the limit rate for each cost category.

(2) A facility ~~who~~ which has an actual rate that exceeds the limit rate for a cost category will receive the limit rate.

~~(3)--For--the--rate--years--beginning-January-1,-1990,-and ending-December-31,-1992,--a--facility--whose--actual rate--exceeds-the-limit-rate-for-a-cost-category-will receive-a-percentage-of-the-difference-bet--when--the actual-rate-and-the-limit-rate-as-follows:~~

~~(a)--For--the--rate--year--beginning-January-1,-1990, forty-five-percent-of--the--difference--will--be included-in-the-facility's-rate.~~

~~(b)--For--the--rate--year--beginning-January-1,-1991, forty-five-percent-of--the--difference--will--be included-in-the-facility's-rate.~~

~~(c)--For--the--rate--year--beginning-January-1,-1992, twenty-five-percent-of-the--difference--will--be included-in-the-facility's-rate.~~

~~(4)--The limit rates will be adjusted each year to reflect the latest available index of nursing facility costs, prepared by an independent economic forecaster, which is, to the extent reasonably possible, based on the actual historical increase or decrease in base year costs, and which is further adjusted to reflect the forecasted increase or decrease in base year costs to the end of the rate year.~~

d. The acutal rate for indirect care costs and property costs will be the lesser of the rate established using actual census or ninety percent of licensed bed capacity available for occupancy. A licensed bed is not available for occupancy if the licensed bed is part of a remodeling, renovation, or construction project for the period the bed is not in service.

4. Adjustment factors for direct care, other direct care, and indirect care costs.

~~a. The department will utilize an independent economic forecast method of predicting the factors to be used to adjust historical allowable costs. Where possible, adjustment factors specific to North Dakota will be used to establish the adjustment for each rate year. If specific North Dakota data is not available, regional specific or national data will be used to establish adjustment factors for each rate year. Individual adjustment factors for the cost components included in this subdivision will be calculated for each rate year.~~

~~(1)--Salaries.~~

~~(2)--Employment benefits.~~

~~(3)--Foods.~~

~~(4)--Utilities.~~

~~(5)--Drugs and nursing supplies.~~

~~(6)--Other costs.~~

~~b.~~--~~An adjustment factor will be separately calculated for~~ has determined that the appropriate economic change index, for purposes of subsection 5 of North Dakota Century Code section 50-24.4-10, is the increase, if any, in the consumer price index for urban wage earners and clerical workers (CPI-W), all items, United States city average. For purposes of this subsection, the "consumer price index increase" means the percentage (rounded to the nearest one-tenth of one percent) by which that consumer price

index for the quarter ending September thirtieth of the year immediately preceding the rate year (as prepared by the United States department of labor) exceeds that index for the quarter ending September thirtieth of the second year preceding the rate year. The consumer price index increase must be used to adjust direct care, other direct care, and indirect care costs ~~based--on--the--forecasted increase--or--decrease--in--the--cost--components--for-the eighteen-months-from-the-end-of-the-report-year-to-the-end of-the-next-rate-year.~~

5. Rate adjustments.

   a. Desk audit rate.

      (1) The cost report will be reviewed taking into consideration the prior year's adjustments. The facility will be notified by telephone or mail of any adjustments based on the desk review. Within seven working days after notification, the facility may submit information to explain why the desk adjustment should not be made. The department will review the information and make appropriate adjustments ~~which are-determined-to-be-appropriate.~~

      (2) The desk audit rate will be effective January first of each rate year unless the department specifically identifies an alternative effective date and will continue in effect until a final rate is established.

      (3) Until a final rate is effective, pursuant to paragraph 3 of subdivision b of this subsection, private-pay rates may not exceed the desk audit rate except as provided for in North Dakota Century Code section 50-24.4-19 or subdivision c.

      (4) The facility may request a reconsideration of the desk rate, pursuant to subsection 2 of North Dakota Century Code section 50-24.4-17, for purposes of establishing a pending decision rate. No decision on the request for reconsideration will be given by the department for the desk rate unless the facility has been notified that the desk rate is the final rate.

      (5) The desk rate may be adjusted for special rates or one-time adjustments provided for in this section.

      (6) The des rate may be adjusted to reflect errors or omissions for the report year which result in a change of at least five cents per day for the rate weight of one.

   b. Final rate.

(1) The cost report may be field audited to establish a final rate. If no field audit is performed, the desk audit rate will become the final rate upon notification from the department. The final rate is effective January first of each rate year unless the department specifically identifies an alternative effective date.

(2) The final rate will include any adjustments for nonallowable costs, errors, or omissions that result in a change from the desk audit rate of at least five cents per day for the rate weight of one ~~or--an aggregate--of--one-thousand-dollars-for-the-facility, whichever-is-less,~~ that are found during a field audit or are reported by the facility within twelve months of the rate yearend.

(3) The private-pay rate must be adjusted to the final rate no later than the first day of the second month following receipt of notification by the department of the final rate and is not retroactive except as provided for in subdivision c of this subsection.

(4) The final rate may be revised at any time for special rates or one-time adjustments provided for in this section.

(5) If adjustments, errors, or omissions are found after a final rate has been established, the following procedures will be used:

(a) Adjustments, errors, or omissions found within twelve months of establishment of the final rate and resulting in a change of at least five cents per day for the rate weight of one will result in a change to the final rate. The change will be applied retroactively as provided for in this section.

(b) Adjustments, errors, or omissions ~~in-excess-of one-thousand--dollars--for--the--facility~~ found later than twelve months after the establishment of the final rate, and which would have resulted in a change of at least five cents per day for the rate weight of one had they been included, will be included as an adjustment in the report year that the adjustment, error, or omission was found.

(c) Adjustments resulting from an audit of home office costs, and which result in a change of at least five cents per day for the rate weight of

one, will be included as an adjustment in the report year in which the costs were incurred.

c. Pending decision rates for private-pay residents.

(1) If a facility has made a request for reconsideration, taken an administrative appeal, or taken a judicial appeal from a decision on an administrative appeal, and has provided information sufficient to allow the department to accurately calculate, on a per day basis, the effect of each of the disputed issues on the facility's rate, the department shall determine and issue a pending decision rate within thirty days of receipt of the request for reconsideration, administrative appeal, or judicial appeal. If the information furnished is insufficient to determine a pending decision rate, the department, within thirty days of receipt of the request for reconsideration, shall inform the facility of the insufficiency and may identify information that would correct the insufficiency.

(2) The department shall add the pending decision rate to the rate that would otherwise be set under this chapter, and, notwithstanding North Dakota Century Code section 50-24.4-19, the total must be the rate chargeable to private-paying residents until a final decision on the request for reconsideration or appeal is made and is no longer subject to further appeal. The pending decision rate is subject to any rate limitation that may apply.

(3) The facility shall establish and maintain records that reflect the amount of any pending decision rate paid by each private-paying resident from the date the facility charges a private-paying resident the pending decision rate.

(4) If the pending decision rate paid by a private-paying resident exceeds the final decision rate, the facility shall refund the difference, plus interest accrued at the legal rate from the date of notification of the pending decision rate, within sixty days after the final decision is no longer subject to appeal. If a facility fails to provide a timely refund to a living resident or former resident, the facility shall pay interest at three times the legal rate for the period after the refund is due. If a former resident is deceased, the facility shall pay the refund to a person lawfully administering the estate of the deceased former resident or lawfully acting as successor to the deceased former resident. If no person is lawfully

administering the estate or lawfully acting as a successor, the facility may make any disposition of the refund permitted by law. Interest paid under this subsection is not an allowable cost.

~~c.~~ d. Adjustment of the total payment rate. The final rate as established will be retroactive to ~~January first of the rate year~~ the effective date of the desk rate, except with respect to rates paid by private-paying residents. ~~Rates~~ A rate paid by a private-pay ~~residents~~ resident must be retroactively adjusted and the difference refunded to the resident, if the ~~desk audit rate~~ rate paid by the private-pay resident exceeds the final rate by at least twenty-five cents per day, except that a pending decision rate is not subject to adjustment or refund until a decision on the disputed amount is made.

6. Rate payments.

a. The rate as established shall be considered as payment for all accommodations and includes all items designated as routinely provided. No payments may be solicited or received from the resident or any other person to supplement the rate as established.

b. The rate as established shall be paid by the department only if the rate charged to private-pay residents for semiprivate accommodations equals the established rate. If at any time the facility discounts ~~the private pay rate for those periods of time that the resident is not in the facility~~ rates for private-pay residents, the discounted rate will be the maximum chargeable to the department for the same ~~service~~ bed type, i.e., hospital or leave days.

c. If the established rate exceeds the ~~private pay~~ rate charged to a private-pay resident, on any given date, the facility shall immediately report that fact to the department and charge the department at the lower rate. If payments were received at the higher rate, the facility shall, within thirty days, refund the overpayment. The refund will be the difference between the established rate and the rate charged the private-pay resident times the number of medical assistance resident days paid during the period in which the established rate exceeded the rate charged to private-pay residents, plus interest calculated at two percent over the Bank of North Dakota prime rate on any amount not repaid within thirty days. The refund provision will also apply to all duplicate billings involving the department. Interest charges on these refunds are not allowable costs.

d. Peer groupings, limitations, or adjustments ~~which are~~ based upon data received from or relating to more than one

facility will be effective for a rate period. Any change in the data used to establish peer groupings, limitations, or adjustments will not be used to change such peer groupings, limitations, or adjustments during the rate period, except with respect to the specific facility or facilities to which the data change relates.

e. The established rate is paid based on a prospective ratesetting procedure. No retroactive settlements for actual costs incurred during the rate year which exceed the established rate will be made unless specifically provided for in this section.

7. Partial year.

a. For ~~facilities~~ a facility changing ownership during the rate period, the rate established for the previous owner will be retained. The rate for the next rate period following the change in ownership will be established as ~~follows~~:

(1) For a facility with four or more months of operation under the new ownership during the report year, through use of a cost report for the period ~~will be used~~; and

(2) For a facility with less than four months of ~~operations~~ operation under the new ownership during the report year, by indexing the rate established for the previous owner ~~will be indexed~~ forward using the adjustment factors ~~as set forth~~ in subsection 4.

b. For a new facility, the department will establish interim rates equal to the limit rates for direct care, other direct care, and indirect care in effect for the rate year in which the facility begins operation, plus the property rate. The property rate will be calculated using projected property costs and certificate of need projected census. The interim rate will be in effect for no less than ten months and no more than eighteen months. Costs for the period in which the interim rates are effective will be used to establish final rates, which will be limited to the lesser of the interim or actual rates. If the final ~~rate~~ rates for direct care, other direct care, and indirect care costs are less than the interim rates for those costs, a retroactive adjustment as provided for in subsection 5 will be made. A retroactive adjustment to the property rate will be made to adjust projected property costs to actual property costs. For the rate period following submission of any partial year cost report by a facility, census used to establish rates for property and indirect care costs will be the greater of actual census or certificate of need projected census.

(1) If the effective date of the interim rates is on or after ~~the first day of~~ March first and on or before June thirtieth, the interim rates will be effective for the remainder of that rate year and will continue through June thirtieth of the subsequent rate year. The facility must file an interim cost report for the period ending December thirty-first of the year in which the facility first provides services. The interim cost report is due March first and is used to establish actual rates which will be effective July first of the subsequent rate year. The partial year rates established based on the interim cost report will include applicable incentives, margins, phase-ins, and adjustment factors and will not be subject to any cost settle-up. The cost reports for the report year ending June thirtieth of the current and subsequent rate years will be used to determine the final rates for the period that the interim rates were in effect.

(2) If the effective date of the interim rates is on or after July first and on or before December thirty-first, the interim rates will remain in effect through the end of the subsequent rate year. The facility must file a cost report for the partial report year ending June thirtieth of the subsequent rate year. This cost report will be used to establish the rates for the next subsequent rate year. The facility must file an interim cost report for the period July first through December thirty-first of the subsequent rate year. The interim cost report is due on March first and is used, along with the report year cost report, to determine the final rates for the period that the interim rates were in effect.

(3) If the effective date of the interim rate is on or after January first and on or before February twenty-ninth, the interim rates will remain in effect through the end of the rate year in which the interim rates become effective. The facility must file a cost report for the period ending June thirtieth of the current rate year. This cost report will be used to establish the rates for the subsequent rate year. The facility must file an interim cost report for the period July first through December thirty-first of the current rate year. The interim cost report is due on March first and is used, along with the report year cost report, to determine the final rates for the period that the interim rates were in effect.

(4) The final rates established under this subdivision will be limited to the lesser of the limit rates for the current rate year or the actual rates.

c. For a facility with renovations or replacements in excess of one hundred thousand dollars, and without a significant capacity increase, the rates established for direct care, other direct care, and indirect care, based on the last report year, plus a property rate calculated based on projected property costs and imputed census ~~from the last report year~~, must be applied to all licensed beds. The projected property rate will be effective at the time the project is completed and placed into service. The property rate for the subsequent rate year will be based on projected property costs and imputed census ~~imputed based on actual census on all licensed beds existing before the renovation, plus ninety-five percent occupancy of the increase in licensed bed capacity~~, rather than on property costs actually incurred in the report year. Imputed census is based on the greater of actual census of all licensed beds existing before the renovation or ninety percent of the available licensed beds existing prior to renovation, plus ninety-five percent of the increase in licensed bed capacity and unavailable licensed beds existing prior to the renovation. Subsequent property rates will be adjusted using this methodology, except imputed census will be actual census if actual census exceeds ninety-five percent of total licensed capacity, until such time as twelve months of property costs are reflected in the report year.

d. For a facility with a significant capacity increase, the rates established for direct care, other direct care, and indirect care, based on the last report year, must be applied to all licensed beds. An interim property rate will be established based on projected property costs and projected census. The interim property rate will be effective from the first day of the month beginning after the date in which the increase in licensed beds is issued by the department of health and consolidated laboratories through the end of the rate year. The facility must file an interim property cost report following the rate year. The interim cost report is due March first and is used to determine the final rate for property and to establish the amount for a retroactive cost settle-up. The final rate for property is limited to the lesser of the interim property rate or a rate based upon actual property costs. The property rate for the subsequent rate year will be based on projected property costs and census imputed as ninety-five percent of licensed beds, rather than on property costs actually incurred during the report year; and will not be subject to retroactive costs settle-up. Subsequent property rates will be adjusted using this

methodology, except imputed census will be actual census if actual census exceeds ninety-five percent of total licensed capacity, until such time as twelve months of property costs are reflected in the report year.

e. For a facility which has no significant capacity increase and no renovations or replacements in excess of one hundred thousand dollars, the rates based on the report year will be applied throughout the rate year for all licensed beds.

f. ~~For a facility with a capacity increase occurring on or after January 1, 1990, but before July 1, 1991, and for a facility with a capacity increase which is not a significant capacity increase, occurring on or after July 1, 1991, but before January 1, 1992, a settle-up for property costs will be made. The settle-up will be based on property costs, actually incurred after the capacity increase was available for use, as reported in the cost report for the report year in which the costs were incurred. No settle-up will be made for costs incurred after December 31, 1991. Settle-up will occur within sixty days after both the cost report and a request for settle-up are received by the department. Any settle-up made before audit is subject to audit. The department may determine and make a settle-up after audit.~~

g. For a facility terminating its participation in the medical assistance program, whether voluntarily or involuntarily, the department may authorize the facility to receive continued payment until medical assistance residents can be relocated to facilities participating in the medical assistance program.

8. One-time adjustments.

a. Adjustments to meet certification standards.

(1) The department may provide for an increase in the established rate for additional costs that are incurred to meet certification standards. The survey conducted by the state department of health and consolidated laboratories must clearly require that the facility take steps to correct deficiencies dealing with resident care. The plan of correction must identify the salary and other costs that will be increased to correct the deficiencies cited in the survey process.

(2) The facility must submit a written request to the medical services division within thirty days of submitting the plan of correction to the state

department of health and consolidated laboratories. The request must ~~contain the following information~~:

(a) A Include a statement that costs or staff numbers have not been reduced for the report year immediately preceding the state department of health and consolidated laboratories' certification survey~~.~~;

(b) ~~The~~ Identify the number of new staff or additional staff hours and the associated costs that will be required to meet the certification standards~~.~~; and

(c) A Provide a detailed list ~~and implementation~~ of any other costs necessary to meet survey standards.

(3) The department will review the submitted information and may request additional documentation or conduct onsite visits. If an increase in costs is approved, the established rate will be adjusted ~~upward~~ to an amount not to exceed the limit rate.

(4) Any additional funds provided must be used in accordance with the facility's written request to the department and are subject to audit. If the department determines that the funds were not utilized for the intended purpose, an adjustment will be made in accordance with subsection 5.

b. Adjustments for unforeseeable expenses.

(1) The department may provide for an increase in the established rate for additional costs that are incurred to meet major unforeseeable expenses. Such expenses must be resident related and must be beyond the control of those responsible for the management of the facility.

(2) The facility must submit a written request containing the following information to the medical services division within sixty days after first incurring the unforeseeable expense:

(a) An explanation as to why the facility believes the expense was unforeseeable~~.~~;

(b) An explanation as to why the facility's management believes the expense was beyond the managerial control of the facility~~.~~; and

(c) A detailed breakdown of the unforeseeable expenses by expense line item.

(3) The department will base its decision on whether the request clearly demonstrates that the economic or other factors that caused the expense were unexpected and arose because of conditions that could not have been anticipated by management based on their background and knowledge of nursing care industry and business trends.

(4) The department will review the submitted information and may request additional documentation or conduct onsite visits. If an increase in costs is approved, the established rate will be adjusted upward not to exceed the limit rate.

(5) Any additional funds provided must be used to meet the unforeseeable expenses outlined in the facility's request to the department and are subject to audit. If the department determines that the funds were not utilized for the intended purpose, an adjustment will be made in accordance with subsection 5.

c. Adjustment to historical operating costs.

(1) A facility may receive a one-time adjustment to historical operating costs when the facility has been found to be significantly below care-related minimum standards described in subparagraph a of paragraph 2 of this subdivision and when it has been determined that the facility cannot meet the minimum standards through reallocation of costs and efficiency incentives.

(2) The following conditions must be met before a facility can receive the adjustment:

(a) The facility shall document that based on nursing hours and standardized resident days, the facility cannot provide a minimum of one and two-tenths nursing hours per standardized resident day~~.~~;

(b) The facility shall document that all available resources, including efficiency incentives, if used to increase nursing hours, are not sufficient to meet the minimum standards~~.~~; and

(c) The facility shall submit a written plan describing how the facility will meet the minimum standard if the adjustment is received. ~~The plan~~, which must include the number and type

of staff to be added to the current staff and the projected cost for salary and fringe benefits for the additional staff.

(3) The adjustment will be calculated based on the costs necessary to increase nursing hours to the minimum standards less any operating margins and incentives included when calculating the established rate. The net increase will be divided by standardized resident days and the amount calculated will be added to the actual rate. This rate will then be subject to any rate limitations that may apply.

(4) If the facility fails to implement the plan to increase nursing hours to one and two-tenths hours per standardized resident day, the amount included as the adjustment will be adjusted in accordance with the methodologies set forth in subsection 5.

(5) If the actual cost of implementing the plan exceeds the amount included as the adjustment, no retroactive settlement will be made.

History: Effective September 1, 1980; amended effective July 1, 1981; December 1, 1983; July 1, 1984; September 1, 1987; January 1, 1990; April 1, 1991; January 1, 1992; November 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-17. Classifications.

1. Any resident, except respite care residents, occupying a licensed nursing facility bed must have a resident classification review.

2. Residents will be classified in one of sixteen classes based on a resident classification review. If ~~no~~ a resident classification review is not performed ~~for a resident~~ in accordance with subsection 3, except for a respite care ~~residents~~ resident, the resident must be classified as special care B until the next required review is performed in accordance with subsection 3 for purposes of determining standardized resident days. ~~Residents~~ A resident, except for a respite care ~~residents~~ resident, who ~~have~~ has not been classified must be billed at the reduced physical functioning A established rate. ~~Respite~~ A respite care ~~residents~~ resident who ~~are~~ is not classified will be given a weight of one and five-tenths when determining standardized resident days.

3. Reviews must be conducted as follows:

a. The facility will review the resident within the first seven days after any admission or return from a an acute hospital stay.

b. The facility will review the resident after twenty-five days, but within thirty days after any admission or return from a an acute hospital stay.

c. The facility will review each resident twice each year. The reviews will be conducted six months apart and will be done according to a schedule established by the department for each report year.

d. The seven-day ~~reviews~~ review will take precedence over the thirty-day ~~reviews~~ review and the biannual ~~reviews~~ review, and the thirty-day ~~reviews~~ review will take precedence over the biannual ~~reviews~~ review. For example, if resident A was admitted on June first and the ~~annual medicaid~~ biannual review was ~~on~~ in June ~~third~~, resident A would not be included in the June ~~third~~ biannual review. On the other hand, if the ~~annual-medicaid~~ biannual review was ~~on~~ the second full week in July ~~third~~, resident A would be included, even though he or she had just had a thirty-day facility review on June thirtieth.

4. The resident classification review is to be completed based on the following criteria:

a. Assign point values for a resident's activities of daily living in the areas of:

(1) Eating - the process of getting food by any means into the body.

(2) Transfer - the process of moving between positions.

(3) Toileting - all processes involved with toileting.

b. Determine each resident's clinical group using the following hierarchy of criteria:

(1) Heavy rehabilitation - to qualify for heavy rehabilitation, a resident must require and receive restorative physical or occupational therapy five times per week for a minimum of two and one-half hours per week or requires and is receiving intensive bowel or bladder retraining. Residents receiving therapy ~~which--is~~ separately reimbursable by a third party cannot be included in this group.

(2) Special care - to qualify for special care, a resident must not qualify as heavy rehabilitation and must have an activity of daily living score of five

or more and one or more of the following conditions or treatments:

(a) Stage 4 decubitus.

(b) Comatose.

(c) Suctioning.

(d) Nasal gastric feeding.

(e) Parenteral feeding.

(f) Quadriplegia.

(g) Multiple sclerosis.

(h) Ventilator dependent.

(3) Clinically complex - to qualify for clinically complex, a resident must not qualify as special care and must have one or more conditions or treatments characteristic of special care with an activity of daily living score of three or four; or must not qualify for special care and must have one or more of the following conditions or treatments:

(a) Dehydration.

(b) Internal bleeding.

(c) Stasis ulcer.

(d) Terminally ill.

(e) Daily oxygen.

(f) Wound care.

(g) Chemotherapy.

(h) Transfusion.

(i) Dialysis.

(j) Daily respiratory care.

(k) Cerebral palsy.

(l) Urinary tract infection.

(m) Hemiplegia.

(4) Special ~~behavioral--needs~~ behavior - to qualify for special ~~behavioral-needs~~ behavior, a resident must not qualify for clinically complex and must have one of the following conditions:

(a) Verbal disruption - level 4+.

(b) Physical aggression - level 4+.

(c) Disruptive, infantile, or socially inappropriate - level 4+.

(d) Hallucinations - level 2+.

(5) Reduced physical functioning - a resident who does not qualify for special behavior will be classified as reduced physical functioning. For a resident who has a level 4+ rating for general behavior, one point will be added to the activity of daily living score assigned in subdivision a of subsection 4.

5. Based on the resident classification review, each resident will be classified into a case-mix class with a corresponding case-mix weight as follows:

a. Heavy rehabilitation A; case-mix weight: 1.91.

b. Heavy rehabilitation B; case-mix weight: 2.24.

c. Special care A; case-mix weight: 2.45.

d. Special care B; case-mix weight: 2.67.

e. Clinically complex A; case-mix weight: 1.17.

f. Clinically complex B; case-mix weight: 1.81.

g. Clinically complex C; case-mix weight: 2.12.

h. Clinically complex D; case-mix weight: 2.63.

i. Special ~~behavioral--needs~~ behavior A; case-mix weight: 1.16.

j. Special ~~behavioral--needs~~ behavior B; case-mix weight: 1.48.

k. Special ~~behavioral--needs~~ behavior C; case-mix weight: 1.90.

l. Reduced physical functioning A; case-mix weight: 1.00.

m. Reduced physical functioning B; case-mix weight: 1.29.

n. Reduced physical functioning C; case-mix weight: 1.48.

o. Reduced physical functioning D; case-mix weight: 1.72.

p. Reduced physical functioning E; case-mix weight: 2.21.

6. The classification is effective the date the review is completed in all cases except for the admission review. The admission review is effective the date of admission.

History: Effective September 1, 1987; amended effective January 1, 1990; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-18. Reviewer criteria.

1. The resident classification review form must be completed by a licensed practical nurse or registered nurse who has completed a training program approved by the department, and is certified by the department.

2. If a facility does not employ a sufficient number of registered nurses to provide the required number of reviewers, a substitution of no more than two licensed practical nurses may be made.

3. The department may decertify any certified nurse for incompetency or neglect in completing resident classification review.

4. The maximum number of reviewers a facility may use during each review period is:

   a. Facilities of one hundred beds or less - two reviewers.

   b. Facilities of more than one hundred beds - two reviewers plus one additional reviewer for each fifty beds or part thereof by which the facility exceeds one hundred beds.

5. Information may not be used for the review unless it is documented, readily available to the review nurse, and properly includable in the resident's medical record or is in the resident's medical record.

6. The ~~facilitywide--reviews~~ biannual review must be conducted during the second full week (Sunday through Saturday) of the month scheduled.

7. A reviewer must use the following qualifiers when completing the resident classification review:

a. Time period - the time period to be used is the past seven days except when reviewing behaviors. The time period for behaviors is the last fourteen days.

b. Frequency - number of times the questioned action occurs.

c. Documentation - specific medical record documentation ~~which is~~ required must be in the resident's medical record, or readily available to the review nurse, and properly includable in the resident's medical record.

History: Effective September 1, 1987; amended effective June 1, 1988; January 1, 1990; November 1, 1992; November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; 42 USC 1396a(a)(13)

75-02-06-19. ~~Refinancing---incentives.~~ Appeal from facility transfer or discharge.

~~1.--For purposes of this section:~~

~~a.--"Net savings"--means the difference between the scheduled interest costs to be paid on qualified debt immediately prior to refinancing reduced by the total of interest costs to be paid on qualified debt after refinancing and refinancing costs.~~

~~b.--"Qualified debt"-means:~~

~~(1)--Borrowing by a provider to refinance nursing facility capital debt which existed on April 1, 1992;~~

~~(2)--Which is completed on or after May 1, 1992, and on or before December 31, 1992; and~~

~~(3)--Which provides a net aggregate savings, which is at least equal to the greater of fifty thousand dollars or seven and one-half percent of the remaining principal balance immediately before refinancing.~~

~~c.--"Refinancing costs"--means those costs which must be incurred by a provider to complete qualified debt borrowing.~~

~~2.--Refinancing costs are allowable costs.--Refinancing costs may be met through the use of existing provider funds, including funds in funded depreciation accounts or through borrowing.~~

~~a.--If the existing provider funds are derived from funded depreciation accounts, the refinancing costs will be treated as costs incurred for other capital purposes related to resident care.~~

~~b.--A--provider--meeting--refinancing-costs-through-the-use-of existing-provider-funds-may-report,-as-an-interest-expense in--the--report-year-in-which-the-refinancing-occurred,-an amount-equal-to-twelve-percent-of-the-refinancing-costs.~~

~~c.--A-provider-meeting-refinancing-costs-through-borrowing-may report-the-interest-expense-when-that-interest-expense--is incurred.~~

~~d.--The--principal--amount--of--the--refinancing-costs-must-be amortized-over-the-period-of-borrowing-for--the--qualified debt.~~

~~e.--If--refinancing--of--qualified-debt-is-done-in-conjunction with-new-borrowing-for-capital-purposes,--the--refinancing costs--recognized--under-this-section-will-be-limited-to-a percentage-of-refinancing-costs-equal--to--the--percentage the-qualified-debt-is-of-the-total-qualified-and-new-debt.~~

~~3.--This---section---applies---to---qualified---debt---refinancing notwithstanding-any-other--provision--of--this--chapter--which calls--for--a--different-treatment-of-the-debt-and-refinancing costs.~~

1. For purposes of this section:

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

   b. "Resident" includes a resident as defined in section 75-02-06-01 and any legal representative of the resident.

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

2. Except as provided in subsection 4, a facility must issue a written notice of involuntary transfer or discharge, which meets the requirements of subsection 3, at least thirty days before the date of intended transfer or discharge. The first day of that thirty-day period is the day after the date of issuance. The date of issuance is the day notice is delivered or mailed to the resident.

3. The notice provided by the facility must contain:

   a. A statement that the facility intends to transfer or discharge the resident, as the case may be;

   b. The reason for the transfer or discharge;

c. The effective date of the transfer or discharge;

d. The location to which the resident is to be transferred or discharged;

e. The specific provision of section 33-07-03.1-37 that authorizes the transfer or discharge, or the change in federal or state law that requires the action;

f. A statement that the resident has the right to appeal the intended transfer or discharge to the department, and the mailing address to which an appeal must be sent;

g. The name, address, and telephone number of the state long-term care ombudsman;

h. If the resident is developmentally disabled or mentally ill, the address and telephone number of the protection and advocacy office;

i. If the medicaid program is paying for some or all of the cost of services furnished to the resident by the facility, a statement that those medicaid payments will continue until after the hearing unless:

(1) The sole issue at the hearing is one of state or federal law or policy and the resident is so informed in writing; or

(2) Some change in circumstances affects the resident's eligibility for medicaid benefits and the resident is so notified in writing;

j. A statement that the transfer or discharge will be delayed, if a request for fair hearing is filed before the effective date of the transfer or discharge:

(1) In the case of a discharge for nonpayment of facility charges, at least until the hearing officer recommends a decision that the charges were due and unpaid at the time the facility issued a notice of discharge; and

(2) In all other cases, until the fair hearing decision is rendered; and

k. A statement that the resident may represent oneself at the hearing, or may use legal counsel, a relative, a friend, or other spokesperson.

4. a. A facility need not provide a notice under subsection 2 if the resident:

(1) Provides a clear written statement, signed by the resident, that the resident does not object to a proposed transfer or discharge; or

(2) Gives information that requires a transfer or discharge and indicates that the resident understands that a transfer or discharge will result.

b. A facility must issue a notice that meets the requirements of subsection 3, as soon as practicable before an involuntary transfer or discharge, when:

(1) The safety of individuals in the facility would be endangered;

(2) The health of individuals in the facility would be endangered;

(3) The transfer or discharge is appropriate because the resident's health has improved sufficiently to allow a more immediate transfer or discharge;

(4) An immediate transfer or discharge is required by the resident's urgent medical needs which cannot be met in the facility; or

(5) The resident has not resided in the facility for thirty days.

5. A resident of a facility may appeal a notice from the facility of intent to discharge or transfer the resident. A resident has appeal rights when the resident is transferred from a certified bed to a noncertified bed or from a bed in a certified facility to a bed in a facility that is certified as a different provider. A resident has no appeal rights when the resident is moved from one bed in a certified facility to another bed in the same certified facility. A resident has no appeal rights if the transfer or discharge has taken place and the resident did not appeal within thirty days after the date of issuance of a notice that meets the requirements of subsection 3.

6. If a resident with appeal rights files an appeal before the effective date of the transfer or discharge, the resident may not be transferred or discharged:

a. In the case of a discharge for nonpayment of facility charges, earlier than the date a hearing officer recommends a decision that the charges were due and unpaid at the time the facility issued a notice of discharge; and

b. In all other cases, until the fair hearing decision is rendered.

History: Effective May 1, 1992; amended effective November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4; ~~42-USC-1396a(a)(13)~~ 42 CFR Part 483, subpart E

75-02-06-21. Specialized rates for extraordinary medical care.

1. A specialized rate for an individual with extraordinary medical needs may be established if the criteria in both subdivisions a and b are met.

   a. (1) The individual requires specialized therapies that are:

      (a) Restorative in nature (restorative means the individual has the ability to improve);

      (b) Medically necessary and provided in the facility;

      (c) Of at least two different types; and

      (d) Provided in excess of fifteen hours per week;

   (2) The individual requires extensive pulmonary care resulting from:

      (a) Suctioning and related tracheostomy care performed by a licensed nurse or therapist in excess of three and one-half hours in a twenty-four-hour period; or

      (b) A drug-resistant respiratory infection;

   (3) The individual requires total parenteral nutrition (TPN) and:

      (a) The individual is not eligible for or has been denied medicare part A or B benefits; and

      (b) The individual requires total parenteral nutrition based on medical necessity for a minimum of three months; or

   (4) The individual requires the use of a ventilator and:

      (a) Is dependent on the ventilator a minimum of six hours per day;

(b) Requires direct care by a licensed nurse, nurse aide, or therapist on a daily average of nine hours per day;

(c) Is physiologically stable; and

(d) Attempts to wean the individual from the ventilator have occurred during the acute hospital stay.

b. Costs to provide direct care to the individual must exceed two and one-half times the actual direct care rate, adjusted for inflation, prior to limitations, for the individual's resident classification. Costs which may be included in determining if the cost factor is exceeded include salaries and fringe benefits of all direct care staff, nursing supplies, drugs, dietary supplements, and specialized equipment costs.

2. A specialized rate will be calculated for an individual who meets the criteria by subtracting the actual cost per day for direct care, prior to limitations, for the individual's classification from the total cost per day for the individual.

3. All income received for a specialized rate must be offset proportionately to the affected cost categories.

4. The facility must report costs on a monthly basis for the first three full months after admission and on a quarterly basis thereafter. The specialized rates will be adjusted to actual on a prospective basis based on the report submissions.

5. The specialized rate will be paid in addition to the rate established for the individual's resident classification.

History: Effective November 22, 1993.
General Authority: NDCC 50-24.1-04, 50-24.4-02
Law Implemented: NDCC 50-24.4-19.2

TITLE 81

Tax Commissioner

AUGUST 1994

CHAPTER 81-01.1-01

81-01.1-01-05. Time for completion of an audit.

1. The tax commissioner shall notify the taxpayer in writing if the tax commissioner is unable to complete a field or office audit within twelve months of the commencement of such audit. For purposes of this section, an office audit is commenced on the date the tax commissioner first makes written request for information. A field audit is commenced on the date the auditor begins the review of taxpayer's records at the taxpayer's place of business.

2. If the tax commissioner issues a notice of determination later than twelve months after the commencement of a field or office audit, subsection 2 of section 81-01.1-01-09 applies. The twelve-month period is extended by any agreed upon extensions of time, by the time it takes information requested but not provided during a field audit to be received by the tax commissioner, and by the time expended after the second notice provided for in section 81-01.1-01-04.

3. Audits conducted by the multistate tax commission are not subject to the time deadlines set forth in subsection 1 or 2.

History: Effective May 1, 1991; amended effective November 1, 1991; August 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-06. Protest of notice of determination or refund change.

1. A taxpayer has the right to protest any notice of determination or notice of refund change only if a protest is perfected in full and timely compliance with the requirements contained in subsections 2 and 3.

2. The taxpayer has thirty days, or ninety days if the taxpayer is outside the United States, after the notice of determination or refund change to file a notice of protest. This notice of protest must be signed by the taxpayer or a duly authorized agent and must contain the following information:

   a. Taxpayer's name, address, telephone and social security number, or federal identification number, and sales tax permit number, if applicable.

   b. Name, address, and telephone number of taxpayer's agent, if any, for the purpose of the protest.

   c. Type of tax and tax periods under protest.

   d. Amount under protest.

   The taxpayer may file an oral protest provided the oral protest is made within the thirty days and is confirmed in writing.

3. The taxpayer has up to ninety days after the notice of determination or refund change within which to file a written statement of grounds for protest setting forth the taxpayer's specific reasons for opposing the determination or refund change, unless the taxpayer and tax commissioner agree to extend the ninety days set forth in this subsection.

4. If the notice of protest or the statement of grounds for protest is served by mail, certified mail is recommended.

5. If the taxpayer fails to timely file either the notice of protest or statement of grounds, the notice of determination or the notice of refund change becomes finally and irrevocably fixed.

6. The tax commissioner shall acknowledge receipt of the statement of grounds within fifteen days. If the taxpayer fails to specifically state the reasons and facts for opposing the determination or refund change, the tax commissioner shall give the taxpayer thirty days to perfect the statement of grounds. The tax commissioner shall state specifically the additional information required.

7. Amounts of tax not protested are irrevocably fixed and must be paid.

History: Effective May 1, 1991; amended effective August 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-07. Response to statement of grounds. Within ninety days of the final statement of grounds, the tax commissioner ~~shall~~ must provide a detailed response. The tax commissioner's response ~~shall~~ must address each objection raised by the statement of grounds. The taxpayer may request a more specific statement within fifteen days of the tax commissioner's detailed response. The tax commissioner shall respond to the request for a more specific statement within thirty days. If the tax commissioner fails to meet the deadlines specified in this section, subsection 2 of section 81-01.1-01-09 applies, unless the taxpayer and tax commissioner agree to extend the ninety-day period in this section.

History: Effective May 1, 1991; amended effective August 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

CHAPTER 81-02.1-02

81-02.1-02-10. Valuation of nonagricultural property. Any assessment made by a township assessor or class II city assessor of a nonagricultural property, upon which there are buildings and structures with a true and full value of more than five hundred thousand dollars, must be ~~reviewed and approved by~~ submitted by March first annually to a certified county director of tax equalization or a certified class I city assessor for review and approval prior to the township or city board of equalization annual meeting.

History: Effective November 1, 1992; amended effective August 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 11-10.1-05(2)

CHAPTER 81-03-01.1

81-03-01.1-06. Income tax exemption for new and expanding business.

1. When a taxpayer is granted an exemption from income tax pursuant to North Dakota Century Code chapter 40-57.1, the exemption must be prorated, when necessary, in the first and last years in order to exempt income for a period not to exceed sixty months.

2. The amount of the yearly income tax exemption for new and expanding business is limited to income earned from the new business or expansion in each tax year reduced by the amount of federal tax assignable to the North Dakota exempt income which was included in federal taxable income.

3. When the project operator is a partnership or S corporation, the income tax exemption flows through to the partners and shareholders.

4. ~~When--reapplication--for--a-property-tax-exemption-is-required pursuant--to--North--Dakota--Century--Code--chapter---40-57.1, reapplication--is--also-required-for-the-income-tax-exemption.~~ The conditions for reapplication set forth in North Dakota Century Code chapter 40-57.1 apply to the income tax exemption. A project operator must reapply for the income tax exemption if these conditions are met.

5. ~~Termination--of--the--property--tax--exemption--terminates-the income-tax-exemption.~~

6. ~~.~~ The office of the state tax commissioner must be notified of any changes in ownership of a new industry which has been granted an income tax exemption. A change of ownership includes transfer of a partnership interest or of a stock interest in a subchapter S corporation.

~~7.~~ 6. The income tax exemption may be claimed by an individual taxpayer on North Dakota form 37.

~~8.~~ 7. A taxpayer with both exempt and nonexempt activities shall prorate its income pursuant to the provisions of North Dakota Century Code chapter 57-38.1.

   a. If the taxpayer has only North Dakota activity, exempt income must be determined by multiplying income from all activities, exempt and nonexempt, by a fraction, the

numerator of which is the sum of its exempt property, sales, and payroll factors and the denominator of which is three.

EXAMPLE:

Facts:	Exempt Plant	Other North Dakota Activity	Total North Dakota Activity
Property	$ 5,000,000	$10,000,000	$15,000,000
Payroll	750,000	1,000,000	1,750,000
Sales	20,000,000	35,000,000	55,000,000

Apportionable income $50,000,000

Computing North Dakota exempt income

Apportionment factor relating to exempt activities:

```
Property factor = $ 5,000,000 :   $15,000,000 =  .333333
Payroll factor  = $   750,000 :   $ 1,750,000 =  .428571
Sales factor    = $20,000,000 :   $55,000,000 =  .363636
                                                 1.12554 : 3 = .37518
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     .37518 Apportionment factor of exempt activities
$50,000,000 Apportionable income
$18,759,000 Exempt income
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b. Computing North Dakota exempt income of multistate business requires two steps.

(1) Compute North Dakota income including both exempt and nonexempt activities in the apportionment factor and in apportionable income.

EXAMPLE:

Multistate corporation

Facts: Utilize the same facts in the above example, and add:

Total activity within and without North Dakota

Property	$100,000,000
Payroll	$ 5,000,000
Sales	$200,000,000

Apportionment factor, including tax-exempt activity

```
Property Factor = $ 15,000,000 : $100,000,000 =  .15
Payroll Factor  = $  1,750,000 : $  5,000,000 =  .35
Sales Factor    = $ 55,000,000 : $200,000,000 =  .275
                                                 .775 : 3 = .258333
```

$50,000,000
x .25833
$12,916,650 North Dakota income

(2) Apply a second factor to North Dakota income computed in the first step. The second factor is computed in the same way as in subdivision a, as a ratio of exempt North Dakota activity to total North Dakota activity.

$12,916,650 North Dakota income
x .37518 Apportionment factor of exempt activities
$ 4,846,069 North Dakota exempt income

c. When a partial exemption on a project or plant has been granted, the percentage of the project's nonexempt property, payroll, and sales would be added to the other North Dakota taxable activity's factors. For instance, a twenty percent exemption would mean eighty percent of the project's property, payroll, and sales would be added to the other North Dakota factors creating a taxable activity.

d. When a company has only one operating facility which has been granted a partial exemption, North Dakota taxable income shall be computed based on total income of the operation, and a percentage of the income which is equal to the percentage of the exemption shall be deducted from the total.

History: Effective March 1, 1990; amended effective June 1, 1992; August 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 40-57.1

81-03-02.1-11. Credit for premiums for long-term care insurance coverage.

1. An individual is entitled to a credit for premiums paid for long-term care insurance coverage if the policy complies with the provisions of North Dakota Century Code title 26.1 and all other applicable insurance laws insofar as they do not conflict with North Dakota Century Code title 26.1.

2. "Long-term care insurance" for purposes of this article means an insurance policy as defined by subsection 4 of North Dakota Century Code section 26.1-45-01.

History: Effective August 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-29.2

81-03-02.1-12. Seed capital investment credit - Limitations on credit - Carryover. For the purpose of administering the credit under North Dakota Century Code chapter 57-38.5, the following apply:

1. The credit must first be credited against the taxpayer's income tax liability for the taxpayer's taxable year in which the investment is paid for in full.

2. For purposes of applying the annual limitation on the total amount of credits allowed for investments in one qualified business under subsection 6 of North Dakota Century Code section 57-38.5-03, the total amount of investments and the total amount of gross receipts from out-of-state sales must be determined on a calendar year basis.

3. For purposes of applying the annual limitation on the total amount of credits allowed for investments in all qualified businesses under North Dakota Century Code section 57-38.5-05, the total amount of investments and related credits must be determined on a calendar year basis.

4. For purposes of determining whether a taxpayer has reached the annual minimum or maximum amount of investment for which a credit is allowed under subsection 1 of North Dakota Century Code section 57-38.5-03, the total amount of investments must be determined by aggregating all of the investments made by a taxpayer within the taxpayer's taxable year.

5. Every qualified business shall file with the tax commissioner a written report showing the total amount of its gross receipts from out-of-state sales on a calendar year basis.

The report must be filed by January thirty-first following the end of each calendar year. If a qualified business fails to file a written report, the total amount of the credit attributable to investments made in that qualified business during the calendar year for which the report was required to be filed must be disallowed until such time as the report is received by the tax commissioner.

6. If a taxpayer elects to determine the taxpayer's state income tax liability under North Dakota Century Code section 57-38-30.3, the credit is not allowed in the taxable year of the election or in any subsequent taxable year to which an unused credit may otherwise be carried.

7. For purposes of applying subsection 3 of North Dakota Century Code section 57-38.5-03, the amount of the credit which may be carried forward from the taxpayer's taxable year in which the related investment was made is the amount of the credit not allowed because of subsection 2 of North Dakota Century Code section 57-38.5-03.

8. If a partnership makes an investment in a qualified business, and if the taxable year of the partnership differs from the taxable year of the partner, the amount of credit allocated to the partner under subsection 4 of North Dakota Century Code section 57-38.5-03 must first be credited in the partner's taxable year in which the partnership's taxable year ends.

9. If a taxpayer makes an investment in a qualified business and then sells the investment back to the qualified business within three years of making the investment, the credit must be disallowed. If a taxpayer makes an investment in a qualified business and then sells the investment to a second taxpayer, the credit attributable to the investment must be allowed to the first taxpayer provided the investment is held by the qualified business for three years, and no credit may be allowed to the second taxpayer.

10. For purposes of subsection 8 of North Dakota Century Code section 57-38.5-03, "controlling interest" means ownership of over fifty percent of the voting stock and over fifty percent of each class of other stock of the corporation.

History: Effective August 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38.5

CHAPTER 81-03-04

81-03-04-01. Corporation required to report and pay estimated tax, penalty, and interest - Refund of overpayment.

1. Any corporation may elect to ~~file-a-declaration~~ make a payment of estimated income tax with the tax commissioner.

2. A corporation ~~shall-file-a-declaration~~ is required to make a payment of estimated tax with the tax commissioner if:

   a. The corporation's previous year's state income tax liability exceeded five thousand dollars; and

   b. The corporation reasonably expects the current state income tax liability to be in excess of five thousand dollars.

3. For the purpose of this section, tax liability is defined as the amount of North Dakota tax due computed after the application of allowable credits and before the application of estimated payments.

4. When making ~~the-declaration~~ payment of estimated income tax, a corporation has the option of basing the estimation on the tax liability for the previous year or on an estimate of the liability for the current tax year.

5. The ~~declaration~~ payment of estimated income tax must be ~~filed~~ made on or before the fifteenth day of the fourth month of the current corporate tax year. The original ~~declaration~~ payment of estimated income tax may be amended ~~by--filing--an--amended declaration~~ any time before the fifteenth day of the first month of the tax year following the current tax year.

6. A corporation shall pay the estimated tax liability in four equal installments payable on the fifteenth day of the fourth, sixth, and ninth month of the current tax year and the fifteenth day of the first month of the following tax year. As an alternative to paying in quarterly installments, a corporation may pay the entire estimated amount on the fifteenth day of the fourth month of the current tax year.

7. For taxable years beginning after December 31, 1986, the provisions for recurring seasonal income as provided in section 6655(e) of the Internal Revenue Code are recognized for state income tax purposes.

8. For taxable years beginning after December 31, 1990, the provisions for the annualized or adjusted seasonal method of determining estimated income under section 6655 of the

Internal Revenue Code are recognized for state income tax purposes.

9. Penalty and interest apply in the following conditions:

   a. ~~A--corporation--did--not--timely--file--a--declaration--of estimated-tax.~~

   ~~b.~~ A corporation did not pay the estimated tax on or before the quarterly due date.

   ~~c.~~ b. The quarterly estimated payments were underpaid by more than ten percent of the actual tax liability for the current tax year divided by four. However, no penalty or interest will apply if the quarterly estimated payments equaled the previous year's total tax divided by four.

10. Interest is computed from the due date of the quarterly installment to the date of actual payment. Estimated tax payments, received as a result of an ~~amended-declaration-of~~ amendment to the originally estimated tax, will have interest computed from the date paid to the date due in the related quarters.

11. If the total amount of estimated tax payments exceed the total amount of tax required to be paid for the current tax year, the overpayment will be refunded. ~~Interest-will-be-paid-on any-overpayment-of-tax-if--the--overpayment--is--not--refunded within--sixty-days-after-the-due-date-of-the-income-tax-return or-within-sixty-days-after-the-date-the-income-tax-return--was filed,-whichever-comes-later.~~

12. a. If the total amount of estimated tax payments exceeds the anticipated tax liability for the tax year by more than five hundred dollars, a quick refund may be requested. The request for refund must be filed on forms provided by the tax commissioner. In addition, the request must be filed after the close of the tax year and before the original due date of the tax return. No interest will be paid on a quick refund.

    b. If a quick refund of estimated income tax results in a corporation's failure to meet the requirements of North Dakota Century Code section 57-38-62, penalty and interest provisions will apply.

History: Effective July 1, 1985; amended effective November 1, 1987; November 1, 1991; August 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-62

CHAPTER 81-03-05.2

81-03-05.2-02. Water's edge election.

1. A taxpayer may elect to use the water's edge method for any taxable year beginning on or after January 1, 1989.

2. Each taxpayer in the unitary group shall take the following steps when electing to use the water's edge method:

   a. Execute the water's edge election form provided by the commissioner; and

   b. File the water's edge election form with its original North Dakota income tax return for the first year to which the election applies.

   Provided, however, that a joint election may be made on behalf of more than one taxpayer.

3. Each taxpayer in the ~~unitary~~ water's edge group shall make an election pursuant to subsection 2 before any taxpayer in the group may use the water's edge method.

4. An affiliated corporation is considered to have consented to a ~~unitary-group's~~ water's edge election if the corporation becomes a member of the group after the group elects to use the water's edge method.

History: Effective July 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38.4-02

81-03-05.2-04. Elements of the water's edge combined report.

1. A taxpayer who elects to use the water's edge method shall include the income and the apportionment factors of the water's edge group in its combined report. The aforementioned group must include the following ~~unitary~~ corporations:

   a. A United States parent corporation.

   b. An affiliated corporation incorporated in the United States, excluding, however, an 80/20 corporation.

   c. An affiliated corporation incorporated in a possession of the United States as described in Internal Revenue Code sections 931 through 936.

d. A domestic international sales corporation as described in Internal Revenue Code sections 991 through 994.

e. A foreign sales corporation as described in Internal Revenue Code sections 921 through 927.

f. An export trade corporation as described in Internal Revenue Code sections 970 through 972.

g. A foreign corporation which derived gain or loss from disposing of a United States real property interest but only to the extent the gain or loss was recognized under Internal Revenue Code section 897.

h. A foreign corporation if over fifty percent of its voting stock is owned, directly or indirectly, by a member of the water's edge group, and if more than twenty percent of the average of its property and payroll is assignable to a location within the United States or its possessions.

2. Income for the water's edge group must be computed on the same basis as federal taxable income, except as provided for in the following subdivisions and in subsection 2 of North Dakota Century Code section 57-38.4-02, and plus or minus the adjustments provided for in North Dakota Century Code section 57-38-01.3 with the exception of subdivision c of subsection 1 of North Dakota Century Code section 57-38-01.3:

   a. Transactions between members of the water's edge group must be eliminated.

   b. Transactions between a member of the water's edge group and an affiliated corporation that has been excluded from the group must be included.

   c. If a corporation is included in the water's edge group but it is not required to file a federal income tax return, the equivalent of its federal taxable income must not include a deduction for foreign taxes based on income.

3. The factors used to apportion the income of the water's edge group must be determined pursuant to North Dakota Century Code chapters 57-38.1 and 57-59, chapter 81-03-09, and the following subdivisions:

   a. Transactions between members of the water's edge group must be eliminated.

   b. Transactions between any member of the water's edge group and an affiliated corporation that has been excluded from the group must be included.

c. The property, payroll, and sales of an 80/20 corporation, a dividend payor corporation, or any other affiliated corporation that has been excluded from the water's edge group must not be included in the apportionment factors of the group.

History: Effective July 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-01.3, 57-38.1, 57-38.4, 57-59

81-03-05.2-05. Domestic disclosure spreadsheet.

1. A taxpayer electing to use the water's edge method shall file a domestic disclosure spreadsheet if the affiliated corporations as a group have:

   a. Property, payroll, or sales in foreign countries exceeding ten million dollars.

   b. Assets exceeding two hundred fifty million dollars.

2. The domestic disclosure spreadsheet must be filed the first year the conditions set forth in subsection 1 of section 81-03-05.2-05 are met and every third year thereafter provided the conditions set forth in subsection 1 of section 81-03-05.2-05 continue to be met.

3. A domestic disclosure spreadsheet must include the following:

   a. A list of the corporations in the water's edge group and any corporation in which more than twenty percent of the voting stock is, either directly or indirectly, owned or controlled by a member of the water's edge group.

   b. The following identifying information for each corporation listed in subdivision a:

      (1) Federal identification number.

      (2) Address.

      (3) Percentage of voting stock, that is either directly or indirectly owned or controlled by each member of the water's edge group.

   c. The following information for each corporation in the water's edge group:

      (1) Primary business locations.

      (2) Primary business activities.

(3) Country of incorporation.

(4) Dates of acquisition or disposition of the ownership interest.

(5) For each state which assesses a tax on, according to, or measured by net income, a schedule detailing the tax liability and the computations used to allocate or apportion the corporation's income to each state in which the corporation is taxable. The details which must be disclosed on the aforementioned schedule include:

(a) Whether the liability was computed on a single entity basis or pursuant to a combined report.

(b) The entities included in the combined report.

(c) The federal taxable income for each entity whose income was included in determining the amount of income that was allocated and apportioned to the state.

(d) The amount of income apportioned to the state, the formula used to apportion the income, and the amount of property, payroll, and sales included in the formula used to apportion the income.

(e) The amount of income allocated to the state.

(f) The total amount of income not subject to apportionment by formula under the rules of the state.

(g) The amount of tangible personal property sales made or delivered to customers within the state.

(6) For each state which does not assess a tax on, according to, or measured by income, a schedule disclosing the following information for each corporation which has a taxable presence in the state:

(a) The federal taxable income for the corporation or for the federal consolidated filing group of which the corporation is a member.

(b) The amount of property, payroll, and sales that would be assigned to the state under North Dakota Century Code chapter 57-38.1 and the rules adopted pursuant thereto.

(c) The amount of tangible personal property sales made or delivered to customers within the state.

d. A copy of pages one through four of the federal income tax return that was filed with the internal revenue service for each corporation listed in subdivision c.

3. 4. The spreadsheet information must be filed on the forms provided by the commissioner. Data not submitted on the preapproved forms will be deemed incomplete.

~~4. The spreadsheet must be filed in the first year of the election period and every third year thereafter that the election remains in effect.~~

5. If the information required to be reported on the spreadsheet is not available when the return is filed, a taxpayer may file the spreadsheet within six months after the due date of the return, including any extensions. If the aforementioned time deadlines cannot be met, a taxpayer shall file a written request for an extension of time with the commissioner within six months after the due date of the return, including any extensions. This request which will be deemed filed on the date it is sent by certified mail must state the grounds for the request. Within a reasonable time after receiving the request, the commissioner shall notify the taxpayer as to whether the request for additional time is granted. However, the commissioner will not grant an extension of time that exceeds one hundred twenty days.

6. A spreadsheet will be deemed complete when filed unless the commissioner notifies the taxpayer, within one hundred eighty days after the spreadsheet was filed, that the spreadsheet requirements have not been met. This notice must be sent by certified mail and it must inform the taxpayer as to why the spreadsheet was not properly completed. A taxpayer shall correct the deficiencies in its spreadsheet within ninety days after receiving the aforementioned notice of deficiency. If the ninety-day deadline cannot be met, a taxpayer shall file a written request for an extension of time with the commissioner within ninety days after receiving the notice of deficiency. This request which will be deemed filed on the date it is sent by certified mail must state the grounds for the request. Within a reasonable time after receiving the request, the commissioner shall notify the taxpayer as to whether the request for additional time is granted.

History: Effective July 1, 1989; amended effective March 1, 1990; May 1, 1991; August 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38.4-02

81-04.1-01-16. Casual or occasional sales. Casual or occasional sales made by an individual are not subject to sales tax. Sales made in the course of a regularly conducted business are subject to sales tax. The following are retailers who must collect and remit sales tax:

1. The auctioneer who auctions the belongings of several undisclosed individuals at a public auction.

2. Persons who buy antiques from others and offer them for sale at a public auction or through a private sale.

3. Persons who conduct permanent rummage sales through which they dispose of the property of others.

A retailer may not claim a casual sale if the property sold is similar to property sold by the retailer in the regular course of business.

A person selling one's own products occasionally is making casual sales, and such sales are not taxable. Sales of such number, volume, or frequency as to indicate that the sale is not a casual or isolated one are subject to tax.

The sale of a business or the assets of a business is a casual sale and no sales tax is due. If the business being sold is a retail business and the business will continue as a retail business, the inventory is considered to be sold for resale while the sale of the other business assets is considered to be a casual sale. Sale of a retail inventory through auction is subject to section 81-04.1-04-11.

History: Effective June 1, 1984; amended effective August 1, 1994.
General Authority: NDCC 57-39.2-19
Law Implemented: NDCC 57-39.2-01, 57-39.2-02.1, 57-39.2-03.2, 57-39.2-03.3, 57-39.2-04, 57-39.2-20, 57-40.3

81-04.1-01-23. Manufacturers and recyclers. Manufacturing or agricultural processing is a process which produces a new article with a different form, use, and name. The modification of articles of tangible personal property is not manufacturing or processing. For example, the creation of steel ducts or I-beams is manufacturing whereas the modification of steel ducts or I-beams to meet the specifications of a particular real property construction contract is not manufacturing or processing. To be considered manufacturing or processing, the raw materials must be materially altered.

By way of illustration and not of limitation, the following are manufacturers or agricultural processors: food, beverage, confectionary plants; grain mills; bakeries; textile mills; apparel makers; wood and

lumber plants; furniture and fixture makers; paper product makers; printers and publishers (includes newspapers); chemical producers; leather good plants; stone, clay, glass, concrete product makers; cement and asphalt plants; metal ware makers; auto/aircraft makers; dairy processors (not producers); photo finishers (not photographers); and dental, medical, ophthalmolic labs.

By way of illustration and not of limitation, the following are not manufacturers or agricultural processors: farmers or ranchers, construction contractors, refining companies, artists, utilities, nurseries, restaurants, pharmacists, drycleaners, photographers, advertisement agencies, secretarial services, computer programmers, auto body shops, repair shops, radio and television stations, architects, jewelers, grain elevators, and tire retreaders or recappers.

Machinery and equipment used directly in the manufacturing process includes molds and dies that determine the physical characteristics of the finished product or its packaging material, and computers and related peripheral equipment that directly control or measure the manufacturing process.

Machinery and equipment used directly in the manufacturing process also includes temperature or humidity control equipment necessary to maintain certain levels of temperature or humidity in a limited area of the processing or manufacturing facility where either temperature or humidity must be closely regulated for the proper function or production process to occur. For example, in certain food processing plants, maintenance of high levels of humidity are necessary during part of the process. Therefore, equipment or machinery used to create or maintain necessary humidity levels is exempt as manufacturing or processing equipment. Equipment or machinery used for general heating or cooling of the facility or air-conditioning or air exchange equipment does not qualify for the tax exemption.

Items which are consumed or destroyed in the manufacturing process but which do not become a part of the finished product cannot be considered machinery and equipment and consequently are subject to the general sales and use tax. Purchase of these items by a manufacturer is taxable, and suppliers shall charge sales or use tax on these consumable items. If the items are purchased from an out-of-state supplier or if a North Dakota supplier fails to charge the tax, the North Dakota manufacturer shall report the sales or use tax directly to the North Dakota tax commissioner.

Machinery and equipment not used directly in the manufacturing process or in agricultural processing include repair parts, equipment used for storage, delivery to and from the plant, repairing or maintaining facilities, research and development, or environmental control equipment required to maintain certain levels of ~~humidity, temperature,--or~~ air quality in a manufacturing or agricultural processing plant.

"Recycling" means collecting or recovering waste material and processing it so it becomes a raw material or another product for sale.

Machinery and equipment used directly in recycling of tangible personal property includes pulverizers, shredders, balers, granulators, separators, and conveyors. The machinery and equipment must be used solely and exclusively in affecting material as a part of the recycling process.

Motor vehicles used to collect material to be recycled do not qualify for the exemption nor does transportation equipment such as forklift trucks used to load or unload material either before it is recycled or after the recycling process.

Items consumed or destroyed in the recycling process but which do not become a part of the finished product are not considered recycling machinery or equipment and are subject to sales tax when purchased for use by the recycler.

Requests for approval to buy goods without paying tax or for refunds of tax paid on goods which qualify for exemption must be made in writing to the tax commissioner. The tax commissioner reserves the right to make an onsite inspection prior to granting permission to purchase qualifying goods without paying tax or to receiving a refund. The tax commissioner's approval to purchase goods without paying tax or to grant a refund is binding unless a further review or additional information indicates that the decision was made upon misrepresentation by the applicant. An onsite inspection by the tax commissioner does not preclude an audit of the taxpayer's books and records.

History: Effective June 1, 1984; amended effective March 1, 1990; November 1, 1991; August 1, 1994.
General Authority: NDCC 57-39.2-19
Law Implemented: NDCC 57-39.2-01, 57-39.2-02.1, 57-39.2-04, 57-39.2-04.3, 57-39.2-07, 57-40.2-02.1, 57-40.2-04

CHAPTER 81-04.1-02

81-04.1-02-01. Sales to the state of North Dakota, other states, any subdivisions of North Dakota, and sales by municipal corporations. Gross receipts from sales of tangible personal property or from furnishing taxable services to this state or any of its political subdivisions, departments, agencies, or institutions are exempt from sales tax. Sales or furnishing taxable services to any other state are ~~exempt from sales tax, but sales or furnishing services to the political~~ subdivisions or municipalities of a ~~foreign~~ any state are ~~subject to~~ exempt from sales tax unless these entities are subject to sales tax in their home state.

Retail sales or furnishing of services to the public by any state, subdivisions, departments, or institutions of any state, are subject to sales tax.

History: Effective June 1, 1984; amended effective August 1, 1994.
General Authority: NDCC 57-39.2-19, 57-40.2-13; S.L. 1993, Ch. 561
Law Implemented: NDCC 57-39.2-01, 57-39.2-02.1, 57-39.2-03.2, 57-39.2-03.3, 57-39.2-04; S.L. 1993, Ch. 561

81-04.1-04-07.1. Educational, religious, or charitable sales activities. Gross receipts from educational, religious, or charitable activities are subject to tax when these activities include regular retail sales made in direct competition with other retailers.

"Regular retail sales" includes all recurring, regularly scheduled, or ongoing retail sales made in the ordinary course of business other than those made on an isolated or occasional basis.

"Direct competition" means activity wholly or substantially similar to existing sales, taxable goods, or services competing for the same customer market.

A community music organization or a community theater organization may present live performances of musical or theatrical works in a publicly owned facility without charging sales tax on the admissions provided that the organization is exempt from federal income tax and provided that the net proceeds from all such activities are expended for religious, educational, or charitable purposes.

History: Effective November 1, 1987; amended effective August 1, 1994.
General Authority: NDCC 57-39.2-19
Law Implemented: NDCC 57-39.2-01, 57-39.2-02.1, 57-39.2-04

81-04.1-04-20.1. Highway contractor's tax. Effective for contracts bid on or after August 1, 1993, a contractor who enters into a highway contract is responsible for a license or privilege tax of five percent on the gross proceeds from such contract.

The department of transportation shall identify those contractors who are responsible for the tax.

Forms for reporting the license or privilege tax will be prepared and distributed by the office of tax commissioner. The tax is due within thirty days after the contractor receives payment, whether such payment is in whole or in part.

Administrative provisions of the sales tax chapter apply to the highway contractor's tax.

History: Effective August 1, 1994.
General Authority: NDCC 57-39.2-19; S.L. 1993, Ch. 561
Law Implemented: S.L. 1993, Ch. 561

CHAPTER 81-06.1-01

81-06.1-01-01. Definitions. As used in this article, unless the context otherwise requires, all terms and phrases have the same meaning as defined in North Dakota Century Code chapters 57-43.1 and 57-43.2, and, in addition:

1. "Anhydrous alcohol" means qualifying alcohol whose purity is at least ninety-nine percent.

2. "Contractor" includes a person engaged in construction, sand and gravel processing, plumbing and heating, painting, or any other industrial activity.

3. "Industrial purposes" includes a manufacturing, warehouse and loading dock operation, construction, sand and gravel processing, and well drilling, testing, and servicing. Fuel used for industrial purposes includes fuel used in an unlicensed off-road vehicle, engine or machine, movable or immovable, which is operated in whole or in part by internal combustion and fuel used to operate a refrigeration unit on a transport. It does not include heating fuel.

~~3.~~ 4. "Motor fuel" means all motor vehicle fuels and aviation fuels.

~~4.~~ 5. "Public funds" means payment by the United States, state, county, city, township, park district, or other political subdivision.

~~5.~~ 6. "Special fuels" include diesel fuel, heating oil, kerosene, jet aviation fuel, propane, butane, agriculturally derived alcohol used pure or blended with another agriculturally derived alcohol, and fuel consisting of a blend of diesel fuel and recovered oil. It does not include solvent, gasoline, heavyweight distillates sometimes referred to as number 5 or 6 fuel, or antifreeze.

7. "Subcontractor" includes a person who performs work for a contractor.

~~6.~~ 8. "Wet alcohol" means qualifying alcohol whose purity is less than ninety-nine percent.

History: Effective June 1, 1984; amended effective December 3, 1985; November 1, 1987; August 1, 1994.
General Authority: NDCC 57-43.1-30, 57-43.2-22, 57-43.3-05
Law Implemented: NDCC 57-43.1-01, 57-43.1-03, 57-43.2-01, 57-43.2-02, 57-43.3-01

81-06.1-02-03. Special fuels tax imposed under North Dakota Century Code section 57-43.2-02 **- Exemptions.** ~~Special fuels sold, used, or delivered in this state are taxed at the rate~~ A person who holds a valid special fuels or liquefied petroleum dealer's license issued by the tax commissioner is subject to the per gallon [3.78 liters] tax imposed under North Dakota Century Code section 57-43.2-02 on special fuels sold or used in the state in the following situations:

1. ~~Special fuels used for heating, agricultural, industrial other than as set out in subsection 2, or railroad purposes are subject to an excise tax of two percent in lieu of seventeen cents per gallon [3.78 liters]. If the sale price is discounted by the special fuels dealer, the tax applies on the discounted price. The sale price on which the tax is computed must include freight or related charges if these charges are paid by the purchaser.~~ Special fuels sold for resale to a nonlicensed dealer.

2. Special fuels sold to ~~construction contractors including sand and gravel processors, and to well drilling, testing, and servicing companies for use in auxiliary equipment, is taxed at the per gallon [3.78 liters] rate imposed under North Dakota Century Code section 57-43.2-02. A qualifying user may request a refund of the tax pursuant to section 81-06.1-03-03~~ subcontractor.

3. ~~Banks~~ Special fuels sold to a fuel user for use in a licensed vehicle.

4. Special fuels sold for use in a vehicle owned or used by a bank, trust ~~companies~~ company, building and loan ~~associations~~ association, credit ~~unions~~ union, and public and private educational ~~facilities are subject to the special fuels tax.~~ A facility, school busing service, medical facility, ambulance service, and a law enforcement agency are not exempt. Also, special fuels sold for use in a race car or in any type of recreational vehicle are not exempt.

5. Special fuels sold directly to an agency of the federal government, including a federal credit union organized under the Federal Credit Union Act ~~is~~ are exempt.

~~4.~~ 6. ~~The licensed special fuels dealer is responsible for the tax. A monthly dealer's report is required and the tax must be remitted upon filing the report.~~ Special fuels sold to a fuel user who intends to use all or part of the fuels for a purpose that does not qualify for an exemption. This includes fuels sold to a custom combiner, an implement dealer, an agricultural fuel user who intends to use part of the fuel in

a licensed vehicle, an industrial fuel user who intends to use part of the fuel in auxiliary equipment, and to any other fuel user who intends to use the fuels for both an exempt and a nonexempt purpose.

~~5.~~ 7. ~~The state of North Dakota and all political subdivisions are subject to the special fuels tax but may obtain a full refund when the fuel is used for construction, reconstruction, or maintenance of public highways pursuant to section 81-06.1-03-03.~~ Special fuels sold to the state, county, city, township, park district, or other political subdivision.

History: Effective June 1, 1984; amended effective November 1, 1987; March 1, 1990; August 1, 1994.
General Authority: NDCC 57-43.2-22
Law Implemented: NDCC 57-43.2-02, 57-43.2-03, 57-43.2-04

81-06.1-02-03.1. Special fuels tax imposed under North Dakota Century Code section 57-43.2-03 - Exemptions. A person who holds a valid special fuels or liquefied petroleum dealer's license issued by the tax commissioner is subject to the two percent excise tax imposed under North Dakota Century Code section 57-43.2-03 on special fuels sold or used in the state in the following situations:

1. Special fuels used for heating purposes.

2. Special fuels sold for use in a railroad locomotive or in a nonlicensed offroad vehicle used for railroad repair and maintenance.

3. Special fuels sold to a person in the business of agriculture for use in nonlicensed equipment.

4. Special fuels sold for a privately funded industrial purpose, excluding special fuels sold to a contractor or subcontractor.

The tax is computed based upon two percent of the sale price. If the sale price is discounted by the special fuels or liquefied petroleum dealer, the tax applies on the discounted price. The sale price on which the tax is computed must include freight or related charges if those charges are paid by the special fuels user.

Before determining whether the tax imposed by North Dakota Century Code section 57-43.2-03 applies, the licensed special fuels or liquefied petroleum dealer must make a good faith effort to assure that the special fuels user intends to use the fuel exclusively for one of the exempt purposes. If after the fuel is sold, it is determined that a special fuels user used all or part of the fuel for a purpose that does

not qualify for the two percent excise tax, the tax commissioner may assess the fuels user for additional tax, penalty, and interest.

History: Effective August 1, 1994.
General Authority: NDCC 57-43.2-22
Law Implemented: NDCC 57-43.2-03, 57-43.2-04, 57-43.2-15, 57-43.2-24

81-06.1-03-03. Special fuels tax refunds. Special fuels tax refunds may be obtained upon application to and approval by the tax commissioner. Refunds may be issued for:

1. Tax paid by any person on special fuels used for heating, agricultural, privately funded industrial, and railroad purposes, except fuel used in motor vehicles operated or intended to be operated on public highways in this state.

2. Special fuels tax paid by the state of North Dakota or any of its political subdivisions on fuel used in publicly owned vehicles for construction, reconstruction, or maintenance of any public road, highway, street, or airport. Maintenance includes mowing grass along a public road or highway right of way but does not include any other mowing or weed control project.

3. Special fuels tax paid on fuel used in the operation of auxiliary equipment which is fueled from the same supply tank as the vehicle itself, provided:

   a. The user keeps complete and accurate daily records of the time during which the equipment is operated.

   b. The records reflect miles [kilometers] traveled in each individual unit.

   c. The user obtains certified figures from the manufacturer of the equipment as to standard fuel consumption.

   d. The user complies with all provisions of North Dakota Century Code chapter 57-43.1 in applying for the refund.

One cent per gallon [3.79 liters] for deposit in the township highway aid fund and an excise tax of two percent of the purchase price of the fuel is deducted from all refunds issued under subsections 1, 2, and 3. No refund claim for less than five dollars is allowed.

History: Effective June 1, 1984; amended effective November 1, 1987; March 1, 1990; August 1, 1994.
General Authority: NDCC 57-43.2-22
Law Implemented: NDCC 57-43.2-02, 57-43.2-03

81-09-02-03.1. Interest on refunds. The commissioner does not have the authority to pay interest on a claim for credit of tax. For taxable periods before July 1, 1991, the commissioner does not have the authority to pay interest on a claim for refund of tax. For taxable periods beginning on or after July 1, 1991, interest of ten percent per annum must be paid on tax refunds. The daily interest rate is .000277. ~~Interest--is-paid-for-the-period-from-the-date-the-tax-is-paid-until-the date-the-refund-is-mailed-to-the-taxpayer.~~

The accrual period for interest on refunds is as follows:

1. For taxable periods beginning on or after July 1, 1991, interest accrues from the date the tax is paid through the date the refund is mailed to the taxpayer.

2. For taxable periods beginning on or after July 1, 1993, interest accrues from sixty days after the due date of the return or after the return was filed or after the tax was fully paid, whichever comes later, through the date the refund is mailed to the taxpayer.

History: Effective July 1, 1989; amended effective June 1, 1992; August 1, 1994.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-19

81-09-02-17. Definition of gas base rate adjustment and tax rate. The gas base rate adjustment and the tax rate on taxable gas production reported in MCF for fiscal years beginning July 1, 1992, and subsequent years, are as follows:

FISCAL YEAR	BASE RATE ADJUSTMENT	TAX RATE PER MCF
July 1, 1992, through June 30, 1993	1.018494	$ .0407
July 1, 1993, through June 30, 1994	1.002642	$ .0401

History: Effective August 1, 1994.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-02.2

81-09-02-18. Method for calculating the tax rate on gas. The gas tax rate for fiscal years beginning July 1, 1992, and subsequent years, will be calculated by the following method:

1. An annual average of the gas fuels producer price index, commodity code 05-3, as published by the United States department of labor, bureau of labor statistics, will be calculated by dividing the sum of the monthly gas fuels producer price index for January through December of the previous calendar year by the denominator of twelve, with the resultant rounded to one place after the decimal.

2. The gas base rate adjustment will be calculated by dividing the annual average of the gas fuels price index by the denominator of 75.7, with the resultant rounded to six places after the decimal.

3. The gas tax rate will be calculated by multiplying $.04 times the gas base rate adjustment with the resultant rounded to four places after the decimal.

History: Effective August 1, 1994.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-51-02.2

81-09-03-08. Work-over exemption. Oil produced from a qualifying well that has been worked over is exempt from the oil extraction tax for a consecutive twelve-month period starting with the first day of the third month after completion of the work-over project. The twelve-month period runs consecutively from the first day of the third month after completion of the work-over project, even though all or a portion of the exemption may be rendered ineffective by the oil price trigger discussed below.

To be eligible for this exemption, a taxpayer shall submit a work-over qualification letter signed by a representative of the industrial commission. This qualification letter must state that the work-over project meets the requirements set forth in North Dakota Century Code section 57-51.1-03. The letter must also provide the following information:

1. The name of the lease.
2. The location of the well.
3. The name of the party entitled to the tax exemption.
4. The date the notice of intention was filed.
5. The average daily production of the well during the latest six calendar months of continuous production.
6. The cost of the work-over project.
7. The average daily production of the well during the first sixty days after completion of the work-over project, if ~~applicable~~ the cost of the work-over project is sixty-five thousand dollars or less.
8. The dates on which the work-over project was performed.

The commissioner will accept the information provided in the qualification letter subject to confirmation upon audit.

If the average price of a barrel of crude oil, as defined in subsection 2 of North Dakota Century Code section 57-51.1-01, is thirty-three dollars or more, the exemption is eliminated on all wells beginning the first day of the first month following that five-month period.

If the above trigger provision does occur, and the average price of oil then declines below thirty-three dollars per barrel for any subsequent consecutive five-calendar-month period, the exemption is reinstated for all qualifying wells beginning the first day of the first

month following the five months of prices below thirty-three dollars per barrel.

History: Effective March 1, 1990; amended effective June 1, 1992; August 1, 1994.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-03

81-09-03-09. Trigger provision applicable to reduced oil extraction tax rate. Oil produced from a new well, or a well that receives a work-over exemption after June 30, 1993, or a qualifying secondary or tertiary recovery project and not otherwise exempt is subject to tax at a reduced extraction tax rate of four percent. However, if the average price of a barrel of crude oil is thirty-three dollars or more, for any consecutive five-calendar-month period, the oil extraction tax rate for the aforementioned production increases to six and one-half percent starting with the first day of the first month following the five-month period where the average price was thirty-three dollars or more. If the oil extraction tax rate is increased from four to six and one-half percent, and after the increase, the average price of oil declines to less than thirty-three dollars per barrel during any subsequent five-calendar-month period, the rate of tax reverts to four percent starting with the first day of the first month following the five-month period where the average price was less than thirty-three dollars.

History: Effective June 1, 1992; amended effective August 1, 1994.
General Authority: NDCC 57-51-21, 57-51.1-05
Law Implemented: NDCC 57-51.1-03

SEPTEMBER 1994

STAFF COMMENT: Chapter 81-03-03.2 contains all new material but is not underscored so as to improve readability.

CHAPTER 81-03-03.2
NEW JOBS CREDIT FROM WITHHOLDING

81-03-03.2-01. Definitions. For purposes of implementing section 3 of chapter 493 of the 1993 Session Laws, unless the context clearly indicates:

1. "Act" means chapter 493 of the 1993 Session Laws of North Dakota.

2. "New job" means a job for which training is actually provided for under the Act.

3. "Program funds" means any money loaned to a business as a result of a training agreement entered into with job service North Dakota under the Act.

4. "Training" means a new job training program or project approved by job service North Dakota.

History: Effective September 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: S.L. 1993, Ch. 493, § 3

81-03-03.2-02. New jobs credit from withholding. Except as provided in section 81-03-03.2-03, the new jobs credit from withholding is the total amount of income tax the employer actually withholds pursuant to North Dakota Century Code section 57-38-59 from the wages paid to all individuals employed in a new job during the taxable period. The new jobs credit from withholding does not reduce the amount an employer must pay pursuant to North Dakota Century Code section 57-38-60.

History: Effective September 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: S.L. 1993, Ch. 493, § 3

81-03-03.2-03. Withholding not included in new jobs credit from withholding calculation. The income tax withheld for an individual employed in a new job may not be included in determining the amount of credit if any of the following apply:

1. Training for the new job has not commenced.

2. The individual employed in the new job is exempt from the individual income tax provisions of North Dakota Century Code chapter 57-38.

History: Effective September 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: S.L. 1993, Ch. 493, § 3

81-03-03.2-04. New jobs credit from withholding statement. An employer shall complete and file a new jobs credit from withholding statement as prescribed by the tax commissioner. The new jobs credit from withholding statement must be attached to each return the employer is required to file pursuant to subsection 2 of North Dakota Century Code section 57-38-60. The employer shall file the new jobs credit withholding statement for each taxable period until the employer is no longer eligible for the new jobs credit from withholding. The tax commissioner shall not transfer the equivalent credit amount until such

time as the statement required by this section is filed and the amount deducted and withheld by the employer as required by North Dakota Century Code section 57-38-60 is paid.

History: Effective September 1, 1994.
General Authority: NDCC 57-38-56
Law Implemented: S.L. 1993, Ch. 493, § 3

TITLE 89

Water Commission

JUNE 1994

STAFF COMMENT: Article 89-12 contains all new material but is not underscored so as to improve readability.

ARTICLE 89-12

MUNICIPAL, RURAL, AND INDUSTRIAL WATER SUPPLY PROGRAM

CHAPTER 89-12-01
MINICIPAL, RURAL, AND INDUSTRIAL WATER SUPPLY PROGRAM

89-12-01-01. Definitions. As used in this chapter, unless the context or subject matter otherwise requires:

1. "Applicant" means the party submitting a proposal.

2. "Bureau" means the bureau of reclamation or its duly authorized agent.

3. "C-district" means the Garrison Diversion Conservancy District or its duly authorized agent.

4. "City" means any city organized under the laws of this state.

5. "Commission" means the North Dakota state water commission or its designee.

6. "Design and construction" means preparation of the final design plans and the ultimate construction of a project.

7. "Feasibility study" means a report of sufficient detail to provide a sound estimate of capital costs, water costs to users, and operation, maintenance, and replacement costs.

8. "Preliminary engineering report" means a reconnaissance level report containing sufficient information to determine whether additional detailed studies are merited.

9. "Program funds" means money available for municipal, rural, and industrial projects including money available through the Garrison Diversion Reformulation Act of 1986.

10. "Proposal" means an application submitted to the commission for financial assistance from program funds for municipal, rural, and industrial projects and associated costs.

11. "Public water system" means a system for the provision to the public of piped water for human consumption, if the system has at least fifteen service connections or regularly serves at least twenty-five individuals.

12. "Regional water system" is a system that provides water to at least four public water systems and may also include rural water users.

13. "Rural water users" means all users, including farms, unincorporated cities, villages, trailer courts, and livestock, excluding cities.

14. "State engineer" means the individual appointed by the commission pursuant to North Dakota Century Code section 61-03-01 or the state engineer's designee.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-02. Eligibility for program funds. The following projects and associated costs are eligible for financial assistance from program funds:

1. Water supply projects.

   a. Design and construction of projects for supplying water including:

      (1) New ground water wells including mechanical and electrical components.

      (2) Pipelines from water sources to public water systems and principal supply works for rural water systems.

      (3) Booster pumping plants for supply lines.

      (4) Intake works and pumping plants for new surface water source.

      (5) New or enlarged storage facilities.

      (6) New rural water systems or enlargements or extensions of rural water systems.

      (7) New regional water systems or enlargements or extensions of regional water systems.

   b. Design and construction of water treatment projects including:

      (1) New water treatment plants.

      (2) Modifications to and upgrades of existing water treatment plants.

2. Program funds may be used for engineering, legal, and right-of-way costs, excluding the purchase of easements, and costs incurred in conducting environmental reviews or cultural resources investigations associated with the planning and design and construction of projects listed in subdivisions a and b of subsection 1.

3. Program funds are not available for costs associated with operation, maintenance, and replacement of water supply or treatment systems or with the preparation of the preliminary engineering report.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-03. Application.

1. An applicant must submit an application for program funds to the state engineer at the following address:

   North Dakota State Water Commission
   900 East Boulevard Avenue
   Bismarck, North Dakota 58505-0850

   The application must include the following:

   a. Information explaining the need for the proposal, including its objectives and benefits.

   b. The area to be served by the proposal.

   c. Maps, diagrams, or other illustrated documentation if these will make the proposal more understandable.

   d. The approximate cost of carrying out the proposal, if available.

   e. The amount of funding sought from program funds and the amount the applicant intends to contribute to carry out the proposal.

   f. Efforts made, and the results, to secure funds from sources other than program funds. If available, provide the current rate schedule for the water supply and treatment system.

   g. Other information the applicant believes pertinent or requested by the state engineer.

2. A copy of the application must also be sent to the c-district at the following address:

   Garrison Diversion Conservancy District
   P.O. Box 140
   Carrington, North Dakota 58421

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-04. Application to determine eligibility - Initial review by the state engineer. After the initial review of an application, the state engineer may decide:

1. The proposal is eligible for funding from program funds. If the proposal is eligible for funding, the state engineer shall notify the applicant in writing.

2. The information provided is inadequate to review the proposal and may order the applicant to provide more information, or may obtain more information.

3. The proposal is not eligible for funding from program funds. The state engineer shall notify the applicant of and include the reasons for ineligibility in writing.

4. The state engineer shall submit a copy of all notifications to the c-district.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-05. Preliminary engineering reports - Initial review by state engineer - Bureau requirements.

1. An applicant notified that its project is eligible for funding must submit a preliminary engineering report to the state engineer. The applicant shall contact the bureau at the initiation of the preliminary engineering report to discuss applicable federal requirements. The preliminary engineering report must contain:

   a. Name of the project sponsor and contact persons.

   b. A brief summary of the proposed project including:

(1) Identification of the use of water and estimated water for each use.

(2) Description of existing water quantity and quality.

(3) Explanation of inadequacy of existing supplies.

(4) Estimate of potential users.

(5) User interest and how it was determined.

c. A map of the project area showing:

(1) Water sources (aquifers, lake, stream, other systems).

(2) Proposed facilities.

(3) Distribution systems.

(4) Alternatives.

d. Preliminary costs estimate for feasibility study, capital costs, and costs for all alternatives.

e. Repayment concepts.

f. Funding source for the applicant's share.

g. Proposed project schedule.

h. Identification of entity responsible for applicable reports or studies.

i. Availability and cost of construction material.

j. Social and local economic climate.

k. Special or unusual considerations such as public and construction safety, repayment contracts, biota transfer, and environmental.

l. Special site conditions such as ground water table, soil conditions, right of way, and zoning constraints, and manmade features.

m. Project's energy requirements and date of service.

n. Documentation of the engineering selection process.

o. Project's potential effect on economic development within project area.

p. Documentation of cultural resources in the affected project area.

q. An outline of the water conservation plan.

r. Action necessary and action taken to comply with all applicable state and federal laws including the National Environmental Policy Act, Fish and Wildlife Coordination Act, Endangered Species Act, Clean Water Act, and state and federal laws pertaining to identification and preservation of cultural resources with letters from the appropriate agencies.

s. Other information requested by the state engineer.

2. The applicant must consider whether an alternative project could satisfy the objectives of the applicant. The preliminary engineering report must set forth a general discussion of all other alternatives considered before and during report preparation, a description of the preferred alternative, and a no action alternative.

3. The applicant shall submit one copy of the preliminary engineering report to the c-district and copies to the bureau as specified by the state engineer.

4. After initial review of the preliminary engineering report, the state engineer may decide:

   a. The proposal is, or parts of the proposal are, eligible for program funds. The state engineer shall notify the applicant in writing that the proposal is, or parts of it are, eligible for funding.

   b. The information provided is inadequate and may order the applicant to provide more information, or may obtain more information.

   c. The proposal or parts of the proposal are not eligible for program funds. The state engineer shall notify the applicant and include the reasons for ineligibility in writing.

   d. The state engineer shall submit a copy of all notifications to the c-district.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-06. Feasibility study - Review - Report.

1. An applicant whose project is eligible to receive program funds must submit a copy of a feasibility study to the state engineer. The feasibility study must include the following information:

   a. All the information required by subdivisions a, b, c, e, f, g, h, i, j, k, l, m, n, o, and r of subsection 1 of section 89-12-01-05. This information, however, must be updated and submitted in more detail and clarity.

   b. Project plans and alternative plans with a description of the preferred alternative.

   c. A description of proposed water treatment and storage facilities.

   d. Design criteria including population projections and water demands.

   e. Ability and willingness of beneficiaries to pay capital and other costs.

   f. Cost estimates for capital and other costs.

   g. Economic and engineering project cost analyses.

   h. Design and operation alternatives.

   i. Methods of construction.

   j. Operation, maintenance, and replacement plan.

   k. Entity responsible for operation, maintenance, and replacement.

   l. Entity responsible for administration of contracts.

   m. A county soil map with prime farmland indicated.

   n. Water conservation plan.

   o. Any other information requested by the state engineer.

2. For projects that deliver Missouri River water to the Hudson Bay drainage area, a determination must be made that treatment will be provided to meet requirements of the Boundary Waters Treaty Act of 1909.

3. The applicant shall submit one copy of the feasibility study to the c-district and copies to the bureau as specified by the state engineer.

4. After review of the feasibility study, the state engineer shall prepare a report setting forth its recommendations regarding the project. The report shall address whether the project is consistent with statewide plans and programs.

5. The state engineer shall provide a copy of the report to the commission and c-district.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-07. Design and construction requirements.

1. In order to receive program funds for design and construction, an applicant must submit to the state engineer:

   a. Documentation of the engineering selection process for design and construction engineering services and a copy of the contract for engineering services for design and construction.

   b. Engineering plans, designs, and specifications not less than forty days prior to the start of the invitation to bid date.

2. No construction contract may be awarded or construction initiated until the plans, designs, and specifications have been approved by the state engineer, c-district, and bureau. Any changes in plans must be approved by the state engineer, c-district, and bureau.

3. Construction contracts over two thousand dollars must incorporate the Davis-Bacon wage rate unless otherwise specified.

4. The entity responsible for operation, maintenance, and replacement shall contract with water users for payment of:

   a. Water delivery.

   b. Hookup.

   c. Standby service charges.

   d. Other fees necessary.

5. Documentation of the following must be made available to the state engineer and c-district prior to the applicant receiving construction funds:

a. Procurement process for services and goods.

b. Necessary state water right permits.

c. Necessary state permits controlling diversion and distribution.

d. Rights of way for construction (easements).

e. All contracts relating to the project.

f. Applicable federal permits.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-08. Funding - Priority.

1. The commission shall evaluate each eligible project based on the following criteria:

   a. Need for improving water supply quantity and quality problems or both.

   b. Local contribution to project funding.

   c. Location of project.

   d. Equitable distribution of municipal, rural and industrial funds.

   e. Ability to pay.

   f. Economic development.

   g. Water conservation plan.

   h. Other criteria determined to be relevant by the commission.

   Based upon these evaluations, the commission shall rank the eligible projects in priority order which, based on its judgment, are in most need of funding. A report ranking the eligible projects must be in writing and include data substantiating the determinations. This data must be available to the public upon written request.

2. Program funds must be provided to eligible projects to the extent funding is available as determined by the commission, after consultation with the c-district. Program funds may be

provided in the form of grants or loans, or both, and may be provided for a feasibility study or for design or construction of a project, or a combination of the three. The commission, after consultation with the c-district, shall decide whether to provide program funds, and the amount of funds, to an applicant for a feasibility study or for design or construction of a project, or a combination of the three.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-09. Reports to commission and c-district. After a project has been determined to be eligible for program funds, a report must be submitted to the commission and c-district by the end of each quarter regardless of whether funds have been requested. The quarterly report must include:

1. A schedule and cost of work for the upcoming quarter.
2. A written report describing progress during the preceding quarter and the cost of work performed during the preceding quarter.
3. Other information requested by the commission.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

89-12-01-10. Contract awards.

1. Prior to the award of any contract, the applicant shall provide the state engineer and c-district the following:
   a. A bid abstract.
   b. A statement of the low bidder's qualifications even if the contract is not awarded to the low bidder.
   c. A statement of intent to award the contract at least fifteen days prior to proposed contract award.
   d. A written justification describing the reasons for nonselection of the low bidder, and reasons for the proposed selection if the applicant plans to award the contract to other than the low bidder.

2. Contracts must be pursuant to applicable federal procurement laws.

3. The following items must be submitted to the state engineer and c-district after the award of the contract:

   a. The contractor's performance and payment bond.

   b. The contractor's certificate of insurance.

   c. The contractor's license.

   d. The contract.

4. A construction management plan must be submitted to the state engineer and bureau within thirty days after the award of the contract. The construction management plan must include the following:

   a. Construction schedules.

   b. Contract requirements.

   c. Contractor qualifications, duties, and responsibilities.

   d. Agreement for engineering services, including description of coordination activities with the commission.

   e. Field office location, addresses, and phone numbers of project personnel.

   f. Resumes of professional staff.

   g. Safety program.

   h. Other information requested by the state engineer.

History: Effective June 1, 1994.
General Authority: NDCC 28-32-02, 61-02-14
Law Implemented: NDCC 54-40-01, 57-51.1-07.1, 61-02-14, 61-02-24.1, 61-02-64, 61-24-08

AUGUST 1994

CHAPTER 89-02-01

89-02-01-01. ~~Intent~~ Application of chapter. ~~The intent of this article is to establish rules for the handling of~~ This chapter applies to all applications not covered by chapter 89-02-02 for permits to drain certain ponds, sloughs, or lakes, or any series thereof, and meandered lakes, as required by North Dakota Century Code ~~sections~~ section 61-15-08 ~~and 61-16.1-41~~.

History: Amended effective December 1, 1979; August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-15-08~~, 61-16.1-41~~

89-02-01-18.1. Notice by state engineer of public hearing on application of statewide or interdistrict significance. The state engineer, upon receipt of a drainage application that is of statewide or interdistrict significance which has been approved by a district shall hold a public hearing. Notice shall be published in the official newspaper in the county or counties of the proposed drainage once a week for two consecutive weeks. ~~The final~~ One of the published ~~notice~~ notices shall be published not less than ~~seven~~ twenty days before the hearing date. The notice shall give essential information about the proposed drainage application and set the date and time of the public hearing. All public hearings conducted by the state engineer shall be held at the state engineer's offices in Bismarck.

History: Effective October 1, 1982; amended effective August 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC ~~28-32-04~~ 28-32-05

89-02-01-20.1. Time for determination by the state engineer. Within thirty days of the public hearing on a drainage application, the state engineer shall render the determination on the application. For complex or unique applications this time limit may be extended by the state engineer. Following the determination, the state engineer shall notify the parties of record of the determination, either personally or, by certified mail, ~~of the determination~~ or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the determination was served. This notice must be accompanied by the findings of fact and conclusions on which the determination was based and the notice is deemed given as of the date of certification.

History: Effective October 1, 1982; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-13

89-02-01-27. Notice of drainage application denials to commissioner of agriculture. ~~Pursuant to North Dakota Century Code section 61-31-09, the state engineer and districts, upon the denial of an application to drain, shall notify the commissioner of agriculture of any landowner whose wetland was denied a drainage permit. The notification is to inform the commissioner of agriculture of wetlands that may be eligible for inclusion in the state's waterbank program and shall be sent to the commissioner by certified mail not later than ten days after the decision.~~ Repealed effective August 1, 1994.

History: ~~Effective October 1, 1982.~~
General Authority: ~~NDCC 28-32-02, 61-03-13~~
Law Implemented: ~~NDCC 61-31-09~~

89-02-02-18. Notice of state engineer's hearing. Upon receipt of a valid request for a hearing on an application of statewide or interdistrict significance, the state engineer shall set a date for a hearing and publish notice in the official newspaper of the county within which a majority of the drainage basin is located. Publication must be once a week for two consecutive weeks. ~~Final publication~~ One of the publications must be published no less than ~~seven~~ twenty days before the hearing date. The person requesting the hearing shall give notice by certified mail to the state department of health and consolidated laboratories, the state game and fish department, the state ~~highway~~ department of transportation, and all parties to the board's hearing at least twenty-one days before the date of the hearing. If such notice is not provided, the hearing may not be held. The notice must give essential information about the proposed drainage application including the date, time, and location of the hearing. All hearings will be held in Bismarck.

History: Effective October 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13, 61-32-04
Law Implemented: NDCC ~~28-32-04~~ 28-32-05

89-02-02-20. Time for determination by the state engineer - Copies of decision. Unless the state engineer determines the matters put in issue by the request for a hearing raise complex or unique issues, the state engineer's decision will be rendered within thirty days of the close of the state engineer's hearing. A copy of the decision will be given to all parties of record at the state engineer's hearing either personally ~~or~~, by certified mail, or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom a copy of the decision was served.

History: Effective October 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 28-32-13, 61-03-13, 61-32-04
Law Implemented: NDCC 28-32-13

89-02-04-07. Sufficiency of information on appeal.

1. Once the state engineer's review under section 89-02-04-06 is complete, the state engineer will determine whether the information reviewed is sufficient to make a sound decision.

2. If the information is not sufficient, the state engineer will either conduct further investigations ~~himself~~ or return the record to the board for its further investigation.

3. If the information is sufficient, the state engineer shall determine whether a drain, lateral drain, or ditch has been opened or established contrary to North Dakota Century Code title 61 or any rules adopted by the state engineer or the board. If so, the state engineer will take one of the three actions set forth in North Dakota Century Code section 61-32-08. If the drain has not been opened contrary to North Dakota Century Code title 61 or a drainage rule, the complaint must be dismissed. In either case the state engineer will notify all parties of ~~his~~ the state engineer's decision by certified mail or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served. The notice of decision will include the names and addresses of all parties.

History: Effective October 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-32-04
Law Implemented: NDCC 28-32-13, 61-32-08

89-02-04-14. Notice of hearing. When the hearing officer determines a date for a hearing, the hearing officer will notify the water resource board, the petitioner, and the respondent of the time and date of the hearing. In the case of a demand by an affected landowner pursuant to section 89-02-04-09, the hearing officer shall give the notice of the hearing date within fifteen days of the demand. The notice must be given by certified mail not less than ~~thirty~~ forty-five days prior to the date set for the hearing. All hearings will be held in Bismarck, North Dakota.

The notice must state that parties may present testimony at the hearing, petitioner and respondent may call witnesses at the hearing, and of the hearing officer's appointment as hearing officer. The notice must also state that each party shall identify the position it is urging the state engineer to adopt. Those urging the state engineer's decision

should be affirmed must be designated respondents. Those urging reversal or modification of the state engineer's decision must be designated petitioners.

History: Effective October 1, 1988; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13, 61-32-04
Law Implemented: NDCC 28-32-05, 61-03-22, 61-32-08

89-03-01-01.1. Priority date. The date of receipt by the state engineer of a properly completed application must be endorsed thereon. Except for water applied to domestic, livestock, or fish, wildlife, and other recreational uses where a water permit is not required, this date of filing establishes the original priority date of an application, subject to final acceptance of the application and issuance of a perfected water permit by the state engineer. For water applied to domestic, livestock, or fish, wildlife, and other recreational uses, where a water permit is not required, the priority date is ~~determined to~~ be the date the quantity of water was first ~~appropriated~~ used.

History: Effective April 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-04, 61-04-06.3

89-03-01-01.2. Land or property interest requirement for conditional water permit. ~~Before considering an application, the state engineer may require the~~ An applicant ~~to submit evidence of~~ for a conditional water permit must have an interest or intent and ability to acquire an interest in the land on which the point of diversion and conveyance system will be located. ~~If~~ and, if the applicant is seeking a permit for irrigation, the applicant ~~shall~~ must also, ~~if the state engineer requests, submit evidence of the applicant's~~ have an interest or intent and ability to acquire an interest in the land to be irrigated. If the applicant is seeking a permit to impound water, the applicant must have an interest or intent and ability to acquire an interest in the land or other property inundated by the impounded water. The state engineer may require the applicant to submit evidence of such an interest. At any time the state engineer may require additional verification of land or property interest.

History: Effective April 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-03

89-03-01-01.3. When a water permit for stored water may be obtained. A water permit for stored water may be obtained when the stored water will be put to a beneficial use. A water permit may also authorize the storage of ~~additional~~ water for flood control, ~~a holdover supply,~~ or other reasons deemed necessary by the state engineer. However, authorization to store ~~additional~~ water for flood control, ~~a holdover supply,~~ or other reasons does not create a water right.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-01.1, 61-04-01.2, 61-04-02

89-03-01-02. Correction of unsatisfactory application. If an unsatisfactory application is refiled within sixty days from the date the request for corrections is mailed, and if it meets the required corrections and is accepted, it shall take the priority date of its original filing. ~~The amended priority date shall be noted on the corrected application.~~

History: Amended effective April 1, 1989; August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-04

89-03-01-03.3. Evaporative losses. When an application involves water stored in a reservoir, a volume of water equal to the mean net evaporative loss over the surface area of the impoundment at the principal spillway elevation must be ~~included in the total volume of water for which application is sought~~ requested as an annual use which will come out of the stored water.

History: Effective April 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-03, 61-03-13
Law Implemented: NDCC 61-04-03, 61-04-06.2

89-03-01-05. Publication of notice of hearing.

1. Upon receipt of an applicant's properly completed affidavit of notice by certified mail, the state engineer shall set a date for a hearing on the application.

2. The state engineer shall provide a notice of hearing to the official newspaper of the county in which the proposed point of diversion is located and instruct the newspaper to publish the notice once a week for two consecutive weeks. One of the publications of the notice of hearing must be published at least twenty days before the hearing.

3. A copy of the notice of hearing shall be forwarded to the applicant so that the notice may be reviewed for accuracy.

4. The applicant must pay costs of publication.

History: Amended effective April 1, 1989; November 1, 1989; February 1, 1994; August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-05, 61-04-05

89-03-01-05.1. Notice of decision on water permit application. The state engineer may give notice of a decision to grant or deny a water permit by mailing the decision, and findings and conclusions upon which it is based, to all parties either personally, by certified mail,

or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served.

History: Effective August 1, 1994.
General Authority: NDCC 28-32-02, 28-32-13, 61-03-13
Law Implemented: NDCC 28-32-13

89-03-01-10.1. Temporary water transfer for irrigation. To accommodate annual crop rotation requirements, the holder of a water permit for irrigation may make a request to the state engineer for the temporary transfer of the volume of water appropriated from an approved point of diversion to another tract of land. The transfer must be made for an entire irrigation season and conform to the terms and conditions of the water permit, except that no water right will accrue to the land under temporary irrigation. Irrigation may not take place on the tract of land from which the transfer is made during that irrigation season. The request for a transfer must be made by May fifteenth of the year the transfer is to be in effect.

History: Effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-02.1

89-03-02-05. Notice of application. Notification of an application for change in purpose of use or change in point of diversion shall be handled in the manner outlined in subsections 1 through 4 3 of section 89-03-01-04.

History: Amended effective April 1, 1989; August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-05, 61-04-15.1

89-03-02-12. Water permit for irrigation - Limitation. The state engineer may, to allow for more efficient ~~farming~~ operation of an irrigation system, increase the number of acres that may be irrigated ~~under a~~ on the tracts of land specified in the water permit. A request for an increase in the number of acres must be evaluated in accordance with subsections 1 through 3 of North Dakota Century Code section 61-04-06.

History: Effective April 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-06.2

89-03-03-04. Definition of reasonably necessary for the future water requirements of the municipality. "Reasonably necessary for the future water requirements of the municipality" means ~~one-hundred-percent of the amount of water to-be-beneficially-used--thirty--years--from--the priority--date--of-the-conditional-water-permit~~ estimated to be required thirty years in the future. The total quantity of water a municipality may hold under all permits for municipal use may not exceed the quantity the municipality can reasonably expect to use thirty years in the future.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-04-06.2, 61-04-23, 61-04-24, 61-04-25

89-10-01-03. Definitions. The following definitions apply to this article:

1. "Authorization" means a permit, easement, lease, or management agreement approved and granted by the state engineer after application; and the authority granted in ~~section~~ sections 89-10-01-10 and 89-10-01-19.

2. "Grantee" means the person, including that person's assigns, successors, and agents who are authorized pursuant to an authorization.

3. "Navigable streams or waters" means any waters which were in fact navigable at time of statehood, including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake.

4. "~~Permit--line~~ Ordinary high watermark" means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ~~permit-line~~ ordinary high watermark in their entirety.

5. "Project" means any activity which occurs below the ~~permit line~~ ordinary high watermark of navigable streams or waters.

6. "Riparian owner" means a person who owns land adjacent to navigable streams or waters or the person's authorized agent.

7. "State engineer" means the state officer provided for in North Dakota Century Code section 61-03-01 or any of the state engineer's employees or authorized agents.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-04. Authorization. Each project which lies either partially or wholly below the ~~permit-line~~ ordinary high watermark of navigable streams or waters requires an authorization from the state

engineer prior to construction or operation, except as specified in ~~section~~ sections 89-10-01-10 and 89-10-01-19.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-06. Application review. Upon receipt of a completed application, the state engineer shall initiate a review as follows:

1. Comments must be requested from the following entities:
   a. The state game and fish department;
   b. The state department of health and consolidated laboratories;
   c. The state historical society;
   d. The state land department;
   e. ~~The Little Missouri River Commission if the application involves the Little Missouri River;~~
   ~~f.~~ The state parks and recreation department;
   ~~g.~~ f. The United States fish and wildlife service;
   ~~h.~~ g. The park district and planning commission of any city or county, if any part of the project is within the boundaries of the city or county;
   ~~i.~~ h. Any water resource district in which the proposed project will be wholly or partially located; and
   ~~j.~~ i. Other agencies, private entities, and landowner associations as appropriate or required by law.
2. Each entity shall submit all comments in writing to the state engineer within thirty days of the date requests for comments were mailed. The state engineer is not bound by any comment submitted.
3. Upon completion of the review and any public meeting held pursuant to section 89-10-01-07, the state engineer may grant, deny, or condition the application.
4. The state engineer shall provide written notice of the decision on the application by certified mail or by regular

mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-07. Public meeting. An information-gathering public meeting may be held by the state engineer prior to final action on a project. The procedure for notice and meeting must be as follows:

1. The state engineer shall cause a notice of meeting to be published in the official newspaper for each county in which the project is located. The notice must be published once each week for two consecutive weeks.

2. The meeting date must be at least ~~ten~~ twenty days after the date of last publication.

3. The meeting must be conducted by the state engineer and the meeting may be held in Bismarck.

4. The meeting is not an adversary proceeding nor a contested case hearing under North Dakota Century Code chapter 28-32.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-09. Specific project requirements.

1. In addition to the considerations set forth in section 89-10-01-08, the following conditions apply when a permit application involves the mining of gravel, sand, or other resources other than oil, gas, and related hydrocarbons:

   a. Mining must be completed in the shortest practicable period of time and during the season which will minimize the effects on the waterway and biotic life in the waterway.

   b. Mining may be prohibited or restricted when it would, in the judgment of the state engineer, adversely affect the maintenance or reproduction of fish or other wildlife populations.

   c. If the state engineer determines mining will have a significant adverse impact on downstream riparian owners, the grantee must obtain the riparian owner's written consent.

2. In addition to the considerations set forth in section 89-10-01-08, the following considerations apply when a permit application involves dredging or filling:

   a. Unless there is no reasonable alternative or the public need exceeds other values, dredging or filling will not be permitted.

   b. Dredged material must be removed to a site above the ~~permit--line~~ ordinary high watermark unless otherwise authorized by the state engineer.

   c. Approved fill must be clean, nonpolluting material free of waste metal, organic material, and unsightly debris.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-10. Projects not requiring a permit. The following projects do not require a permit:

1. Boat docks if:

   a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for the riparian owner's or lessee's personal use;

   b. The dock is used only for embarkation, debarkation, moorage of boats, or recreation;

   c. Only clean, nonpolluting materials are used;

   d. The dock ~~is no~~ does not extend more than twenty-five feet [7.6 meters] in length within the ordinary high watermarks on a river and fifty feet [15.24 meters] in length within the ordinary high watermarks on a lake, and there is no unreasonable interference with navigation or access to adjacent riparian owner's property;

   e. The dock is connected to shore by a walkway, and removed from below the ~~permit-line~~ ordinary high watermark each fall;

   f. There is no excavation or filling below the ~~permit-line~~ ordinary high watermark in excess of that authorized in subsection 4; and

   g. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.

2. Boat ramps if:

a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for the riparian owner's or lessee's personal use;

b. Excavation of the bank is limited to the minimum width necessary for the placement of a single lane boat ramp adjacent to privately owned property or a double lane boat ramp adjacent to publicly owned property;

c. Material excavated from the bank is removed to a location above the ~~permit-line~~ ordinary high watermark;

d. Only such clean, nonpolluting fill and riprap material free of waste metal, organic materials, and unsightly debris are placed below the ~~permit-line~~ ordinary high watermark as necessary to construct and stabilize the boat ramp; and

e. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.

3. Water intakes if:

a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for riparian owner's or lessee's personal use;

b. Excavation of the bank is limited to the minimum width necessary to install and maintain the water intake;

c. Materials excavated from the bank are removed to a location above the ~~permit-line~~ ordinary high watermark;

d. The intake is entirely removed each fall; and

e. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.

4. Dredging or filling if:

a. The work is completed and maintained by the riparian owner or the riparian owner's lessee;

b. The amount of dredge or fill material does not exceed ten cubic yards as part of a single and complete project;

c. No stream diversion results;

d. No extension of a claim of ownership to an island or any portion of the bed of a navigable stream or water results; and

e. Only clean, nonpolluting material free of waste metal, organic materials, and unsightly debris is used.

~~5. Bridges and bank stabilization by a governmental entity if:~~

~~a. The project is approved by the state engineer;~~

~~b. Only clean, nonpolluting material free of waste metal, organic materials, and unsightly debris is used for bank stabilization;~~

~~c. On the Little Missouri River, only washed field stone is used for bank stabilization;~~

~~d. Work does not exceed the minimum necessary to complete the project; and~~

~~e. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.~~

~~6. Fences crossing the Little Missouri River if:~~

~~a. The fence is marked so it is clearly visible at two hundred yards [182.88 meters]; and~~

~~b. A clearly marked opening at least eight feet [2.44 meters] in width is provided~~ Boards that are temporarily moored.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-11. Structures below ~~permit---line~~ ordinary high watermark. Excluding boats that are temporarily moored, the construction or moorage of any residential structure or structure designed for human occupancy will not be permitted below the ~~permit line~~ ordinary high watermark.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-13. Vehicular access. The use of motorized vehicles other than boats below the ~~permit--line~~ ordinary high watermark is authorized ~~only in designated areas~~ in conjunction with the use of navigable waters for transportation or recreation, or as reasonably necessary for activities allowed pursuant to these rules. This section does not authorize use of property ~~outside~~ above the ~~permit--line~~ ordinary high watermark but does ~~contemplate~~ authorize the use of trails established by a government agency, such as those established for

snowmobiles, which are located below the ~~permit line~~ ordinary high watermark.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-14. Cancellation by the state engineer. The state engineer may cancel any authorization granted pursuant to these rules, including projects authorized by ~~section~~ sections 89-10-01-10 and 89-10-01-19, if the grantee fails to comply with any term or condition of the authorization or this article. ~~In the event of cancellation, not involving an emergency, the procedure set forth below must be followed:~~

~~1. The state engineer shall give the grantee thirty days' notice by certified mail, at the last known address of grantee.~~

~~2. The thirty-day notification period begins on the day notice is mailed.~~

~~3. The notice shall describe what must be done to correct the breach or violation.~~

~~4. During the thirty-day notification period, the grantee may correct any breach or violation, or request an appearance before the state engineer to show cause why the authorization should not be canceled.~~

~~5. The grantee will be notified by certified mail at the last known address of grantee. Cancellation shall take effect on the day it is ordered by the state engineer.~~

~~6.~~ Cancellation does not release grantee from any liability.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-17. Inspections. The state engineer may inspect all projects which lie below the ~~permit line~~ ordinary high watermark and enter upon a grantee's land during normal working hours to carry out the inspection.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-19. Maintenance, and repair, and reconstruction. Maintenance and or repair of authorized projects ~~existing on November 1, 1989, may be completed without~~ do not require additional authorization

provided the work is in conformance with the original authorization, standards, and specifications provided in this article, and the work does not alter the use or size of the project.

History: Effective November 1, 1989; amended effective August 1, 1994.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

OCTOBER 1994

CHAPTER 89-07-01

PRACTICE AND PROCEDURE

[Repealed effective October 1, 1994]

TITLE 92

Workers Compensation Bureau

AUGUST 1994

CHAPTER 92-01-02

92-01-02-22. Out-of-state injuries. An employee may be deemed to regularly work at or from an employment principally localized in this state as defined in North Dakota Century Code ~~section~~ sections 65-08-01 and 65-08.1-01 if the employee's out-of-state injury is sustained under circumstances in which the employee has worked outside this state for a period of not more than ~~fourteen~~ thirty consecutive calendar days.

History: Effective July 1, 1991; amended effective January 1, 1994.
General Authority: NDCC 65-02-08~~;-65-08-01~~
Law Implemented: NDCC ~~65-08-01~~ 65-08.1-02, 65-08.1-05

STAFF COMMENT: Section 92-01-02-50 contains all new material but is not underscored so as to improve readability.

92-01-02-50. Other states' coverage.

1. Definitions. The terms used in this section have the same meaning as in North Dakota Century Code title 65 and in North Dakota Administrative Code title 92, except:

   a. "Covered employment" means hazardous employment principally localized in this state which involves incidental operations in another state. The term "covered employment" specifically excludes any employment in which the employer is required by the laws of that other state

to purchase workers' compensation coverage in that other state.

b. "Employee" means any North Dakota employee as that term is defined in North Dakota Century Code section 65-01-02 who engages in covered employment principally localized in this state and who is eligible to file for workers' compensation benefits in another state if the employee suffers a work-related illness or injury or dies as a result of work activities in that state. The term "employee" for purposes of this section also includes a person with optional workers' compensation coverage in this state under North Dakota Century Code section 65-04-29 or 65-07-01 whose employment is principally localized in this state and engages in covered employment and who is eligible to file for workers' compensation benefits in another state if the employee suffers a work-related illness or injury or dies as a result of work activities in that state.

c. "Employer" means any North Dakota employer as that term is defined in North Dakota Century Code section 65-01-02, not materially delinquent in payment of premium, who has employees engaged in covered employment. An employer is not materially delinquent in premium if such premium is no more than thirty days delinquent.

d. "Incidental operations" means business operations of an employer for fewer than thirty consecutive days in a state where the employer has no other significant contacts and which operations do not require the employer to purchase workers' compensation insurance under the laws of that state. "Significant contacts" means such contacts as are defined as significant by the workers' compensation laws of that other state and are sufficient to subject the employer to liability for payment of workers' compensation premium in that other state. Significant contacts, for the purposes of these rules, does not bear the same meaning as that term is defined in North Dakota Century Code section 65-08-01.

e. "Principally localized" is defined in North Dakota Century Code section 65-08.1-01 and section 92-01-02-22, and those definitions are adopted by reference in this chapter.

2. Scope of section. If an employee, hired in this state for covered employment principally localized in this state by an employer covered by the Workers' Compensation Act of this state, receives an injury while temporarily employed in incidental operations outside this state, such injury is subject to the provisions of this section if the employee elects to receive benefits under the workers' compensation laws of that other state in lieu of a claim for benefits in

this state. This section applies only if the workers' compensation laws of the other state allow the employee to elect to receive benefits under the laws of that state. If the employee does not or cannot elect coverage under the laws of another state, such injury is subject to the provisions of North Dakota Century Code chapter 65-08.

The provisions of this section do not apply to:

a. States having a monopolistic state fund.

b. States having a reciprocal agreement with this state regarding extraterritorial coverage.

c. Compensation received under any federal act.

d. Federal Employees Liability Act.

e. Foreign countries.

f. United States Longshoremen and Harborworker's Act.

g. Maritime employment.

h. Employer's liability or "stop-gap" coverage.

i. Employment in which the employer is required by the laws of another state to purchase workers' compensation coverage in that state.

3. Election of other state's benefits waives right to receive North Dakota benefits. An employee who elects to receive benefits under the workers' compensation laws of another state waives the employee's right to seek compensation under North Dakota Century Code title 65.

4. Coverage provided. The bureau will pay on behalf of an employer any regular workers' compensation benefits the employer is obligated to pay under the workers' compensation laws of a state other than North Dakota, with respect to personal injury, illness, or death sustained as a result of work activities by an employee engaged in covered employment in that state, if the employee or the employee's dependents elect to receive benefits under the other state's laws in lieu of benefits available under the North Dakota Workers' Compensation Act. The term "dependents" includes an employee's spouse for purposes of this section. The bureau will pay benefits on behalf of an employer but may not act nor be deemed as an insurer, nor may the bureau indemnify an employer for any liabilities, except as specifically provided in this section.

The benefits provided by this section are those mandated by the workers' compensation laws of the elected state. This includes benefits for injuries that are deemed compensable in that other state but are not compensable under North Dakota Century Code chapters 65-05 and 65-08. Medical benefits provided pursuant to this section are subject to any fee schedule and other limitations imposed by the workers' compensation law of the elected state. The North Dakota fee schedule does not apply to this section.

The bureau may reimburse an employer covered by this section for legal costs and for reasonable attorney's fees incurred, at a rate of no more than eighty-five dollars per hour, if the employer is sued in tort in another state by an injured employee or an injured employee's dependents relative to a work-related illness, injury, or death; or if the employer is alleged to have failed to make payment of workers' compensation premium in that other state by the workers' compensation authorities of that state. This reimbursement may be made only if it is determined by the bureau or by a court of competent jurisdiction that the employer is subject to the provisions of this section and was not required to purchase workers' coverage in that other state relative to the employment of the injured employee.

The bureau may not reimburse any legal costs, attorney's fees, nor any other costs to a coemployee sued in tort by an injured employee.

5. Administration of other states' coverage. The bureau may contract with a qualified third-party administrator to adjust and administer claims arising under this chapter. The costs of such third-party administrator must be paid from the general fund.

6. Experience rating. Benefits paid on behalf of an employer pursuant to this section will be charged against the employer's account for experience rating purposes. The experience rating loss will be equal to the actual claim costs. The assessment charge plus appropriate penalties and interest, if any, levied pursuant to North Dakota Century Code section 65-05-07.2, will be assessed on all claims brought under this section.

7. Employer's report of claim. The employer shall notify the bureau when a claim is filed in another state by an employee covered by this section. The employer shall notify the bureau of such claim in writing. The employer has thirty days after actual knowledge of the filing of a claim in which to notify the bureau, and such time can be extended an additional thirty days by the bureau upon a showing of good cause by the employer for failing to timely notify the bureau. If the employer fails to timely notify the bureau when a claim is

filed in another state by an employee covered under this section, the bureau is not liable for payment of benefits under this section.

The employer also may have a duty, under the workers' compensation law of the state of injury, to notify the workers' compensation authorities of that state of the injury or claim. The bureau is not liable for any costs, charges, or penalties that may be charged against an employer for late reporting of an injury or claim to the workers' compensation authorities of the state of injury.

8. Exclusive remedy. The exclusive remedy provisions of North Dakota Century Code sections 65-01-01, 65-01-08, 65-04-28, and 65-05-06 apply to this section in full.

History: Effective January 1, 1994.
General Authority: NDCC 65-02-08
Law Implemented: NDCC 65-08.1-02, 65-08.1-05