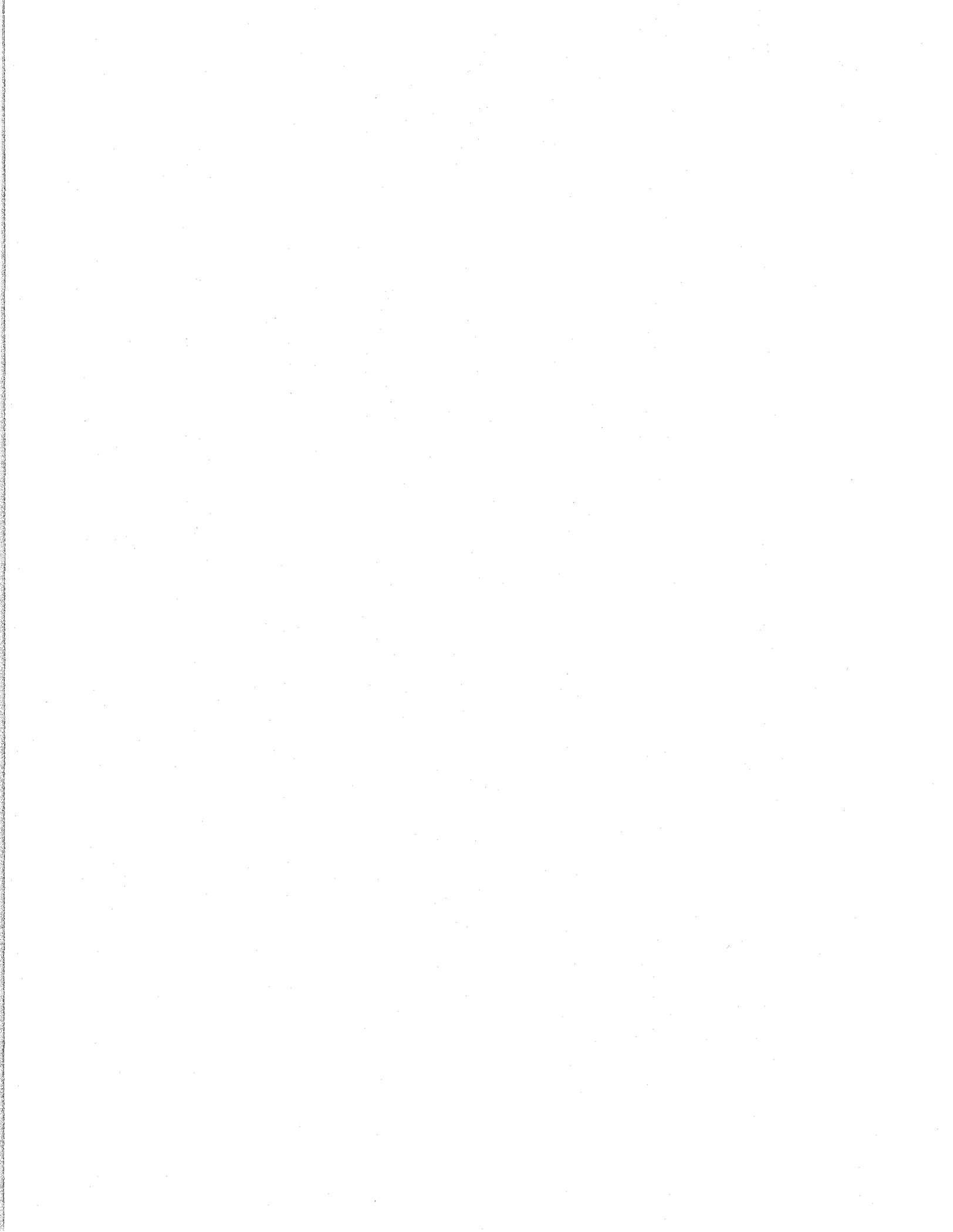


**NORTH DAKOTA ADMINISTRATIVE CODE**

**Supplement 331**

**January 2009**

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



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



**JANUARY 2009**

**CHAPTER 33-20-04.1**

**33-20-04.1-09. General disposal standards.**

1. In addition to sections 33-20-04.1-02, 33-20-04.1-03, 33-20-04.1-04, and 33-20-04.1-05, the standards of this section apply to all landfills, surface impoundments closed with solid waste in place, and land treatment units, unless otherwise indicated.
2. Construction and operation standards for solid waste management facilities regulated by this section:
  - a. Every solid waste landfill or facility shall have and maintain, or have access to, equipment adequate for the excavation, compaction, covering, surface water management, and monitoring procedures required by approval plans and this article.
  - b. Roads must be constructed and maintained to provide access to the facility. Access roads must be cleaned and decontaminated as necessary.
  - c. There must be available an adequate supply of suitable cover material, which, if necessary, must be stockpiled and protected for winter operation.
  - d. The final cover of all disposal facilities must be designed and constructed in a manner that ensures the quality and integrity of the hydraulic barrier and the protective vegetative cover.
  - e. The working face or open area of a landfill must be limited in size to as small an area as practicable. Sequential partial closure must be implemented as necessary to keep the disposal area as small as practicable and to close filled areas in a timely manner.
  - f. All disposal facilities shall identify, quantify, remove, stockpile, and maintain suitable plant growth material for later use in closure.

- g. Any recycling or salvage activity must be authorized by the owner or operator and must be in a separate area in a manner to avoid injury and interference with the landfill operation.
  - h. Vehicles, farm machinery, metal appliances, or other similar items brought to the facility for recycling may be stored temporarily in a separate area.
  - i. Vector control measures, in addition to the application of cover material, must be instituted whenever necessary to prevent the transmission of disease, prevent bird hazards to aircraft, and otherwise prevent and reduce hazards created by rats, flies, snakes, insects, birds, cats, dogs, and skunks.
  - j. All domestic animals must be excluded from the facility. Feeding of garbage to animals is prohibited.
  - k. All earthen material must be maintained onsite unless removal from the site is authorized by the department.
3. Construction and operation standards, excluding inert waste landfills.
- a. The landfill must be designed and operated to prevent the run-on and runoff of surface waters resulting from a maximum flow of a twenty-five-year, twenty-four-hour storm.
  - b. Facilities receiving on average over twenty tons [18.2 metric tons] per day of solid waste shall make provisions for measuring all waste delivered to and disposed in the facility. Weight measurements are preferable; volume measurements (cubic yards) are acceptable.
  - c. Active areas of the landfill must be surveyed periodically to ensure that filling is proceeding in a manner consistent with the landfill design and that closure grades are not exceeded.
  - d. All run-on or runoff must be properly controlled to avoid its concentration on or in solid waste and to minimize infiltration into the waste material. Disposal shall avoid any areas within the facility where run-on or runoff accumulates.
  - e. Leachate removal systems must be operated and maintained to assure continued function according to the design efficiency. This shall include, where applicable:
    - (1) Flushing, inspection and, if necessary, repair of collection lines after placement of the first layer of waste in a landfill cell;

- (2) Annual sampling and analysis of leachate for the parameters required under the ground water quality monitoring required under section 33-20-13-02;
- (3) At minimum, semiannual monitoring of leachate head or elevations above the liner;
- (4) Annual flushing of leachate collection lines to remove dirt and scale; and
- (5) Inclusion of leachate removal system operation, inspection, and maintenance procedures in the operating record.

4. Closure standards, excluding land treatment units.

- a. Closed solid waste management units may not be used for cultivated crops, heavy grazing, buildings, or any other use which might disturb the protective vegetative and soil cover.
- b. All solid waste management units must be closed with a final cover designed to:
  - (1) ~~Have a permeability less than or equal to the permeability of any bottom liner or natural subsoils present~~ Limit the amount of percolation that may enter the waste to meet the efficiency requirements for that type of solid waste management unit;
  - (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 long-term 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~~ two tons [1.82 metric tons] per acre per year. In no instance may slopes exceed twenty-five percent; and
  - (4) Provide a surface drainage system which does not adversely affect drainage from adjacent lands.
- c. The final cover must include six inches [15.2 centimeters] or more of suitable plant growth material which must be seeded with shallow rooted grass or native vegetation.
- d. The department may allow, on a case-by-case basis, the use of closed inert waste landfill sites for certain beneficial uses that would not pose a threat to human health or the environment.

5. **Postclosure standards for solid waste management facilities regulated by this section.**
- a. **The owner or operator of a landfill or a surface impoundment closed with solid waste in place shall meet the following during the postclosure period:**
- (1) **Maintain the integrity and effectiveness of the final cover, including making repairs to the cover to correct effects of settlement, subsidence, and other events, and preventing run-on and runoff from eroding or otherwise damaging the final cover;**
  - (2) **Maintain and operate the leachate collection system, if applicable;**
  - (3) **Monitor the ground water and maintain the ground water monitoring system, if applicable; and**
  - (4) **Operate and maintain the gas control system, if applicable.**
- b. **The owner or operator of a municipal waste landfill, an industrial waste landfill, a special waste landfill, a surface impoundment closed with solid waste remaining in place, or a land treatment facility shall prepare and implement a written postclosure plan approved by the department as a part of the permitting process. The postclosure plan must address facility maintenance and monitoring activities for a postclosure period of thirty years.**
- (1) **Postclosure includes appropriate: ground water monitoring; surface water monitoring; gas monitoring; and maintenance of the facility, facility structures, and ground water monitoring systems.**
  - (2) **The postclosure plan must: provide the name, address, and telephone number of the person or office to contact during the postclosure period; and project time intervals at which postclosure activities are to be implemented, identify postclosure cost estimates, and provide financial assurance mechanisms as required by chapter 33-20-14.**
  - (3) **The department may require an owner or operator to amend the postclosure plan, including an extension of the postclosure period, and implement the changes. If the permittee demonstrates that the facility is stabilized, the department may authorize the owner or operator to discontinue postclosure activities.**

- c. Following completion of the postclosure period, the owner or operator shall notify the department verifying that postclosure management has been completed in accordance with the postclosure plan.

**History:** Effective December 1, 1992; amended effective August 1, 1993; October 1, 1994; August 1, 1995; January 1, 2009.

**General Authority:** NDCC 23-29-04

**Law Implemented:** NDCC 23-29-04, 23-29-07

## CHAPTER 33-20-06.1

**33-20-06.1-03. Closure criteria.** In addition to sections 33-20-04.1-05 and 33-20-04.1-09, at closure, an owner or operator shall cover an existing unit with a layer of compacted soil material having a thickness of eighteen inches [45.7 centimeters] or more and a hydraulic conductivity of  $1 \times 10^{-7}$  centimeters per second or less. The compacted layer must be free from cracks and extrusions of solid waste. A second layer of twelve inches [30.5 centimeters] or more of clay-rich soil material suitable for serving as a plant root zone must be placed over the compacted layer. At least six inches [15.2 centimeters] of suitable plant growth material must be placed over the covered landfill and the facility planted with adapted grasses. The total depth of final cover must be three feet [91.4 centimeters] or more, as required to achieve subsection 3 of section 33-20-06.1-02. The requirements of this section may be modified by the department if the permit applicant demonstrates that an alternative design will appropriately limit percolation of liquid into the waste.

1. If the permit applicant wishes to pursue an alternative cover design, one of the following methods shall be used to demonstrate that the alternative cover design will appropriately limit the amount of percolation that may enter the waste:
  - a. Hydrologic modeling;
  - b. Lysimetry or instrumentation using a field-scale test section;
  - c. Comparison of the soil and climatic conditions at the site with the soil and climatic conditions at a site where the department has previously approved the same alternative cover design; or
  - d. Other method approved by the department.
2. To demonstrate that an alternative cover design will appropriately limit percolation of liquid into the waste, the alternative cover design must be shown to limit the average rate of percolation of liquid into wastes to an equal or lower value than the final cover design described in this section, or to an average long-term percolation rate less than 0.2 inches [5.0 millimeters] per year.

**History:** Effective December 1, 1992; amended effective August 1, 1995; January 1, 2009.

**General Authority:** NDCC 23-29-04

**Law Implemented:** NDCC 23-29-04

## CHAPTER 33-20-07.1

**33-20-07.1-02. Closure criteria.** In addition to sections 33-20-04.1-05 and 33-20-04.1-09, at closure, an owner or operator shall cover an existing unit with ~~two feet [61.0 centimeters] or more of clay-rich soil material having a layer of compacted soil material having a thickness of eighteen inches [45.7 centimeters] or more, and a saturated hydraulic conductivity of  $1 \times 10^{-7}$  centimeters per second or less placed as a clay cap on the landfill. An additional layer of clay-rich soil material must be placed over the compacted clay cap; the upper. A second layer of twelve inches [30.5 centimeters] or more of this layer must be clay-rich soil material suitable for serving as a plant root zone must be placed over the compacted layer. The department may allow the use of a synthetic material to replace part or all of the compacted clay cap.~~ At least six inches [15.2 centimeters] of suitable plant growth material must be placed over the covered landfill and the facility planted with adapted grasses. The total depth of the final cover must be ~~five~~ three feet [1.5 meters ~~91.4 centimeters~~] or more, ~~or as necessary to meet the requirement of subdivision h of subsection 4 of section 33-20-07.1-01.~~ The requirements of this section may be modified by the department if the permit applicant demonstrates that an alternative design will appropriately limit percolation of liquid into the waste.

1. If the permit applicant wishes to pursue an alternative cover design, one of the following methods shall be used to demonstrate that the alternative cover design will appropriately limit the amount of percolation that may enter the waste:
  - a. Hydrologic modeling;
  - b. Lysimetry or instrumentation using a field-scale test section;
  - c. Comparison of the soil and climatic conditions of the site with the soil and climatic conditions at a site where the department has previously approved the same alternative cover design; or
  - d. Other method approved by the department.
2. To demonstrate that an alternative cover design will appropriately limit percolation of liquid into the waste, the alternative cover design must be shown to limit the average rate of percolation of liquid into wastes to an equal or lower value than the final cover design described in this section or to an average long-term percolation rate less than 0.2 inches [5.0 millimeters] per year.

**History:** Effective December 1, 1992; amended effective August 1, 1993; January 1, 2009.

**General Authority:** NDCC 23-29-04

**Law Implemented:** NDCC 23-29-04

## CHAPTER 33-24-08

### **33-24-08-03. Definitions (technical standards, delivery prohibition, and corrective action).**

1. "Aboveground release" means any release to the surface of the land or to surface water. This includes, but is not limited to, releases from the aboveground portion of an underground storage tank system and aboveground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank system.
2. "Ancillary equipment" means any devices including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps used to distribute, meter, or control the flow of regulated substances to and from an underground storage tank.
3. "Belowground release" means any release to the subsurface of the land and the ground water. This includes, but is not limited to, releases from the belowground portions of an underground storage tank system and belowground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank.
4. "Beneath the surface of the ground" means beneath the ground surface or otherwise covered with earthen materials.
5. "Cathodic protection" is a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current.
6. "Cathodic protection tester" means a person who can demonstrate an understanding of the principles and measurements of all common types of cathodic protection systems as applied to buried or submerged metal piping and tank systems. At a minimum, such persons must have education and experience in soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements of buried metal piping and tank systems.
7. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
8. "Community water system (CWS)" 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.
9. "Compatible" means the ability of two or more substances to maintain their respective physical and chemical properties upon contact with one

another for the design life of the tank system under conditions likely to be encountered in the underground storage tank.

- 9- 10. "Connected piping" means all underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow. For the purpose of determining how much piping is connected to any individual underground storage tank system, the piping that joins two underground storage tank systems should be allocated equally between them.
- 40- 11. "Consumptive use" with respect to heating oil means consumed on the premises.
- 41- 12. "Corrosion expert" means a person who, by reason of thorough knowledge of the physical sciences and the principles of engineering and mathematics acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged piping systems and metal tanks. Such a person must be accredited or certified as being qualified by the national association of corrosion engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control of buried or submerged metal piping systems and metal tanks.
- 42- 13. "Department" means the North Dakota state department of health ~~and consolidated laboratories~~ charged with the administration and enforcement of this chapter.
- 43- 14. "Dielectric material" means a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate underground storage tank systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of the underground storage tank system (e.g. for example, tank from piping).
15. "Dispenser" means equipment that is used to transfer a regulated substance from underground piping, through a rigid or flexible hose or piping located aboveground, to a point of use outside of the underground storage tank system such as a motor vehicle.
- 44- 16. "Electrical equipment" means underground equipment that contains dielectric fluid that is necessary for the operation of equipment such as transformers and buried electrical cable.
- 45- 17. "Excavation zone" means the volume containing the tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the underground storage tank system is placed at the time of installation.

- ~~16:~~ 18. "Existing tank system" means a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988. Installation is considered to have commenced if:
- a. The owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system; and if,
  - b. Either, (1) a continuous onsite physical construction or installation program has begun, or (2) the owner or operator has entered into contractual obligations, which cannot be canceled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.
- ~~17:~~ 19. "Farm tank" is a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, rangeland, and nurseries with growing operations.
- ~~18:~~ 20. "Flowthrough process tank" is a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flowthrough process tanks do not include tanks used for the storage of materials prior to their introduction into the production process or for the storage of finished products or byproducts from the production process.
- ~~19:~~ 21. "Free product" refers to a regulated substance that is present as a nonaqueous phase liquid (e.g. for example, liquid not dissolved in water).
- ~~20:~~ 22. "Gathering lines" means any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.
- ~~24:~~ 23. "Hazardous substance underground storage tank system" means an underground storage tank system that contains a hazardous substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (but not including any substance regulated as a hazardous waste under subtitle C) or any mixture of such substances and petroleum, and which is not a petroleum underground storage tank system.
- ~~22:~~ 24. "Heating oil" means petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy, No. 5-light, No. 5-heavy, and No. 6 technical grades of fuel oil; other residual fuel oils (including navy special fuel oil and bunker c); and other fuels when used as substitutes for one of these

fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

- ~~23-~~ 25. "Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate lifts, elevators, and other similar devices.
- ~~24-~~ 26. "Liquid trap" means sumps, well cellars, and other traps used in association with oil and gas production, gathering, and extraction operations (including gas production plants), for the purpose of collecting oil, water, and other liquids. These liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.
- ~~25-~~ 27. "Maintenance" means the normal operational upkeep to prevent an underground storage tank system from releasing product.
- ~~26-~~ 28. "Motor fuel" means petroleum or a petroleum-based substance that is motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any grade of gasohol, and is typically used in the operation of a motor engine.
- ~~27-~~ 29. "New tank system" means a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988. (See also "existing tank system".)
- ~~28-~~ 30. "Noncommercial purposes" with respect to motor fuel means not for resale.
- ~~29-~~ 31. "On the premises where stored" with respect to heating oil means underground storage tank systems located on the same property where the stored heating oil is used.
- ~~30-~~ 32. "Operational life" refers to the period beginning when installation of the tank system has commenced until the time the tank system is properly closed under sections 33-24-08-60 through 33-24-08-64.
- ~~31-~~ 33. "Operator" means any person in control of, or having responsibility for, the daily operation of the underground storage tank system.
- ~~32-~~ 34. "Overfill release" is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.
- ~~33-~~ 35. "Owner" means:

- a. In the case of an underground storage tank system in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank system used for storage, use, or dispensing of regulated substances; and
  - b. In the case of any underground storage tank system in use before November 8, 1984, but no longer in use on that date, any person who owned such underground storage tank immediately before the discontinuation of its use.
- ~~34.~~ 36. "Person" means an individual, trust, firm, joint stock company, federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. "Person" also includes a consortium, a joint venture, a commercial entity, and the United States government.
- ~~35.~~ 37. "Petroleum underground storage tank system" means an underground storage tank system that contains petroleum or a mixture of petroleum with de minimus quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.
- ~~36.~~ 38. "Pipe" or "piping" means a hollow cylinder or tubular conduit that is constructed of nonearthen materials that routinely contains and conveys regulated substances from the underground tank or tanks to the dispenser or dispensers, or other end-use equipment. Such piping includes any elbows, couplings, unions, valves, or other in-line fixtures that contain and convey regulated substances from the underground tank or tanks to the dispenser or dispensers. This definition does not include vent, vapor recovery, or fill lines.
- ~~37.~~ 39. "Pipeline facilities (including gathering lines)" are new and existing pipe rights of way and any associated equipment, facilities, or buildings.
40. "Potable drinking water well" means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets ground water which:
- a. Supplies water for a noncommunity public water system, or;
  - b. Otherwise supplies water for household use (consisting of drinking, bathing, and cooking, or other similar uses).
- Such wells may provide water to entities such as a single-family residence, group of residences, businesses, schools, parks, campgrounds, and other permanent or seasonal communities.
41. "Product deliverer" means any person who delivers or deposits product into an underground storage tank. This term may include major oil

companies, jobbers, petroleum transportation companies, or other product delivery entities.

42. "Public water system (PWS)" means a system for the provision to the public of water for human consumption through pipes, or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least sixty days out of the year. Such term includes:

- a. Any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and
- b. Any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

Such term does not include any "special irrigation district". A public water system is either a "community water system" or a "noncommunity water system".

43. "Red tag" means a tag, device, or mechanism on the tank's fill pipes that clearly identifies an underground storage tank as ineligible for product delivery. The tag or device is easily visible to the product deliverer and clearly states and conveys that it is unlawful to deliver to, deposit into, or accept product into the ineligible underground storage tank. The tag, device, or mechanism is generally tamper resistant.

~~38.~~ 44. "Regulated substance" means:

- a. Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (but not including any substance regulated as a hazardous waste under North Dakota Century Code chapter 23-20.3; and
- b. Petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (sixty degrees Fahrenheit [10 degrees Celsius] and fourteen and seven-tenths pounds per square inch [101.3 kilopascals] absolute). The term "regulated substance" includes, but is not limited to, petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, and finishing, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

- 39- 45. "Release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into ground water, surface water, or subsurface soils.
- 40- 46. "Release detection" means determining whether a release of a regulated substance has occurred from the underground storage tank system into the environment or into the interstitial space between the underground storage tank system and its secondary barrier or secondary containment around it.
- 41- 47. "Repair" means to restore a tank or underground storage tank system component that has caused a release of product from the underground storage tank system. Piping repair includes installation of a single run of up to ten feet of new piping to replace existing piping. Piping repair involving installation of a single run of more than ten feet of new piping to replace existing piping constitutes replacement as defined in subsection 48. Dispenser repair includes installation of a new dispenser to replace an existing dispenser so long as work is performed entirely on or above any shear valves and check valves. Installation of a new dispenser to replace an existing dispenser constitutes replacement as defined in subsection 48 if the work is performed beneath any shear valves or check valves, or on any flexible connectors, or unburied risers.
48. "Replace or replacement" means the installation of a new underground tank system or component in substantially the same location as another tank system or component in lieu of that tank system or component.
- 42- 49. "Residential tank" is a tank located on property used primarily for dwelling purposes.
- 43- 50. "SARA" means the Superfund Amendments and Reauthorization Act of 1986.
51. "Secondary containment tank or piping" means a tank or piping which is designed with an inner primary barrier and an outer barrier which extends around the inner barrier, and which is designed to contain any leak through the primary barrier from any part of the tank or piping that routinely contains product, and to allow for monitoring of the interstitial space between the barriers for the detection of any leak or release of regulated substance from the underground tank or piping.
- 44- 52. "Septic tank" is a watertight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from such receptacle is distributed for disposal through the soil and settled solids and scum from the tank are pumped out periodically and hauled to a treatment facility.

- 45- 53. "Storm water or wastewater collection system" means piping, pumps, conduits, and any other equipment necessary to collect and transport the flow of surface water runoff resulting from precipitation, or domestic, commercial, or industrial wastewater to and from retention areas or any areas where treatment is designated to occur. The collection of storm water and wastewater does not include treatment except where incidental to conveyance.
- 46- 54. "Surface impoundment" is a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials (although it may be lined with manmade materials) that is not an injection well.
- 47- 55. "Tank" is a stationary device designed to contain an accumulation of regulated substances and constructed of nonearthen materials (e.g. for example, concrete, steel, plastic) that provide structural support.
56. "Under-dispenser containment (UDC)" means containment underneath a dispenser that will prevent leaks from the dispenser from reaching soil or ground water. Such containment must:
- a. Be liquid-tight on its sides, bottom, and at any penetrations;
  - b. Be compatible with the substance conveyed by the piping; and
  - c. Allow for visual inspection and access to the components in the containment system or be monitored.
- 48- 57. "Underground area" means an underground room, such as a basement, cellar, shaft, or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.
- 49- 58. "Underground release" means any belowground release.
- 50- 59. "Underground storage tank" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is ten percent or more beneath the surface of the ground. This term does not include any:
- a. Farm or residential tank of one thousand one hundred gallons [4163.94 liters] or less capacity used for storing motor fuel for noncommercial purposes;
  - b. Tank used for storing heating oil for consumptive use on the premises where stored;
  - c. Septic tank;

- d. Pipeline facility (including gathering lines) regulated under:
  - (1) The Natural Gas Pipeline Safety Act of 1968 [49 U.S.C. App. 1671, et seq.];
  - (2) The Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C. App. 2001, et seq.]; or
  - (3) Which is an intrastate pipeline facility regulated under state laws comparable to the provisions of the law referred to in paragraph 1 or 2 of this subdivision;
- e. Surface impoundment, pit, pond, or lagoon;
- f. Storm water or wastewater collection system;
- g. Flowthrough process tank;
- h. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or
- i. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term "underground storage tank" does not include any pipes connected to any tank which is described in subdivisions a through i of this subsection.

~~54- 60.~~ "Underground storage tank system" or "tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

~~52- 61.~~ "Upgrade" means the addition or retrofit of some systems such as cathodic protection, lining, or spill and overfill controls to improve the ability of an underground storage tank system to prevent the release of product.

~~53- 62.~~ "Wastewater treatment tank" means a tank that is designed to receive and treat an influent wastewater through physical, chemical, or biological methods.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-10. Performance standards for new underground storage tank systems.** In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the underground storage tank system is used to

store regulated substances, all owners and operators of new underground storage tank systems must meet the following requirements:

1. **Tanks.** Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion, using one of the following methods, except that all tanks installed or replaced after January 1, 2009, and located within one thousand feet of any existing community water system or any existing potable drinking water well shall comply with subdivision f.

The corrosion protection methods must be in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

- a. The tank is constructed of fiberglass-reinforced plastic. (NOTE: The following industry codes may be used to comply with this subdivision: Underwriters Laboratory Standard 1316, "Standard for Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products"; Underwriters Laboratories of Canada CAN4-S615-M83, "Standard for Reinforced Plastic Underground Tanks for Petroleum Products"; or American Society of Testing and Materials Standard D4021-86, "Standard Specification for Glass-Fiber-Reinforced Polyester Underground Petroleum Storage Tanks.");
- b. The tank is constructed of steel and cathodically protected in the following manner:
  - (1) The tank is coated with a suitable dielectric material;
  - (2) Field-installed cathodic protection systems are designed by a corrosion expert;
  - (3) Impressed current systems are designed to allow determination of current operating status as required in subsection 3 of section 33-24-08-21; and
  - (4) Cathodic protection systems are operated and maintained in accordance with section 33-24-08-21 or according to guidelines established by the department. (NOTE: The following codes and standards may be used to comply with this subdivision: Steel Tank Institute "Specification for STI-P3 System of External Corrosion Protection of Underground Steel Storage Tanks"; Underwriters Laboratories Standard 1746, "Corrosion Protection Systems for Underground Storage Tanks"; Underwriters Laboratories of Canada CAN4-S603-M85, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids", and CAN4-G03.1-M85, "Standard for Galvanic Corrosion

Protection Systems for Underground Tanks for Flammable and Combustible Liquids", and CAN4-S631-M84, "Isolating Bushings for Steel Underground Tanks Protected with Coatings and Galvanic Systems"; or National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems", and Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids".);

- c. The tank is constructed of a steel-fiberglass-reinforced-plastic composite. (NOTE: The following industry codes may be used to comply with this subdivision: Underwriters Laboratories Standard 1746, "Corrosion Protection Systems for Underground Storage Tanks", or the Association for Composite Tanks ACT-100, "Specification for the Fabrication of FRP Clad Underground Storage Tanks".);
- d. The tank is constructed of metal without additional corrosion protection measures provided that:
  - (1) The tank is installed at a site that is determined by a corrosion expert not be corrosive enough to cause it to have a release due to corrosion during its operating life; and
  - (2) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph 1 of this subdivision for the remaining life of the tank; or
- e. The tank construction and corrosion protection are determined by the department to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than subdivisions a through d; or
- f. The tank is secondarily contained. (NOTE: The following industry codes may be used to comply with this subdivision: Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids", Underwriters Laboratories Standard 1746, "Standard for Safety for External Corrosion Protection Systems for Steel Underground Storage Tanks", or the Steel Tank Institute RP012-02, "Recommended Practice for Interstitial Tightness Testing of Existing Underground Double Walled Steel Tanks", or the Steel Tank Institute STI F841, "Standard for Dual Wall Underground Steel Storage Tanks".).
  - (1) Secondary containment tanks shall use one of the following designs:

- (a) The tank is of double-walled fiberglass reinforced plastic construction;
    - (b) The tank is of double-walled steel construction; or
    - (c) The tank is of single-walled steel construction, with a fiberglass-reinforced plastic jacket which is designed to contain and detect a leak through the inner wall.
  - (2) All secondary containment tanks shall be capable of containing a release from the inner wall of the tank and shall be designed with release detection according to subsection 7 of section 33-24-08-33.
2. **Piping.** The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion using one of the following methods, except that all piping installed or replaced after January 1, 2009, and located within one thousand feet of any existing community water system or any existing potable drinking water well shall comply with subdivision e.

The corrosion protection methods must be in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

- a. The piping is constructed of fiberglass-reinforced plastic. (NOTE: The following codes and standards may be used to comply with this subdivision: Underwriters Laboratories Subject 971, "UL Listed Non-Metal Pipe"; Underwriters Laboratories Standard 567, "Pipe Connectors for Flammable and Combustible and LP Gas"; Underwriters Laboratories of Canada Guide ULC-107, "Glass Fiber Reinforced Plastic Pipe and Fittings for Flammable Liquids"; and Underwriters Laboratories of Canada Standard CAN 4-S633-M81, "Flexible Underground Hose Connectors".);
- b. The piping is constructed of steel and cathodically protected in the following manner:
  - (1) The piping is coated with a suitable dielectric material;
  - (2) Field-installed cathodic protection systems are designed by a corrosion expert;
  - (3) Impressed current systems are designed to allow determination of current operating status as required in subsection 3 of section 33-24-08-21; and
  - (4) Cathodic protection systems are operated and maintained in accordance with section 33-24-08-21 or guidelines

established by the department. (NOTE: The following codes and standards may be used to comply with this subdivision: National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage Systems"; American Petroleum Institute Publication 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; and National Association of Corrosion Engineers Standard RP-01-69, "Control of External Corrosion on Submerged Metallic Piping Systems".);

- c. The piping is constructed of metal without additional corrosion protection measures provided that:
  - (1) The piping is installed at a site that is determined by a corrosion expert to not be corrosive enough to cause it to have a release due to corrosion during its operating life; and
  - (2) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph 1 for the remaining life of the piping. (NOTE: National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; and National Association of Corrosion Engineers Standard RP-01-69, "Control of External Corrosion on Submerged Metallic Piping Systems", may be used to comply with this subdivision.);
- d. The piping construction and corrosion protection are determined by the department to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements in subdivisions a through c; or
- e. The piping is secondarily contained. (NOTE: The following industry code may be used to comply with this subdivision: Underwriters Laboratories Standard 971, "Standard for Nonmetallic Underground Piping for Flammable Liquids".).
  - (1) Secondary containment piping shall use one of the following designs:
    - (a) The piping is of double-walled fiberglass-reinforced plastic construction;
    - (b) The piping is of double-walled steel construction;

- (c) The piping is of single-walled steel construction, with a fiberglass-reinforced plastic jacket which is designed to contain and detect a leak through the steel wall; or
  - (d) The piping is of double-walled nonmetallic flexible construction.
- (2) All secondary containment piping shall be capable of containing a release from the inner wall of the piping and shall be designed with release detection according to subsection 4 of section 33-24-08-34. (NOTE: The secondary containment requirements do not apply to suction piping that meets the standards as listed in subdivision b of subsection 2 of section 33-24-08-31.).

**3. Spill and overflow prevention equipment.**

- a. Except as provided in subdivision b, to prevent spilling and overflowing associated with product transfer to the underground storage tank system, owners and operators must use the following spill and overflow prevention equipment:
  - (1) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and
  - (2) Overflow prevention equipment that will:
    - (a) Automatically shut off flow into the tank when the tank is no more than ninety-five percent full;
    - (b) Alert the transfer operator when the tank is no more than ninety percent full by restricting the flow into the tank or triggering a high-level alarm; or
    - (c) Restrict flow thirty minutes prior to overflowing, alert the operator with a high-level alarm one minute before overflowing, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overflowing.
- b. Owners and operators are not required to use the spill and overflow prevention equipment specified in subdivision a if:
  - (1) Alternative equipment is used that is determined by the department to be no less protective of human health and the environment than the equipment specified in paragraphs 1 and 2 of subdivision a; or

- (2) The underground storage tank system is filled by transfers of no more than twenty-five gallons [94.63 liters] at one time.
4. **Dispensers.** After January 1, 2009, any new dispenser, and any replacement dispenser where work is performed beneath any shear valves or check valves, or on any flexible connectors or unburied risers, shall be provided with secondary containment (UDC) beneath the dispenser. Secondary containment shall be:
- a. Designed to contain a release from the dispenser and any connectors, fittings, and valves beneath the dispenser until the release can be detected and removed;
  - b. Designed with liquid-tight sides, bottom, and points of piping penetration;
  - c. Constructed of fiberglass-reinforced plastic or other synthetic material of comparable thickness and durability; and
  - d. Compatible with the stored substance.
5. **Submersible pumps.** Where necessary for secondary containment of the piping near the underground tank, after January 1, 2009, submersible pumps shall be provided with secondary containment around and beneath the pump head. Secondary containment shall be:
- a. Designed to contain a release from the pump head and any connectors, fittings, and valves beneath the pump head until the release can be detected and removed;
  - b. Designed with liquid-tight sides, bottom, and points of piping penetration;
  - c. Constructed of fiberglass-reinforced plastic, or other synthetic material of comparable thickness and durability; and
  - d. Compatible with the stored substance.
6. **Installation.** All tanks and piping must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

(NOTE: Tank and piping system installation practices and procedures described in the following codes may be used to comply with the requirements of this subsection: American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage System"; Petroleum Equipment Institute Publication RP100, "Recommended Practices for Installation of Underground Liquid

Storage Systems"; or American National Standards Institute Standard B31.3, "Petroleum Refinery Piping", and American National Standards Institute Standard B31.4, "Liquid Petroleum Transportation Piping System".)

- 5: 7. **Certification of installation.** All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with subsection 4 6 by providing a certification of compliance on the underground storage tank notification form in accordance with section 33-24-08-12:
- a. The installer has been certified by the tank and piping manufacturers;
  - b. The installer has been certified or licensed by the department;
  - c. The installation has been inspected and certified by a registered professional engineer with education and experience in underground storage tank system installation;
  - d. The installation has been inspected and approved by the department;
  - e. All work listed in the manufacturer's installation checklists has been completed; or
  - f. The owner and operator have complied with another method for ensuring compliance with subsection 4 6 that is determined by the department to be no less protective of human health and the environment.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-12. Notification requirements.**

1. Any owner who brings an underground storage tank system into use after May 8, 1986, must within thirty days of bringing such tank into use, submit, in the form prescribed in appendix I, a notice of existence of such tank system to the department.

(NOTE: Owners and operators of underground storage tank systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the designated state or local agency in accordance with the Hazardous and Solid Waste Amendments of 1984, Public Law 98-616, on a form published by the environmental protection agency on November 8,

1985, (50 Federal Register 46602) unless notice was given pursuant to section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Owners and operators who have not complied with the notification requirements may use portions I through VI of the notification form contained in appendix I.)

2. Owners required to submit notices under subsection 1 must provide notices to the department for each tank they own. Owners may provide notice for several tanks using one notification form, but owners who own tanks located at more than one place of operation must file a separate notification form for each separate place of operation.
3. Notices required to be submitted under subsection 1 must provide all of the information in sections I through VI of the prescribed form for each tank for which notice must be given.
4. All owners and operators of new underground storage tank systems must certify in the notification form compliance with the following requirements:
  - a. Installation of tanks and piping under subsection 5 7 of section 33-24-08-10;
  - b. Cathodic protection of steel tanks and piping under subsections 1 and 2 of section 33-24-08-10;
  - c. Financial responsibility under sections 33-24-08-80 through ~~33-24-08-104~~ 33-24-08-106; and
  - d. Release detection under sections 33-24-08-31 and 33-24-08-32.
5. Beginning October 24, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under subsection 1. The form provided in appendix II may be used to comply with this requirement.
6. All owners and operators of new underground storage tank systems must ensure that the installer certifies in the notification form that the methods used to install the tanks and piping complies with the requirements in subsection 4 6 of section 33-24-08-10.
7. Beginning January 1, 2009, owners and operators who install or replace underground tanks or piping or install new motor fuel dispenser systems that are not equipped with secondary containment must demonstrate to the satisfaction of the department at least thirty days before beginning installation or replacement that their new or replaced tanks or piping or new motor fuel dispenser systems are not within one thousand feet of

any existing community water system or any existing potable drinking water well.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-24. Reporting and recordkeeping.** Owners and operators of underground storage tank systems must cooperate fully with inspections, monitoring, and testing conducted by the department, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to North Dakota Century Code section 23-30.3-04.1.

1. **Reporting.** Owners and operators must submit the following information to the department:
  - a. Notification for all underground storage tank systems (section 33-24-08-12), which includes certification of installation for new underground storage tank systems (subsection 5 7 of section 33-24-08-10);
  - b. Reports of all releases including suspected releases (section 33-24-08-40), spills and overfills (section 33-24-08-43), and confirmed releases (section 33-24-08-51);
  - c. Corrective actions planned or taken including initial abatement measures (section 33-24-08-52), initial site characterization (section 33-24-08-53), free product removal (section 33-24-08-54), investigation of soil and ground water cleanup (section 33-24-08-55), and corrective action plan (section 33-24-08-56); and
  - d. A notification before permanent closure or change in service (section 33-24-08-61).
2. **Recordkeeping.** Owners and operators must maintain the following information:
  - a. A corrosion expert's analysis of site corrosion potential if corrosion protection equipment is not used (subdivision d of subsection 1 of section 33-24-08-10, subdivision c of subsection 2 of section 33-24-08-10);
  - b. Documentation of operation of corrosion protection equipment (section 33-24-08-21);
  - c. Documentation of underground storage tank system repairs (subsection 6 of section 33-24-08-23);

- d. Recent compliance with release detection requirements (section 33-24-08-35); and
  - e. Results of the site investigation conducted at permanent closure (section 33-24-08-64).
3. **Availability and maintenance of records.** Owners and operators must keep the records required either:
- a. At the underground storage tank site and immediately available for inspection by the department;
  - b. At a readily available alternative site and be provided for inspection to the department upon request; or
  - c. In case of permanent closure records required under section 33-24-08-64, owners and operators are also provided with the additional alternative of mailing closure records to the department if they cannot be kept at the site or an alternative site as indicated above.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-32. Release detection requirements for hazardous substance underground storage tank systems.** Owners and operators of hazardous substance underground storage tank systems must provide release detection that meets the following requirements:

- 1. Release detection at existing underground storage tank systems must meet the requirements for petroleum underground storage tank systems in section 33-24-08-31. By December 22, 1998, all existing hazardous substance underground storage tank systems must meet the release detection requirements for new systems in subsection 2.
- 2. Release detection at new hazardous substance underground storage tank systems must meet the following requirements:
  - a. Secondary containment systems must be designed, constructed, and installed:
    - (1) Contain regulated substances released from the tank system until they are detected and removed;
    - (2) Prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system; and

- (3) Be checked for evidence of a release at least every thirty days.

(NOTE: The provisions of section 33-24-05-106 may be used to comply with this subsection.)

- b. Double-walled tanks must be designed, constructed, and installed to:
  - (1) Contain a release from any portion of the inner tank within the outer wall; and
  - (2) Detect the failure of the inner wall.
- c. External liners (including vaults) must be designed, constructed, and installed to:
  - (1) Contain one hundred percent of the capacity of the largest tank within its boundary;
  - (2) Prevent the interference of precipitation or ground water intrusion with the ability to contain or detect a release of regulated substances; and
  - (3) Surround the tank completely (~~i.e.~~ for example, it is capable of preventing lateral as well as vertical migration of regulated substances).
- d. Underground piping must be equipped with secondary containment that satisfies the requirements of subdivision a of subsection 2 (~~e.g.~~ for example, trench liners, jacketing of double-walled pipe). In addition, underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector in accordance with subsection 1 of section 33-24-08-34; ~~or.~~
- e. Other methods of release detection may be used if owners and operators:
  - (1) Demonstrate to the department that an alternate method can detect a release of the stored substance as effectively as any of the methods allowed in subsections 2 through 8 of section 33-24-08-33 can detect a release of petroleum;
  - (2) Provide information to the department on effective corrective action technologies, health risks, and chemical and physical properties of the stored substance, and the characteristics of the underground storage tank site; and

- (3) Obtain approval from the department to use the alternate release detection method before the installation and operation of the new underground storage tank system.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-33. Methods of release detection for tanks.** Each method of release detection for tanks used to meet the requirements of section 33-24-08-31 must be conducted in accordance with the following:

1. **Inventory control.** Product inventory control (for another test of equivalent performance) must be conducted monthly to detect a release of at least one percent of flowthrough plus one hundred thirty gallons [492.10 liters] on a monthly basis in the following manner:
  - a. Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;
  - b. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch [3.05 millimeters];
  - c. The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery;
  - d. Deliveries are made through a drop tube that extends to within one foot [0.30 meters] of the tank bottom;
  - e. Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of six cubic inches [98.32 milliliters] for every five gallons [18.93 liters] of product withdrawn; and
  - f. The measurement of any water level in the bottom of the tank is made to the nearest one-eighth of an inch [3.05 millimeters] at least once a month.

(NOTE: Practices described in the American Petroleum Institute Publication 1621, "Recommended Practice for Bulk Liquid Stock Control at Retail Outlets", may be used, where applicable, as guidance in meeting the requirements.)

2. **Manual tank gauging.** Manual gauging must meet the following requirements:

- a. Tank liquid level measurements are taken at the beginning and ending of a period of at least thirty-six hours during which no liquid is added to or removed from the tank;
- b. Level measurements are based on an average of two consecutive stick readings at both the beginning and ending of the period;
- c. The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch [3.05 millimeters];
- d. A leak is suspected and subject to the requirements of sections 33-24-08-40 through 33-24-08-43 if the variation between beginning and ending measurements exceeds the weekly or monthly standards in the following table:

Nominal Tank Capacity	Weekly Standard (one test)	Monthly Standard (average of four tests)
550 gallons or less	10 gallons	5 gallons
551-1,000 gallons	13 gallons	7 gallons
1,001-2,000 gallons	26 gallons	13 gallons; and

- e. Only tanks of five hundred fifty gallons [2081.98 liters] or less nominal capacity may use this as the sole method of release detection. Tanks of five hundred fifty-one to two thousand gallons [2085.76 to 7570.80 liters] may use the method in place of manual inventory control in subsection 1 of section 33-24-08-33. Tanks of greater than two thousand gallons [7570.80 liters] nominal capacity may not use this method to meet the requirements of sections ~~33-24-08-40~~ 33-24-08-30 through ~~33-24-08-45~~ 33-24-08-35.
3. **Tank tightness testing.** Tank tightness testing (or another test of equivalent performance) must be capable of detecting a one-tenth gallon [.38 liter] per hour leak rate from any portion of the tank that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation, and the location of the water table.
  4. **Automatic tank gauging.** Equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must meet the following requirements:
    - a. The automatic product level monitor test can detect a two-tenths gallon [.76 liter] per hour leak rate from any portion of the tank that routinely contains product; and



- b. Ground water is never more than twenty feet [6.07 meters] from the ground surface and the hydraulic conductivity of the soils between the underground storage tank system and the monitoring wells or devices is not less than one one-hundredths centimeter per second (e.g. for example, the soil should consist of gravels, coarse to medium sands, coarse silts or other permeable materials);
  - c. The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low ground water conditions;
  - d. Monitoring wells must be sealed from the ground surface to the top of the filter pack;
  - e. Monitoring wells or devices intercept the excavation zone or are as close to it as is technically feasible;
  - f. The continuous monitoring devices or manual methods used can detect the presence of at least one-eighth of an inch [3.05 millimeters] of free product on top of the ground water in the monitoring wells;
  - g. Within and immediately below the underground storage tank system excavation zone, the site is assessed to ensure compliance with the requirements in subdivisions a through e and to establish the number and positioning of monitoring wells or devices that will detect releases from any portion of the tank that routinely contains product; and
  - h. Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
7. **Interstitial monitoring.** Interstitial monitoring between the underground storage tank system and a secondary barrier immediately around or beneath it may be used, but only if the system is designed, constructed, and installed to detect a leak from any portion of the tank that routinely contains product and also meets one of the following requirements:
- a. For double-walled underground storage tank systems, the sampling or testing method can detect a release through the inner wall in any portion of the tank that routinely contains product;

(NOTE: The provisions outlined in the Steel Tank Institute's "Standard for Dual Wall Underground Storage Tanks" may be used as guidance for aspects of the design and construction of underground steel double-walled tanks.)

- b. For underground storage tank systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a release between the underground storage tank system and the secondary barrier;
    - (1) The secondary barrier around or beneath the underground storage tank system consists of artificially constructed material that is sufficiently thick and impermeable (at least  $10^{-6}$  centimeter per second for the regulated substance stored) to direct a release to the monitoring point and permit its detection;
    - (2) The barrier is compatible with the regulated substance stored so that a release from the underground storage tank system will not cause a deterioration of the barrier allowing a release to pass through undetected;
    - (3) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;
    - (4) The ground water, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than thirty days;
    - (5) The site is assessed to ensure that the secondary barrier is always above the ground water and not in a twenty-five-year floodplain, unless the barrier and monitoring designs are for use under such conditions; and
    - (6) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.
  - c. For tanks with an internally fitted liner, an automated device can detect a release between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.
8. **Other methods.** Any other type of release detection method, or combination of methods, can be used if:
- a. It can detect a two-tenths gallon [.76 liter] per hour leak rate or a release of one hundred fifty gallons [567.81 liters] within a month with a probability of detection of ninety-five hundredths and a probability of false alarm of five one-hundredths; or
  - b. The department may approve another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in subsections 3 through 8. In comparing methods, the department shall consider

the size of release the method can detect and the frequency and reliability with which it can be detected. If the method is approved, the owner and operator must comply with any conditions imposed by the department on its use to ensure the protection of human health and the environment.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-02.3-04.1

**33-24-08-34. Methods of release detection for piping.** Each method of release detection for piping used to meet the requirements of subsection 2 of section 33-24-08-10 and section 33-24-08-31 must be conducted in accordance with the following:

1. **Automatic line leak detectors.** Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of three gallons [11.36 liters] per hour at ten pounds per square inch line pressure within one hour. An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.
2. **Line tightness testing.** A periodic test of piping may be conducted only if it can detect a one-tenth gallon [.38 liter] per hour leak rate at one and one-half times the operating pressure.
3. **Applicable tank methods.** Any of the methods in subsections 5 through 8 of section 33-24-08-33 may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.
4. **Interstitial monitoring.** Interstitial monitoring of secondary containment piping shall be conducted in the following manner:
  - a. The interstitial space or sump shall be monitored continuously, by means of an automatic leak-sensing device that signals the operator of the presence of any regulated substance in the interstitial space or sump; or monthly, by means of a procedure, such as visual monitoring, capable of detecting the presence of any regulated substance in the interstitial space or sump.
  - b. The interstitial space or sump shall be maintained free of water, debris, or anything that could interfere with leak detection capabilities.
  - c. On an annual basis, any sump shall be visually inspected for integrity of sides and floor and tightness of piping penetration

seals. Any automatic leak-sensing device shall be tested for proper function.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-36. ~~[Reserved]~~ Applicability (delivery prohibition).**

1. Tank owners and operators and product deliverers are responsible for ensuring that product is not delivered, deposited, or accepted into an underground storage tank identified by the department as ineligible to receive product.
2. For purposes of this section the term "underground storage tank" means those tanks that satisfy the definition of petroleum underground storage tank system in section 33-24-08-03, except for those tanks identified as excluded or deferred storage tanks.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-37. ~~[Reserved]~~ Criteria for delivery prohibition.**

1. An underground storage tank shall be classified as ineligible for delivery, deposit, or acceptance of product upon determination by the department that the underground storage tank meets one or more of the following conditions:
  - a. Spill prevention equipment as required by this chapter is not installed;
  - b. Overfill protection equipment as required by this chapter is not installed;
  - c. Leak detection equipment as required by this chapter is not installed;
  - d. Corrosion protection equipment as required by this chapter is not installed; or
  - e. Other conditions which the department determines may present an imminent and substantial endangerment to public health and the environment.
2. The department may also classify an underground storage tank as ineligible for delivery, deposit, or acceptance of product if the owner or operator of that tank has been issued a written warning or citation (for

example, field citation, warning letter, notice of violation), and has failed to take corrective action, within a reasonable period of time determined by the department, under any of the following circumstances:

- a. Failure to properly operate or maintain leak detection equipment;
  - b. Failure to properly operate or maintain spill, overfill, or corrosion protection equipment;
  - c. Failure to maintain financial responsibility;
  - d. Failure to protect a buried metal flexible connector from corrosion;  
or
  - e. Other conditions which the department determines may present an imminent and substantial endangerment to public health and the environment.
3. The department shall retain the discretion to decide whether to identify an underground storage tank as ineligible to deliver, deposit, or accept product based on whether the prohibition is in the best interest of the public. In those cases where prohibition of delivery, deposit, or acceptance of product to an underground storage tank is not in the best interest of the public (for example, certain emergency generator underground storage tanks), the department may classify an underground storage tank as ineligible to receive product but authorize an emergency delivery.
4. The department may also consider not treating an underground storage tank as ineligible for delivery, deposit, or acceptance of product if such treatment would jeopardize the availability of, or access to, motor fuel in any rural and remote areas. The department shall only defer application of delivery prohibition for up to one hundred eighty days after determining an underground storage tank is ineligible for delivery, deposit, or acceptance of product.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-38. [Reserved] Mechanisms for designating tanks ineligible for delivery.**

1. Upon identifying an underground storage tank as ineligible for delivery, deposit, or acceptance of product, the department shall notify tank owners or operators in writing (for example, field notification or mail) prior to prohibiting the delivery, deposit, or acceptance of product into the ineligible tank.

2. After reasonable effort is made to notify the underground storage tank owner or operator in writing, the department may affix a "red tag" to the fill pipe of the noncompliant underground storage tank system using a tamper-resistant strap or straps, fill pipe bag, or any combination thereof so that the tag clearly identifies the tank as ineligible to receive product.
3. The department shall develop a process and procedure for notifying product deliverers when an underground storage tank is ineligible for delivery, deposit, or acceptance of product. Notice shall be made available (for example, electronic listing) to product deliverers within twenty-four hours of an underground storage tank being identified as ineligible to receive product.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-39. [Reserved] Reclassifying ineligible tanks as eligible for delivery.**

1. Upon notification by the owner or operator that the violation or violations has or have been corrected, the department shall confirm compliance.
2. The department shall reclassify an ineligible underground storage tank as eligible to receive product the same day the department confirms that the underground storage tank has been returned to compliance. Likewise, notice shall be made available to product deliverers the same day an ineligible tank has been reclassified as eligible to receive product.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-51. Initial response.** Upon confirmation of a release in accordance with section 33-24-08-42 or after a release from the underground storage tank system is identified in any other manner, owners and operators must perform the following initial response actions within twenty-four hours of a release or within another reasonable period of time determined by the department:

1. Report the release to the department (e.g. for example, by telephone or electronic mail);
2. Take immediate action to prevent any further release of the regulated substance into the environment; and

3. Identify and mitigate fire, explosion, and vapor hazards.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-55. Investigations for soil and ground water cleanup.**

1. In order to determine the full extent and location of soils contaminated by the release and the presence and concentrations of dissolved product contamination in the ground water, owners and operators must conduct investigations of the release, the release site, and the surrounding area possibly affected by the release if any of the following conditions exist:
  - a. There is evidence that ground water wells have been affected by the release (e.g. for example, as found during release confirmation or previous corrective action measures);
  - b. Free product is found to need recovery in compliance with section 33-24-08-54;
  - c. There is evidence that contaminated soils may be in contact with ground water (e.g. for example, as found during conduct of the initial response measures or investigations required under sections 33-24-08-50 through 33-24-08-54); and
  - d. The department requests an investigation, based on the potential effects of contaminated soil or ground water on nearby surface water and ground water resources.
2. Owners and operators must submit the information collected under subsection 1 as soon as practicable or in accordance with a schedule established by the department.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-80. Applicability (financial responsibility).**

1. Sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106 apply to owners and operators of all petroleum underground storage tank systems except as otherwise provided.
2. Owners and operators of petroleum underground storage tank systems are subject to these requirements if they are in operation on or after the date for compliance established in section 33-24-08-81.

3. State and federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106.
4. The requirements of sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106 do not apply to owners or operators of any underground storage tank system described in subsection 2 or 3 of section 33-24-08-01.
5. If the owner and operator of a petroleum underground storage tank are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in event of noncompliance. Regardless of which party complies, the date set for compliance at a particular facility is determined by the characteristics of the owner as set forth in section 33-24-08-81.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-81. Financial responsibility compliance dates.** Owners of petroleum underground storage tanks are required to comply with the requirements of sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106 by the following dates:

1. All petroleum marketing firms owning one thousand or more underground storage tanks and all other underground storage tank owners that report a tangible net worth of twenty million dollars or more to the United States securities and exchange commission, dun and bradstreet, the energy information administration, or the rural electrification administration - January 24, 1989, except that compliance with subsection 2 of section 33-24-08-84 is required by July 24, 1989.
2. All petroleum marketing firms owning one hundred to nine hundred ninety-nine underground storage tanks - October 26, 1989.
3. All petroleum marketing firms owning thirteen to ninety-nine underground storage tanks at more than one facility - April 26, 1991.
4. All petroleum underground storage tank owners not described in subsection 1, 2, or 3, excluding all local government entities - December 31, 1992 1993.
5. All local government entities - ~~one year from the date of promulgation by the environmental protection agency of additional mechanisms for use by local government entities to comply with financial responsibility~~

~~requirements for underground storage tanks containing petroleum~~  
February 18, 1994.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-82. Definitions (financial responsibility).** When used in sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106, the following terms have the meanings given below:

1. "Accidental release" means any sudden or nonsudden release of petroleum from an underground storage tank that results in a need for corrective action or compensation for bodily injury or property damage, or both, neither expected nor intended by the tank owner or operator.
2. "Bodily injury" has the meaning given to this term by applicable state law; however, this term does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.
3. "Chief financial officer", in the case of local government owners and operators, means the individual with overall authority and responsibility for the collection, disbursement, and use of funds by the local government.
4. "Controlling interest" means direct ownership of at least fifty percent of the voting stock of another entity.
- ~~4.~~ 5. "Department" means the North Dakota state department of health and ~~consolidated laboratories.~~
- ~~5.~~ 6. "Financial reporting year" means the latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:
  - a. A 10-K report submitted to the securities and exchange commission;
  - b. An annual report of tangible net worth submitted to dun and bradstreet; or
  - c. Annual reports submitted to the energy information administration or the rural electrification administration. ~~"Financial reporting year" may thus comprise a fiscal year or a calendar year period.~~

"Financial reporting year" may thus comprise a fiscal year or a calendar year period.

- 6- 7. "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought:
- a. By the environmental protection agency or a state to require corrective action or to recover the costs of corrective action;
  - b. By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or
  - c. By any person to enforce the terms of a financial assurance mechanism.
8. 8. "Local government" has the meaning given this term by applicable state law. The term is generally intended to include:
- a. Counties, municipalities, townships, separately chartered and operated special districts (including local government public transit systems and redevelopment authorities), and independent school districts authorized as governmental bodies by state charter or constitution; and
  - b. Special districts and independent school districts established by counties, municipalities, townships, and other general purpose governments to provide essential services.
- 7- 9. "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank. (NOTE: This definition is intended to assist in the understanding of these rules and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence".)
- 8- 10. "Owner or operator", when the owner or operator are separate parties, refers to the party that is obtaining or has obtained financial assurances.
- 9- 11. "Petroleum marketing facilities" include all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.
- 40- 12. "Petroleum marketing firms" are all firms owning petroleum marketing facilities. Firms owning other types of facilities with underground storage tanks as well as petroleum marketing facilities are considered to be petroleum marketing firms.
- 44- 13. "Property damage" has the meaning given this term by applicable state law. This term does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage

in liability insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

- ~~42-~~ 14. "Provider of financial assurance" means an entity that provides financial assurance to an owner or operator of an underground storage tank through one of the mechanisms listed in sections 33-24-08-85 through 33-24-08-93, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.
- ~~43-~~ 15. "Substantial business relationship" means the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.
16. "Substantial governmental relationship" means the extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is insured incident to that relationship if it arises from a clear commonality of interest in the event of an underground storage tank release such as coterminous boundaries, overlapping constituencies, common ground water aquifer, or other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.
- ~~44-~~ 17. "Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.
- ~~45-~~ 18. "Termination" under subdivisions a and b of subsection 2 of section 33-24-08-87 means only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-84. Allowable mechanisms and combinations of mechanisms.**

1. Subject to the limitations of subsections 2 and 3, an owner or operator, including a local government owner or operator may use any one or combination of the mechanisms listed in sections 33-24-08-85 through 33-24-08-93 to demonstrate financial responsibility under sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106 for one or more underground storage tanks.
2. A local government owner or operator may use any one or combination of the mechanisms listed in sections 33-24-08-94 through 33-24-08-97 to demonstrate financial responsibility under sections 33-24-08-80 through 33-24-08-106 for one or more underground storage tanks.
3. An owner or operator may use a guarantee under section 33-24-08-86 or surety bond under section 33-24-08-88 to establish financial responsibility only if the ~~attorneys attorney~~ attorney general of the states in which the underground storage tanks are located ~~have~~ has submitted a written statement to the department that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in that the state.
- ~~3.~~ 4. An owner or operator may use self-insurance in combination with a guarantee only if, for the purpose of meeting the requirements of the financial test under this ~~section~~ chapter, the financial statements of the owner or operator are not consolidated with the financial statements of the guarantor.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-85. Financial test of self-insurance.**

1. An owner or operator, or guarantor, or both, may satisfy the requirements of section 33-24-08-83 by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner or operator, or guarantor, or both, must meet the criteria of subsection 2 or 3 based on yearend financial statements for the latest completed fiscal year.
2. The following apply:
  - a. The owner or operator, or guarantor, or both, must have a tangible net worth of at least ten times:
    - (1) The total of the applicable aggregate amount required by section 33-24-08-83, based on the number of underground storage tanks for which a financial test is used to demonstrate financial responsibility to the department;

- (2) The sum of the corrective action cost estimates, the current closure and postclosure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial responsibility to the department under sections 33-24-05-58, 33-24-05-77, and 33-24-05-79; and
  - (3) The sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial responsibility to the department under chapter 33-25-01.
- b. The owner or operator, or guarantor, or both, must have a tangible net worth of at least ten million dollars.
  - c. The owner or operator, or guarantor, or both, must have a letter signed by the chief financial officer worded as specified in subsection 4.
  - d. The owner or operator, or guarantor, or both, must either:
    - (1) File financial statements annually with the United States securities and exchange commission, the energy information administration, or the rural electrification administration; or
    - (2) Report annually the firm's tangible net worth to dun and bradstreet, and dun and bradstreet must have assigned the firm a financial strength rating of 4A or 5A.
  - e. The firm's yearend financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.
3. The following apply:
- a. The owner or operator, or guarantor, or both, must meet the financial test requirements of subdivision a of subsection 6 of section 33-24-05-79, substituting the appropriate amounts specified in subdivisions a and b of subsection 2 of section 33-24-08-83 for the "amount of liability coverage" each time specified in that section;
  - b. The fiscal yearend financial statements of the owner or operator, or guarantor, or both, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination;
  - c. The firm's yearend financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification;

- d. The owner or operator, or guarantor, or both, must have a letter signed by the chief financial officer, worded as specified in subsection 4; and
  - e. If the financial statements of the owner or operator, or guarantor, or both, are not submitted annually to the United States securities and exchange commission, the energy information administration or the rural electrification administration, the owner or operator, or guarantor, or both, must obtain a special report by an independent certified public accountant stating that:
    - (1) The certified public accountant has compared the data that the letter from the chief financial officer specifies as having been derived from the latest yearend financial statements of the owner or operator, or guarantor, or both, with the amounts in such financial statements; and
    - (2) In connection with that comparison, no matters came to the certified public accountant's attention which caused the certified public accountant to believe that the specified data should be adjusted.
4. To demonstrate that it meets the financial test under subsection 2 or 3, the chief financial officer of the owner or operator, or guarantor, must sign, within one hundred twenty days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

#### Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator, or guarantor]. This letter is in support of the use of [insert: "the financial test of self-insurance", and/or "guarantee"] to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this [insert: "owner or operator", and/or "guarantor"]: [List for each facility: the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this

financial test by the tank identification number provided in the notification submitted pursuant to state requirements.]

A [insert: "financial test", and/or "guarantee"] is also used by this [insert: "owner or operator", or "guarantor"] to demonstrate evidence of financial responsibility in the following amounts under other environmental protection agency regulations or state programs authorized by the environmental protection agency under 40 CFR Parts 271 and 145:

EPA Regulations	Amount
Closure [§§264.143 and 265.143]	\$ _____
Postclosure Care [§§264.145 and 265.145]	\$ _____
Liability Coverage [§§264.147 and 265.147]	\$ _____
Corrective Action [§264.101(b)]	\$ _____
Plugging and Abandonment [§144.63]	\$ _____
Closure	\$ _____
Postclosure Care	\$ _____
Liability Coverage	\$ _____
Corrective Action	\$ _____
Plugging and Abandonment	\$ _____
Total	\$ _____

This [insert: "owner or operator", or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on his financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of subsection 2 of section 33-24-08-85 are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of subsection 3 of section 33-24-08-85 are being used to demonstrate compliance with the financial test requirements.]

#### ALTERNATIVE I

1. Amount of annual underground storage tank aggregate coverage being assured by a financial test, and/or guarantee \$ \_\_\_\_\_
2. Amount of corrective action, closure and postclosure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee \$ \_\_\_\_\_
3. Sum of lines 1 and 2 \$ \_\_\_\_\_
4. Total tangible assets \$ \_\_\_\_\_
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] \$ \_\_\_\_\_

- |   |          |       |       |
|---|----------|-------|-------|
| 6. Tangible net worth [subtract line 5 from line 4]   | \$ _____ |       |       |
|   |          | Yes   | No    |
| 7. Is line 6 at least \$10 million?   | _____    | _____ | _____ |
| 8. Is line 6 at least 10 times line 3?  | _____    | _____ | _____ |
| 9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission?   | _____    | _____ | _____ |
| 10. Have financial statements for the latest fiscal year been filed with the Energy Information Administration?   | _____    | _____ | _____ |
| 11. Have financial statements for the latest fiscal year been filed with the Rural Electrification Administration?  | _____    | _____ | _____ |
| 12. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? [Answer "Yes" only if both criteria have been met.] | _____    | _____ | _____ |

**ALTERNATIVE II**

- |  |          |       |       |
|--|----------|-------|-------|
| 1. Amount of annual underground storage tank aggregate coverage being assured by a test, and/or guarantee  | \$ _____ |       |       |
| 2. Amount of corrective action, closure and postclosure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee | \$ _____ |       |       |
| 3. Sum of lines 1 and 2  | \$ _____ |       |       |
| 4. Total tangible assets   | \$ _____ |       |       |
| 5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] | \$ _____ |       |       |
| 6. Tangible net worth [subtract line 5 from line 4]  | \$ _____ |       |       |
| 7. Total assets in the United States [required only if less than 90 percent of assets are located in the United States]  | \$ _____ |       |       |
|  |          | Yes   | No    |
| 8. Is line 6 at least \$10 million?  | _____    | _____ | _____ |
| 9. Is line 6 at least 6 times line 3?  | _____    | _____ | _____ |

- 10. Are at least 90 percent of assets located in the United States? [If "No", complete line 11.] \_\_\_\_\_
  - 11. Is line 7 at least 6 times line 3? [Fill in either lines 12-15 or lines 16-18:] \_\_\_\_\_
  - 12. Current assets \$ \_\_\_\_\_
  - 13. Current liabilities \$ \_\_\_\_\_
  - 14. Net working capital [subtract line 13 from line 12] \$ \_\_\_\_\_
- |   | Yes   | No    |
|---|-------|-------|
| 15. Is line 14 at least 6 times line 3?   | _____ | _____ |
| 16. Current bond rating of most recent bond issue:  | _____ |       |
| 17. Name of rating service:   | _____ |       |
| 18. Date of maturity of bond:   | _____ |       |
| 19. Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural Electrification Administration? | _____ | _____ |

[If "No", please attach a report from an independent certified public accountant certifying that there are no material differences between data as reported in lines 4-18 above and the financial statements for the latest fiscal year.]

[For both Alternative I and Alternative II complete the certification with this statement.]

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33-24-08-85, ~~chapter 33-24-08~~, as such regulations rules were constituted on the date shown immediately below.

[Signature]  
 [Name]  
 [Title]  
 [Date]

- 5. If an owner or operator using the test to provide financial assurance finds that the owner or operator no longer meets the requirements of the financial test based on the yearend financial statements, the owner or operator must obtain alternative coverage within one hundred fifty days of the end of the year for which financial statements have been prepared.
- 6. The department may require reports of financial condition at any time from the owner or operator, or guarantor, or both. If the department

finds, on the basis of such reports or other information, that the owner or operator, or guarantor, or both, no longer meets the financial test requirements of subsections 2 or 3 and 4 of section 33-24-08-85, the owner or operator must obtain alternate coverage within thirty days after notification of such a finding.

7. If the owner or operator fails to obtain alternate assurance within one hundred fifty days of finding that the owner or operator no longer meets the requirements of the financial test based on the yearend financial statements, or within thirty days of notification by the department that the owner or operator no longer meets the requirements of the financial test, the owner or operator must notify the department of such failure within ten days.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-86. Guarantee.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:
  - a. A firm that:
    - (1) Possesses a controlling interest in the owner or operator;
    - (2) Possesses a controlling interest in a firm described under paragraph 1 of subdivision a of subsection 1; or
    - (3) Is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or
  - b. A firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.
2. Within one hundred twenty days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of section 33-24-08-85 based on yearend financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in subsection 4 of section 33-24-08-85 and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within one hundred twenty days of the end of that financial reporting year the guarantor shall send via certified mail, before cancellation or nonrenewal of the guarantee,

notice to the owner or operator. If the department notifies the guarantor that the guarantor no longer meets the requirements of the financial test of subsections 2 or 3 and 4 of section 33-24-08-85, the guarantor must notify the owner or operator within ten days of receiving such notification from the department. In both cases, the guarantee will terminate no less than one hundred twenty days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in subsection 3 of section 33-24-08-100.

3. The guarantee must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

### **GUARANTEE**

Guarantee made this [date] by [name of guaranteeing entity], a business entity organized under the laws of the state of [name of state], herein referred to as guarantor, to ~~{the state implementing agency}~~ the department and to any and all third parties, and obligees, on behalf of [owner or operator] of [business address].

#### **Recitals.**

- (1) Guarantor meets or exceeds the financial test criteria of subsections 2 or 3 and 4 of section 33-24-08-85 and agrees to comply with the requirements for guarantors as specified in subsection 2 of section 33-24-08-86.
- (2) [Owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility. This guarantee satisfies sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.

- (3) [Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator); "On behalf of our affiliate" (if guarantor is a related firm of the owner or operator); or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)][owner or operator], guarantor guarantees to ~~implementing agency~~ the department and to any and all third parties that:

In the event that [owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the ~~department~~ department has determined or suspects a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the ~~department~~ department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-98, in an amount not to exceed the coverage limits specified above.

In the event that the ~~department~~ department determines that [owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor upon written instructions from the ~~department~~ department shall fund a standby trust in accordance with the provisions of section 33-24-08-98, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from, or alleged to arise from, such injury or damage, the guarantor, upon written instructions from the ~~department~~ department, shall fund a standby trust in accordance with the provisions of section 33-24-08-98 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of subsections 2 or 3 and 4 of section 33-24-08-85, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [owner or operator]. The guarantee will terminate one hundred twenty days from the date of receipt of the notice by [owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy)

United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.

- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106 for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily damage or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by ~~the department~~ the department, by any or all third parties, or by [owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 3 of section 33-24-08-86 as such regulations rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

\_\_\_\_\_

4. An owner or operator who uses a guarantee to satisfy the requirements of section 33-24-08-83 must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the department under section 33-24-08-98. The standby trust fund must meet the requirements specified in section 33-24-08-93.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-87. Insurance and risk retention group coverage.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. Such insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.
2. Each insurance policy must be amended by an endorsement worded as specified in subdivision a, or evidenced by a certificate of insurance worded as specified in subdivision b, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:

a. Endorsement

Name: [name of each covered location] \_\_\_\_\_

Address: [address of each covered location] \_\_\_\_\_

Policy Number: \_\_\_\_\_

Period of Coverage: [current policy period] \_\_\_\_\_

Name of [Insurer or Risk Retention Group]: \_\_\_\_\_

Address of [Insurer or Risk Retention Group]: \_\_\_\_\_

Name of Insured: \_\_\_\_\_

Address of Insured: \_\_\_\_\_

**Endorsement:**

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility.]

for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs, which are subject to a separate limit under the policy. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subsections a through e of this paragraph 2 are hereby amended to conform with subsections a through e;
  - a. Bankruptcy or insolvency of the insured shall not relieve the ["Insurer" or "Group"] of its obligations under the policy to which this endorsement is attached.
  - b. The ["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged

third party, with a right of reimbursement by the insured for any such payment made by the ["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in sections 33-24-08-85 through 33-24-08-92.

- c. Whenever requested by the ~~{department}~~ department, the ["Insurer" or "Group"] agrees to furnish to the ~~{department}~~ department a signed duplicate original of the policy and all endorsements.
- d. Cancellation or any other termination of the insurance by the ["Insurer" or "Group"]; except for nonpayment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty days after a copy of such written notice is received by the insured. Cancellation for nonpayment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

- e. The insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or "Group"] within six months of the effective date of cancellation or nonrenewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in subdivision a of subsection 2 of section 33-24-08-87 and that the ["Insurer" or "Group"] is ["licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states"].

[Signature of authorized representative of Insurer or Risk Retention Group]

[Name of person signing]

[Title of person signing], Authorized Representative of [name of Insurer or Risk Retention Group]

[Address of Representative]

b. Certificate of insurance

Name: [name of each covered location] \_\_\_\_\_  
Address: [address of each covered location] \_\_\_\_\_  
Policy Number: \_\_\_\_\_  
Endorsement: [if applicable] \_\_\_\_\_  
Period of Coverage: [current policy period] \_\_\_\_\_  
Name of [Insurer or Risk Retention Group]: \_\_\_\_\_  
Address of [Insurer or Risk Retention Group]: \_\_\_\_\_  
\_\_\_\_\_  
Name of Insured: \_\_\_\_\_  
Address of Insured: \_\_\_\_\_  
\_\_\_\_\_

Certification:

1. [Name of Insurer or Risk Retention Group], [the "Insurer" or "Group"], as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility.]

for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs, which are subject to a separate limit under the policy. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The ["Insurer" or "Group"] further certifies the following with respect to the insurance described in paragraph 1:
  - a. Bankruptcy or insolvency of the insured shall not relieve the ["Insurer" or "Group"] of its obligations under the policy to which this certificate applies.
  - b. The ["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third party, with a right of reimbursement by the insured for any such payment made by the ["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in sections 33-24-08-85 through 33-24-08-92.
  - c. Whenever requested by the ~~[department]~~ department, the ["Insurer" or "Group"] agrees to furnish to the ~~[department]~~ department a signed duplicate original of the policy and all endorsements.
  - d. Cancellation or any other termination of the insurance by the ["Insurer" or "Group"], except for nonpayment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of sixty days after a copy of such written notice is received by the insured. Cancellation for nonpayment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

- e. The insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or

"Group"] within six months of the effective date of cancellation or nonrenewal of the policy except where the new or renewed policy has the same retroactive data or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive data, if applicable, and prior to such policy renewal or termination data. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in subdivision b of subsection 2 of section 33-24-08-87 and that the ["Insurer" or "Group"] is ["licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states"].

[Signature of authorized representative of Insurer]  
[Type name]  
[Title], Authorized Representative of [name of Insurer or Risk Retention Group]  
[Address of Representative]

3. Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-88. Surety bond.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest circular 570 of the United States department of the treasury.
2. The surety bond must be worded as follows, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:

**Performance Bond**

Date bond executed: \_\_\_\_\_

Period of coverage: \_\_\_\_\_

Principal: [legal name and business address  
of owner or operator]: \_\_\_\_\_

Type of organization: [insert "individual",  
"joint venture", "partnership", or  
"corporation"]:

State of incorporation (if applicable): \_\_\_\_\_

Surety(ies): [name(s) and business  
address(es)]: \_\_\_\_\_

Scope of Coverage: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility. List the coverage guaranteed by the bond: "taking corrective action" provided in the notification submitted pursuant to and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank"].

Penal sums of bond:

Per occurrence \$ \_\_\_\_\_

Annual aggregate \$ \_\_\_\_\_

Surety's bond number: \_\_\_\_\_

Know all Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to ~~{the department}~~ the department, in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under section 23-20.3-04.1 of the North Dakota Century Code to provide financial assurance for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully ["take corrective action, in accordance with sections 33-24-08-50 through 33-24-08-57 and the department's instructions for", and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden" or "nonsudden" or "sudden and nonsudden"] accidental releases arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106, within one hundred twenty days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the ~~{department}~~ department that the Principal has failed to ["take corrective action, in accordance with chapter 33-24-08, sections 33-24-08-50 through 33-24-08-57 and the department's instructions", and/or "compensate injured third parties"] as guaranteed by this bond, the Surety(ies) shall either perform ["corrective action in accordance with chapter 33-24-08 and the department's instructions", and/or "third-party liability compensation"] or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the ~~{department}~~ department under section 33-24-08-98.

Upon notification by the ~~{department}~~ department that the Principal has failed to provide alternate financial assurance within sixty days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the ~~{department}~~ department has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the ~~{department}~~ department under section 33-24-08-98.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its(their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the one hundred twenty days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Thereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to

the wording specified in subsection 2 of section 33-24-08-88 as such regulations rules were constituted on the date this bond was executed.

Principal  
[Signature(s)]  
[Name(s)]  
[Title(s)]  
[Corporate seal]

Corporate Surety(ies)

[Name and address]  
[State of Incorporation: \_\_\_\_\_]  
[Liability limit: \$ \_\_\_\_\_]  
[Signature(s)]  
[Name(s) and title(s)]  
[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: \$ \_\_\_\_\_

3. Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.
4. The owner or operator who uses a surety bond to satisfy the requirements of section 33-24-08-83 must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the department under section 33-24-08-98. This standby trust fund must meet the requirements specified in section 33-24-08-93.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-89. Letter of credit.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section. The issuing institution must be an entity that has the authority to issue letters of credit in each state where used and whose letter-of-credit operations are regulated and examined by a federal or state agency.

2. The letter of credit must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

### **Irrevocable Standby Letter of Credit**

[Name and address of issuing institution]

[Name and address of ~~director(s) of state implementing agency(ies)~~ the department]

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of [in words] U.S. dollars (\$[insert dollar amount]), available upon presentation [insert, if more than one ~~director of a state implementing agency~~ department is a beneficiary, "by any one of you"] of

- (1) Your sight draft, bearing reference to this letter of credit, No. \_\_\_\_\_, and
- (2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations rules issued under authority of chapter 23-20.3-04.1 of the North Dakota Century Code".

This letter of credit may be drawn on to cover [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the underground storage tank(s) identified below in the amount of [in words] \$ [insert dollar amount] per occurrence and [in words] \$ [insert dollar amount] annual aggregate:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to section 33-24-08-12, and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended for a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least one hundred twenty days before the current expiration date, we notify [owner or operator] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that [owner or operator] is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for one hundred twenty days after the date of receipt by [owner or operator], as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner or operator] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in subsection 2 of section 33-24-08-89 as such ~~regulations~~ rules were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]  
[Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce", or "the Uniform Commercial Code"].

3. An owner or operator who uses a letter of credit to satisfy the requirements of section 33-24-08-83 must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the

letter of credit, all amounts paid pursuant to a draft by the department will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the department under section 33-24-08-98. This standby trust fund must meet the requirements specified in section 33-24-08-93.

4. The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit must provide that credit be automatically renewed for the same term as the original term, unless, at least one hundred twenty days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the one hundred twenty days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-91. State fund or other state assurance. [Reserved]**

**33-24-08-92. Trust fund.**

1. An owner or operator may satisfy the requirements of section 33-24-08-83 by establishing a trust fund that conforms to the requirements of this section. The trustee must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the state in which the fund is established.
2. The wording of the trust agreement must be identical to the wording specified in subdivision a of subsection 2 of section 33-24-08-93, and must be accompanied by a formal certification of acknowledgment as specified in subdivision b of subsection 2 of section 33-24-08-93.
3. The trust fund, when established, must be funded for the full required amount of coverage, or funded for part of the required amount of coverage and used in combination with other mechanisms that provide the remaining required coverage.
4. If the value of the trust fund is greater than the required amount of coverage, the owner or operator may submit a written request to the department for release of the excess.
5. If other financial assurance as specified in sections 33-24-08-80 through ~~33-24-08-102~~ 33-24-08-106 is substituted for all or part of the trust fund, the owner or operator may submit a written request to the department for release of the excess.

6. Within sixty days after receiving a request from the owner or operator for release of funds as specified in subsection 4 or 5, the department will instruct the trustee to release to the owner or operator such funds as the department specifies in writing.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

### **33-24-08-93. Standby trust fund.**

1. An owner or operator using any one of the mechanisms authorized by section 33-24-08-86, 33-24-08-88, or 33-24-08-89 must establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the state in which the fund is established.
2. The following apply:
  - a. The standby trust agreement, or trust agreement, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

#### **Trust Agreement**

Trust agreement, the "Agreement", entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert "corporation", "partnership", "association", or "proprietorship"], the "Grantor", and [name of corporate trustee], [insert "Incorporated in the state of \_\_\_\_\_" or "a national bank"], the "Trustee".

Whereas, the department has established certain regulations rules applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed for corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the standby trust agreement.

[Whereas, the Grantor has elected to establish [insert either "a guarantee", "surety bond", or "letter of credit"] to provide all or part of such financial assurance for the underground storage tanks identified herein and is required to establish a standby trust fund able to accept payments from the instrument (This paragraph is only applicable to the standby trust agreement.)];

[Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

#### Section 1. Definitions.

As used in this Agreement:

- (a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.
- (b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

#### Section 2. Identification of the Financial Assurance Mechanism.

This Agreement pertains to the [identify the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments (This paragraph is only applicable to the standby trust agreement.)].

#### Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund", for the benefit of [the department]. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided [The Fund is established initially as a standby to receive payments and shall not consist of any property.]. Payments made by the provider of financial assurance pursuant to the [department's] instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the {~~department~~} department.

#### Section 4. Payment for ["Corrective Action" and/or "Third-Party Liability Claims"].

The Trustee shall make payments from the Fund as [the department] shall direct, in writing, to provide for the payment of the costs of [insert: "taking corrective action" and/or "compensating third-parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"]

arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

- (a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- (b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of employment by [insert owner or operator];
- (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;
- (e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.

The Trustee shall reimburse the Grantor, or other persons as specified by the ~~{department}~~ department, from the Fund for corrective action expenditures and/or third-party liability claims in such amounts as the ~~{department}~~ department shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the ~~{department}~~ department specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

#### Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

#### Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge the duties of the Trustee with

respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (i) Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;
- (ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and
- (iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

#### Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

#### Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;
- (d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and
- (e) To compromise or otherwise adjust all claims in favor of or against the Fund.

#### **Section 9. Taxes and Expenses.**

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

#### **Section 10. Advice of Counsel.**

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

#### **Section 11. Trustee Compensation.**

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

#### Section 12. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail ten days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

#### Section 13. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the ~~{department}~~ department to the Trustee shall be in writing, signed by the ~~{department}~~ department, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the ~~{department}~~ department hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the ~~{department}~~ department, except as provided for herein.

#### Section 14. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and [the department] if the Grantor ceases to exist.

#### Section 15. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the ~~{department}~~ department, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

**Section 16. Immunity and Indemnification.**

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the ~~{department}~~ department issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

**Section 17. Choice of Law.**

This agreement shall be administered, construed, and enforced according to the laws of the state of ~~{insert name of state}~~ North Dakota, or the Comptroller of the Currency in the case of National Association of Banks.

**Section 18. Interpretation.**

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in subdivision a of subsection 2 of section 33-24-08-93 as such ~~regulations~~ rules were constituted on the date written above.

[Signature of Grantor]

[Name of the Grantor]

[Title]

Attest:

[Signature of Trustee]

[Name of the Trustee]

[Title]

[Seal]  
[Signature of Witness]  
[Name of the Witness]  
[Title]  
[Seal]

- b. The standby trust agreement, or trust agreement, must be accompanied by a formal certification of acknowledgment similar to the following.

State of \_\_\_\_\_  
County of \_\_\_\_\_

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that the owner or operator resides at [address], that the owner or operator is [title] of [corporation], the corporation described in and which executed the above instrument; that the owner or operator knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that the owner or operator signed their name thereto by like order.

[Signature of Notary Public]  
[Name of Notary Public]

3. The department will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the department determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.
4. An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this section chapter.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-94. Substitution of financial assurance mechanisms by owner or operator Local government bond rating test.**

1. ~~An owner or operator may substitute any alternate financial assurance mechanisms as specified in sections 33-24-08-80 through 33-24-08-102, provided that at all times the owner or operator maintains an effective financial assurance mechanism or combination of mechanisms that satisfies the requirements of section~~

33-24-08-83: A general purpose local government owner or operator, or local government, or both, serving as a guarantor may satisfy the requirements of section 33-24-08-83 currently outstanding issue or issues of general obligation bonds of one million dollars or more, excluding refunded obligations, with a Moody's rating of Aaa, Aa, A, or Baa, or a Standard and Poor's rating of AAA, AA, A, or BBB. Where a local government has multiple outstanding issues, or where a local government's bonds are rated by both Moody's and Standard and Poor's, the lowest rating must be used to determine eligibility. Bonds that are backed by credit enhancement other than municipal bond insurance may not be considered in determining the amount of applicable bonds outstanding.

2. After obtaining alternate financial assurance as specified in sections 33-24-08-80 through 33-24-08-102, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance. A local government owner or operator or local government serving as a guarantor that is not a general purpose local government and does not have the legal authority to issue general obligation bonds may satisfy the requirements of section 33-24-08-83 by having a currently outstanding issue or issues of revenue bonds of one million dollars or more, excluding refunded issues and by also having a Moody's rating of Aaa, Aa, A, or Baa, or a Standard and Poor's rating of AAA, AA, A, or BBB as the lowest rating for any rated revenue bond issued by the local government. Where bonds are rated by both Moody's and Standard and Poor's, the lower rating for each bond must be used to determine eligibility. Bonds that are backed by credit enhancement may not be considered in determining the amount of applicable bonds outstanding.
3. The local government owner or operator or guarantor, or both, must maintain a copy of its bond rating published within the last twelve months by Moody's or Standard and Poor's.
4. To demonstrate that it meets the local government bond rating test, the chief financial officer of a general purpose local government owner or operator, or guarantor, or both, must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and

[insert: dollar amount] annual aggregate arising from operating (an) underground storage tank or tanks.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

<u>Issue Date</u>	<u>Maturity Date</u>	<u>Outstanding Amount</u>	<u>Bond Rating</u>	<u>Rating Agency</u> <u>[Moody's or Standard and Poor's]</u>
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The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of one million dollars. All outstanding general obligation bonds issued by this government that have been rated by Moody's or Standard and Poor's are rated as at least investment grade (Moody's Baa or Standard and Poor's BBB) based on the most recent ratings published within the last twelve months. Neither rating service has provided notification within the last twelve months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33-24-08-94 as such rules were constituted on the date shown immediately below.

[Date]  
[Signature]  
[Name]  
[Title]

5. To demonstrate that it meets the local government bond rating test, the chief financial officer of local government owner or operator, or guarantor, or both, other than a general purpose government must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of one million dollars. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard and Poor's are rated

as at least investment grade (Moody's Baa or Standard and Poor's BBB) based on the most recent ratings published within the last twelve months. The revenue bonds listed are not backed by third-party credit enhancement or are insured by a municipal bond insurance company. Neither rating service has provided notification within the last twelve months of downgrading of bond ratings below an investment grade nor of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 5 of section 33-24-08-94 as such rules were constituted on the date shown immediately below.

[Date]

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating an underground storage tank or tanks. This local government is not organized to provide general governmental services and does not have the legal authority under state law or constitutional provisions to issue general obligation debt.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding revenue bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

<u>Issue</u> <u>Date</u>	<u>Maturity</u> <u>Date</u>	<u>Outstanding</u> <u>Amount</u>	<u>Bond</u> <u>Rating</u>	<u>Rating Agency</u> <u>[Moody's or Standard</u> <u>and Poor's]</u>
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[Signature]  
[Name]  
[Title]

6. The department may require reports of financial condition at any time from the local government owner or operator, or local government guarantor, or both. If the department finds, on the basis of such reports or other information, that the local government owner or operator, or guarantor, or both, no longer meets the local government bond rating test requirements of this section, the local government owner or operator must obtain alternative coverage within thirty days after notification of such a finding.
7. If a local government owner or operator using the bond rating test to provide financial assurance finds that it no longer meets the bond rating test requirements, the local government owner or operator must obtain alternative coverage within one hundred fifty days of the change in status.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-95. ~~Cancellation or nonrenewal by provider of financial assurance~~ Local government financial test.**

1. ~~Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator. A local government owner or operator may satisfy the requirements of section 33-24-08-83 by passing the financial test specified in this section. To be eligible to use the financial test, the local government owner or operator must have the ability and authority to assess and levy taxes or to freely establish fees and charges. To pass the local government financial test, the owner or operator must meet the criteria of subdivision b of subsection 2 and subdivision c of subsection 2 based on yearend financial statements for the latest completed fiscal year.~~
  - a. ~~Termination of a guarantee, a surety bond, or a letter of credit may not occur until one hundred twenty days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.~~
  - b. ~~Termination of insurance or risk retention group coverage, except for nonpayment or misrepresentation by the insured, or state-funded assurance may not occur until sixty days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for nonpayment of premium or misrepresentation by the insured may not occur until a minimum of ten days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.~~

2. ~~If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in section 33-24-08-96, the owner or operator must obtain alternate coverage as specified in this section within sixty days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within sixty days after receipt of the notice of termination, the owner or operator must notify the department of such failure and submit~~ The local government owner or operator must have the following information available, as shown in the yearend financial statements for the latest completed fiscal year:
- a. ~~The name and address of the provider of financial assurance; The following apply:~~
- (1) Total revenues: Consists of the sum of general fund operating and nonoperating revenues including net local taxes, licenses and permits, fines and forfeitures, revenues from use of money and property, charges for services, investment earnings, sales (property, publications, etc.), intergovernmental revenues (restricted and unrestricted), and total revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity. For purposes of this test, the calculation of total revenues shall exclude all transfers between funds under the direct control of the local government using the financial test (interfund transfers), liquidation of investments, and issuance of debt.
- b. (2) ~~The effective date of termination; and~~ Total expenditures: Consists of the sum of general fund operating and nonoperating expenditures including public safety, public utilities, transportation, public works, environmental protection, cultural and recreational, community development, revenue sharing, employee benefits and compensation, office management, planning and zoning, capital projects, interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprises, debt service, capital projects, and special revenues. For purposes of this test, the calculation of total expenditures shall include all transfers between funds under the direct control of the local government using the financial test (interfund transfers).
- c. (3) ~~The evidence of the financial assistance mechanism subject to the termination maintained in accordance with subsection 2 of section 33-24-08-97.~~ Local revenues: Consists of total revenues minus the sum of all transfers from other

governmental entities, including all moneys received from federal, state, or local government sources.

(4) Debt service: Consists of the sum of all interest and principal payments on all long-term credit obligations and all interest-bearing short-term credit obligations. Includes interest and principal payments on general obligation bonds, revenue bonds, notes, mortgages, judgments, and interest-bearing warrants. Excludes payments on noninterest-bearing short-term obligations, interfund obligations, amounts owed in a trust or agency capacity, and advances and contingent loans from other governments.

(5) Total funds: Consists of the sum of cash and investment securities from all funds, including general, enterprise, debt service, capital projects, and special revenue funds, but excluding employee retirement funds, at the end of the local government's financial reporting year. Includes federal securities, federal agency securities, state and local government securities, and other securities such as bonds, notes and mortgages. For purposes of this test, the calculation of total funds shall exclude agency funds, private trust funds, accounts receivable, value of real property and other nonsecurity assets.

(6) Population: Consists of the number of people in the area served by the local government.

b. The local government's yearend financial statements, if independently audited, cannot include an adverse auditor's opinion or a disclaimer of opinion. The local government cannot have outstanding issues of general obligation or revenue bonds that are rated as less than investment grade.

c. The local government owner or operator must have a letter signed by the chief financial officer worded as specified in subsection 3.

3. To demonstrate that it meets the financial test under subsection 2, the chief financial officer of the local government owner or operator, must sign, within one hundred twenty days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator]. This letter is in support of the use of the local

government financial test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating [an] underground storage tank[s].

Underground storage tanks at the following facilities are assured by this financial test [list for each facility: the name and address of the facility where tanks assured by this financial test are located. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to section 33-24-08-12].

This owner or operator has not received an adverse opinion, or a disclaimer of opinion from an independent auditor on its financial statements for the latest completed fiscal year. Any outstanding issues of general obligation or revenue bonds, if rated, have a Moody's rating of Aaa, Aa, A, or Baa or a Standard and Poor's rating of AAA, AA, A, or BBB; if rated by both firms, the bonds have a Moody's rating of Aaa, Aa, A, or Baa and a Standard and Poor's rating of AAA, AA, A, or BBB.

## **WORKSHEET FOR MUNICIPAL FINANCIAL TEST**

### **Part I. Basic Information**

#### **1. Total Revenues**

**a. Revenues (dollars) \_\_\_\_\_**  
Value of revenues excludes liquidation of investments and issuance of debt. Value includes all general fund operating and nonoperating revenues, as well as all revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity.

**b. Subtract interfund transfers (dollars) \_\_\_\_\_**

**c. Total Revenues (dollars) \_\_\_\_\_**

#### **2. Total Expenditures**

**a. Expenditures (dollars) \_\_\_\_\_**  
Value consists of the sum of general fund operating and nonoperating expenditures including interest payments on debt, payments for retirement of debt principal, and total expenditures

from all other governmental funds including enterprise, debt service, capital projects, and special revenues.

b. Subtract interfund transfers (dollars) \_\_\_\_\_

c. Total Expenditures (dollars) \_\_\_\_\_

3. Local Revenues

a. Total Revenues (from 1c) (dollars) \_\_\_\_\_

b. Subtract total intergovernmental transfers (dollars) \_\_\_\_\_

c. Local Revenues (dollars) \_\_\_\_\_

4. Debt Service

a. Interest and fiscal charges (dollars) \_\_\_\_\_

b. Add debt retirement (dollars) \_\_\_\_\_

c. Total Debt Service (dollars) \_\_\_\_\_

5. Total Funds (Dollars) \_\_\_\_\_

(Sum of amounts held as cash and investment securities from all funds, excluding amounts held for employee retirement funds, agency funds, and trust funds.)

6. Population (Persons) \_\_\_\_\_

**Part II: Application of Test**

7. Total Revenues to Population

a. Total Revenues (from 1c) \_\_\_\_\_

b. Population (from 6) \_\_\_\_\_

c. Divide 7a by 7b \_\_\_\_\_

d. Subtract 417 \_\_\_\_\_

e. Divide by 5.212 \_\_\_\_\_

f. Multiply by 4.095 \_\_\_\_\_

8. Total Expenses to Population

- a. Total Expenses (from 2c) \_\_\_\_\_
- b. Population (from 6) \_\_\_\_\_
- c. Divide 8a by 8b \_\_\_\_\_
- d. Subtract 524 \_\_\_\_\_
- e. Divide by 5.401 \_\_\_\_\_
- f. Multiply by 4.095 \_\_\_\_\_

**9. Local Revenues to Total Revenues**

- a. Local Revenues (from 3c) \_\_\_\_\_
- b. Total Revenues (from 1c) \_\_\_\_\_
- c. Divide 9a by 9b \_\_\_\_\_
- d. Subtract .695 \_\_\_\_\_
- e. Divide by .205 \_\_\_\_\_
- f. Multiply by 2.840 \_\_\_\_\_

**10. Debt Service to Population**

- a. Debt Service (from 4d) \_\_\_\_\_
- b. Population (from 6) \_\_\_\_\_
- c. Divide 10a by 10b \_\_\_\_\_
- d. Subtract 51 \_\_\_\_\_
- e. Divide by 1.038 \_\_\_\_\_
- f. Multiply by -1.866 \_\_\_\_\_

**11. Debt Service to Total Revenues**

- a. Debt Service (from 4d) \_\_\_\_\_
- b. Total Revenues (from 1c) \_\_\_\_\_
- c. Divide 11a by 11b \_\_\_\_\_

- d. Subtract .068 \_\_\_\_\_
- e. Divide by .259 \_\_\_\_\_
- f. Multiply by -3.533 \_\_\_\_\_

**12. Total Revenues to Total Expenses**

- a. Total Revenues (from 1c) \_\_\_\_\_
- b. Total Expenses (from 2c) \_\_\_\_\_
- c. Divide 12a by 12b \_\_\_\_\_
- d. Subtract .910 \_\_\_\_\_
- e. Divide by .899 \_\_\_\_\_
- f. Multiply by 3.458 \_\_\_\_\_

**13. Funds Balance to Total Revenues**

- a. Total Funds (from 5) \_\_\_\_\_
- b. Total Revenues (from 1c) \_\_\_\_\_
- c. Divide 13a by 13b \_\_\_\_\_
- d. Subtract .891 \_\_\_\_\_
- e. Divide by 9.156 \_\_\_\_\_
- f. Multiply by 3.270 \_\_\_\_\_

**14. Funds Balance to Total Expenses**

- a. Total Funds (from 5) \_\_\_\_\_
- b. Total Expenses (from 2c) \_\_\_\_\_
- c. Divide 14a by 14b \_\_\_\_\_
- d. Subtract .866 \_\_\_\_\_
- e. Divide by 6.409 \_\_\_\_\_
- f. Multiply by 3.270 \_\_\_\_\_

15. Total Funds to Population \_\_\_\_\_

a. Total Funds (from 5) \_\_\_\_\_

b. Population (from 6) \_\_\_\_\_

c. Divide 15a by 15b \_\_\_\_\_

d. Subtract 270 \_\_\_\_\_

e. Divide by 4.548 \_\_\_\_\_

f. Multiply by 1.866 \_\_\_\_\_

16. Add 7f + 8f + 9f + 10f + 11f + 12f + 13f + 14f + 15f + 4.937

I hereby certify that the financial index shown on line 16 of the worksheet is greater than zero and that the wording of this letter is identical to the wording specified in subsection 3 of section 33-24-08-95 as such rules were constituted on the date shown immediately below.

[Date]

[Signature]

[Name]

[Title]

4. If a local government owner or operator using the test to provide financial assurance finds that it no longer meets the requirements of the financial test based on the yearend financial statements, the owner or operator must obtain alternative coverage within one hundred fifty days of the end of the year for which financial statements have been prepared.
5. The department may require reports of financial condition at any time from the local government owner or operator. If the department finds, on the basis of such reports or other information, that the local government owner or operator no longer meets the financial test requirements of subsections 2 and 5, the owner or operator must obtain alternative coverage within thirty days after notification of such a finding.
6. If the local government owner or operator fails to obtain alternate assurance within one hundred fifty days of finding that it no longer meets the requirements of the financial test based on the yearend financial statements or within thirty days of notification by the department that it no longer meets the requirements of the financial

test, the owner or operator must notify the department of such failure within ten days.

**History:** Effective December 1, 1989; amended effective April 1, 1992; January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-96. Reporting by owner or operator Local government guarantee.**

1. An owner or operator must submit the appropriate forms listed in subsection 2 of section 33-24-08-97 documenting current evidence of financial responsibility to the department: A local government owner or operator may satisfy the requirements of section 33-24-08-83 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be either the estate in which the local government owner or operator is located or a local government having a "substantial governmental relationship" with the owner and operator and issuing the guarantee as an act incident to that relationship. A local government acting as the guarantor must:
  - a. Within thirty days after the owner or operator identifies a release from an underground storage tank required to be reported under section 33-24-08-43 or 33-24-08-51; Demonstrate that it meets the bond rating test requirement of section 33-24-08-94 and deliver a copy of the chief financial officer's letter as contained in subsection 3 of section 33-24-08-94 to the local government owner or operator.
  - b. If the owner or operator fails to obtain alternate coverage as required by sections 33-24-08-80 through 33-24-08-102, within thirty days after the owner or operator receives notice of: Demonstrate that it meets the worksheet test requirements of section 33-24-08-95 and deliver a copy of the chief financial officer's letter as contained in subsection 3 of section 33-24-08-95.
    - (1) Commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming a provider of financial assurance as a debtor;
    - (2) Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;
    - (3) Failure of a guarantor to meet the requirements of the financial test;
    - (4) Other incapacity of a provider of financial assurance; or

- ~~c. As required by subsection 7 of section 33-24-08-85 and subsection 2 of section 33-24-08-95. Demonstrate that it meets the local government fund requirements of subsection 1, 2, or 3 of section 33-24-08-97, and deliver a copy of the chief financial officer's letter as contained in section 33-24-08-97 to the local government owner or operator.~~
2. ~~An owner or operator must certify compliance with the financial responsibility requirements of chapter 33-24-08 as specified in the new tank notification form when notifying the department of the installation of a new underground storage tank under section 33-24-08-12. If the local government guarantor is unable to demonstrate financial assurance under any of sections 33-24-08-94, 33-24-08-95, subsection 1 of section 33-24-08-97, subsection 2 of section 33-24-08-97, or subsection 3 of section 33-24-08-97, at the end of the financial reporting year, the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. The guarantee will terminate no less than one hundred twenty days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in subsection 3 of section 33-24-08-104.~~
3. ~~The department may require an owner or operator to submit evidence of financial assurance as described in subsection 2 of section 33-24-08-97 or other information relevant to compliance with sections 33-24-08-80 through 33-24-08-102 at any time. The guarantee agreement must be worded as specified in subsection 4 or 5, depending on which of the following alternative guarantee arrangements is selected:~~
- ~~a. If, in the default or incapacity of the owner or operator, the guarantor guarantees to fund a standby trust as directed by the department, the guarantee shall be worded as specified in subsection 4.~~
- ~~b. If in the default or incapacity of the owner or operator, the guarantor guarantees to make payments as directed by the department for taking corrective action or compensating third parties for bodily injury and property damage, the guarantee shall be worded as specified in subsection 5.~~
4. ~~If the guarantor is a state, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:~~

Local Government Guarantee With Standby Trust Made by a State

Guarantee made this [date] by North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor is a state.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks, covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility.] This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases", or "nonsudden accidental releases", or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.
- (3) Guarantor guarantees to the department and to any and all third parties:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102, in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the

above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instruction is from the department, shall fund a standby trust in accordance with the provisions of section 33-24-08-102, satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106, for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (7) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law.
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a

contract or agreement entered into to meet the requirements of section 33-24-08-83.

- (8) Guarantor expressly waives notice of acceptance of this guarantee by department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 4 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

If the guarantor is a local government, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee With Standby Trust Made by a Local Government

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of North Dakota, herein referred to a guarantor, to the department, and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of section 33-24-08-94, the local government financial test requirements of section 33-24-08-95, or the local government fund under subsection 1, 2, or 3 of section 33-24-08-97.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility.] This guarantee satisfies sections

33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases": if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.

- (3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to the department and to any and all third parties that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102 in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor upon written instructions from the department shall fund a standby trust fund in accordance with the provisions of section 33-24-08-102, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department shall fund a standby trust in accordance with the provisions of section 33-24-08-102 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

- (4) Guarantor agrees that, if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph 1, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [local

government owner or operator], as evidenced by the return receipt.

- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106 for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt.
- (8) The guarantor's obligation does not apply to any of the following:
  - (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 4 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_  
[Name of guarantor]  
[Authorized signature for guarantor]  
[Name of person signing]  
[Title of person signing]  
Signature of witness or notary: \_\_\_\_\_

5. If the guarantor is a state, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

LOCAL GOVERNMENT GUARANTEE WITHOUT STANDBY TRUST MADE BY A STATE

Guarantee made this [date] by North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor is a state.
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [list the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tank or tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility]. This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
- (3) Guarantor guarantees to the department and to any and all third parties and obligees that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written instructions from the department shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor, upon written instructions from the department, shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department, shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

- (4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106, for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice of certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all

charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.

- (7) The guarantor's obligation does not apply to any of the following:
- (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law:
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator]:
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft:
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (8) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 5 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_  
[Authorized signature for guarantor]  
[Name of person signing]  
[Title of person signing]  
Signature of witness or notary: \_\_\_\_\_

If the guarantor is a local government, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

LOCAL GOVERNMENT GUARANTEE WITHOUT STANDBY TRUST MADE BY A LOCAL GOVERNMENT

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of North Dakota, herein referred to as guarantor, to the department and to any and all third parties, and obligees, on behalf of [local government owner or operator].

Recitals.

- (1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of section 33-24-08-94, the local government financial test requirements of section 33-24-08-95, or the local government fund under subsection 1, 2, or 3 of section 33-24-08-97.
  
- (2) [Local government owner or operator] owns or operates the following underground storage tank or tanks covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to chapter 33-24-08, and the name and address of the facility.] This guarantee satisfies sections 33-24-08-80 through 33-24-08-106 requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank or tanks in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate.
  
- (3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to the department and to any and all third parties and obligees that:

In the event that [local government owner or operator] fails to provide alternative coverage within sixty days after receipt of a notice of cancellation of this guarantee and the department has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written instructions from the department shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the department determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank or tanks in accordance with sections 33-24-08-50 through 33-24-08-57, the guarantor, upon written instructions from the department, shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank or tanks, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the department, shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

- (4) Guarantor agrees that if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph 1, guarantor shall send within one hundred twenty days of such failure, by certified mail, notice to [local government owner or operator], as evidenced by the return receipt.
- (5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code naming guarantor as debtor, within ten days after commencement of the proceeding.
- (6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to chapter 33-24-08.
- (7) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of sections 33-24-08-80 through 33-24-08-106 for the above-identified tank or tanks, except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than one hundred twenty days after receipt of such notice by [owner or operator], as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits

specified above, notwithstanding the cancellation of the guarantee with respect to future releases.

- (8) The guarantor's obligation does not apply to any of the following:
- (a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
  - (b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];
  - (c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
  - (d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank; or
  - (e) Bodily injury or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of section 33-24-08-83.
- (9) Guarantor expressly waives notice of acceptance of this guarantee by the department, by any or all third parties, or by the [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in subsection 5 of section 33-24-08-96 as such rules were constituted on the effective date shown immediately below.

Effective date: \_\_\_\_\_

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-97. Recordkeeping Local government fund.** A local government owner or operator may satisfy the requirements of section 33-24-08-83 establishing a dedicated fund account that conforms to the requirements of this section. Except as specified in subsection 2, a dedicated fund may not be commingled with other funds or otherwise used in normal operations. A dedicated fund will be considered eligible if it meets one of the following requirements:

1. ~~Owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under sections 33-24-08-80 through 33-24-08-102 for an underground storage tank until released from the requirements of sections 33-24-08-80 through 33-24-08-102 under section 33-24-08-99. An owner or operator must maintain such evidence at the underground storage tank site or the owner's or operator's place of business. Records maintained offsite must be made available upon request of the department. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order to pay for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks and is funded for the full amount of coverage required under section 33-24-08-83 or funded for part of the required amount of coverage and used in combination with other mechanism or mechanisms that provide the remaining coverage.~~
2. An owner or operator must maintain the following types of evidence of financial responsibility; The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order as a contingency fund for general emergencies, including taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks, and is funded for five times the full amount of coverage required under section 33-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanisms that provide the remaining coverage. If the fund is funded for less than five times the amount of coverage required under section 33-24-08-83, the amount of financial responsibility demonstrated by the fund may not exceed one-fifth the amount in the fund.
  - a. ~~An owner or operator using an assurance mechanism specified in sections 33-24-08-85 through 33-24-08-90 or section 33-24-08-92 must maintain a copy of the instrument worded as specified;~~
  - b. ~~An owner or operator using a financial test or guarantee must maintain a copy of the chief financial officer's letter based on yearend financial statements for the most recent completed financial reporting year. Such evidence must be on file no later~~

~~than one hundred twenty days after the close of the financial reporting year;~~

- ~~e. An owner or operator using a guarantee, surety bond, or letter of credit must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement;~~
- ~~d. An owner or operator using an insurance policy or risk retention group coverage must maintain a copy of the signed insurance policy or risk retention group coverage policy, with the endorsement or certificate of insurance and any amendments to the agreements;~~
- ~~e. An owner or operator covered by a state fund or other state assurance must maintain on file a copy of any evidence of coverage supplied by or required by the state under section 33-24-08-91; and~~
- ~~f. An owner or operator using an assurance mechanism specified in sections 33-24-08-85 through 33-24-08-92 must maintain an updated copy of a certification of financial responsibility worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:~~

### **Certification of Financial Responsibility**

~~[Owner or operator] hereby certifies that it is in compliance with the requirements of sections 33-24-08-80 through 33-24-08-102.~~

~~The financial assurance mechanism(s) used to demonstrate financial responsibility under sections 33-24-08-80 through 33-24-08-102 is [are] as follows:~~

~~[For each mechanism, list the type of mechanism, name of issuer, mechanism number (if applicable), amount of coverage, effective period of coverage and whether the mechanism covers "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases".]~~

~~\_\_\_\_\_  
[Signature of owner or operator]  
\_\_\_\_\_  
[Name of owner or operator]  
\_\_\_\_\_  
[Title]  
\_\_\_\_\_  
[Date]  
\_\_\_\_\_  
[Signature of witness or notary]  
\_\_\_\_\_  
[Name of witness or notary]  
\_\_\_\_\_  
[Date]~~

~~The owner or operator must update this certification whenever the financial assurance mechanism(s) used to demonstrate financial responsibility change(s).~~

3. The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance or order to pay for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. A payment is made to the fund once every year for seven years until the fund is fully-funded. This seven-year period is hereafter referred to as the "pay-in-period". The amount of each payment must be determined by this formula:

$$\frac{TF - CF}{Y}$$

Where TF is the total required financial assurance for the owner or operator, CF is the current amount in the fund, and Y is the number of years remaining in the pay-in-period, and:

- a. The local government owner or operator has available bonding authority, approved through voter referendum (if such approval is necessary prior to the issuance of bonds), for an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund. This bonding authority shall be available for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks; or
- b. The local government owner or operator has a letter signed by the appropriate state attorney general stating that the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws. The letter must also state that prior voter approval is not necessary before use of the bonding authority.
4. To demonstrate that it meets the requirements of the local government fund, the chief financial officer of the local government owner or operator or guarantor, or both, must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter From the Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the local government fund mechanism to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount]

per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank or tanks.

Underground storage tanks at the following facilities are assured by this local government fund mechanism: [list for each facility: the name and address of the facility where tanks are assured by the local government fund].

[Insert: "The local government fund is funded for the full amount of coverage required under section 33-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage", or "The local government fund is funded for ten times the full amount of coverage required under section 33-24-08-83, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage", or "A payment is made to the fund once every year for seven years until the fund is fully-funded and [name of local government owner or operator] has available bonding authority, approved through voter referendum, of an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund" or "A payment is made to the fund once every year for seven years until the fund is fully-funded and I have attached a letter signed by the state attorney general stating that (1) the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws and (2) that prior voter approval is not necessary before use of the bonding authority"].

The details of the local government fund are as follows:

Amount in fund (market value of fund at the close of last fiscal year):  
\$ \_\_\_\_\_  
[if fund balance is incrementally funded as specified in subsection 3, insert:

Amount added to fund in the most recently completed fiscal year:  
\$ \_\_\_\_\_  
Number of years remaining in the pay-in period:

A copy of the state constitutional provision, or local government statute, charter, ordinance or order dedicating the fund is attached.

I hereby certify that the wording of this letter is identical to the wording specified in subsection 4 of section 33-24-08-97, as such rules were constituted on the date shown immediately below:

[Date]  
[Signature]  
[Name]

[Title]

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-98. Drawing on financial assurance mechanisms Substitution of financial assurance mechanisms by owner or operator.**

1. ~~The department shall require the guarantor, surety, or institution issuing a letter of credit to place the amount of funds stipulated by the department, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:~~ An owner or operator may substitute any alternate financial assurance mechanisms as specified in sections 33-24-08-80 through 33-24-08-106, provided that at all times the owner or operator maintains an effective financial assurance mechanism or combination of mechanisms that satisfies the requirements of section 33-24-08-83.
  - a. ~~The following apply:~~
    - (1) ~~The owner or operator fails to establish alternate financial assurance within sixty days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or, as applicable, other financial assurance mechanisms; and~~
    - (2) ~~The department determines or suspects that a release from an underground storage tank covered by the mechanism has occurred and so notifies the owner or operator or the owner or operator has notified the department pursuant to sections 33-24-08-40 through 33-24-08-43 or 33-24-08-50 through 33-24-08-57 of a release from an underground storage tank covered by the mechanism; or~~
  - b. ~~The conditions of subdivision a of subsection 2 or paragraphs 1 or 2 of subdivision b of subsection 2 are satisfied.~~
2. ~~The department may draw on a standby trust fund when:~~ After obtaining alternate financial assurance as specified in sections 33-24-08-80 through 33-24-08-106, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance.
  - a. ~~The department makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under sections 33-24-08-50 through 33-24-08-57; or~~

b. The department has received either:

- (1) ~~Certification from the owner or operator and the third-party liability claimants and from attorneys representing the owner or operator and the third-party liability claimants that a third-party liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:~~

**Certification of Valid Claim**

~~The undersigned, as principals and as legal representatives of [insert owner or operator] and [insert name and address of third party claimant], hereby certify that the claim of bodily injury [and/or] property damage caused by an accidental release arising from operating [owner's or operator's] underground storage tank should be paid in the amount of \$[\_\_\_\_\_].~~

~~[Signatures]  
\_\_\_\_\_  
Owner or Operator  
\_\_\_\_\_  
Attorney for Owner or Operator  
\_\_\_\_\_  
[Notary] \_\_\_\_\_ Date  
\_\_\_\_\_  
[Signature(s)]  
\_\_\_\_\_  
Claimant(s)  
\_\_\_\_\_  
Attorney(s) for Claimant(s)  
\_\_\_\_\_  
[Notary] \_\_\_\_\_ Date \_\_\_\_\_ or~~

- (2) ~~A valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an underground storage tank covered by financial assurance under sections 33-24-08-80 through 33-24-08-102 and the department determines that the owner or operator has not satisfied the judgment.~~
3. ~~If the department determines that the amount of corrective action costs and third-party liability claims eligible for payment under subsection 2 may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The department shall pay third-party liability claims in the order in which the department receives certifications under paragraph 1 of subdivision b of subsection 2 and valid court orders under paragraph 2 of subdivision b of subsection 2.~~

**History:** Effective December 1, 1989; amended effective January 1, 2009.  
**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1  
**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-99. Release from requirements Cancellation or nonrenewal by a provider of financial assurance.** An owner or operator is no longer

~~required to maintain financial responsibility under sections 33-24-08-80 through 33-24-08-102 for an underground storage tank after the tank has been properly closed or, if corrective action is required, after corrective action has been completed and the tank has been properly closed as required by sections 33-24-08-60 through 33-24-08-64.~~

1. Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator.
  - a. Termination of a guarantee, a surety bond, or a letter of credit may not occur until one hundred twenty days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.
  - b. Termination of insurance or risk retention group coverage, except for nonpayment or misrepresentation by the insured, or state-funded assurance may not occur until sixty days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for nonpayment of premium or misrepresentation by the insured may not occur until a minimum of ten days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.
2. If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in section 33-24-08-104, the owner or operator must obtain alternate coverage as specified in this section within sixty days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within sixty days after receipt of the notice of termination, the owner or operator must notify the department of such failure and submit:
  - a. The name and address of the provider of financial assurance;
  - b. The effective date of termination; and
  - c. The evidence of the financial assistance mechanism subject to the termination maintained in accordance with subsection 2 of section 33-24-08-101.

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-100. ~~Bankruptcy or other incapacity of owner or operator or provider of financial assurance~~ Reporting by owner or operator.**

1. ~~Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code naming an owner or operator as debtor, the owner or operator must notify the department by certified mail of such commencement and submit the appropriate forms listed in subsection 2 of section 33-24-08-97 documenting current financial responsibility. An owner or operator must submit the appropriate forms listed in subsection 2 of section 33-24-08-101 documenting current evidence of financial responsibility to the department:~~
  - a. Within thirty days after the owner or operator identifies a release from an underground storage tank required to be reported under section 33-24-08-43 or 33-24-08-51;
  - b. If the owner or operator fails to obtain alternate coverage as required by sections 33-24-08-80 through 33-24-08-106, within thirty days after the owner or operator receives notice of:
    - (1) Commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming a provider of financial assurance as a debtor;
    - (2) Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;
    - (3) Failure of a guarantor to meet the requirements of the financial test; or
    - (4) Other incapacity of a provider of financial assurance; or
  - c. As required by subsection 7 of section 33-24-08-85 and subsection 2 of section 33-24-08-95.
2. ~~Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming a guarantor providing financial assurance as debtor, such guarantor must notify the owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in section 33-24-08-86. An owner or operator must certify compliance with the financial responsibility requirements of chapter 33-24-08 as specified in the new tank notification form when notifying the department of the installation of a new underground storage tank under section 33-24-08-12.~~
3. ~~An owner or operator who obtains financial assurance by a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or~~

~~revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, letter of credit, or state-required mechanism. The owner or operator must obtain alternate financial assurance as specified in sections 33-24-08-80 through 33-24-08-102 within thirty days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within thirty days after such notification, the owner or operator must notify the department. The department may require an owner or operator to submit evidence of financial assurance as described in subsection 2 of section 33-24-08-101 or other information relevant to compliance with sections 33-24-08-80 through 33-24-08-106 at any time.~~

- ~~4. Within thirty days after receipt of notification that a state fund or other state assurance has become incapable of paying for assured corrective action or third-party compensation costs, the owner or operator must obtain alternate financial assurance.~~

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-101. Replenishment of guarantees, letters of credit, or surety bonds Recordkeeping.**

- ~~1. If at any time after a standby trust is funded upon the instruction of the department with funds drawn from a guarantee, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn: Owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under sections 33-24-08-80 through 33-24-08-106 for an underground storage tank until released from the requirements of sections 33-24-08-80 through 33-24-08-106 under section 33-24-08-103. An owner or operator must maintain such evidence at the underground storage tank site or the owner's or operator's place of business. Records maintained offsite must be made available upon request of the department.~~
  - ~~a. Replenish the value of financial assurance to equal the full amount of coverage required; or~~
  - ~~b. Acquire another financial assurance mechanism for the amount which funds in the standby trust have been reduced.~~
- ~~2. For purposes of this section, the full amount of coverage required is the amount of coverage to be provided by section 33-24-08-83. If a combination of mechanisms was used to provide the assurance funds~~

which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms. An owner or operator must maintain the following types of evidence of financial responsibility:

- a. An owner or operator using an assurance mechanism specified in sections 33-24-08-85 through 33-24-08-90, or section 33-24-08-92, or sections 33-24-08-94 through 33-24-08-97, must maintain a copy of the instrument worded as specified:
- b. An owner or operator using a financial test or guarantee, or a local government financial test, or a local government guarantee supported by a local government financial test, must maintain a copy of the chief financial officer's letter based on yearend financial statements for the most recent completed financial reporting year. Such evidence must be on file no later than one hundred twenty days after the close of the financial reporting year:
- c. An owner or operator using a guarantee, surety bond, or letter of credit must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement:
- d. A local government owner or operator using a local government guarantee under subsection 4 of section 33-24-08-96 must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement:
- e. A local government owner or operator using the local government bond rating test under section 33-24-08-94 must maintain a copy of its bond rating published within the last twelve months by Moody's or Standard and Poor's:
- f. A local government owner or operator using the local government guarantee under section 33-24-08-96, where the guarantor's demonstration of financial responsibility relies on the bond rating test under section 33-24-08-94 must maintain a copy of the guarantor's bond rating published within the last twelve months by Moody's or Standard and Poor's:
- g. An owner or operator using an insurance policy or risk retention group coverage must maintain a copy of the signed insurance policy or risk retention group coverage policy, with the endorsement or certificate of insurance and any amendments to the agreements:
- h. An owner or operator covered by a state fund or other state assurance must maintain on file a copy of any evidence of coverage supplied by or required by the state under subsection 4 of section 33-24-08-91:

- i. An owner or operator using a local government fund under section 33-24-08-97 must maintain the following documents:
- (1) A copy of the state constitutional provision or local government statute, charter, ordinance or order dedicating the fund:
  - (2) Yearend financial statements for the most recent completed financial reporting year showing the amount in the fund. If the fund is established under subsection 3 of section 33-24-08-97 using incremental funding backed by bonding authority, the financial statements must show the previous year's balance, the amount of funding during the year, and the closing balance in the fund; and
  - (3) If the fund is established under subsection 3 of section 33-24-08-97 using incremental funding backed by bonding authority, the owner or operator must also maintain documentation of the required bonding authority, including either the results of a voter referendum, under subdivision a of subsection 3 of section 33-24-08-97, or attestation by the state attorney general as specified under subdivision b of subsection 3 of section 33-24-08-97;
- j. A local government owner or operator using the local government guarantee supported by the local government fund must maintain a copy of the guarantor's yearend financial statements for the most recent completed financial reporting year showing the amount of the fund; or
- k. An owner or operator using an assurance mechanism specified in sections 33-24-08-85 through 33-24-08-97 must maintain an updated copy of a certification of financial responsibility worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

### **Certification of Financial Responsibility**

[Owner or operator] hereby certifies that it is in compliance with the requirements of sections 33-24-08-80 through 33-24-08-106.

The financial assurance mechanism(s) used to demonstrate financial responsibility under sections 33-24-08-80 through 33-24-08-106 is [are] as follows:

[For each mechanism, list the type of mechanism, name of issuer, mechanism number (if applicable), amount of coverage, effective period of coverage and whether the mechanism covers "taking corrective action" and/or "compensating third parties for bodily injury and property

damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases".]

[Signature of owner or operator]

[Name of owner or operator]

[Title]

[Date]

[Signature of witness or notary]

[Name of witness or notary]

[Date]

The owner or operator must update this certification whenever the financial assurance mechanism(s) used to demonstrate financial responsibility change(s).

**History:** Effective December 1, 1989; amended effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-102. Suspension of enforcement. [Reserved] Drawing on financial assurance mechanisms.**

1. Except as specified in subsection 4, the department shall require the guarantor, surety, or institution issuing a letter of credit to place the amount of funds stipulated by the department, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:
  - a. The following conditions exist:
    - (1) The owner or operator fails to establish alternate financial assurance within sixty days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or, as applicable, other financial assurance mechanisms; and
    - (2) The department determines or suspects that a release from an underground storage tank covered by the mechanism has occurred and so notifies the owner or operator or the owner or operator has notified the department pursuant to sections 33-24-08-40 through 33-24-08-43 or 33-24-08-50 through 33-24-08-57 of a release from an underground storage tank covered by the mechanism; or
  - b. The conditions of subdivision a of subsection 2 or paragraph 1 or 2 of subdivision b of subsection 2 are satisfied.
2. The department may draw on a standby trust fund when:

a. The department makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under sections 33-24-08-50 through 33-24-08-57; or

b. The department has received either:

(1) Certification from the owner or operator and the third-party liability claimant or claimants and from attorneys representing the owner or operator and the third-party liability claimant or claimants that a third-party liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

**Certification of Valid Claim**

The undersigned, as principals and as legal representatives of [insert owner or operator] and [insert name and address of third party claimant], hereby certify that the claim of bodily injury [and/or] property damage caused by an accidental release arising from operating [owner's or operator's] underground storage tank should be paid in the amount of \$[\_\_\_\_\_].

[Signatures]

Owner or Operator  
Attorney for Owner or Operator  
[Notary]  
Date

[Signature(s)]

Claimant(s)  
Attorney(s) for Claimant(s)  
[Notary]  
Date \_\_\_\_\_ or

(2) A valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an underground storage tank covered by financial assurance under sections 33-24-08-80 through 33-24-08-106 and the department determines that the owner or operator has not satisfied the judgment.

3. If the department determines that the amount of corrective action costs and third-party liability claims eligible for payment under subsection 2

may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The department shall pay third-party liability claims in the order in which the department receives certifications under paragraph 1 of subdivision b of subsection 2 and valid court orders under paragraph 2 of subdivision b of subsection 2.

4. A government entity acting as guarantor under subsection 5 of section 33-24-08-96, the local government guarantee without standby trust, shall make payments as directed by the department under the circumstances described in subsections 1, 2, and 3.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-103. Release from requirements.** An owner or operator is no longer required to maintain financial responsibility under sections 33-24-08-80 through 33-24-08-106 for an underground storage tank after the tank has been properly closed or, if corrective action is required, after corrective action has been completed and the tank has been properly closed as required by sections 33-24-08-60 through 33-24-08-64.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-104. Bankruptcy or other incapacity of owner or operator or provider of financial assurance.**

1. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming an owner or operator as debtor, the owner or operator must notify the department by certified mail of such commencement and submit the appropriate forms listed in subsection 2 of section 33-24-08-101 documenting current financial responsibility.
2. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming a guarantor providing financial assurance as debtor, such guarantor must notify the owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in section 33-24-08-86.
3. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming a local government owner or operator as debtor, the local government owner or operator must notify the department by certified mail of such

commencement and submit the appropriate forms listed in subsection 2 of section 33-24-08-101 documenting current financial responsibility.

4. Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) United States Code, naming a guarantor providing a local government financial assurance as debtor, such guarantor must notify the local government owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in section 33-24-08-96.
5. An owner or operator who obtains financial assurance by a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, letter of credit, or state-required mechanism. The owner or operator must obtain alternate financial assurance as specified in sections 33-24-08-80 through 33-24-08-106 within thirty days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within thirty days after such notification, the owner or operator must notify the department.
6. Within thirty days after receipt of notification that a state fund or other state assurance has become incapable of paying for assured corrective action or third-party compensation costs, the owner or operator must obtain alternate financial assurance.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-105. Replenishment of guarantees, letters of credit, or surety bonds.**

1. If at any time after a standby trust is funded upon the instruction of the department with funds drawn from a guarantee, local government, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn:
  - a. Replenish the value of financial assurance to equal the full amount of coverage required; or
  - b. Acquire another financial assurance mechanism for the amount which funds in the standby trust have been reduced.

2. For purposes of this section, the full amount of coverage required is the amount of coverage to be provided by section 33-24-08-83. If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-106. Suspension of enforcement. [Reserved]**

**33-24-08-107. [Reserved]**

**33-24-08-108. [Reserved]**

**33-24-08-109. [Reserved]**

**33-24-08-110. [Reserved]**

**33-24-08-111. [Reserved]**

**33-24-08-112. [Reserved]**

**33-24-08-113. [Reserved]**

**33-24-08-114. [Reserved]**

**33-24-08-115. Definitions (lender liability).**

1. "Borrower, debtor, or obligor" is a person whose underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located is encumbered by a security interest. These terms may be used interchangeably.
2. "Holder" is a person who, upon the effective date of this rule, or in the future, maintains indicia of ownership, as defined in subsection 3, primarily to protect a security interest, as defined in subdivision a of subsection 6, in a petroleum underground storage tank or underground storage tank system or facility or property on which a petroleum underground storage tank or underground storage tank system is located. A holder includes the initial holder (such as a loan originator); any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market); a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder.

3. "Indicia of ownership" means evidence of a secured interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), and legal or equitable title obtained pursuant to foreclosure. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.
4. "Operation" means, for purposes of this subpart, the use, storage, filling, or dispensing of petroleum contained in an underground storage tank or underground storage tank system.
5. Petroleum production, refining, and marketing.
  - a. "Petroleum marketing" means the distribution, transfer, or sale of petroleum or petroleum products for wholesale or retail purposes.
  - b. "Petroleum production" means the production of crude oil or other forms of petroleum, as defined in section 33-24-08-03, as well as the production of petroleum products from purchased materials.
  - c. "Petroleum refining" means the cracking, distillation, separation, conversion, upgrading, and finishing of refined petroleum or petroleum products.
6. "Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation.
  - a. "Primarily to protect a security interest", as used in sections 33-24-08-115 through 33-24-08-130, does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why any ownership indicia are held must be as protection for a security interest.
  - b. "Security interest" means an interest in a petroleum underground storage tank or underground storage tank system or in the facility or property on which a petroleum underground storage tank or underground storage tank system is located, created or

established for the purpose of securing a loan or other obligation. Security interests include but are not limited to mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, and consignments, if the transaction creates or establishes an interest in an underground storage tank or underground storage tank system or in the facility or property on which the underground storage tank or underground storage tank system is located, for the purpose of securing a loan or other obligation.

7. "Underground storage tank technical standards", as used in sections 33-24-08-115 through 33-24-08-130, refers to the underground storage preventative and operating requirements under sections 33-24-08-10 through 33-24-08-35, sections 33-24-08-60 through 33-24-08-64, and section 33-24-08-40.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-116. [Reserved]**

**33-24-08-117. [Reserved]**

**33-24-08-118. [Reserved]**

**33-24-08-119. [Reserved]**

**33-24-08-120. Participation in management (lender liability).** The term "participating in the management of an underground storage tank or underground storage tank system" means that, subsequent to December 6, 1995, the holder was engaging in decisionmaking control of, or activities related to, operation of the underground storage tank or underground storage tank system, as defined herein.

1. Actions that are participation in management.

- a. Participation in the management of an underground storage tank or underground storage tank system means, for purposes of sections 33-24-08-115 through 33-24-08-130, actual participation by the holder in the management or control of decisionmaking related to the operation of an underground storage tank or underground storage tank system. Participation in management does not include the mere capacity or ability to influence or the unexercised right to control underground storage tank or underground storage tank system operations. A holder is

participating in the management of the underground storage tank or underground storage tank system only if the holder either:

- (1) Exercises decisionmaking control over the operational (as opposed to financial or administrative) aspects of the underground storage tank or underground storage tank system, such that the holder has undertaken responsibility for all or substantially all of the management of the underground storage tank or underground storage tank system; or
- (2) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise.

b. Operational aspects of the enterprise relate to the use, storage, filling, or dispensing of petroleum contained in an underground storage tank or underground storage tank system, and include functions such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of a credit manager, personnel manager, controller, chief financial officer, or similar functions. Operational aspects of the enterprise do not include the financial or administrative aspects of the enterprise, or actions associated with environmental compliance, or actions undertaken voluntarily to protect the environment in accordance with applicable requirements in chapter 33-24-08.

2. Actions that are not participation in management preforeclosure.

a. Actions at the inception of the loan or other transaction. No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management within the meaning of sections 33-24-08-115 through 33-24-08-130. A prospective holder who undertakes or requires an environmental investigation (which could include one or more of the following: a site assessment, inspection, or audit) of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located (in which indicia of ownership are to be held), or requires a prospective borrower to clean up contamination from the underground storage tank or underground storage tank system or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered

to be participating in the management of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located.

b. Loan policing and work out. Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management for purposes of sections 33-24-08-115 through 33-24-08-130. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations, or promises from the borrower. Loan policing and work out activities cover and include all such activities up to foreclosure, exclusive of any activities that constitute participation in management.

(1) Policing the security interest or loan.

(a) A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not together with other actions participate in the management of the underground storage tank or underground storage tank system as provided in subsection 1. Such policing actions include, but are not limited to, requiring the borrower to clean up contamination from the underground storage tank or underground storage tank system during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, rules, and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower).

(b) Policing activities also include undertaking by the holder of underground storage tank environmental compliance actions and voluntary environmental actions taken in compliance with chapter 33-24-08, provided that

the holder does not otherwise participate in the management or daily operation of the underground storage tank or underground storage tank system as provided in subsection 1 of section 33-24-08-120 and section 33-24-08-130. Such allowable actions include, but are not limited to, release detection and release reporting, release response and corrective action, temporary or permanent closure of an underground storage tank or underground storage tank system, underground storage tank upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements in chapter 33-24-08. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such action considered to be participating in the management of the underground storage tank or underground storage tank system.

(2) Loan work out. A holder who engages in work out activities prior to foreclosure will remain within the exemption provided that the holder does not together with other actions participate in the management of the underground storage tank or underground storage tank system as provided in subsection 1. For purposes of this rule, "work out" refers to those actions by which a holder, at any time prior to foreclosure, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Work out activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

3. Foreclosure on an underground storage tank or underground storage tank system or facility or property on which an underground storage tank or underground storage tank system is located, and participation in management activities postforeclosure.

a. Foreclosure.

- (1) Indicia of ownership that are held primarily to protect a security interest include legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. For purposes of sections 33-24-08-115 through 33-24-08-130, the term "foreclosure" means that legal, marketable or equitable title or deed has been issued, approved, and recorded, and that the holder has obtained access to the underground storage tank, or underground storage tank system, underground storage tank facility, and property on which the underground storage tank or underground storage tank system is located, provided that the holder acted diligently to acquire marketable title or deed and to gain access to the underground storage tank, underground storage tank system, underground storage tank facility, and property on which the underground storage tank or underground storage tank system is located. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest provided that the holder undertakes to sell, release an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, taking all facts and circumstances into consideration, and provided that the holder does not participate in management as defined in subsection 1 prior to or after foreclosure.
- (2) For purposes of establishing that a holder is seeking to sell, release pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest in a reasonably expeditious manner an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, the holder may use whatever commercially reasonable means as are relevant or appropriate with respect to the underground storage tank or underground storage tank system or facility or property on which the underground

storage tank or underground storage tank system is located, or may employ the means specified in subdivision b of subsection 3. A holder that outbids, rejects, or fails to act upon a written bona fide, firm offer of fair consideration for the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, as provided in subdivision b of subsection 3, is not considered to hold indicia of ownership primarily to protect a security interest.

b. Holding foreclosed property for disposition and liquidation. A holder, who does not participate in management prior to or after foreclosure, may sell, release, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, liquidate, wind up operations, and take measures, prior to sale or other disposition, to preserve, protect, or prepare the secured underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located. A holder may also arrange for an existing or new operator to continue or initiate operation of the underground storage tank or underground storage tank system. The holder may conduct these activities without voiding the security interest exemption, subject to the requirements of sections 33-24-08-115 through 33-24-08-130.

(1) A holder establishes that the ownership indicia maintained after foreclosure continue to be held primarily to protect a security interest by, within twelve months following foreclosure, listing the underground storage tank or underground storage tank system or the facility or property on which the underground storage tank or underground storage tank system is located, with a broker, dealer, or agent who deals with the type of property in question, or by advertising the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, as being for sale or disposition on at least a monthly basis in either a real estate publication or a traded or other publication suitable for the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, or a newspaper of general circulation (defined as one with a circulation more than ten thousand, or one suitable under any applicable federal, state, or local rules of court for publication required by court

order or rules of civil procedure) covering the location of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located. For purposes of this provision, the twelve-month period begins to run from December 6, 1995, or from the date that the marketable title or deed has been issued, approved and recorded, and the holder has obtained access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located, whichever is later, provided that the holder acted diligently to acquire marketable title or deed and to obtain access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the underground storage tank or underground storage tank system, the twelve-month period begins to run from December 6, 1995, or from the date on which the holder first acquires either title to or possession of the secured underground storage tank or underground storage tank system, or facility or property on which the underground storage tank or underground storage tank system is located, whichever is later.

- (2) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the underground storage tank or underground storage tank system or the facility or property on which the underground storage tank or underground storage tank system is located, establishes by such outbidding, rejection, or failure to act, that the ownership indicia in the secured underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.
- (a) Fair consideration, in the case of a holder maintaining indicia of ownership primarily to protect a senior security interest in the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, is the value of the security interest as defined in this section. The value of the security interest includes all debt and costs incurred

by the security interest holder, and is calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or possession in the case of a lease financing transaction) pursuant to foreclosure, plus any unpaid interest, rent, or penalties (whether arising before or after foreclosure). The value of the security interest also includes all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure, retention, preserving, protecting, and preparing, prior to sale, the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, release, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), of an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, or other disposition. The value of the security interest also includes environmental investigation costs (which could include one or more of the following: a site assessment, inspection, or audit of the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located), and corrective action costs incurred under sections 33-24-08-41 through 33-24-08-57, or any other costs incurred as a result of reasonable efforts to comply with any other applicable federal, state or local law or regulation; less any amounts received by the holder in connection with any partial disposition of the property and any amounts paid by the borrower (if not already applied to the borrower's obligations) subsequent to the acquisition of full title (or possession in the case of a lease financing transaction) pursuant to foreclosure. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in this subparagraph.

- (b) Outbids, rejects, or fails to act upon an offer of fair consideration means that the holder outbids, rejects, or fails to act upon within ninety days of receipt, a written, bona fide, firm offer of fair consideration for the underground storage tank or underground storage tank

system or facility or property on which the underground storage tank or underground storage tank system is located received at any time after six months following foreclosure, as defined in subsection 3. A "written, bona fide, firm offer" means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For purposes of this provision, the six-month period begins to run from December 6, 1995, or from the date that marketable title or deed has been issued, approved and recorded to the holder, and the holder has obtained access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located, whichever is later, provided that the holder was acting diligently to acquire marketable title or deed or to gain access to the underground storage tank or underground storage tank system, underground storage tank facility and property on which the underground storage tank or underground storage tank system is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the underground storage tank or underground storage tank system, the six-month period begins to run from December 6, 1995, or from the date on which the holder first acquires either title to or possession of the secured underground storage tank or underground storage tank system, or facility or property on which the underground storage tank or underground storage tank system is located, whichever is later.

- C. Actions that are not participation in management postforeclosure. A holder is not considered to be participating in the management of an underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located when undertaking actions under chapter 33-24-08, provided that the holder does not otherwise participate in the management or daily operation of the underground storage tank or underground storage tank system as provided in subsection 1 of section 33-24-08-120 and section 33-24-08-130. Such allowable actions include, but are not limited to, release detection and release reporting, release

response and corrective action, temporary or permanent closure of the underground storage tank or underground storage tank system, underground storage tank upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements in chapter 33-24-08. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such action considered to be participating in the management of the underground storage tank or underground storage tank system.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-121. [Reserved]**

**33-24-08-122. [Reserved]**

**33-24-08-123. [Reserved]**

**33-24-08-124. [Reserved]**

**33-24-08-125. Ownership of an underground storage tank or underground storage tank system or facility or property on which an underground storage tank or underground storage tank system is located (lender liability). A holder is not an "owner" of a petroleum underground storage tank or underground storage tank system or facility or property on which a petroleum underground storage tank or underground storage tank system is located for purposes of compliance with the underground storage tank technical standards as defined in subsection 1, the underground storage tank corrective action requirements under sections 33-24-08-41 through 33-24-08-57, and the underground storage tank financial responsibility requirements under sections 33-24-08-80 through 33-24-08-101, provided the person:**

- 1. Does not participate in the management of the underground storage tank or underground storage tank system as defined in section 33-24-08-120; and**
- 2. Does not engage in petroleum production, refining, and marketing as defined in subsection 2 of section 33-24-08-115.**

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

**33-24-08-126. [Reserved]**

**33-24-08-127. [Reserved]**

**33-24-08-128. [Reserved]**

**33-24-08-129. [Reserved]**

**33-24-08-130. Operating an underground storage tank or underground storage tank system (lender liability).**

1. Operating an underground storage tank or underground storage tank system prior to foreclosure. A holder, prior to foreclosure, as defined in subsection 3 of section 33-24-08-120, is not an "operator" of a petroleum underground storage tank or underground storage tank system for purposes of compliance with the underground storage tank technical standards as defined in subsection 1 of section 33-24-08-115, the underground storage tank corrective action requirements under sections 33-24-08-41 through 33-24-08-57, and the underground storage tank financial responsibility requirements under sections 33-24-08-80 through 33-24-08-101, provided that, after December 6, 1995, the holder is not in control of or does not have responsibility for the daily operation of the underground storage tank or underground storage tank system.
  
2. Operating an underground storage tank or underground storage tank system after foreclosure. The following provisions apply to a holder who, through foreclosure, as defined in subsection 3 of section 33-24-08-120, acquires a petroleum underground storage tank or underground storage tank system or facility or property on which a petroleum underground storage tank or underground storage tank system is located.
  - a. A holder is not an "operator" of a petroleum underground storage tank or underground storage tank system for purposes of compliance with chapter 33-24-08 if there is an operator, other than the holder, who is in control of or has responsibility for the daily operation of the underground storage tank or underground storage tank system, and who can be held responsible for compliance with applicable requirements of chapter 33-24-08.
  
  - b. If another operator does not exist, as provided for under subdivision a, a holder is not an "operator" of the underground storage tank or underground storage tank system, for purposes of compliance with the underground storage tank technical standards as defined in subsection 1 of section 33-24-08-115, the underground storage tank corrective action requirements under sections 33-24-08-41 through 33-24-08-57, and the underground storage tank financial responsibility requirements under sections 33-24-08-80 through 33-24-08-101, provided that the holder:

- (1) Empties all of its known underground storage tanks or underground storage tank systems within sixty calendar days after foreclosure or within sixty calendar days after December 6, 1995, whichever is later, or another reasonable time period specified by the department, so that no more than two and one-half centimeters [1 inch] of residue, or three-tenths of one percent [0.3] by weight of the total capacity of the underground storage tank system, remains in the system; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment; and
- (2) Empties those underground storage tanks and underground storage tank systems that are discovered after foreclosure within sixty calendar days after discovery or within sixty calendar days after December 6, 1995, whichever is later, or another reasonable time period specified by the department, so that no more than two and one-half centimeters [1 inch] of residue, or three-tenths of one percent [0.3] by weight of the total capacity of the underground storage tank system, remains in the system; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment.

c. If another operator does not exist, as provided for under subdivision a, in addition to satisfying the conditions under subdivision b, the holder must either:

- (1) Permanently close the underground storage tank or underground storage tank system in accordance with sections 33-24-08-61 through 33-24-08-64, except subsection 2 of section 33-24-08-62; or
- (2) Temporarily close the underground storage tank or underground storage tank system in accordance with the following applicable provisions of section 33-24-08-60:
  - (a) Continue operation and maintenance of corrosion protection in accordance with section 33-24-08-21;
  - (b) Report suspected releases to the department; and
  - (c) Conduct a site assessment in accordance with subsection 1 of section 33-24-08-62 if the underground storage tank system is temporarily closed for more than twelve months and the underground storage tank system does not meet either the performance standards in section 33-24-08-10 for new underground storage tank systems or the upgrading requirements in

section 33-24-08-11, except that the spill and overfill equipment requirements do not have to be met. The holder must report any suspected releases to the department. For purposes of this provision, the twelve-month period begins to run December 6, 1995, or from the date on which the underground storage tank system is emptied and secured under subdivision b, whichever is later.

- d. The underground storage tank system can remain in temporary closure until a subsequent purchaser has acquired marketable title to the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located. Once a subsequent purchaser acquires marketable title to the underground storage tank or underground storage tank system or facility or property on which the underground storage tank or underground storage tank system is located, the purchaser must decide whether to operate or close the underground storage tank or underground storage tank system in accordance with applicable requirements in chapter 33-24-08.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 23-20.3-03, 23-20.3-04.1

**Law Implemented:** NDCC 23-20.3-04.1

Appendix I

 NOTIFICATION FOR UNDERGROUND STORAGE TANKS NORTH DAKOTA STATE DEPARTMENT OF HEALTH AND CONSOLIDATED LABORATORIES SPN 10980 2/89	Type of Owner (Check one)				
	<input type="checkbox"/> State or Local Government				<input type="checkbox"/> Private
Tank Owner Name		<input type="checkbox"/> Federal Government (Give Facility I.D. Number) _____			
Street Address		City	State	Zip Code	Phone Number
Contract Person		Title			
Street Address		City	State	Zip Code	Phone Number
Facility Name Where Tanks Located				County	
Street Address/Section, Township, Range		Nearest City	State	Zip Code	Number of Tanks
Type of Notification			Are Tanks Located on Indian Land?		
<input type="checkbox"/> First <input type="checkbox"/> Amended			<input type="checkbox"/> Yes <input type="checkbox"/> No		

Notes: If there are more than five underground storage tanks at this location, make additional copies of this form before filling in any data.

DESCRIPTION OF UNDERGROUND STORAGE TANK

	Tank No. _____				
1. STATUS OF TANK (Check One)      Currently in use Temporarily out of use Permanently out of use Brought into use after 5/6/86					
2. ESTIMATED AGE (YEARS)					
3. ESTIMATED TOTAL CAPACITY (GALLONS)					
4. MATERIAL OF CONSTRUCTION (Check One)      Steel Concrete Fiberglass Reinforced Plastic Other (specify) _____ Unknown					
5. INTERNAL PROTECTION (Check all that apply) Cathodic Protection Interior Lining (e.g., epoxy resin) Other (specify) _____ None Unknown					

	Tank No. ____				
<b>6. EXTERNAL PROTECTION</b> (Check all that apply)					
Cathodic Protection					
Painted (e.g., asphaltic)					
Fiberglass Reinforced Plastic Coated					
Other (specify)					
None					
Unknown					
<b>7. PIPING</b> (Check all that apply)					
Bare Steel					
Galvanized Steel					
Fiberglass Reinforced Plastic					
Cathodically Protected					
Other (specify)					
Unknown					
<b>8. SUBSTANCE CURRENTLY OR LAST STORED IN GREATEST QUANTITY BY VOLUME</b>					
a. Empty					
b. Petroleum					
Gasoline (including alcohol blends)					
Diesel					
Kerosene					
Used Oil					
Other (specify)					
c. Hazardous Substances					
Name of Substance or					
Chemical Abstract Service (CAS) No.					
Check box if tank stores a mixture					
of substances					
d. Unknown					
<b>9. ADDITIONAL INFORMATION (FOR TANKS PERMANENTLY TAKEN OUT OF SERVICE)</b>					
a. Estimated date last used (mm/yr)					
b. Estimated quantity of substance remaining (gal.)					
c. Check box if tank was filled with inert material (e.g., sand, concrete)					
d. Check box if tank was removed					

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

Signature \_\_\_\_\_

Date \_\_\_\_\_

**CERTIFICATION OF COMPLIANCE (COMPLETE FOR ALL NEW TANKS AT THIS LOCATION)**

Tank Owner Name \_\_\_\_\_ Facility Address \_\_\_\_\_

	Tank(s)	Piping
<b>10. RELEASE DETECTION (Specify Tanks) by No., for piping check all that apply)</b>  Manual tank gauging. Tank tightness testing with inventory controls. Automatic tank gauging. Vapor monitoring. Ground water monitoring. Interstitial monitoring within a secondary barrier. Interstitial monitoring within secondary containment. Automatic line leak detectors. Line tightness testing. Another method allowed by the implementing agency. Please specify: _____		
<b>11. CORROSION PROTECTION (Specify Tanks) by No., for piping check all that apply)</b>  As specified for coated steel tanks with cathodic protection. As specified for coated steel piping with cathodic protection. Another method allowed by the implementing agency. Please specify: _____		
<b>12. I have financial responsibility in accordance with Subpart 1. Please specify:</b>  Method: _____ Insurer: _____ Policy Number: _____		

	Tank(s)	Piping
<b>13. INSTALLATION (Check all that apply)</b>  The installer has been certified by the tank and piping manufacturers. The installer has been certified or licensed by the implementing agency. The installation has been inspected and certified by a registered professional engineer. The installation has been inspected and approved by the implementing agency. All work listed on the manufacturer's installation checklist has been completed. Another method was used as allowed by the implementing agency. Please specify: _____		
<b>14. OATH: I certify that the information concerning installation provided in item 13 is true to the best of my belief and knowledge.</b>  Installer: _____ <div style="display: flex; justify-content: space-between; width: 100%;"> <span>Name</span> <span>Date</span> </div> _____ Position _____ Company		

## GENERAL INFORMATION

**Notification is required by Federal law for all underground tanks that have been used to store regulated substances since January 1, 1974, and that are in the ground as of May 8, 1986.**

The primary purpose of this notification program is to locate and evaluate underground tanks that store or have stored petroleum and hazardous substances. It is expected that the information you provide will be based on reasonably available records, or, in the absence of such records, your knowledge, belief, or recollection.

**Who Must Notify?** Section 9002 of the Resource Conservation and Recovery Act (RCRA), as amended, requires that, unless exempted, owners of underground tanks that store regulated substances must notify designated State or local agencies of the existence of their tanks. Owner means - (a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and (b) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use.

**What Tanks Are Included?** Underground storage tank is defined as any one or combination of tanks that (1) is used to contain an accumulation of "regulated substances" and (2) whose volume (including connected underground piping) is 10% or more beneath the ground. Some examples are: 1. underground tanks storing gasoline, used oil, or diesel fuel; 2. underground tanks storing industrial solvents, pesticides, herbicides or fumigants; 3. underground tanks no longer in operation but which stored regulated substances (petroleum or hazardous substances) since January 1, 1974.

**What Tanks Are Excluded?** Tanks excluded from notification are: 1. farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes; 2. tanks used for storing heating oil for consumptive use on the premises where stored; 3. septic tanks; 4. pipeline facilities (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1979, or which is an intrastate pipeline facility regulated under State laws; 5. surface impoundments, pits, ponds, or lagoons; 6. storm water or waste water collection systems; 7. flow-through process tanks; 8. liquid traps or associated gathering lines directly related to oil or gas production and gathering operations; 9. storage tanks situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

**What Substances Are Covered?** The notification requirements apply to underground storage tanks that contain regulated substances. This includes any substance defined as hazardous in section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA. It also includes petroleum, e.g., crude oil or any fraction

thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

**When Must One Notify?** 1. Owners of underground storage tanks in use or that have been taken out of operation after January 1, 1974, but still in the ground, must notify by May 8, 1986. 2. Owners who bring underground storage tanks into use after May 8, 1986, must notify within 30 days of bringing the tanks into use.

**What Are The Penalties?** Any owner who knowingly fails to notify or knowingly submits false information shall be subject to a civil penalty not to exceed \$10,000 for each tank for which notification is not given or for which false information is submitted.

**Where Must One Notify?** North Dakota State Department of Health, Division of Waste Management, 1200 Missouri Avenue, Room 302, Box 5520, Bismarck, ND 58502-5520.

**Appendix II**  
**Statement for Shipping Tickets and Invoices**

**NOTE:** A federal law (the Resource Conservation and Recovery Act (RCRA), as amended (Pub. L. 98-616)) requires owners of certain underground storage tanks to notify designated state or local agencies by May 8, 1986, of the existence of their tanks. Notifications for tanks brought into use after May 8, 1986, must be made within thirty days. Consult the environmental protection agency's regulations, issued on November 8, 1985, (40 CFR part 280) to determine if you are affected by this law.

## CHAPTER 33-34-01

### 33-34-01-01. Analytical specifications.

1. **Gasoline Petroleum and fuel product specifications.** Gasoline specifications are listed and described in the appendix to this chapter labeled North Dakota gasoline specifications. Gasoline must meet the specifications in the appendix. Petroleum and fuel products including gasoline, alcohol-blended gasoline, diesel, tractor fuel, fuel oil (heating oil), kerosene, biodiesel, biodiesel blends, and all other alternative fuels shall comply with the most current applicable specifications of American society for testing and materials (ASTM), which are found in section 5 - petroleum products, lubricants, and fossil fuels of that organization's publication "Annual Book of ASTM Standards" and supplements thereto or revisions thereof as may be designated by ASTM, except as modified or rejected by this chapter or any rule promulgated pursuant to chapter 19-10 of the North Dakota Century Code. If gasoline is blended with ethanol, it shall be blended under any of the following three options:
  - a. The base gasoline used in such blends shall meet the requirements of ASTM D4814;
  - b. The blend shall meet the requirements of ASTM D4814; or
  - c. The base gasoline used in such blends shall meet all the requirements of ASTM D4814 except distillation, and the blend shall meet the distillations requirements of the ASTM specification.

The volatility standards for blends of gasoline and ethanol shall be the same as those adopted under the rules, regulations, and Clean Air Act waivers of the environmental protection agency of the United States department of the interior. Fuel products shall not be blended at a retail location with products commonly and commercially known as casing head gasoline, absorption gasoline, condensation gasoline, drip gasoline, or natural gasoline.

2. **Gasohol Ethanol specifications.** Gasohol is a motor fuel composed of ninety volume percent of unleaded gasoline meeting all of the requirements of the North Dakota gasoline specifications except for those regarding octane and ten volume percent of denatured ethanol meeting the requirements detailed in subsection 5. The final product must meet the octane requirements of the North Dakota gasoline specifications. The denatured ethanol at the time of blending with gasoline shall conform to the most recent version of ASTM D4806, "Standard Specification for Denatured Fuel Ethanol for Blending with Gasolines for Use as Automotive Spark-Ignition Engine Fuel", except as modified or rejected by this chapter or any rule promulgated pursuant to chapter 19-10 of the North Dakota Century Code.

3. ~~Leaded gasohol specifications~~ Permissible levels of alcohol.  
~~Leaded gasohol is a motor fuel composed of ninety volume percent of leaded gasoline meeting all of the requirements of the North Dakota gasoline specifications except for those regarding octane and ten volume percent of denatured ethanol meeting the requirements detailed in subsection 5. The final product must meet the octane requirements of the North Dakota gasoline specifications. The maximum permitted level or levels of ethanol, methanol, or other alcohol, in gasoline or alcohol-blended gasoline must be in accord with any levels as established by the environmental protection agency of the United States department of the interior. Any blender or wholesaler distributing a gasoline containing methanol which has been granted an exemption or waiver by the environmental protection agency in reference to this section shall inform the North Dakota state department of health and the retailer of the blended product of this exemption or waiver in writing prior to distribution.~~
4. ~~Alternative specifications.~~ A permitted alternative is gasohol or leaded gasohol prepared by the addition of a nominal ten volume percent of denatured ethanol meeting the requirements of subsection 5 to an unleaded or leaded gasoline, respectively, that may not meet the requirements of the North Dakota gasoline specifications, provided that the finished product does meet the North Dakota gasoline specifications.
5. ~~Alcohol specifications.~~ The denatured ethanol at the time of blending either gasohol or leaded gasohol must contain no more than one and twenty-five one-hundredths weight percent of water. It shall be made unfit for beverage use by the addition of noxious or toxic materials (denaturants), as required by the United States department of treasury, bureau of alcohol, tobacco, and firearms.
6. ~~Permissible levels of alcohol.~~ The maximum permitted level or levels of ethanol, methanol, or other alcohol, in gasoline or gasohol must be in accord with any levels as established by the environmental protection agency of the United States department of the interior. Any blender or wholesaler distributing a gasoline containing methanol which has been granted an exemption or waiver by the environmental protection agency in reference to this section shall inform the state department of health and consolidated laboratories and the retailer of the blended product of this exemption or waiver in writing prior to distribution.

**History:** Effective August 1, 1988; amended effective January 1, 2009.

**General Authority:** NDCC 19-10-10, 23-01-03(3)

**Law Implemented:** NDCC 19-10-10

### **33-34-01-02. Labeling specifications.**

1. **Posted octane rating.** The posted octane rating of a gasoline or ~~gasohol~~ alcohol-blended gasoline is the mathematical average of the octane as determined by the ASTM D2699 Research Method engine test and the octane as determined by the ASTM D2700 Motor Method engine test.

- a. The posted octane rating must ~~appear~~ be conspicuously placed on the dispenser's front panel in a type not less than one inch [2.54 centimeters] high.
- b. Only gasoline or ~~gasohol~~ alcohol-blended gasoline with a posted octane rating greater than or equal to ninety-one may be labeled "premium", "supreme", or "high test".
- c. Only gasoline or ~~gasohol~~ alcohol-blended gasoline with a posted octane rating greater than or equal to eighty-nine may be labeled "super", "plus", or "midgrade".
- d. Octane of unleaded and leaded gasoline or ~~gasohol~~ alcohol-blended gasoline must be at least eighty-seven. Unleaded gasoline or ~~gasohol~~ alcohol-blended gasoline means that gasoline or ~~gasohol~~ alcohol-blended gasoline produced without the intentional use of any lead additive and which contains not more than five one-hundredths grams of lead per gallon and not more than five one-thousandths grams of phosphorus per gallon. Leaded gasoline or ~~gasohol~~ alcohol-blended gasoline means gasoline or ~~gasohol~~ alcohol-blended gasoline ~~produced with the use of any lead additive or~~ alcohol-blended gasoline which contains more than five one-hundredths grams of lead per gallon ~~or more than five one-thousandths grams of phosphorus per gallon, or any fuel to which lead or phosphorus is intentionally added.~~

2. **Alcohol-blended gasolines.**

- a. All gasoline or ~~gasohol~~ alcohol-blended gasoline sold or offered for sale containing ethanol, methanol, or cosolvent alcohol, or any combination thereof, shall be labeled with the conventional name or names of the alcohol contained in the gasoline or ~~gasohol~~ alcohol-blended gasoline if the gasoline or ~~gasohol~~ alcohol-blended gasoline consists of one percent or more by volume of any alcohol or combinations of alcohols. The label must be on any price advertising and the dispenser's front panel next to the gasoline or alcohol-blended gasoline grade label in a position that is clear and conspicuous from the driver's position. The dispensing unit label shall also identify the maximum percentage by volume, to the nearest whole percent, of ethanol, methanol, or cosolvent alcohol, or any combination thereof contained in the gasoline or alcohol-blended gasoline. If gasoline or alcohol-blended gasoline consists of one percent or more by

volume of ethanol, the dispensing unit shall bear the ethanol promotion and information council label or logo.

- b. Maximum percentage of methanol and cosolvent alcohol must both be conspicuously displayed or labeled if the product contains three percent or more by volume of methanol.
  - c. No person may sell gasoline or ~~gasohol~~ alcohol-blended gasoline in any manner, including coloring, which shall deceive, tend to deceive, or has the effect of deceiving the purchaser as to grade or type.
  - d. Suppliers of alcohol-blended gasoline to retail service stations or to other resuppliers must provide to the retailer or other reseller an invoice or delivery ticket indicating to within one percentage point the specific content by volume of any alcohol contained if the ~~gasoline or gasohol~~ alcohol-blended gasoline consists of one percent or more by volume of any alcohol or combinations of alcohols. This information must be made readily available to the consumer of an alcohol-blended gasoline.
3. **Gasoline grade designations.** All gasolines or alcohol-blended gasolines sold or offered for sale must bear on the dispenser's front panel and on any price advertising the appropriate leaded or lead-free grade designation. This label must be posted in a position that is clear and conspicuous from the driver's position.

4. **Biodiesel.**

- a. Biodiesel and biodiesel blends shall be identified by the capital letter "B" followed by the numerical value representing the volume percentage of biodiesel fuel.
- b. Each retail dispenser of biodiesel blend containing more than five percent and up to and including twenty percent biodiesel shall be labeled with either the capital letter "B" followed by the numerical value representing the volume percentage of biodiesel fuel and ending with "biodiesel blend" or the phrase "biodiesel blend between 5% and 20%" or similar words.
- c. Each retail dispenser of biodiesel or biodiesel blend containing more than twenty percent biodiesel shall be labeled with the capital letter "B" followed by the numerical value representing the volume percentage of biodiesel fuel and ending with either "biodiesel" or "biodiesel blend".
- d. Suppliers of biodiesel or biodiesel blend to retail service stations or to other resuppliers must provide to the retailer or reseller a declaration of the volume percent biodiesel on an invoice or

delivery ticket. This documentation is for dispenser labeling purposes only. It is the responsibility of any potential blender to determine the amount of biodiesel in the diesel fuel prior to blending.

**History:** Effective August 1, 1988; amended effective August 1, 1989; February 1, 1992; ~~January 1, 2009.~~

**General Authority:** NDCC 19-10-10, 23-01-03(3)

**Law Implemented:** NDCC 19-10-10

**33-34-01-03. Kerosene specifications:** **[Reserved]** ~~Kerosene shall meet the specifications of this section.~~

- ~~1. Kerosene shall be a petroleum fraction, shall be free from water, additives, foreign and or suspended matter, and shall be suitable for use as an illuminating oil.~~
- ~~2. Burning test, hours (minimum) ..... \* 16~~
- ~~3. Volatility:  
Flash point, degrees  
Fahrenheit (minimum) ..... 100  
Distillation, degrees Fahrenheit:  
10 percent recovered (maximum) ..... 40±  
  
End point, (maximum) ..... 572~~
- ~~4. Sulfur, percent (maximum)  
No. 1-K ..... 0.04  
No. 2-K ..... 0.30~~
- ~~5. Color, Saybolt number,  
(minimum) (after heating 16 hours) ..... 16~~
- ~~6. Fluidity:  
Freezing point, degrees Fahrenheit ..... -22  
Viscosity at 40 degrees Celsius ..... 1.0 min/1.9 max~~

~~\*After the first weighing, the rate of burning shall be 18 to 26 g/h. with the Institute of Petroleum (IP) burner. At the end of test the chimney shall be clear or only slightly clouded; the wick shall have no appreciable hard incrustation; at the end of test, the width of the flame may not vary by more than six millimeters, and the height of the flame may not have lowered by more than five millimeters from the respective measurements recorded at the start of the test.~~

**History:** Effective August 1, 1988; amended effective August 1, 1989.

**General Authority:** NDCC 19-10-10, 23-01-03(3)

**Law Implemented:** NDCC 19-10-10

**33-34-01-04. Tractor fuel specifications:** **[Reserved]** ~~Tractor fuel specifications shall be as provided in this section.~~

Test	Light Grade
Distillation	
10 percent recovered	
degrees Fahrenheit maximum	347
95 percent recovered	
degrees Fahrenheit	465 to 518
Octane number American society for testing and materials motor method, minimum	
	35
Corrosion copper strip, maximum	
	No. 2
Sulfur percent, maximum	
	1.0

Test	Regular Grade
Distillation	
10 percent recovered	
degrees Fahrenheit	347 to 401
95 percent recovered	
degrees Fahrenheit	465 to 518
Octane number American society for testing and materials motor method, minimum	
	35
Corrosion, copper strip, maximum	
	No. 2
Sulfur percent, maximum	
	1.0

Tractor fuel may be colored green.

**History:** Effective August 1, 1988.

**General Authority:** NDCC 19-10-10, 23-01-03(3)

**Law Implemented:** NDCC 19-10-10

~~33-34-01-05. Heating oil specifications. [Reserved] Heating oil specifications are listed and described in the appendix to this chapter labeled North Dakota heating oil specifications.~~

**History:** Effective August 1, 1988.

**General Authority:** NDCC 19-10-10, 23-01-03(3)

**Law Implemented:** NDCC 19-10-10

~~33-34-01-06. Diesel fuel specifications. [Reserved] Diesel fuel specifications are listed and described in the appendix to this chapter labeled North Dakota diesel fuel specifications.~~

**History:** Effective August 1, 1988.

**General Authority:** NDCC 19-10-10, 23-01-03(3)

**Law Implemented:** NDCC 19-10-10

## NORTH DAKOTA GASOLINE SPECIFICATIONS

TEST	MOTOR			
Water and Sediment. . . . .	None			
Color, Dye. . . . .	a			
Antiknock Compound g/gal. max . . . . .	b			
Distillation Test				
<del>10 percent Evap. degrees F. max . . . . .</del>	<del>122<sup>c</sup></del>	<del>131<sup>d</sup></del>	<del>140<sup>e</sup></del>	<del>150<sup>f</sup></del>
<del>50 percent Evap. degrees F. min . . . . .</del>	<del>170</del>	<del>170</del>	<del>170</del>	<del>170</del>
<del>50 percent Evap. degrees F. max . . . . .</del>	<del>230</del>	<del>235</del>	<del>240</del>	<del>250</del>
<del>90 percent Evap. degrees F. max . . . . .</del>	<del>365</del>	<del>365</del>	<del>365</del>	<del>374</del>
<del>End Point degrees F. max. . . . .</del>	<del>437</del>	<del>437</del>	<del>437</del>	<del>437</del>
<del>Residue percent max . . . . .</del>	<del>2</del>			
Vapor Pressure g (Reid) lbs. max. . . . .	<del>15.0<sup>g</sup></del>	<del>13.5<sup>h</sup></del>	<del>11.5<sup>i</sup></del>	<del>9.0<sup>j</sup></del>
Vapor/Liquid Ratio				
<del>Minimum Test Temp. degrees F. . . . .</del>	<del>105<sup>k</sup></del>	<del>116<sup>l</sup></del>	<del>124<sup>m</sup></del>	<del>133<sup>n</sup></del>
<del>V/L max . . . . .</del>	<del>20</del>	<del>20</del>	<del>20</del>	<del>20</del>
Corrosion (copper strip) max. . . . .	No. 1			
Sulfur percent max				
<del>(lead free gasolines) . . . . .</del>	<del>0.1</del>			
Sulfur percent max				
<del>(leaded gasolines). . . . .</del>	<del>0.15</del>			
Gum, mgs/100 ml max . . . . .	5			
Knock Value				
<del>Motor and Research Octane No., min. . . . .</del>	<del>a</del>			

## NORTH DAKOTA GASOLINE SPECIFICATIONS (Continued)

TEST	STOVE AND LIGHT	80	AVIATION 100	100LL
Water and Sediment. . . . .	None			
Color Saybolt, min. . . . .	15			
Color, Dye. . . . .	None	Red(l)	Green	Blue
Dye Content . . . . .				
— Permissible blue dye (m)				
— max. mg/gal . . . . .		0.5	4.7	5.7
— Permissible yellow dye (n)				
— max. mg/gal . . . . .		None	5.9	None
— Permissible red dye (o)				
— max. mg/gal . . . . .		8.65	None	None
Antiknock Compound (p) ml/gal. max . . .	Trace	0.5(p)	4.0	2.0
<b>Distillation Test</b>				
— 10 percent Evap. degrees F. max . . .	158	167	167	167
— 50 percent Evap. degrees F. max . . .	266	221	221	221
— 90 percent Evap. degrees F. max . . .	365	275	275	275
— End Point degrees F. max. . . . .	---	338	338	338
— Sum of 10 and 50 degrees F				
— Evap. Points degrees F. min . . . . .	---	307	307	307
— Distillation Recovery percent min . . .	---	97	97	97
— Residue percent max . . . . .	2	1.5	1.5	1.5
— Loss percent max. . . . .	---	1.5	1.5	1.5
Vapor Pressure (Reid) lbs. max. . . . .	10	7.0	7.0	7.0
— min. . . . .	---	5.5	5.5	5.5
Corrosion (copper strip) max. . . . .	None	No. 1	No. 1	No. 1
Sulfur percent max (leaded gasolines). . . . .	---	0.05	0.05	0.05
Potential Gum (g) (5 hr. aging gum)				
— max. mg/per 100 ml. . . . .	---	6	6	6
Freezing Point degrees F. max . . . . .	---	-72	-72	-72
<b>Net Heat of Combustion</b>				
— min. BTU/lb . . . . .	---	18.720	18.720	18.720
Visible Lead Precipitate (r)				
— max. mg/100 ml. . . . .	---	3	3	3
Water Reaction. . . . .	---	Volume change not to exceed (+) (-) 2 ml		
Permissible antioxidants (s)				
— max. lb/1000 bbl. . . . .	---	4.2	4.2	4.2

Knock Value

Octane Number Lean Rating, min. . . . .	80	100	100
Octane Number Rich Rating, min. . . . .	87	+	+
Performance number, min. . . . .		130	130
Oxidation stability, Minutes min. . . . .	400		

**FOOTNOTES TO NORTH DAKOTA GASOLINE SPECIFICATIONS**

- a. ~~The minimum octane for premium gasoline shall be 91 as determined by the sum of the research method plus the motor method all divided by two  $((R+M)/2)$ . The minimum octane for super or midgrade gasoline shall be 89 as determined by the sum of the research method plus the motor method all divided by two  $((R+M)/2)$ . The minimum octane for leaded and unleaded gasoline shall be 87 as determined by the sum of the research method plus the motor method all divided by two  $((R+M)/2)$ . A person may not sell gasoline in any manner, including coloring, which deceives, tends to deceive, or has the effect of deceiving the purchaser as to grade or type.~~
- b. ~~The lead content of gasoline must be in accordance with environmental protection agency requirements.~~
- c. ~~Applies to gasoline sold during the months of January, February, March, November, and December.~~
- d. ~~Applies to gasoline sold during the months of March, April, October, and November.~~
- e. ~~Applies to gasoline sold from September sixteenth through the month of October.~~
- f. ~~Applies to gasoline sold during the months of April, May, June, July, and August and September first through September fifteenth. For the month of May, the specification only applies to gasoline and gasoline-oxygenate blend tankage at refineries, importers, pipelines, and terminals.~~
- g. ~~North Dakota and environmental protection agency regulations allow 1.0 pounds per square inch higher vapor pressure for gasoline-ethanol blends containing 9 to 10 volume percent ethanol for the same period.~~
- h. ~~Applies to gasoline sold during the months of January, February, March, November, and December.~~
- i. ~~Applies to gasoline sold during the months of March, April, May, October, and November.~~

- j. ~~Applies to gasoline sold during the months of June and October and during the period from September sixteenth through September thirtieth.~~
- k. ~~Applies to gasoline sold during the months of July, August, and September.~~
- l. ~~If mutually agreed upon between purchaser and supplier, grade 80 may be required to be free from tetraethyllead. In such case the fuel may not contain any dye and color may not be darker than +20 saybolt.~~
- m. ~~The only blue dye which may be present in the finished gasoline is essentially 1,4-dialkylaminoanthraquinone.~~
- n. ~~The only yellow dye which may be present in the finished gasoline is essentially p-diethylaminoazobenzene (Color Index No. 11020).~~
- o. ~~The only red dye which may be present in the finished gasoline is essentially methyl derivatives of azobenzene-4-azo-2-naphthol (methyl derivatives of Color Index No. 26105) or alkyl derivatives of azobenzene-4-azo-2-naphthol.~~
- p. ~~The tetraethyllead must be added in the form of an aviation antiknock mixture containing not less than 61 percent by weight of tetraethyllead and sufficient ethylene dibromide to provide two bromine atoms per atom of lead. The balance must contain no added ingredients other than kerosene, and approved inhibitors, and blue dye, as specified herein.~~
- q. ~~If mutually agreed upon between purchaser and supplier, aviation gasoline may be required to meet a sixteen-hour aging gum test instead of the five-hour aging gum test. In some cases the gum content may not exceed 10 mg per 100 ml and the visible lead precipitate may not exceed 4 mg per 100 ml. In such fuel the permissible antioxidants may not exceed 8.4 lb per 1000 bbl [42 gallons].~~
- r. ~~The visible lead precipitate requirement applies only to leaded fuels.~~
- s. ~~Permissible antioxidants are as follows:~~

~~N,N'-diisopropyl-para-phenylenediamine~~  
~~N,N'-di-secondary-butyl-para-phenylenediamine~~  
~~2,4-dimethyl-6-tertiary-butylphenol~~  
~~2,6-ditertiary-butyl-4-methylphenol~~  
~~2,6-ditertiary butylphenol~~

~~Mixed tertiary butylphenols, composition:~~

~~Seventy-five percent minimum 2,6-ditertiary butylphenol plus twenty-five percent maximum tertiary and tritertiary butylphenols.~~

ROPERI ABEROTA BEARING OILS SPECIFICATIONS

	No. 1	No. 2	No. 4 (Light)	No. 6	No. 7 (Light)	No. 8 (Heavy)	No. 9
Corrosion (Kopfer Strich) Maximum							
Flash Point (Cup closed cover) °F	180	180	180	130	130	130	140
Minimum							
Pour Point °F Maximum	6	20	20	20			
Water and sediment percent maximum	0.05	0.05	0.50	0.50	1.00	1.00	2.00
Carbon Residue (by 195 Method) percent maximum	0.15	0.25	0.50	0.50	0.15	0.15	
Ash percent maximum							
Distillation Test:							
100 Recovered % maximum	420	5	32.0	45	420	500	> 900
400 Recovered % maximum	350	640	40	125	300	500	6000
400 Recovered % minimum		360					
Viscosity at 100° F. seconds							
Deposits (Microscopic) Maximum							
Viscosity at 122° F. Saybolt Furol							
Minimum							
Maximum							
Viscosity at 100° F. Kinematic Centistokes							
Minimum	1.4	2.00	2.0	3.8	1.35-4	> 65	42
Maximum	2.7	3.5	5.8	70.4	5	101	62
Viscosity at 100° F. Kinematic Centistokes							
Minimum							
Maximum							
Gravity 150° F. Maximum	35	30	30 max				
Water, percent maximum	0.5	0.5					

a. It is the intent of these classifications that failure to meet any requirement of a given grade does not automatically place an oil in the next lower unless in fact it meets all requirements of the lower grade.

b. Shall not exceed 0° whenever required by conditions of storage or use.

c. The 50 point shall be 40° F. maximum for use in either than circulating bearings.

d. When Pour Point tests than 0° F. is specified, the minimum viscosity shall be 1.000 (122.0 seconds Saybolt Universal) and minimum 98% point shall be retained.

NORTH PACIFIC DISTRICT FUEL SPECIFICATIONS

Grade of Diesel Fuel Oil	Flash Point Degrees Centigrade	Cloud Point Degrees Centigrade	Water and Sediment, percent by volume	Carbon Residue on 10% Residue, percent	Ash percent by weight	PP percent by weight		Viscosity at 50 °C Kinetic, centistokes for 40/60 Redwood, sec.	Sulfur percent by weight	Copper Strip Corrosion	Cetane Number c
						Min.	Max.				
No. 1-D Low Sulfur	38	4	0.05	0.15	0.01	---	226	1.3	0.05	No. 1	402
No. 2-D Low Sulfur	52	4	0.05	0.15	0.01	202b	216	1.9	0.05	No. 1	400
No. 3-D	30	0	0.05	0.15	0.01	---	208	1.3	0.15	No. 2	400
No. 2-M	52	0	0.05	0.15	0.01	202b	218	1.00 (22.8)	0.50	No. 1	400
No. 0-M	34	4	0.05	---	0.10	---	---	5.5 (45)	2.0	---	---

It is unadvisable to specify low temperature properties that will cause satisfactory operation on a hard shaft. Satisfactory operation should be allowed in most cases if the cloud point for the fuel is not above the normal operating temperature of the engine. The maximum cloud point will be used as a guide in determining the operating temperature of the engine. The maximum cloud point for the fuel will be used as a guide in determining the operating temperature of the engine. The maximum cloud point for the fuel will be used as a guide in determining the operating temperature of the engine.

B. Each cloud point is specified, the minimum viscosity shall be 1.700 and the minimum 50 percent point shall be waived.

C. Where grade number by Method 511 Test for Equivalence Quality of Diesel Fuels by Cetane Method, is not available, calculated Cetane Index may be used as an approximation. When this is determined, Method 511 shall be the reference method.

D. Low atmospheric temperatures as well as engine operation at high altitudes may require use of fuels with higher cetane ratings.



**TITLE 45**  
**INSURANCE COMMISSIONER**



JANUARY 2009

**CHAPTER 45-04-07.3**  
**PRE-NEED LIFE INSURANCE MINIMUM STANDARDS FOR DETERMINING**  
**RESERVE LIABILITIES AND NONFORFEITURE VALUES**

<u>Section</u>	
<u>45-04-07.3-01</u>	<u>Definitions</u>
<u>45-04-07.3-02</u>	<u>Minimum Valuation Mortality Standards</u>
<u>45-04-07.3-03</u>	<u>Minimum Valuation Interest Rate Standards</u>
<u>45-04-07.3-04</u>	<u>Minimum Valuation Method Standards</u>
<u>45-04-07.3-05</u>	<u>Transition Rules</u>
<u>45-04-07.3-06</u>	<u>Effective Date</u>

**45-04-07.3-01. Definitions.**

1. "2001 CSO mortality table" means that mortality table, consisting of separate rates of mortality for male and female lives, developed by the American academy of actuaries CSO task force from the valuation basic mortality table developed by the society of actuaries individual life insurance valuation mortality task force, and adopted by the national association of insurance commissioners in December 2002. The 2001 CSO mortality table is included in the proceedings of the national association of insurance commissioners (second quarter 2002). Unless the context indicates otherwise, the "2001 CSO mortality table" includes both the ultimate form of that table and the select and ultimate form of that table and includes both the smoker and nonsmoker mortality tables and the composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality tables.
2. "Ultimate 1980 CSO" means the commissioners' 1980 standard ordinary life valuation mortality tables (1980 CSO) without ten-year selection factors, incorporated into the 1980 amendments to the national association of insurance commissioners standard valuation law approved in December 1983.

3. For the purposes of this chapter, pre-need life insurance is any life insurance policy or certificate that is issued in combination with, in support of, with an assignment to, or as a guarantee for a prearrangement agreement for goods and services to be provided at the time of and immediately following the death of the insured. Goods and services may include embalming, cremation, body preparation, viewing or visitation, coffin or urn, memorial stone, and transportation of the deceased. The status of the policy or contract as pre-need life insurance is determined at the time of issue in accordance with the policy form filing.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-35-02

**45-04-07.3-02. Minimum valuation mortality standards.** The minimum mortality standard for pre-need life insurance contracts for determining reserve liabilities and nonforfeiture values for both male and female insureds shall be the ultimate 1980 CSO.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-35-02

**45-04-07.3-03. Minimum valuation interest rate standards.**

1. The interest rates used in determining the minimum standard for valuation of pre-need life insurance shall be the calendar year statutory valuation interest rates as defined in North Dakota Century Code section 26.1-35-04.
2. The interest rates used in determining the minimum standard for nonforfeiture values for pre-need life insurance shall be the calendar year statutory nonforfeiture interest rates as defined in North Dakota Century Code section 26.1-33-27.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-35-02

**45-04-07.3-04. Minimum valuation method standards.**

1. The method used in determining the standard for the minimum valuation of reserves of pre-need life insurance shall be the method defined in North Dakota Century Code section 26.1-35-02.

2. The method used in determining the standard for the minimum nonforfeiture values for pre-need life insurance shall be the method defined in North Dakota Century Code section 26.1-33-27.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-35-02

**45-04-07.3-05. Transition rules.**

1. For pre-need life insurance policies issued on or after the effective date of this chapter and before January 1, 2012, the 2001 CSO may be used as the minimum standard for reserves and minimum standard for nonforfeiture benefits for both male and female insureds.
2. If an insurer elects to use the 2001 CSO as a minimum standard for any policy issued on or after the effective date of this chapter and before January 1, 2012, the insurer shall provide, as a part of the actuarial opinion memorandum submitted in support of the company's asset adequacy testing, an annual written notification to the domiciliary commissioner. The notification shall include:
  - a. A complete list of all pre-need life insurance policy forms that use the 2001 CSO as a minimum standard;
  - b. A certification signed by the appointed actuary stating that the reserve methodology employed by the company in determining reserves for the pre-need life insurance policies issued after the effective date and using the 2001 CSO as a minimum standard, develops adequate reserves. For the purposes of this certification, the pre-need life insurance policies using the 2001 CSO as a minimum standard cannot be aggregated with any other policies; and
  - c. Supporting information regarding the adequacy of reserves for pre-need life insurance policies issued after the effective date of this chapter and using the 2001 CSO as a minimum standard for reserves.
3. Pre-need life insurance policies issued on or after January 1, 2012, must use the ultimate 1980 CSO in the calculation of minimum nonforfeiture values and minimum reserves.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-35-02

**45-04-07.3-06. Effective date.** This chapter is applicable to pre-need life insurance policies and certificates and similar contracts and certificates issued on or after January 1, 2009.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-35-02

**TITLE 61**  
**STATE BOARD OF PHARMACY**



JANUARY 2009

CHAPTER 61-02-07.1

61-02-07.1-12. Technicians checking technicians. Activities allowed by law to be performed within a licensed pharmacy by a registered pharmacy technician in the preparation of a prescription or order for dispensing or administration may be performed by one registered pharmacy technician and verified by another registered pharmacy technician working in the same licensed pharmacy, under the following conditions:

1. The licensed pharmacy where the work is being conducted has policies and procedures specifically describing the scope of the activities to be verified through this practice.
  - a. Training for the specific activity is reflected in a written policy.
  - b. A record of the individuals trained is maintained in the pharmacy for two years.
2. The pharmacy has a continuous quality improvement system in place to periodically verify the accuracy of the final product, including:
  - a. Recording any quality related events leading up to the final dispensing or administration of the drug prepared.
  - b. Recording any errors which actually reach the patient as a result of these activities.
  - c. Specific limits of acceptable quality related event levels before reassessment is required.
  - d. Consideration must be made for high-risk medications on the institute for safe medication practices (ISMP) list and specific monitoring, review, and quality assurance parameters must be instituted if any of these products are included in the pharmacy's technicians-checking-technicians program.

3. Any error must trigger pharmacist review of the process. This review and subsequent recommendations must be documented.
4. The pharmacy has a system in place to review all quality related events and errors recorded and takes corrective action based on the information to reduce quality related events and eliminate errors reaching the patient.
5. As always, the pharmacist-in-charge and the permitholder are jointly responsible for the final product dispensed or released for administration from the pharmacy.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 28-32-03

## CHAPTER 61-04-04

**61-04-04-01. Definition of unprofessional conduct.** The definition of "unprofessional conduct" for purposes of subdivision i of subsection 1 of North Dakota Century Code section 43-15-10 for disciplinary purposes includes, but is not limited to, the following:

1. The violating or attempting to violate, directly, indirectly, through actions of another, or assisting in or abetting the violation of, or conspiring to violate, any provision or term of North Dakota Century Code chapter 43-15, the Prescription Drug Marketing Act, the Robinson-Patman Act, or of the applicable federal and state laws and rules governing pharmacies or pharmacists.
2. Failure to establish and maintain effective controls against diversion of prescription drugs into other than legitimate medical, scientific, or industrial channels as provided by state or federal laws or rules.
3. Making or filing a report or record which a pharmacist or pharmacy knows to be false, intentionally or negligently failing to file a report or record required by federal or state law, or rules, willfully impeding or obstructing such filing, or inducing another person to do so. Such reports or records include only those which the pharmacist or pharmacy is required to make or file in the capacity as a licensed pharmacist or pharmacy.
4. Being unable to practice pharmacy with reasonable skill and safety by reason of illness, use of drugs, narcotics, chemicals, or any other type of material, or as a result of any mental or physical condition. A pharmacist affected under this subsection shall at reasonable intervals be afforded an opportunity to demonstrate that the pharmacist can resume the competent practice of pharmacy with reasonable skill and safety to the pharmacist's customers.
5. Knowingly dispensed a prescription drug after the death of a patient.
6. Using a facsimile machine to circumvent documentation, authenticity, verification, or other standards of pharmacy practice.
7. Billing or charging for quantities greater than delivered, or for a brand when a generic is dispensed.
8. Submits fraudulent billing or reports to a third-party payor of prescription charges.
9. Refuses to provide information or answer questions when requested to do so by the patient, which affect the patient's use of medications prescribed and dispensed by the pharmacy.

10. Does not address or attempt to resolve and document a possible prescription error or situation of potential harm to the patient when apparent or should have been apparent to the pharmacist.
11. Does not attempt to affect the possible addiction or dependency of a patient to a drug dispensed by the pharmacist, if there is reason to believe that patient may be so dependent or addicted.
12. The assertion or inference in a public manner of material claims of professional superiority in the practice of pharmacy that cannot be substantiated.
13. The publication or circulation of false, misleading, or otherwise deceptive statements concerning the practice of pharmacy.
14. Refusing to compound and dispense prescriptions that may reasonably be expected to be compounded or dispensed in pharmacies by a pharmacist.
15. Participation in agreements or arrangements with any person, corporation, partnership, association, firm, or others involving rebates, kickbacks, fee-splitting, or special charges in exchange for professional pharmaceutical services, including, but not limited to, the giving, selling, donating, or otherwise furnishing or transferring, or the offer to give, sell, donate, or otherwise furnish or transfer money, goods, or services free or below cost to any licensed health care facility or the owner, operator, or administrator of a licensed health care facility as compensation or inducement for placement of business with that pharmacy or pharmacist. Monetary rebates or discounts which are returned to the actual purchaser of drugs as a cost-justified discount or to meet competition are permitted if the rebates or discounts conform with other existing state and federal rules and regulations.
16. Discriminating in any manner between patients or groups of patients for reasons of religion, race, creed, color, sex, age, or national origin.
17. Disclosing to others the nature of professional pharmaceutical services rendered to a patient without the patient's authorization or by order or direction of a court or as otherwise permitted by law. This does not prevent pharmacies from providing information copies of prescriptions to other pharmacies or to the person to whom the prescription was issued and does not prevent pharmacists from providing drug therapy information to physicians for their patients.
18. Improper advertising. Prescription drug price information may be provided to the public by a pharmacy, if all the following conditions are met: No representation or suggestion concerning the drug's safety, effectiveness, or indications for use, is made. No reference is made to controlled substances listed in schedules II-V of the latest revision of the

Federal Controlled Substances Act, North Dakota Uniform Controlled Substances Act, and the rules of the state board of pharmacy.

19. Failure to report to the prescription drug monitoring program as required by North Dakota Century Code chapter 19-03.5.
20. Failure to comply with the reporting requirement of North Dakota Century Code section 43-15-42.3, including:
  - a. Actions that affect the licensee's or registrant's practice privileges in a facility.
  - b. Actions that result in the loss of the licensee's or registrant's employment or membership in a professional organization due to alleged incompetence, negligence, unethical or unprofessional conduct, or physical, mental, or chemical impairment.
  - c. Actions based on a professional liability claim against the licensee or registrant, such as an adverse judgment or settlement, a refusal to issue or renew coverage, or a cancellation of coverage.
  - d. Actions resulting in the loss of the licensee's or registrant's authorization to practice by any state or jurisdiction.
  - e. Conviction of the licensee or registrant of any misdemeanor or felony in this or any other state, territory, or jurisdiction.
21. Notwithstanding any other provision, a practitioner who diagnoses a sexually transmitted disease, such as chlamydia, gonorrhea, or any other sexually transmitted infection, in an individual patient may prescribe or dispense, and a pharmacist may dispense, prescription antibiotic drugs to that patient's sexual partner or partners, without there having been an examination of that patient's sexual partner or partners.

Interpretation of this definition of unprofessional conduct is not intended to hinder or impede the innovative practice of pharmacy, the ability of the pharmacist to compound, alter, or prepare medications, subsequent to a practitioner's order for the appropriate treatment of patients. Further, it is not intended to restrict the exercise of professional judgment of the pharmacist when practicing in the best interest of the pharmacist's patient.

**History:** Effective November 1, 1991; amended effective December 1, 2003; October 1, 2007; January 1, 2009.

**General Authority:** NDCC 28-32-02, 43-15-10(1)(i)(12)(14)

**Law Implemented:** NDCC 28-32-02



**TITLE 69**  
**PUBLIC SERVICE COMMISSION**



**JANUARY 2009**

**CHAPTER 69-05.2-08**

**69-05.2-08-08. Permit applications - Permit area - Vegetation and land use information.**

1. The application must contain the following premining vegetation information:
  - a. A map or aerial photograph at a scale of 1:4,800 that delineates the existing mapping units within each premining land use. The mapping units for different land use categories are:
    - (1) For cropland, each soil mapping unit.
    - (2) For tame pastureland, each soil mapping unit.
    - (3) For native grasslands, each range ecological site. The soil mapping unit in each range ecological site must also be delineated.
    - (4) For woodland, each woodland type, i.e., trees, tall shrubs, and low shrubs.
    - (5) For fish and wildlife habitat, each vegetation type as further specified in subparagraphs a, b, and c.
      - (a) For woodland, each woodland type, i.e., trees, tall shrubs, and low shrubs;
      - (b) For wetlands, wetland classes based on ecological differentiation as set forth in Classification of Natural Ponds and Lakes in the Glaciated Prairie Region (United States department of the interior (1971)) or other approved classification system.

- (c) For grasslands (native or introduced), each soil mapping unit.
    - (6) For shelterbelts, the entire planting.
  - b. For each land use, a comprehensive species list of higher plants and identification of any species of rare, endangered, poisonous, or noxious plants, developed by a thorough reconnaissance of all mapping units.
  - c. A description of each mapping unit delineated under subdivision a. This description must include:
    - (1) The acreage [hectarage] of each mapping unit for each surface owner within the permit area.
    - (2) An assessment of the productivity of cropland, tame pastureland, and native grassland based on published data, historic data, or quantitative data.
    - (3) Natural resource conservation service ~~range-condition~~ similarity index in percent for native grassland.
    - (4) A detailed description of number and arrangement of trees and shrubs, probable age of trees, height of trees, and characteristics of understory vegetation for woodland and fish and wildlife habitat where woodland is the vegetation type.
    - (5) A detailed description of community structure, assemblages of plant species, water conditions, and size for fish and wildlife habitat where wetlands are the vegetation type.
    - (6) A description of number and arrangement of trees and shrubs, length and number of rows, and associated plant species for shelterbelts.
    - (7) When required for the proposed success standard, a quantitative assessment of applicable vegetation parameters using methods approved by the commission.
  - d. A detailed narrative describing the nature and variability of the vegetation in each mapping unit and land use category, based on a thorough reconnaissance and qualitative assessment.
2. When the methods selected for subdivision g of subsection 6 of section 69-05.2-09-11 require the use of reference areas:

- a. The number of reference areas proposed must be sufficient to adequately represent the permit area.
  - b. The location, approximate size, and boundaries of all proposed reference areas must be located on a map of sufficient scale to accurately show the field location of each. The boundaries of the mapping unit in which the reference area is located must also be delineated.
  - c. The permittee shall demonstrate that the proposed reference areas adequately characterize the relevant mapping units which they propose to represent. This demonstration must be done according to methods approved by the commission.
3. The application must contain, in addition to materials satisfying subdivision a of subsection 2 of North Dakota Century Code section 38-14.1-14:
- a. A map and supporting narrative of the uses of the land existing at the time the application is filed. If the premining use of the land was changed within five years before the anticipated date of beginning the proposed operations, the historic use must also be described.
  - b. A narrative of land capability and productivity, which analyzes the land use description under subdivision a in conjunction with other environmental resources information required under this chapter.
4. The application must contain a narrative description which includes information adequate to predict the potential for reestablishing vegetation on all areas to be disturbed.

**History:** Effective August 1, 1980; amended effective June 1, 1983; May 1, 1990; June 1, 1997; January 1, 2009.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-14, 38-14.1-24

## CHAPTER 69-05.2-10

### 69-05.2-10-03. Permit applications - Criteria for permit approval or denial.

1. The commission will not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of any law or rule of this state, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.], or any law or rule in any state enacted under federal law or regulation pertaining to air or water environmental protection, incurred in connection with any surface coal mining and reclamation operation, or if any of the following are outstanding:
  - a. Delinquent civil penalties under North Dakota Century Code sections 38-12.1-08 and 38-14.1-32, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.], or any law or rule in any state enacted under federal law or regulation pertaining to air or water environmental protection, incurred in connection with any surface coal mining and reclamation operation.
  - b. Bond forfeitures where violations upon which the forfeitures were based have not been corrected.
  - c. Delinquent abandoned mine reclamation fees.
  - d. Unabated violations of federal and state laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining and reclamation operation.
  - e. Unresolved federal and state failure-to-abate cessation orders.
  - f. Unresolved imminent harm cessation orders.
2. If a current violation exists, the commission will require the applicant or person who owns or controls the applicant, before the permit is issued, to:
  - a. Submit proof that the violation has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation; or
  - b. Establish that the applicant, or any person owned or controlled by either the applicant or any person who owns or controls the applicant, has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of that violation. If the administrative or judicial authority either

denies a stay applied for in the appeal or affirms the violation, then any operations being conducted under a permit issued under this section must immediately cease, until the provisions of subdivision a are satisfied.

3. Any permit issued on the basis of proof submitted under subdivision a of subsection 2 that a violation is being corrected, or pending the outcome of an appeal under subdivision b of subsection 2, will be conditionally issued.
4. The commission will not issue a permit if it finds the applicant, anyone who owns or controls the applicant, or the operator specified in the application, controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of any law or rule of this state, the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.], or any state or federal program approved under the Surface Mining Control and Reclamation Act of 1977, of such nature and duration, and with resulting irreparable damage to the environment as to indicate an intent not to comply with those laws, rules, or programs. The applicant, anyone who owns or controls the applicant, or the operator must be given an opportunity for hearing on the determination under North Dakota Century Code section 38-14.1-30.
5. After an application is deemed ready for approval, but before the permit is issued, the commission's decision to approve or disapprove the application will be made, based on the compliance review required by subsection 1, in light of any new information submitted under subsection 2 of section 69-05.2-06-01 and subsection 6 of section 69-05.2-06-02.
6. In addition to the requirements of subsection 3 of North Dakota Century Code section 38-14.1-21, no permit or significant revision will be approved, unless the application affirmatively demonstrates and the commission finds, in writing, on the basis of information in the application or otherwise available, which is documented in the approval and made available to the applicant, that:
  - a. The permit area is not on any lands subject to the prohibitions or limitations of North Dakota Century Code section 38-14.1-07 or the area has met the application review procedures of section ~~69-05.2-04-01~~ 69-05.2-04-01.1.
  - b. For alluvial valley floors:
    - (1) The applicant has obtained either a negative determination;  
or

- (2) If the permit area or adjacent area contains an alluvial valley floor:
- (a) The operations would be conducted according to chapter 69-05.2-25 and all applicable requirements of North Dakota Century Code chapter 38-14.1.
  - (b) Any change in the use of the lands covered by the permit area from its premining use in or adjacent to alluvial valley floors will not interfere with or preclude the reestablishment of the essential hydrologic functions of the alluvial valley floor.
- (3) The significance of the impact of the operations on farming will be based on the relative importance of the vegetation and water of the developed grazed or hayed alluvial valley floor area to the farm's production, or any more stringent criteria established by the commission as suitable for site-specific protection of agricultural activities in alluvial valley floors.
- (4) Criteria for determining whether a mining operation will materially damage the quantity or quality of waters include:
- (a) Potential increases in the concentration of total dissolved solids of waters supplied to an alluvial valley floor to levels above the threshold value at which crop yields decrease, based on crop salt tolerance research studies approved by the commission, unless the applicant demonstrates compliance with subdivision e of subsection 3 of North Dakota Century Code section 38-14.1-21.
  - (b) The increases in subparagraph a will not be allowed unless the applicant demonstrates, through testing related to local crop production that the operations will not decrease crop yields.
  - (c) For types of vegetation specified by the commission and not listed in approved crop tolerance research studies, a consideration must be made of any observed correlation between total dissolved solids concentrations in water and crop yield declines.
  - (d) Potential increases in the average depth to water saturated zones (during the growing season) within the root zone that would reduce the amount of subirrigated land compared to premining conditions.

- (e) Potential decreases in surface flows that would reduce the amount of irrigable land compared to premining conditions.
  - (f) Potential changes in the surface or ground water systems that reduce the area available to agriculture as a result of flooding or increased root zone saturation.
- (5) For the purposes of this subsection, a farm is one or more land units on which agricultural activities are conducted. A farm is generally considered to be the combination of land units with acreage [hectarage] and boundaries in existence prior to July 1, 1979, or, if established after July 1, 1979, with boundaries based on enhancement of the farm's agricultural productivity not related to mining operations.
- (6) If the commission determines the statutory exclusions of subsection 3 of North Dakota Century Code section 38-14.1-21 do not apply and that any of the findings required by this section cannot be made, the commission may, at the applicant's request:
  - (a) Determine that mining is precluded and deny the permit without the applicant filing any additional information required by this section; or
  - (b) Prohibit surface coal mining and reclamation operations in all or part of the area to be affected by mining.
- c. The applicant has, with respect to prime farmland, obtained either a negative determination or if the permit area contains prime farmlands:
  - (1) The postmining land use will be cropland.
  - (2) The permit specifically incorporates the plan submitted under section 69-05.2-09-15 after consideration of any revisions suggested by the natural resource conservation service.
  - (3) The operations will be conducted in compliance with chapter 69-05.2-26 and other standards required by this article and North Dakota Century Code chapter 38-14.1.
  - (4) The permit demonstrates that the applicant has the technological capability to restore prime farmland, within a reasonable time, to equivalent or higher yields as nonmined prime farmland in the surrounding area under equivalent management practices.

- (5) The aggregate total prime farmland acreage will not be decreased from that which existed prior to mining based on the cooperative soil survey. Any postmining water bodies that are part of the reclamation must be located within the nonprime farmland portions of the permit area. If any such water bodies reduce the amount of prime farmland that a surface owner had before mining, the affected surface owners must consent to the creation of the water bodies and the plans must be approved by the commission.
- d. The operations will not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitats.
- e. The applicant has submitted proof that all reclamation fees required by 30 CFR subchapter R have been paid.
- f. The applicant has, if applicable, satisfied the requirements for approval of a cropland postmining land use under section 69-05.2-22-01.
- 7. The commission may make necessary changes in the permit to avoid adverse effects on finding that operations may adversely affect any publicly owned park or places included on the state historic sites registry or the national register of historic places. Operations that may adversely affect those parks or historic sites will not be approved unless the federal, state, or local governmental agency with jurisdiction over the park or site agrees, in writing, that mining may be allowed.

**History:** Effective August 1, 1980; amended effective June 1, 1983; June 1, 1986; May 1, 1990; May 1, 1992; June 1, 1994; July 1, 1995; June 1, 1997; May 1, 2001; January 1, 2009.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-21, 38-14.1-33

## CHAPTER 69-05.2-12

### 69-05.2-12-05.1. Performance bond - Self-bond of permit applicant.

1. The commission may accept a self-bond if the following conditions are met:
  - a. The applicant designates an agent for service of process in the state.
  - b. The applicant has been in continuous operation as a business entity the five years preceding the application. The commission may allow a joint venture with less than five years of continuous operation if each member has been in continuous operation for the five years preceding the application.
  - c. The applicant submits financial information in sufficient detail to show one of the following:
    - (1) The applicant has a current ~~Moody's investors service or Standard and Poor's~~ rating of "A" or higher for its most recent bond issuance of "A" or higher as issued by Moody's Investors Service, Standard and Poor's Corporation, or an equivalent rating by any other nationally recognized statistical rating organization, as defined and approved by the United States securities and exchange commission, that is acceptable to the commission.
    - (2) The applicant has a tangible net worth of at least ten million dollars, a ratio of total liabilities to net worth of 2.5 or less, and a ratio of current assets to current liabilities of 1.2 or greater.
    - (3) The applicant's fixed assets in the United States total at least twenty million dollars and the applicant has a ratio of total liabilities to net worth of 2.5 or less, and a ratio of current assets to current liabilities of 1.2 or greater.
  - d. The applicant submits:
    - (1) Financial statements for the last complete fiscal year audited by an independent certified public accountant, and a report containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion; and
    - (2) Financial statements for completed quarters in the current fiscal year and additional information requested by the commission.
  - e. "Tangible net worth" means net worth less intangibles.

2. The commission may accept a written guarantee for an applicant's self-bond from any third-party guarantor, whenever the applicant meets the provisions of subdivisions a, b, and d of subsection 1 and the guarantor meets the provisions of subdivisions a, b, c, and d of subsection 1. The commission may require the applicant to submit information pertaining to the provisions of subdivision c of subsection 1 in order to determine the financial capabilities of the applicant. The written guarantee must provide that:
  - a. If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide to the commission funds, up to the bond amount, sufficient to complete the reclamation plan.
  - b. The guarantee must remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the commission at least ninety days in advance of the cancellation date, and the commission accepts the cancellation.
  - c. The cancellation may be accepted by the commission if the applicant obtains suitable replacement bond before the cancellation or if the covered lands have not been disturbed.
3. The total amount of the outstanding and proposed self-bonds for surface coal mining and reclamation operations may not exceed twenty-five percent of the applicant's or third-party guarantor's tangible net worth in the United States.
4. If the commission accepts a self-bond, an indemnity agreement executed by the applicant and any third-party guarantor must be submitted subject to the following:
  - a. The indemnity agreement is executed according to subsections 9 and 10 of section 69-05.2-12-01.
  - b. An affidavit is submitted certifying that such an agreement is valid under all applicable federal and state laws.
  - c. The guarantor provides a copy of the corporate authorization demonstrating that it may guarantee the self-bond and execute the indemnity agreement.
  - d. In the event of forfeiture, the applicant or third-party guarantor will complete the approved reclamation plan for the land in default or pay to the commission an amount necessary to complete the approved reclamation plan, not to exceed the bond amount.

5. Self-bonded permittees and third-party guarantors shall submit an update of the information required under subdivisions c and d of subsection 1 within ninety days after the close of their fiscal years.
6. If the financial conditions of the permittee or the third-party guarantor change so that the criteria of this section are not satisfied, the permittee shall notify the commission immediately and post an alternate bond in the same amount as the self-bond. If substitution is not made within thirty days, the commission may suspend the permit. If substitution is not made within ninety days, the commission shall suspend the permit and the operator shall cease surface mining activities and comply with section 69-05.2-13-11.

**History:** Effective May 1, 1988; amended effective January 1, 1993; January 1, 2009.

**General Authority:** NDCC 38-14.1-03

**Law Implemented:** NDCC 38-14.1-16



**TITLE 75**  
**DEPARTMENT OF HUMAN SERVICES**



JANUARY 2009

CHAPTER 75-02-01.2

**75-02-01.2-02.1. Diversion assistance.** Diversion assistance helps prevent needy families from becoming dependent on continuing government benefits by providing cash assistance to qualified families to promote job retention may be provided to a family experiencing a specific crisis situation or episode of need. Diversion assistance is not assistance under title 45, Code of Federal Regulations, part 260.31, and is not a benefit for purposes of North Dakota Century Code section 50-09-06.1. Diversion assistance may be provided to a family that meets all factors of eligibility for assistance under the temporary assistance for needy families program except as provided in this section.

1. A family may not receive diversion assistance and a temporary assistance for needy families grant in the same month. A family may receive diversion assistance only once for up to four months within a twelve-month period beginning in the month diversion assistance is provided. A family that includes a caretaker who is not a legally responsible relative of a child member of the family may not receive diversion assistance.
2. Diversion assistance may be provided to defray expenses necessary to retain or obtain employment. Expenses Within the limits described by the department, supportive services may be made available to a participant who would be unable to enter into or remain in a work activity without the use of supportive services. Necessary expenses incurred in retaining or obtaining employment must be verified. ~~Diversion assistance payments may not exceed an amount equal to four times the temporary assistance for needy families standard of need amount in the month diversion assistance is initially provided.~~
3. Family Household members of a diversion assistance recipient are not required to participate in the job opportunities and basic skills program, age sixteen or older, who have completed high school or received a general equivalency diploma, or who have neither completed high school nor received a general equivalency diploma and are not attending school, must participate in the pathways to work program

to reduce barriers to employment, or to prepare for and obtain paid employment, thereby enabling participants to become self-sufficient. Pathways to work provides individualized, intensive case management services to all work-ready and non-work-ready adults who are receiving diversion assistance. Participants who fail or refuse to comply with pathways to work requirements may have their diversion assistance case closed. Actions or failures to comply that may result in case closure include:

- a. Failure to complete the goals, tasks, or objectives listed on an action plan or an employability plan; and
  - b. Failure to cooperate with an agency providing services to meet goals, tasks, or objectives listed in the action plan or employability plan, including goals identified in the assessment.
4. Cooperation in obtaining support or establishing paternity for any child member of the family is permitted but not required. ~~The family may request a referral to the child support enforcement agency.~~
  5. ~~Participation in health tracks screening services is not required.~~
  6. An assessment and social contract are not required.
  7. ~~Monthly gross income of the family may not exceed one hundred and forty percent of the poverty level.~~
  - 8- 6. An applicant may appeal a denial, limitation, or termination of diversion assistance, and a recipient of diversion assistance may appeal termination or reduction of assistance, by making a written request for a hearing within thirty days from the date of the notice of adverse action. Diversion assistance not already approved may not be provided pending the hearing decision.
  - 9- 7. A month in which diversion assistance is received does not count toward the temporary assistance for needy families sixty-month lifetime limit provided under section 75-02-01.2-35.1.
  - 10- For purposes of this section, ~~"poverty level" means the official income poverty line, as defined by the United States office of management and budget, and as revised annually in accordance with 42 U.S.C. 9902(2).~~
  8. When a diversion assistance household is determined to have a recurrent or ongoing need, the diversion assistance case must be

closed and the household may reapply under temporary assistance for needy families to meet the recurrent or ongoing needs.

**History:** Effective June 1, 2005; amended effective January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-02.2. Kinship care assistance.**

1. Kinship care provides a monthly maintenance payment and supportive services to a child residing outside the child's parental home with a caretaker who is related to that child within the fifth degree of kinship.
4. ~~Kinship care monthly maintenance payments must be the same as the standard of need amount for a shared living arrangement for a child under the temporary assistance for needy families program, and~~ To be eligible:
  - a. ~~A court~~ court of competent jurisdiction must have entered an order placing a child's care, custody, and control with a county agency ~~or, an official of a county agency, the executive director of the department, or the division of juvenile services;~~ and
  - b. Before placing a child in kinship care for more than thirty days, ~~the county agency with care, custody, and control of the child, or a designee,~~ child's custodian must have completed a family study, a child abuse and neglect background check, and other investigations as the department may determine necessary to demonstrate that:
    - (1) The home in which care is provided is in fit and sanitary condition and properly equipped to provide good care to the child;
    - (2) The caretaker and other adults residing in the home of the caretaker properly qualify to carry out the duties and responsibilities of a kinship care provider;
    - (3) Kinship care provided in the home is for the public good in accordance with sound social policy and with due regard to the health, morality, and well-being of all children cared for in the home; and
    - (4) The home is maintained according to standards prescribed for its conduct by the department.
2. Within the limits established by the ~~department's foster care program~~ department, supportive services may provide reimbursements for child care expenses, transportation, clothing, emergent needs, activity fees,

and, as a payer of last resort, reasonable legal fees incurred by or on behalf of a child and approved by the department.

3. For purposes of this section, a relative is within the fifth degree of kinship if the relative by birth, marriage, or adoption, is the child's sibling; niece; nephew; grandniece; grandnephew; grandparent; aunt; uncle; first cousin; first cousin once removed; great-grandparent; great-aunt; great-uncle; parent's first cousin; great, great-grandparent; great, great-aunt; great, great-uncle; or great, great, great-grandparent.
4. Kinship care monthly maintenance payments must be the same as the standard of need amount for a shared living arrangement for a child under the temporary assistance for needy families program.

**History:** Effective June 1, 2005; amended effective January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-02.3. Transition assistance.** Transition assistance promotes job retention by providing an extended period of cash assistance to qualified families under temporary assistance for needy families. Households with earnings from employment exceeding the allowable standard of need for their household size may remain eligible for transition assistance for up to six months. Transition assistance is assistance under title 45, Code of Federal Regulations, part 260.31, and is a benefit for purposes of North Dakota Century Code section 50-09-06.1. Transition assistance may be provided to a family that meets all factors of eligibility for assistance under the temporary assistance for needy families program except as provided in this section. For purposes of this section, "caretaker" means a person who provides support to a minor child and who may or may not receive benefits. All provisions of this chapter apply except:

1. A family may not receive a grant for transition assistance in any month in which that family receives a grant for temporary assistance for needy families or diversion assistance.
2. No one may be provided transition assistance in an application month. Only recipients of temporary assistance for needy families may become eligible for transition assistance.
3. Transition assistance provides a monthly job retention incentive, a one-time-only high school graduation or general education diploma incentive, and reimbursement of expenses associated with the cost of child care, health insurance, health tracks, and transportation.
4. A family may not receive transition assistance for more than six consecutive months.
5. Transition assistance may not be provided to:

- a. A caretaker sanctioned due to noncompliance with work requirements:
- b. A caretaker relative, in a child-only case:
- c. A minor parent who is not the head of household or spouse of the head of household:
- d. An alien who is ineligible to receive assistance due to his or her immigration status:
- e. A caretaker in receipt of supplemental security income benefits: and
- f. A caretaker with a disqualification penalty applied for a voluntary job quit or voluntary refusal of an offer of employment or training for employment.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-12. Determining claims of good cause.** Determinations concerning claims of good cause require the use of decisionmaking principles. These principles must be applied to the individual's statements and information to determine if the requirements of good cause are met. The decisionmaking principles are:

1. The individual claiming good cause is responsible to show that good cause exists.
2. Uncorroborated statements of fact are less believable than corroborated statements.
3. Statements by persons with a reputation for being untruthful are less believable than similar statements by persons without that reputation.
4. A reputation for being untruthful exists if the files maintained by the department, the county agency, or the job opportunities and basic skills program ~~coordinator's agency~~ employment contractor contain evidence of untruthful statements made by the individual, or if the individual has made untruthful statements that are a matter of public record.
5. Statements by individuals with a reputation for failures or delays in furnishing information necessary for official action are less believable than similar statements by individuals without that reputation.
6. A reputation for failures or delays in furnishing information necessary for official action exists if the files maintained by the department, the county

agency, or the a job opportunities and basic skills program coordinator's agency employment contractor contain evidence of any failure or delay, without good cause, to furnish reports, including monthly reports, necessary verifications, or a failure or delay in attending meetings or interviews intended to secure information necessary for official action.

7. A statement of fact, made by an individual with something to gain if that statement is regarded as true, is less believable than a similar statement made by an individual with little or nothing to gain.
8. An individual's explanations or reasons for claiming good cause must be judged by a prudent person concept. A prudent person is one who exercises those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for protection of their own interests and the interests of others.
9. Statements of fact made by the individual claiming good cause, or by other individuals who support or oppose the claim of good cause, are not presumed to be either truthful or untruthful. Rather, statements of fact must be evaluated to determine if they are more likely than not or less likely than not to be true.

**History:** Effective December 9, 1996; amended effective January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-35.1. Time limit on certain benefits - Exceptions.** Except as otherwise provided in this section, no household may be provided assistance if that household includes an adult who has received assistance under a temporary assistance for needy families program provided by any state or Indian tribe for sixty months, whether or not consecutive, after the date that program commenced.

1. In determining the number of months an adult received temporary assistance for needy families, the department shall disregard any month in which:
  - a. The adult was a minor child and not, at the same time, a head of household or married to a head of household; or
  - b. No adult member of the household was included in the benefit for the federal lifetime count under title 45, Code of Federal Regulations, part 264.1.
2. In determining the number of months an adult received temporary assistance for needy families, the department shall disregard any month in which the adult lived in Indian country if, during the month, at least fifty percent of the adults living in that Indian country were unemployed. The department shall determine the percentage of unemployed adults

living in Indian country by any means the department determines to be appropriate and reliable, provided that the means chosen are consistent with requirements imposed under federal law.

3. This section may not be applied to preclude eligibility for members of a household if:
  - a. The eligible adult caretaker in the ~~filing unit~~ temporary assistance for needy families household reaches the age of sixty-five years on or before the sixty-first month in which that individual receives temporary assistance for needy families benefits;
  - b. The eligible adult caretaker is determined to be incapacitated or has been determined to be disabled by the social security administration;
  - c. The household includes an individual who is a victim of domestic violence. Domestic violence includes physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members; or
  - d. The condition of a child or a spouse precludes care by a child care provider, in-home care, or outside of home care and prevents the caretaker from employment.
4. For purposes of this section:
  - a. An adult caretaker may be treated as "incapacitated" if the individual is incapacitated or treated as incapacitated under section 75-02-01.2-18; and
  - b. "Indian country" means:
    - (1) All lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation;
    - (2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
    - (3) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

5. The number of households that may be exempted from the temporary assistance for needy families lifetime limit may not exceed twenty percent of the average monthly number of households receiving temporary assistance for needy families assistance.
6. If a household must submit a written request to the county social service agency requesting to be exempt from the sixty-month lifetime limit, the written request must explain the reason for the exemption and must include clear and convincing documentation from a professional service provider.
7. During the exemption period from the lifetime limit, all temporary assistance for needy families, job opportunities, and basic skills program policies apply.
8. Applicants and recipients that appeal the denial for an exemption from the lifetime limit may request in writing a fair hearing within the thirty days from the date of the denial or closure notice. Assistance is not continued pending the fair hearing.
9. ~~All months in which a disqualified adult caretaker is part of the family count toward the lifetime limit. For purposes of this subsection, an individual is a disqualified adult caretaker if that individual is a disqualified alien, or is disqualified because of a sanction, a drug felony conviction, status as a fleeing felon, or an intentional program violation.~~

**History:** Effective July 1, 1997; amended effective January 1, 2003; June 1, 2005; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-51. Disregarded income.**

1. The department shall establish an employment incentive, and an employment incentive limit, to reasonably encourage household members to earn income.
2. If permitted under subsection 3, income must be disregarded, as an employment incentive, in determining the cash grant amount.
  - a. The greater of one hundred eighty dollars or twenty-seven percent of the household's monthly gross earned income, except earnings of any child who is a full-time elementary or high school student, is disregarded as a standard work employment expense allowance. The amount remaining is net earned income.
  - b. Any net earned income that exceeds the income incentive limit is treated as countable earned income.

- c. A portion of net earned income that is equal to or less than the income incentive limit may be disregarded, under this subdivision, in determining countable earned income.
- (1) If an applicant has earned income in the month of application or the month after the month of application, at least fifty percent of the net earned income may be disregarded for six months beginning the month in which the earned income is first budgeted.
  - (2) If a recipient has earned income, at least thirty-five percent of the net earned income may be disregarded for months seven through nine beginning the month earned income is first budgeted.
  - (3) If a recipient has earned income, at least twenty-five percent of the net earned income may be disregarded for months ten through thirteen after the month earned income is first budgeted.
  - (4) If a recipient has earned income, no net earned income may be disregarded under this subdivision after the thirteenth month after the month earned income is first budgeted.
  - (5) Individuals that have received a full thirteen months of the incentive known as the time-limited percentage will not be eligible for this incentive again.
- d. An employed household member who receives an employment incentive disregard for a period of at least four consecutive months is provided employment incentive disregards of at least fifty percent for the first six months after the month in which the income is first budgeted, at least thirty-five percent for months seven through nine, at least twenty-five percent for months ten through thirteen, and none thereafter.
- e. An employed household member who receives an employment incentive disregard for a period of less than four consecutive months is, upon reemployment, provided the employment incentive disregards the member would have received if the first month of reemployment was the first month income is budgeted retrospectively.
- f. If an employed household member, who is receiving the employment incentive disregard, voluntarily terminates employment and is unable to show good cause for failure or refusal to participate, the employment incentive disregard cycle continues as if the household member was employed.

- g. If any nondisregarded income remains, a health insurance premium, or paid child support or alimony, if applicable, may be disregarded.
  - h. If any nondisregarded income remains, child and dependent care costs that are employment-related or a combination of employment-related and education or training-related may be disregarded.
3. An income disregard is available only if the eligible employed individual previously received assistance, but has not completed the twelve-month earned income employment incentive disregard cycle, including months in which the earned income disregard was unavailable because:
    - a. No payment was made because the calculated cash grant was less than ten dollars;
    - b. The household voluntarily requested termination of assistance for the primary purpose of avoiding completion of the earned income employment incentive disregard cycle or any part of that cycle;
    - c. The household failed, without good cause, to file a signed and completed monthly report form by the fifteenth day of the month in which the report was due;
    - d. A member of the household terminated or reduced employment, without good cause, in the thirty days preceding the month in which the earned income employment incentive disregard was unavailable; or
    - e. A member of the household refused a bona fide job offer, or voluntarily quit a job, without good cause, in the thirty days preceding the month in which the earned income employment incentive disregard was unavailable.
  4. If, in any month, additional income received from a recurring source causes the household to be suspended as ineligible for one month, the month of suspension does not count as a month for purposes of this section.
  5. Nonhousehold member deduction for stepparent and minor parent budgeting, if applicable, may be made.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-52. Voluntary quit or refusal of employment.** No household member, except a dependent child, may refuse a bona fide offer of employment or training for employment, or terminate employment, without good cause, within thirty days before the date of application.

1. If an offer of employment or training was made through job service North Dakota, job service North Dakota shall determine if a bona fide offer was made and if there was good cause for refusing it.
2. If an offer of employment or training was made other than through job service North Dakota, the county agency shall determine if a bona fide offer was made and if there was good cause for refusing it, considering the following factors:
  - a. Whether there was a definite offer of employment at wages meeting any applicable minimum wage requirements and that are customary for such work in the community;
  - b. Whether there were any questions as to the physical or mental ability of the household member to engage in the offered employment or training for employment;
  - c. Whether there were any questions of the working conditions such as risks to health, safety, or lack of workers' compensation protection;
  - d. Whether the household member had a way to get to or from the particular job, including evidence the household member reasonably attempted to arrange for transportation;
  - e. Whether, as a condition of being employed, the household member would be required to join a company union, or to resign or refrain from any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization;
  - f. Whether the position offered is vacant directly due to a strike, lockout, or other labor dispute;
  - g. Whether the work is at an unreasonable distance from the household member's residence, provided one-way traveltime of one hour or less may not be treated as an unreasonable distance;
  - h. Whether gross wages are less than the allowable employment expense and child care or adult dependent care;
  - i. Whether an individual's substantially continuous presence in the household is necessary to care for another individual in the household to whom the individual owes a legal duty to provide

care, who has a condition, verified by reliable medical evidence, which does not permit self-care or care by another household member; and

- j. Whether the individual is a victim of domestic violence.
3. If it is determined that a household member voluntarily quit employment or a bona fide offer of employment or training was refused by a household member, without good cause:
    - a. In the case of a recipient household, the member who voluntarily quits a job or refuses a bona fide offer of employment or training for employment is ineligible for the benefit month in which the refusal occurred; and
    - b. In the case of an applicant household, the entire household is ineligible for the thirty days following the actual date of refusal or termination of employment.
  4. If it is determined that a recipient household member voluntarily quits employment without good cause, without prior approval from the household member's coordinator job opportunities and basic skills employment contractor, that household member is ineligible in the benefit month in which the job quit occurred, and may not receive the standard employment expense allowance described in section 75-02-01.2-51, any employment incentive disregard, or any child or adult dependent care deduction, in the month the job quit occurred, and in the month the income is budgeted.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-60. Computing payment if stepparent or alien parent income is deemed.**

1. The amount of a household's cash grant must be reduced by the deemed income of a stepparent or an alien parent who lives in the home, but who is not a member of the household.
2. To encourage marriage among single-parent families and assist those families when the primary individual in a household marries, the income of the stepparent ~~whose needs were not previously included in the household~~ must be disregarded in determining the cash grant for the first six months, effective the month of the marriage. This subsection applies to recipients only, but not to applicants. No six-month disregard

of stepparent income is allowed in situations when a primary individual marries before receiving benefits.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-73. Health tracks.**

- ~~1. All members of a household, under age twenty-one, must participate in health tracks screening services at the time of application and at least annually thereafter, unless excepted under subsection 2. Failure to participate results in a seven percent reduction in the net cash grant after recoupments have been calculated. This reduction is effective the first month after the month the failure to participate is determined and remains in effect until health tracks requirements in the contract are met. All household members required to receive a health tracks screening who complete the a health tracks screening are eligible for a twenty-five dollar payment.~~
- ~~2. An eligible member need not participate in the health tracks requirements if the member:~~
  - ~~a. Is a caretaker under age twenty-one who is at least age twenty years, ten months;~~
  - ~~b. Is an individual who has received a complete screening within the last twelve months performed by an enrolled health tracks provider; or~~
  - ~~c. Establishes good cause for not participating in health tracks.~~
- ~~3. Good cause for failure or refusal to participate in health tracks exists if:~~
  - ~~a. The child and the child's caretaker are believers in a faith with a clergy-verified doctrinal opposition to participation in health tracks; or~~
  - ~~b. The child or the child's caretaker suffers from a medically verified acute illness.~~
- ~~4. Good cause for not participating in health tracks screening must be the responsibility of the health tracks program service manager. The health tracks program service manager must be responsible to determine good~~

~~cause, must set the end dates for good cause, and must be responsible for conciliation.~~

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-80. Good cause determination.**

1. Except with respect to a sanction imposed for failure to obtain child support, or establish paternity, an individual shall be provided an opportunity to present the good cause reason for a failure or refusal to cooperate prior to the imposition of a sanction.
2. The eligibility worker or the individual's job opportunities and basic skills ~~coordinator~~ employment contractor may oversee the good cause determination process.
  - a. If the individual refuses to complete the social contract, refuses to sign the social contract, or refuses to comply with a referral to a service agency, the eligibility worker is responsible to oversee the good cause determination process.
  - b. If the individual is not cooperating with the job opportunities and basic skills program, the ~~coordinator~~ employment contractor is responsible to oversee the good cause determination process and must inform both the individual and the eligibility worker of the outcome of the good cause determination process.
3. Within ten two days following the ~~date~~ after the employment contractor learns of a failure or a refusal to comply, the eligibility worker or ~~coordinator~~ employment contractor, as appropriate, shall send written notice to the individual to offer an opportunity to show good cause. A good cause determination must state that:
  - a. The individual is responsible to call or meet with the ~~coordinator or case manager~~ employment contractor within seven days, from the print date of the notice, to show good cause; and
  - b. A sanction will be imposed if the individual does not contact the ~~coordinator~~ employment contractor or eligibility worker, as appropriate, within the required time or does not show good cause for the individual's failure or refusal to comply.
4. If an individual fails or refuses to participate in the good cause determination process, or if it is determined that the individual did not show good cause for the initial failure or refusal to participate as

required in the temporary assistance for needy families program, the eligibility worker shall notify the individual of the sanction.

5. Claims of good cause must be evaluated using the decisionmaking principles described in section 75-02-01.2-12.

**History:** Effective December 9, 1996; amended effective January 1, 2003; June 1, 2005; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-82. Job opportunities and basic skills program - Definitions.**

For purposes of the job opportunities and basic skills program:

1. "Coordinator" "Eligible individual" means an adult or minor child head of household receiving assistance or a nonrecipient parent living with a child receiving assistance.
2. "Employment contractor" means the job opportunities and basic skills program staff person responsible for directing and monitoring a participant's planning and activities that relate to the job opportunities and basic skills program. The coordinator employment contractor assists the participant in the development and execution of an employability plan and oversees the participant's involvement in the job opportunities and basic skills program.
2. 3. "Minimum required hours" means the number of hours per week during which a participant must be engaged in approved work activity.
3. 4. "Participant" means a member of a household who is not exempt from participating in the job opportunities and basic skills program or who, if exempt, has volunteered to participate in that program.
4. 5. "Satisfactory progress" in any postsecondary education or training program means the participant is maintaining progress minimally sufficient to allow continuation of the course of study or training under the standards of the education or training facility.
6. "Work-eligible individual" includes anyone listed in subdivision a, but does not include anyone listed in subdivision b:
  - a. Included individuals are:
    - (1) Any adult receiving assistance under temporary assistance for needy families;
    - (2) Any minor child head of household receiving assistance under temporary assistance for needy families;

- (3) Any minor parent head of household receiving assistance under temporary assistance for needy families; or
- (4) Any nonrecipient parent living with a child receiving assistance, including any parent:
  - (a) Sanctioned due to noncompliance with work requirements; or
  - (b) Disqualified due to an intentional program violation, status as a fleeing felon, a drug felony conviction, parole or probation violation, or noncompliance with child support enforcement.

b. Individuals not included are:

- (1) A minor parent who is not the head of household;
- (2) A noncitizen who is ineligible to receive assistance due to that individual's immigration status;
- (3) A parent providing care for a disabled family member living in the home;
- (4) A dependent child who is under age sixteen;
- (5) Unless the child is a single head of household, a dependent child who is age sixteen or over, enrolled as a full-time student, who will graduate by the child's nineteenth birthday;
- (6) Those receiving supplemental security income; or
- (7) Those receiving social security disability income.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-83. Job opportunities and basic skills program - Basic requirements.** ~~Repealed effective January 1, 2009. To the extent resources permit, all nonexempt adults, and all children age sixteen or older, who have completed high school or received a general equivalency diploma, or who have neither completed high school nor received a general equivalency diploma and are not attending school shall participate in the job opportunities and basic skills program. The program combines education, training, and employment components. Its purpose is to enable participants to become self-sufficient. The eligibility worker shall:~~

- ~~1. Determine eligibility for assistance and determine whether each person is a member of the household;~~
- ~~2. Determine whether each recipient is exempt from participating in the job opportunities and basic skills program; and~~
- ~~3. Refer nonexempt members of the household to the job opportunities and basic skills program.~~

**History:** ~~Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; June 1, 2005.~~

**General Authority:** ~~NDCC 50-09-02, 50-09-25~~

**Law Implemented:** ~~NDCC 50-09-02~~

**75-02-01.2-84. Job opportunities and basic skills program - Satisfactory participation.**

1. Except as otherwise provided in this section, all ~~eligible nonexempt adults~~ work-eligible individuals and all eligible children, age sixteen or older, who have completed high school or received a general equivalency diploma, or who have neither completed high school nor received a general equivalency diploma and are not currently attending school, shall comply with work requirements no fewer than the minimum required hours each week. Work activity may be required in addition to the minimum required hours in an approved work activity.
2. A parent or other eligible caretaker relative of a child under age six, who is personally caring for that child full time, is deemed to comply with subsection 1 if engaged in an allowable work activity an average of at least the minimum required hours per week during each month.
3. A single head of household, under twenty years of age, who has not earned a high school diploma or its equivalent, but who maintains satisfactory attendance in school, is deemed to comply with subsection 1.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-06-05.1, 50-09

**75-02-01.2-86. Job opportunities and basic skills program - Tribal native employment works program.** Tribal native employment works programs are available to enrolled or enrollable members of tribes who live in that tribe's service area, who receive a temporary assistance for needy families cash grant, and who reside in a county within which there is a tribal native employment works program. An individual who participates in a tribal native employment works program shall meet all work requirements described in this chapter. The county agency shall:

1. Refer nonexempt-eligible work-eligible individuals to the tribal native employment works program based on referral criteria established by a memorandum of understanding between the tribe and the department;
2. Provide child care payments to authorized tribal native employment works program participants, for activities which may be approved under the state child care and development fund plan submitted under the Child Care and Development Block Grant Act of 1996 [42 U.S.C. 9858], based on information furnished by the tribal program; and
3. Upon notification from the tribal program, consider sanctioning individuals for failure or refusal to participate in the program without good cause.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-87. Job opportunities and basic skills program - Exemptions from participation.** An individual is exempt from participation in the job opportunities and basic skills program if the individual is:

1. A parent or other eligible caretaker relative age sixty-five or older;
2. A dependent child who is under age sixteen or a dependent child who is age sixteen or over and who is enrolled or has been accepted for enrollment as a full-time student for the next school term in an elementary or secondary school or in a vocational or technical school that is equivalent to secondary school and will graduate by the child's nineteenth birthday, unless the child is a single head of household; or
3. A parent or other eligible caretaker relative of a child under age four months who is personally caring for the child full time; or
4. A parent providing care for a disabled family member living in the home, provided that the need for such care is supported by documentation.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-89. Job opportunities and basic skills program - Orientation, assessment, and employability planning.** Repealed effective January 1, 2009. ~~The coordinator shall complete a general program orientation. The coordinator shall, in consultation with the participant, make an initial assessment of work skills, work experience, and potential barriers to employment and, on the basis of that assessment, develop a plan that, to the greatest extent~~

~~possible, is designed to move the participant into allowable work activities that match the individual's capabilities and will help move the individual toward self-sufficiency. The cooperation, assistance, and consultation of the participant is important to the accuracy of the assessment and the appropriateness of the plan, but is not required if the participant seeks to use participation as a means of blocking or delaying entry into the workforce.~~

- ~~1. The initial assessment of employability is based on:
  - ~~a. The participant's work skills;~~
  - ~~b. The participant's prior work experience;~~
  - ~~c. The participant's mental and physical limitations affecting employability; and~~
  - ~~d. Other factors that may affect the participant's potential for employment.~~~~
  
- ~~2. The employability plan must:
  - ~~a. Contain an employment goal to move the participant immediately into approved work activities that match the participant's capabilities;~~
  - ~~b. Describe any reasonable accommodations needed to enable the participant to comply with program requirements;~~
  - ~~c. Describe the supportive services to be provided to enable the participant to comply with program requirements; and~~
  - ~~d. Describe the steps to be taken by the participant to achieve self-sufficiency.~~~~
  
- ~~3. The employability plan is not a contract and may not be so interpreted, considered, or applied.~~

**History:** ~~Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003.~~

**General Authority:** ~~NDCC 50-09-02, 50-09-25~~

**Law Implemented:** ~~NDCC 50-09-02~~

**75-02-01.2-90. Job opportunities and basic skills program - Supportive services and transitional supportive services.**

1. Within the limits described in this section, supportive services may be made available to a participant who, but for supportive service, would be unable to enter into or remain in an allowable work activity. No supportive service may be provided without approval from the ~~coordinator or program case manager~~ employment contractor or eligibility worker.
2. Transitional supportive services may be provided to assist employed former temporary assistance for needy families recipients to succeed in the workforce and avoid the need to receive further temporary assistance for needy families benefits.
3. Supportive services may include:
  - a. Relocation assistance provided to a job opportunities and basic skills participant if:
    - (1) The individual has a bona fide offer of employment, verified by the ~~coordinator~~ employment contractor, which will increase the individual's potential for increased earnings, job advancement, or permanent employment; or
    - (2) The individual requests and receives approval from the ~~coordinator~~ employment contractor to move from an area of the state with few employment opportunities to another area of the state with greater employment opportunities, or to an area out of state with greater employment opportunities.
  - b. A ~~monthly~~ Monthly transportation allowance assistance provided to participants in an approved work activity, if necessary for continued participation.
  - c. Child care expense reimbursement in amounts consistent with the provisions of the state child care and development fund plan submitted under the Child Care and Development Block Grant Act of 1990 [42 U.S.C. 9858].
  - d. Assistance in the purchase of care for an incapacitated or disabled adult member of the participant's household, to whom the participant owes a legal duty to provide care, provided:
    - (1) There is no other person in the household who can provide the care; and
    - (2) The incapacitated or disabled adult household member cannot provide self-care.

- e. Assistance in the purchase of employment-related clothing or personal needs determined by the ~~coordinator~~ employment contractor to be reasonable and necessary for the participant to enter employment.
  - f. Assistance in the purchase of tools or equipment determined by the ~~coordinator~~ employment contractor to be required for the participant to accept employment.
  - g. Assistance in the cost of repairs determined by the ~~coordinator~~ employment contractor to be reasonable and necessary to return a participant's vehicle to operable condition, provided:
    - (1) The vehicle is registered to a member of the household;
    - (2) The vehicle is needed by the participant to get to work or another approved work activity; and
    - (3) The general condition and value of the vehicle justifies repairs.
  - h. Assistance for defraying the cost of books, tuition, and fees associated with an allowable work activity, provided:
    - (1) Other educational fund sources have been explored and are exhausted; and
    - (2) The participant is a member of a household and eligible for assistance at the time funds are paid or obligated.
  - i. Assistance with payment for professional license fees and professional examination fees, if there is no other available source of funding, including fee waivers, and the professional license or examination is necessary to achieve an employment-related goal.
  - j. Assistance with expenses determined by the ~~coordinator~~ employment contractor to be reasonable and necessary for employment interviews, including transportation, lodging, grooming, and clothing.
4. The maximum expenditures permitted for supportive services and transitional supportive services are limited to amounts and availability as the department may by order determine.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-91. Job opportunities and basic skills program - Educational activities related to secondary education, basic and remedial education, or education in English proficiency. Repealed effective January 1, 2009.**

1. ~~If a participant, irrespective of the participant's age, has not earned a high school diploma or its equivalent, the employability plan must include activities under this section unless, based on assessment, it is determined that the participant does not have the functional capability to complete high school or receive a general equivalency diploma within a reasonable time, the participant does not have access to such activities within a reasonable distance from the participant's home, or completion of such activities may not be reasonably expected to substantially increase the participant's marketability or earnings potential.~~
2. ~~For purposes of this section:~~
  - a. ~~"Activities under this section" include high school, alternative high school, adult learning center programs, general equivalency diploma programs, education in English proficiency, and basic or remedial education programs;~~
  - b. ~~"Reasonable distance" means a distance that requires less than a one-hour commute from the individual's home to the educational institution; and~~
  - c. ~~A "reasonable length of time" means a time determined by the coordinator, based on recommendations of an individual's instructors, for completion of education activities while consistently participating in those activities on a regular basis as a full-time student in a high school program or as a part-time student in a high school program if the coordinator determines that circumstances beyond the individual's control limits attendance to less than full time.~~

**History:** ~~Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003.~~

**General Authority:** ~~NDCC 50-09-02, 50-09-25~~

**Law Implemented:** ~~NDCC 50-09-02~~

**75-02-01.2-92. Job opportunities and basic skills program - Job skills training directly related to employment. Repealed effective January 1, 2009.** ~~Job skills training includes paid or unpaid activities that enhance skills for employment or training. Job skills training directly related to employment includes apprenticeships and the development of basic job skills through adult basic education in English proficiency, basic computer skills, communication and computational skills, or vocational preparation. An individual who participates in job skills training directly related to employment may be required, in addition to this~~

~~activity, to participate in another approved work activity for the minimum number of hours required under section 75-02-01.2-84.~~

~~History: Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003.~~

~~General Authority: NDCC 50-09-02, 50-09-25~~

~~Law Implemented: NDCC 50-09-02~~

~~75-02-01.2-93. Job opportunities and basic skills program - Unsubsidized employment. Repealed effective January 1, 2009. Unsubsidized employment means work in the private or public sector for which wages, or wages and tips, are paid that equal or exceed the federal hourly minimum wage. Unsubsidized employment includes self-employment. For purposes of determining the number of countable hours a participant is self-employed in unsubsidized employment, the participant's net monthly income is divided by the federal minimum wage. For purposes of this section, net monthly income is gross revenue less the costs of doing business.~~

~~History: Effective December 9, 1996; amended effective July 1, 1997.~~

~~General Authority: NDCC 50-09-02, 50-09-25~~

~~Law Implemented: NDCC 50-09-02~~

~~75-02-01.2-94. Job opportunities and basic skills program - Job search and job readiness. Repealed effective January 1, 2009.~~

- ~~1. Participants engaged in job search are required to make, and verify, a predetermined number of job contacts per week as prescribed by the coordinator. The number of job search contacts required will be consistent with the available job opportunities in that area of the state.~~
- ~~2. Job readiness activities are intended to prepare a participant for work. Job readiness activities may include alcohol and other drug evaluation and treatment, psychological assessment and counseling, vocational rehabilitation assessment and counseling, or work preparation workshops.~~
- ~~3. Participants may be required by the coordinator to participate in job search or job readiness activities for up to four consecutive weeks or six nonconsecutive weeks in each twelve months of continuous eligibility for a temporary assistance for needy families cash grant.~~
- ~~4. In periods after a participant has engaged in job search and job readiness activities for the maximum time permitted under subsection 3, the coordinator may require the participant to engage in extended~~

~~job search or job readiness activities in addition to engaging in the minimum required hours in other approved work activities.~~

~~History: Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003.~~

~~General Authority: NDCC 50-09-02, 50-09-25~~

~~Law Implemented: NDCC 50-09-02~~

~~75-02-01.2-95. Job opportunities and basic skills program - Job development and job placement activities. Repealed effective January 1, 2009. The coordinator may create or discover job openings on behalf of participants. The coordinator may market participants for job openings and may secure job interviews.~~

~~History: Effective December 9, 1996.~~

~~General Authority: NDCC 50-09-02, 50-09-25~~

~~Law Implemented: NDCC 50-09-02~~

~~75-02-01.2-96. Job opportunities and basic skills program - Vocational education. Repealed effective January 1, 2009. Vocational education offers an organized sequence of coursework directly related to preparation of the participant for employment in a current or emerging occupation.~~

- ~~4. Vocational education may be approved as an allowable work activity only if the participant demonstrates:~~
  - ~~a. A lack of marketable job skills that may reasonably be expected to enable the participant to become employed in a current or emerging occupation that has the potential to provide a wage great enough to enable the participant and the participant's family to become self-sufficient;~~
  - ~~b. That the training will result in a marketable skill that may reasonably be expected to enable the participant to become employed in a current or emerging occupation that has the potential to provide a wage great enough to enable the participant and the participant's family to become self-sufficient;~~
  - ~~c. The functional capacity and ability to complete the vocational education and become employed in a job applying that vocational education; and~~
  - ~~d. An understanding of the requirements of the job for which the vocational training is intended to prepare the participant and a willingness to meet those requirements, including, if applicable:
    - ~~(1) Shift work;~~
    - ~~(2) Relocation;~~~~

- ~~(3) Work-related travel;~~
- ~~(4) Licensure or certification; and~~
- ~~(5) Prevailing wage rates.~~

2. A participant in the job opportunities and basic skills program, who has made the demonstration required under subsection 1, may undertake vocational education as an exclusive approved work activity if:

- ~~a. The employability plan outlines a clearly identified goal of employment in a specific occupation that may reasonably be expected to enable the participant to become employed in a current or emerging occupation that has the potential to provide a wage great enough to enable the participant and the participant's family to become self-sufficient;~~
- ~~b. The curriculum is recognized by a statutorily sanctioned education authority as leading to qualification for employment in the specific occupation identified in the employability plan;~~
- ~~c. The participant does not already possess a bachelor's degree or has not previously completed a course in vocational education, unless:
  - ~~(1) The participant, by reason of incapacity or substantiated lack of employment in the field for which the participant was prepared, cannot be employed in North Dakota; and~~
  - ~~(2) The department, exercising its reasonable discretion, approves the employability plan;~~~~
- ~~d. The selection of a course of study is guided by demand in specific occupations or, upon approval by the coordinator, a course of study in another occupation for which the participant provides substantial justification of demand;~~
- ~~e. The participant applies for a Pell grant and all other reasonably available sources of grants and scholarships, which become the first source of payments for books, tuition, and fees;~~
- ~~f. The participant verifies that the participant is maintaining satisfactory progress, and taking classes required by the employability plan, through class schedules and grade reports;~~
- ~~g. During any participant's lifetime, no employability plan beginning on or after July 1, 1997, and no combination of such plans, may include more than twenty-four months, which need not be~~

~~consecutive months, during which vocational education may be the participant's exclusive, approved work activity unless:~~

- ~~(1) The participant, by reason of incapacity or substantiated lack of employment in the field for which the participant was prepared, cannot be employed in North Dakota; and~~
- ~~(2) The department, exercising its reasonable discretion, approves the employability plan; and~~

~~h. The participant who engages in vocational education as an exclusive, approved work activity attends vocational education on a full-time basis.~~

~~3. A participant approved for vocational education may receive any supportive service for which a need can be demonstrated.~~

~~4. Applicants for or recipients of temporary assistance for needy families enrolled as full-time students in any course of vocational education study at the time they become participants may seek approval of an employability plan which continues that course of study if the course of study can reasonably be expected to increase the participant's employability or earnings potential. Approval beyond the current school term may not be granted if the participant is presently qualified for available full-time employment with the potential to provide a wage great enough to allow the participant and the participant's family to become self-sufficient.~~

~~5. A participant who, in addition to meeting the minimum required hours in another approved work activity, is enrolled in a self-initiated course of vocational education may receive any supportive service for which a need can be demonstrated, if the vocational education course may reasonably be expected to increase the participant's employability or earnings potential. A participant's approved work activities must take priority over self-initiated vocational education activities. A participant who refuses to seek employment or reduces involvement in approved work activities to accommodate self-initiated vocational education may be sanctioned.~~

~~6. When determining whether to approve or support a participant's proposed plan for vocational education, whether the vocational education may be completed as an exclusive work activity or as a self-initiated activity, the coordinator shall also consider:~~

- ~~a. The graduation and job placement rates of the education or training facility;~~

- b. ~~The cost of the education or training facility services, combined with the cost of necessary supportive services, as compared to other education or training facilities offering a similar course of study; and~~
  - c. ~~The anticipated length of time to complete training as compared to other education or training facilities offering a similar course of study.~~
7. ~~Employed participants who are approved for vocational education as their exclusive, approved work activity shall not be subjected to the job-quit penalty described in section 75-02-01.2-52, if the coordinator or tribal native employment works program coordinator provides prior approval for the individual to quit or reduce the individual's hours of employment to focus on vocational education. Prior approval must be documented in the individual's employability plan.~~

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; June 1, 2005.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-06-05.1, 50-09

**75-02-01.2-97. Job opportunities and basic skills program - Provision of child care services to another participant engaged in a community service program.** Repealed effective January 1, 2009. ~~A participant may provide child care services to another participant to allow that other participant to engage in a community service program if the participant providing child care is licensed or registered as an early childhood services provider, as required or permitted by North Dakota Century Code chapter 50-11.1, and rules adopted thereunder.~~

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-98. Job opportunities and basic skills program - Work experience and community service program.** Repealed effective January 1, 2009.

- 1. ~~The goal of work experience and community service is to improve a participant's employability through supervised work in order to enable the participant to obtain permanent, unsubsidized employment. A participant does not receive a wage for participating in work experience or community service.~~
- 2. ~~Work experience and community service worksites are usually those provided by public or private, nonprofit public service organizations, tribal governments, nursing homes, and hospitals, or at projects that serve a useful public purpose and provide appropriate working conditions.~~

- ~~3. A worksite placement must be designed to provide a participant with a basic understanding of work and productive work habits, establish positive work references, provide training to a work experience participant, and otherwise encourage the participant to become economically self-sufficient.~~
- ~~4. Workers' compensation coverage must be provided for community work experience and community service program participants.~~

~~History: Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003.~~

~~General Authority: NDCC 50-09-02, 50-09-25~~

~~Law Implemented: NDCC 50-09-02~~

~~75-02-01.2-100. Job opportunities and basic skills program - On-the-job training. Repealed effective January 1, 2009. On-the-job training provides, through a negotiated agreement, payment to an employer for the costs of training and lower productivity normally associated with a new employee. The agreement is intended to place a participant in an occupational position that requires training. The training is intended to lead to permanent employment with that employer or one that is similar in its training requirements.~~

- ~~1. The agreement must be for a fixed price that does not exceed fifty percent of the average wage paid by the employer to the participant during the training period.~~
- ~~2. The starting wage of an on-the-job training participant must be at least equal to the federal minimum wage rate.~~
- ~~3. On-the-job training participants must be compensated at the same rates, and receive the same benefits, as other individuals similarly employed by the employer.~~
- ~~4. Wages paid to an on-the-job training participant must be treated as earned income.~~

~~History: Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003.~~

~~General Authority: NDCC 50-09-02, 50-09-25~~

~~Law Implemented: NDCC 50-09-02~~

~~75-02-01.2-101. Job opportunities and basic skills program - Subsidized public or private sector employment. Repealed effective January 1, 2009. Subsidized public or private sector employment provides a cash subsidy for a portion of the wages paid to a participant. The cash subsidy is provided for a specified period of time for the purpose of assisting the participant to obtain employment. Subsidized employment may include work supplementation.~~

- ~~1. Under work supplementation the cash subsidy is diverted from the participant's temporary assistance for needy families cash grant and is limited to a negotiated amount that cannot exceed the lesser of three hundred dollars or fifty percent of the temporary assistance for needy families cash grant. A work supplementation program participant must be considered a regular employee, and receive benefits and enjoy working conditions at the same level and to the same extent as other employees working a similar length of time and doing the same type of work.~~
- ~~2. Work supplementation program payments may be made only pursuant to a contract signed by the employer, the work supplementation program participant, the eligibility worker, and the coordinator.~~
- ~~3. The length of the contract is limited to the training time required for the recipient to learn the necessary job skills and may not exceed six months.~~

~~History: Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; June 1, 2005.~~

~~General Authority: NDCC 50-09-02, 50-09-25~~

~~Law Implemented: NDCC 50-09-02~~

**75-02-01.2-102. Job opportunities and basic skills program - Failure or refusal to participate.** A failure or refusal to participate in the job opportunities and basic skills program occurs any time the participant:

1. Misses a scheduled appointment for any program or approved work activity;
2. Is absent from a program or approved work activity when scheduled to be there;
3. States an unwillingness to participate in any program or approved work activity;
4. Fails to contact the ~~coordinator~~ employment contractor, within seven calendar days from the print date of the referral, to set up an appointment to begin involvement in the program;
5. Refuses, despite apparent ability, to maintain satisfactory progress in any program or approved work activity; or

6. Fails to comply with the requirements of the participant's employability plan.

**History:** Effective December 9, 1996; amended effective July 1, 1997; January 1, 2003; June 1, 2005; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

**75-02-01.2-103. Job opportunities and basic skills program - Good cause for failure or refusal to comply with a referral to, or participate in, the job opportunities and basic skills program.**

1. All ~~nonexempt household members~~ work-eligible individuals must participate in the job opportunities and basic skills program unless good cause is granted by the eligibility worker. Good cause for failure or refusal to participate in the job opportunities and basic skills program exists when:
  - a. The household member is incapacitated with a physical or mental impairment verified by reliable medical evidence which, by itself or in conjunction with age, prevents the individual from working or participating in any job opportunities and basic skills program or work activity;
  - b. An individual whose substantially continuous presence in the household is necessary to care for another member of the household, to whom the individual seeking good cause for nonparticipation owes a legal duty to provide care, who has a condition, verified by reliable medical evidence, which does not permit self-care, care by another household member, or care provided as supportive services;
  - c. An individual has an illness or injury, verified by reliable medical evidence and reviewed every thirty days, which is serious enough to temporarily prevent entry into employment or participation in any job opportunities and basic skills program activity; or
  - d. In the case of a parent or other eligible caretaker relative of a child under age six, who is personally caring for the child full time and who demonstrates an inability to obtain needed child care for one or more of the following reasons:
    - (1) Child care is unobtainable at a location such that the usual commuting time from the parent's home to the location at which child care is provided, and on to the parent's worksite, is one hour or less;
    - (2) Suitable child care is unobtainable from a relative, from an approved child care provider licensed or registered under

North Dakota Century Code chapter 50-11.1, or from a child care provider not required to be licensed or registered under North Dakota Century Code chapter 50-11.1; or

- (3) Child care is unobtainable, from a child care provider licensed or registered under North Dakota Century Code chapter 50-11.1, at a rate equal to or less than 1.1 times the maximum allowable amount as determined by the child care assistance program.
2. ~~The department may also authorize temporary assistance for needy families case managers to grant good cause for nonparticipation to individuals whenever it becomes necessary to administratively limit the number of individuals being referred to, or participating in, the job opportunities and basic skills program.~~
3. Claims of good cause must be evaluated using the decisionmaking principles described in section 75-02-01.2-12.

**History:** Effective December 9, 1996; amended effective July 1, 1997; June 1, 2002; June 1, 2005; January 1, 2009.

**General Authority:** NDCC 50-09-02, 50-09-25

**Law Implemented:** NDCC 50-09-02

## CHAPTER 75-02-02.2

### 75-02-02.2-12. Income considerations.

1. All income that is actually available must be considered. Income is actually available when it is at the disposal of an applicant, recipient, or responsible relative when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available; or when the applicant, recipient, or responsible relative has the lawful power to make the income available or to cause the income to be made available.
2. It is presumed that all parental income is actually available to a child under twenty-one years of age. This presumption may be rebutted by a showing that the child is:
  - a. Living independently; or
  - b. Living with a parent who is separated from the child's other parent, with or without court order, if the parents did not separate for the purpose of securing plan coverage.
3. As a condition of eligibility, an applicant, recipient, and financially responsible relative must take all necessary steps to obtain any annuities, pensions, retirement, and disability benefits to which they are entitled unless they can show good cause for not doing so. Annuities, pensions, retirement, and disability benefits include veterans' compensation and pensions; old-age, survivors, and disability insurance benefits; railroad retirement benefits; and unemployment compensation.
  - a. Good cause under this section exists if receipt of the annuity, pension, retirement, or disability benefit would result in a loss of health insurance coverage. Good cause must be documented in the case file.
  - b. Application for needs-based payments such as social security supplemental security income benefits or temporary aid to needy families benefits cannot be imposed as a condition of eligibility.
4. The financial responsibility of any individual for any other member of the plan unit will be limited to the responsibility of spouse for spouse and parents for children under age twenty-one or under age eighteen if the child is disabled. Such responsibility is imposed as a condition of plan eligibility. Except as otherwise provided in this section, the income of the spouse and parents is considered available even if that income is not actually contributed. Natural and adoptive parents, but not stepparents, are treated as parents.

5. Income may be received weekly, biweekly, monthly, intermittently, or annually. A monthly income amount must be computed by the department or county agency regardless of how often income is received.
6. The following types of income must be disregarded in determining eligibility for plan coverage:
  - a. Supplemental security income benefits provided by the social security administration.
  - b. Income disregards in section 75-02-02.1-38.2.
7. a. In determining ownership of income from a document, income must be considered available to each individual as provided in the document or in the absence of a specific provision in the document:
  - (1) Income shall be considered available only to the individual if payment of the income was made solely to that individual; and
  - (2) Income shall be considered available to each individual in proportion to the individual's interest if payment of income is made to more than one individual.
- b. One-half of income shall be considered available to each spouse in the case of income available to a married couple in which there is no document establishing ownership otherwise.
- c. Except in the case of income from a trust, the rules for determining ownership of income are superseded to the extent that the applicant or recipient can establish that the ownership interests are otherwise than as provided in subsection 6.
8. To determine the appropriate income level for a plan unit:
  - a. The size of the household is increased by one for each unborn child of a household member;
  - b. A child who is away at school is not treated as living independently, but is allowed a separate income level for one in addition to the income level applicable for the family unit remaining at home;
  - c. A child who is living outside of the parental home but who is not living independently; or a spouse who is temporarily living outside of the home to attend training or college, to secure medical treatment, because of temporary work relocation required by an employer, or for other reasons beyond the control of the spouse, is

allowed a separate income level. This does not apply to situations in which an individual simply decides to live separately;

- d. An individual in a specialized facility is allowed a separate income level for one during all full calendar months in which the individual resides in the facility;
  - e. An individual in a nursing facility is allowed a separate income level for one; and
  - f. A recipient of home and community-based services is allowed a separate income level for one.
9. ~~In order for~~ For a child to be eligible for plan coverage, the income remaining after allowing the appropriate disregards and deductions must be equal to or below ~~one hundred forty percent of the federal poverty line~~ the income level set by the department in accordance with state law and federal authorization, and must be based on the size of the household unless. If federal children's health insurance program funding decreases in ~~which case,~~ the department may decrease the income eligibility limit to accommodate the decrease in federal funding.

**History:** Effective October 1, 1999; amended effective April 1, 2002; August 1, 2005; April 1, 2008; October 1, 2008.

**General Authority:** NDCC 50-29

**Law Implemented:** NDCC 50-29-02, 50-29-04; 42 USC 1397aa et seq.

## CHAPTER 75-03-21

### 75-03-21-02. Application.

1. An application for a license to operate a home must be made to the county agency in the county where the applicant proposes to provide foster care for adults.
2. An application must be made in the form and manner prescribed by the department.
3. A fee of twenty-five dollars must accompany the application for a license to operate a family foster home for adults. The fee will be retained by the county agency and used for training and education of the county agency staff who administer the license program.
4. An application for a license must be filed immediately upon change of provider or location.
5. An application is not complete until all required information and verifications are submitted to the department, including:
  - a. Fire inspections by the state fire marshal or local fire inspector, if required under subsection 7 of section 75-03-21-06;
  - b. A self-declaration of medical history and, when requested by the department, a report of a physician's examination;
  - c. A report of psychological examinations, when requested by the department;
  - d. Proof of age and relationship, when requested by the department;
  - e. Sanitation and safety inspection reports, when requested by the department;
  - f. Completed application form;
  - g. Drug and alcohol evaluation report, when requested by the department;
  - h. Licensing study report;
  - i. Documentation of completion of a course related to fire prevention and safety;
  - j. Fire safety self-declaration form;

- k. Evidence that all caregivers are properly qualified to provide foster care for adults as provided in ~~subsection 8 of~~ section 75-03-21-08;
- l. A successfully completed criminal background check as specified in North Dakota Century Code sections 50-11-02.4, 50-11-06.8, and 50-11-06.9; and
- m. Examples of service logs to be used to account for service time and tasks performed for each resident; and
- n. A family evacuation disaster plan.

**History:** Effective May 1, 1992; amended effective May 1, 1995; September 1, 2004; January 1, 2009.

**General Authority:** NDCC 50-06-16, 50-11

**Law Implemented:** NDCC 50-01-09(6), 50-11-03

**75-03-21-04. Facility.**

1. The home must be:
  - a. Free of warped or damaged floors, loose or unsecured floor coverings, loose tiles, broken or damaged windows, loose or broken handrails, broken light bulbs, and other hazards that would affect the safety of an adult residing in the home;
  - b. Maintained free of offensive odors, vermin, and dampness;
  - c. Maintained by a central heating system at a temperature of at least sixty-eight degrees Fahrenheit [20 degrees Celsius];
  - d. Maintained so as to prevent crawling and flying pests from entering the home through windows;
  - e. Equipped with handrails in all stairways;
  - f. Equipped with nonporous surfaces for shower enclosures; and
  - g. Equipped with safety mats or slip-preventing materials on the bottom of tubs and floors of showers.
2. Bedrooms for all residents must be constructed as a bedroom with walls or partitions of standard construction which extend from floor to ceiling and which provide privacy for the resident.
3. Bedrooms occupied by one resident must have no less than seventy square feet [6.50 square meters] of usable floor space.

4. Bedrooms occupied by two residents must have no less than one hundred twenty square feet [11.15 square meters] of usable floor space.
5. Bedroom ceilings must be at least six feet and eight inches [203.20 centimeters] above the finished floor surface at the ceiling's lowest point.
6. No more than two residents may be assigned to one bedroom.
7. Bedrooms occupied by residents may not be located in a level of the home below grade level unless there are two means of egress, one of which leads to the outside of the home.
8. At least one toilet and bathing facility must be available on the same floor as any bedroom occupied by a resident.
9. The home must have a telecommunication device on the main floor available for use by residents.
10. Mobile home units used as a home must:
  - a. Have been constructed since 1976;
  - b. Have been designed for use as a dwelling, rather than as a travel trailer;
  - c. Meet the flame spread rate requirements; and
  - d. Have a manufacturer's label permanently affixed stating the mobile home meets the requirements of the department of housing and urban development or the American national standards institute.

**History:** Effective May 1, 1992; amended effective May 1, 1995; January 1, 2009.

**General Authority:** NDCC 50-06-16, 50-11

**Law Implemented:** NDCC 50-11-03

**75-03-21-09.1. Criminal conviction - Effect on licensure and operation of home.**

1. An applicant may not be an individual who has, and may not permit an individual, except a resident, to reside in the home or act as a caregiver in the home if the individual has been found guilty of, pled guilty to, or pled no contest to:
  - a. An offense described in North Dakota Century Code chapters 12.1-16, homicide; 12.1-17, assaults - threats - coercion = harassment; or 12.1-18, kidnapping; North Dakota Century Code sections 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition;

12.1-20-05, corruption or solicitation of minors; 12.1-20-05.1, luring minors by computer or other electronic means; 12.1-20-06, sexual abuse of wards; 12.1-20-06.1, sexual exploitation by therapist; 12.1-20-07, sexual assault; 12.1-20-11, incest; 12.1-22-01, robbery; or 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; North Dakota Century Code chapter 12.1-27.2, sexual performances by children; or North Dakota Century Code sections 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; or 12.1-31-05, child procurement; or 12.1-31-07.1, exploitation of a vulnerable adult; or an offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the enumerated North Dakota statutes; or

- b. An offense, other than an offense identified in subdivision a, if the department, ~~in the case of a provider, or the provider, in the case of a substitute caregiver,~~ determines that the individual has not been sufficiently rehabilitated.
2. For purposes of subdivision b of subsection 1, ~~a provider~~ the department shall treat completion of a period of five years after final discharge or release from any term of probation, parole, or other form of community corrections, or from imprisonment, without subsequent conviction, as prima facie evidence of sufficient rehabilitation.
3. The department has determined that the offenses enumerated in subdivision a of subsection 1 have a direct bearing on ~~the~~ an individual's ability to serve the public in any capacity involving the provision of foster care to adults.

**History:** Effective April 1, 1999; amended effective September 1, 2004; January 1, 2009.

**General Authority:** NDCC 50-11-03

**Law Implemented:** NDCC 50-11

**75-03-21-10. Substitute caregiver and respite care provider qualifications.**

1. A substitute caregiver or respite care provider must:
  - a. Be eighteen years of age or older;
  - b. Not be a resident of the home;
  - c. Possess qualifications of a provider specified in subsections 1 and 2 of section 75-03-21-08 excluding subdivision b of subsection 1 of section 75-03-21-08; and

- d. Successfully complete criminal background check requirements as specified in North Dakota Century Code sections 50-11-02.4, 50-11-06.8, and 50-11-06.9. If a qualified service provider's enrollment lapses for more than thirty days, the criminal background check must be repeated if the individual reapplies for enrollment as a qualified service provider subsequent to the lapse.
2. The provider is responsible for the foster care of residents at all times, even though the duties or tasks of furnishing resident care have been delegated to a substitute caregiver or respite care provider.
3. Respite care providers who are caring for residents whose services are funded by the county or state are limited to the respite care service funding cap. Adult family foster care residents whose care is being paid for by the county or state can only receive respite care from an individual who is enrolled by the department as a qualified service provider of respite care ~~by the department~~. Respite care providers ~~must~~ shall bill the department for time spent caring for residents whose care is being paid for by a county or state agency.
4. Substitute caregivers or respite care providers who are providing care to private pay residents may not be left in charge of the home for more than ~~sixty~~ one hundred ninety-two calendar days during the twenty-four-month period immediately following the ~~date of issuance of the license~~ renewal date of the initial license or for more than ~~thirty~~ ninety-six days during the twelve-month period immediately following the date of the issuance of the initial license.
5. For purposes of this section, whenever a substitute caregiver or respite care provider is left in charge of a family foster home for adults for more than eight hours during a calendar day, the calendar day will be counted toward the ~~sixty-calendar-day~~ one hundred ninety-two calendar day or ~~thirty-calendar-day~~ ninety-six calendar day limit a substitute caregiver or respite care provider may be in charge of a family foster care home for adults.
6. Employing individuals other than those who meet the definition of substitute caregiver or respite care provider to provide services to adult family foster care residents is prohibited.

**History:** Effective May 1, 1992; amended effective May 1, 1995; September 1, 2004; January 1, 2009.

**General Authority:** NDCC 50-06-16, 50-11

**Law Implemented:** NDCC 50-11-03

**75-03-21-13. Termination of care.**

1. The provider shall terminate care of a resident when such care is no longer required or when the provider is no longer qualified to provide the care needed by the resident receiving care.
2. The provider who anticipates the termination of care to a resident shall provide the resident and the resident's representative, if any, with at least thirty days' written notice of the termination, and shall refer or transfer the resident to a setting more appropriate to the resident's needs.
3. If an emergency placement outside of the home is needed or a resident is hospitalized and the resident's condition has changed to the extent that the provider is no longer able to provide the resident's care, consideration will be given to waiving the thirty-day written notice required under subsection 2 provided keeping the resident or returning the resident to the home would negatively impact the health and well-being of the resident, other residents living in the home, or the provider. The department staff responsible for adult family foster care licensing must be contacted by the regional human service center adult family foster care representative prior to making the decision to waive the thirty-day requirement.

**History:** Effective May 1, 1992; amended effective May 1, 1995; January 1, 2009.

**General Authority:** NDCC 50-06-16, 50-11

**Law Implemented:** NDCC 50-11-03

## CHAPTER 75-03-23

**75-03-23-01. Definitions.** The terms used in this chapter have the same meaning as in North Dakota Century Code chapter 50-06.2, ~~except.~~ In addition, as used in this chapter:

1. "Activities of daily living" means the daily self-care personal activities that include bathing, dressing or undressing, eating or feeding, toileting, continence, transferring in and out of bed or chair or on and off the toilet, and ~~getting around~~ mobility inside the home.
2. "Adaptive assessment" means an ~~in-home~~ evaluation to identify adaptive devices, equipment, or modifications that enhance the independence and functional capabilities of ~~individuals~~ an individual who may otherwise be unable to remain in ~~their~~ the individual's home. ~~An interdisciplinary team conducts the assessment and oversees implementation of recommendations.~~
3. "Aged" means ~~a person who is~~ sixty-five years of age or older.
4. "Client" means an individual who meets the eligibility requirements ~~to have and is receiving services reimbursed under~~ North Dakota Century Code chapter 50-06.2 or this chapter.
5. "Congenital disability" means a disability that exists at birth or shortly thereafter, and is not attributable to a diagnosis of either mental retardation or a closely related condition of mental retardation.
6. "Department" means the North Dakota department of human services; ~~or its designee.~~
7. "Disability due to trauma" means a disability that results from an injury or assault to the body by an external force.
8. "Disability that is acquired" means a disability that results from an assault that occurs internally within the body.
9. "Disabled" means ~~a person under age sixty-five who has~~ with a congenital disability, a disability due to trauma, or ~~an acquired a disability that is acquired.~~
10. "Disqualifying transfer" as defined in North Dakota Century Code chapter 50-06.2 means a transfer made at any time before or after an individual makes application for SPED benefits by which the individual or the individual's spouse has made any assignment or transfer of any asset for the purpose of making that individual eligible for benefits. Assignment or transfer includes any action or failure to act that effects a transfer, renunciation, or disclaimer of any asset or interest in an asset that the individual otherwise might assert or have asserted, or

which serves to reduce the amount that an individual might otherwise claim from a decedent's estate, a trust or similar device, or another individual obligated by law to furnish support.

11. "Functional assessment" means an evaluation process based on a person's an individual's ability to perform self-care activities and other skills necessary for independent living.
- 44: 12. "Functional impairment" means the inability to perform, either by oneself or with adaptive aids or with human help, ~~the~~ specific activities of daily living or instrumental activities of daily living.
- 42: 13. "Home and community-based services" means the array of services under the SPED program and medicaid waiver defined in the comprehensive human service plan and the other services the department determines to be essential and appropriate to sustain individuals in their homes and in their communities, and to delay or prevent institutional care.
- 43: 14. "Instrumental activities of daily living" means ~~tasks~~ activities requiring cognitive ability or physical ability, or both. ~~Tasks~~ Instrumental activities of daily living include preparing meals, shopping, managing money, housework, laundry, taking medicine, transportation, using the telephone, and mobility outside the home.
- 44: 15. "Medicaid waiver program" means the federal medicaid waiver for the aged and disabled program, as defined in subpart G of 42 CFR 441, under which the department is authorized to provide specific home and community-based services to aged and disabled persons who are at risk of being institutionalized.
16. "Service fee" means the amount a SPED client is required to pay toward the cost of the client's SPED services.
- 45: 17. "Service payment" means the payment issued by the department to a qualified service provider for the provision of authorized home and community-based services to eligible aged and disabled persons.
- 46: 18. "SPED program" means ~~"service the service~~ payments for elderly and disabled program", a state program which authorizes the department to reimburse qualified service providers for the provision of covered home and community-based services to eligible aged and disabled persons individuals.
- 47: 19. "SPED program pool" means the list maintained by the ~~aging services division of the department that~~ which contains the names of these ~~individuals who meet the eligibility criteria to receive services under the SPED program and~~ clients for whom SPED program funding is

available when the ~~individual's name is~~ clients' names are transferred from the SPED program pool to SPED program active status.

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-01(3), 50-06.2-03(5)

**75-03-23-02. Eligibility criteria.**

1. An applicant ~~shall~~ must be entered in the SPED program pool before service payments may be authorized. The department shall allow entry into the SPED program pool to occur:
  - a. ~~When the county social service board of the county where the applicant resides or will receive services~~ department's designee submits a form in the manner prescribed by the department; or
  - b. When the applicant meets the special circumstances provided in subsection 4, 5, or 6 of section 75-03-23-03.
2. An applicant's resources ~~must~~ may not exceed fifty thousand dollars for the applicant to be eligible for services under the SPED program. For purposes of this section, resources are cash or similar assets that can be readily converted to cash and include residences owned by the applicant other than the applicant's primary residence.
3. An applicant eighteen years of age or older is eligible for the SPED program pool if:
  - a. The applicant has a functional impairment ~~in activities of daily living or in instrumental activities of daily living~~ as specified by the department in policies and procedures to indicate applicant eligibility;
  - b. The applicant's functional impairment has lasted, or can be expected to last, three months or ~~more~~ longer;
  - c. The applicant's functional impairment is not the result of a mental illness or a condition of mental retardation, or a closely related condition;
  - d. The applicant is living in North Dakota in a housing arrangement commonly considered a private family dwelling and not in an institution, ~~dormitory, or congregate housing arrangement~~;
  - e. The applicant is not eligible for services under the medicaid waiver program: or the medicaid state plan option of personal care services;

- f. The applicant would receive one or more of the covered services ~~in accord with~~ under department policies and procedures for the specific service;
  - g. The applicant agrees to the plan of care developed for the provision of home and community-based services; ~~and~~
  - h. The applicant is not responsible for one hundred percent of the cost of the covered service provided, ~~in accord with~~ under the ~~human service plan~~ SPED program sliding fee ~~scale~~ scales based on family size and income; ~~and~~
  - i. The applicant has not made a disqualifying transfer of assets.
4. An applicant under eighteen years of age is eligible for the SPED program pool if the applicant is determined to need nursing facility level of care as provided for in section 75-02-02-09 and the applicant's care need is not the result of a mental illness or the condition of mental retardation, or a closely related condition.
5. ~~Applicants~~ An applicant under eighteen years of age ~~are subject to the following limitations or~~ must meet the eligibility requirements in addition to the eligibility criteria in subsection of subsections 3 and 4.
- ~~a.~~ An applicant is not eligible for service payments unless ~~care~~;
  - a. Care provided to the applicant by the applicant's parent or the applicant's spouse is provided under family home care.
  - ~~b.~~ ~~An applicant is eligible for service payments if the caregiver:~~
    - ~~(1)~~ ~~Had to terminate outside employment to care for the applicant;~~
    - ~~(2)~~ ~~Needs to supplement the family income by outside employment if the SPED payments were not available;~~  
~~or~~
    - ~~(3)~~ ~~Would be dependent on county poor relief for support with the service payment. The applicant is unable to regularly attend school or is severely limited in the amount of time the applicant is able to attend school.~~
6. ~~All applicants~~ An applicant must be capable of directing self-care or must have a legally responsible party to act ~~in~~ on the applicant's behalf.

7. An applicant is not eligible for service payments if the care provided is court-ordered.

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-01(3), 50-06.2-03(5), 50-06.2-04(3)

**75-03-23-03. Eligibility determination - Authorization of services.**

1. The department shall provide written notice to the ~~county social service board of the county where the applicant receives services as~~ department's designee of the effective date of the applicant's eligibility for services funded under the SPED program.
2. A person transferred to SPED program active status from the SPED program pool shall continue to meet the eligibility criteria of section 75-03-23-02 in order to remain eligible for services funded under the SPED program.
3. The ~~county social service board's home and community-based services case manager~~ department's designee is responsible for:
  - a. Verifying that the person transferred to active status continues to meet the eligibility criteria for entry placement into the SPED program pool;
  - b. Developing a care plan; ~~and~~
  - c. Authorizing covered services in ~~accord~~ accordance with department policies and procedures;
  - d. Verifying the financial eligibility criteria in relation to income, assets, and deductions; and
  - e. Assuring that other potential federal and third-party funding sources for similar services are sought first.
4. A recipient of services under the medicaid waiver program, who becomes ineligible for the medicaid waiver program because evaluation shows that the recipient no longer requires a nursing facility level of care, ~~shall~~ does not have to go through the SPED program pool to receive services through the SPED program ~~as long as provided the recipient meets~~ all eligibility criteria in ~~subsections 2 through 5 of~~ section 75-03-23-02 ~~are met.~~
5. A recipient of services under the medicaid personal care service option, who becomes ineligible for services under the medicaid personal care service option, does not have to go through the SPED program pool

to receive services through the SPED program provided the recipient meets all eligibility criteria in section 75-03-23-02.

6. A recipient of services under the expanded service payments for elderly and disabled program, who becomes ineligible for services under the expanded service payments for elderly and disabled program, does not have to go through the SPED program pool to receive services through the SPED program provided the recipient meets all eligibility criteria in section 75-03-23-02.
7. An individual who is discharged from an inpatient hospital stay, skilled nursing facility, swing-bed facility, long-term care facility, or basic care facility or who has been off of the SPED program for fewer than sixty days, does not have to go through the SPED program pool to receive services through the SPED program provided the individual meets all eligibility criteria in section 75-03-23-02.

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-01(3), 50-06.2-03(5)

**75-03-23-04. Eligibility criteria for medicaid waiver program.** An applicant is eligible to receive services funded by the medicaid waiver program if:

1. The applicant is either aged or disabled, and, if disabled:
  - a. The disability must not be the result of mental illness as the primary diagnosis or the result of mental retardation, or a closely related condition; and
  - b. The disability must meet the social security administration's definition of disability or the individual must be determined physically disabled by the state review team under section 75-02-02.1-14.
2. The applicant is receiving medicaid;
3. The applicant is evaluated to be in need of a nursing facility level of care;
4. The applicant's needs may be met by one or more of the covered services, as determined by an assessment conducted in accordance with department policies and procedures;
5. The applicant's service provider is not the applicant's spouse, except when allowed by an approved waiver, or, if the applicant is less than eighteen years old, the applicant's service provider is not the applicant's parent, stepparent, or a person legally responsible for the care of the individual unless allowed by an approved waiver;

6. The applicant agrees to accept services provided under the medicaid waiver program instead of nursing home care; and
7. The applicant agrees to the plan of care developed for the provision of home and community-based services.

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-01(3), 50-06.2-03(5), 50-06.2-03(6)

**75-03-23-05. Services covered under the SPED program - Programmatic criteria.** Room and board costs may not be paid in the SPED service payment. The following categories of services are covered under the SPED program and may be provided to a client:

1. ~~Adult~~ The department may provide adult day care services may be provided to a client:
  - a. Who requires assistance in activities of daily living or instrumental activities of daily living;
  - b. ~~Who is able to function in an ambulatory care setting;~~
  - c. ~~Who is able to participate in group activities; and~~
  - d. ~~c.~~ If ~~Who, if~~ the client does not live alone, ~~the client's~~ has a primary caregiver who will benefit from the temporary relief of care giving.
2. ~~Adult~~ The department may provide adult family foster care may be provided using a licensed adult family foster care provider to a client eighteen years of age or older:
  - a. Who resides in a licensed adult family foster care home;
  - b. Who requires care or supervision;
  - c. ~~b.~~ Who would benefit from a family environment; and
  - d. ~~c.~~ Whose required care does not exceed the capability of the foster care provider.

~~Gare must be provided in a licensed adult foster care home. SPED program service payments may not be used to pay room and board costs for adult foster care.~~

3. ~~Chore~~ The department may provide chore services may be provided to a client who is unable to perform intermittent or occasional home tasks for one-time, intermittent, or occasional activities which would enable the client to remain in the home. Activities such as heavy housework

~~and periodic cleaning, minor home repair, and walk maintenance professional extermination, snow removal, and emergency response systems may be provided. Clients receiving emergency response services must be cognitively and physically capable of activating the emergency response system. The task activity must be the responsibility of the client and not the responsibility of the landlord. Chore services may also be used to install bathroom safety rails or other equipment that enables self-care.~~

4. The department may provide environmental modification to a client:
  - a. Who owns the home to be modified;
  - b. When the modification will enable the client to complete the client's own personal care or to receive care and allow the client to safely stay in the home;
  - c. When no alternative community resource is available; and
  - d. Limited to labor and materials for installing safety rails.
5. Family The department may provide family home care services may be provided to a client:
  - a. Who lives in the same residence as the care provider on a twenty-four-hour basis;
  - b. Who agrees to the provision of services by the care provider; and
  - c. Who is the spouse of the care provider or by one of the following relatives, or the current or former spouse of one of the following relatives of the client: parent, grandparent, adult child, adult sibling, adult grandchild, adult niece, or adult nephew.
5. 6. Home The department may provide home and community-based services case management services may be provided to a client who needs a comprehensive assessment and the coordination of cost-effective delivery issues. The case management services must be provided by a licensed social worker in accord with licensed under North Dakota Century Code section 43-41-04.
6. ~~Home health aide services may be provided to a client who needs nonprofessional help with personal care tasks or activities on an intermittent or occasional basis.~~
7. Homemaker The department may provide homemaker services may be provided to a client who needs assistance with environmental maintenance tasks activities including light housekeeping, laundry, meal planning and preparation, and shopping on an intermittent or

occasional basis and who lives alone or with an adult who is unable or is not obligated to perform homemaking activities. The department may provide essential homemaking activities such as meal preparation if the adult not receiving care who resides in the home is unavailable due to employment. Shopping The department may provide shopping assistance ~~may be provided~~ only if at least one other task activity is performed and no other shopping assistance is available through informal networks or other community providers.

8. Nonmedical transportation services may be provided to clients who are unable to provide their own transportation and need transportation to access essential community services such as grocery stores or pharmacies. "Nonmedical transportation services" are transportation services not related to the receipt of medical care.
9. ~~Personal attendant~~ The department may provide personal care services, which must be provided in the client's home, may be provided to a client who needs help or supervision with personal care activities if:
  - a. ~~Who~~ The client is at least eighteen years of age;
  - b. ~~Who~~ The client lives alone or is alone due to the employment of the primary caregiver or the incapacity of other adult household members; and
  - c. ~~Who needs nonprofessional care or supervision on a daily basis. The services are provided in the client's home or in a provider's home if the provider meets the definition of a relative as defined in subdivision c of subsection 5 of section 75-03-23-05.~~
10. Respite ~~The department may provide respite care services may be provided to a client in the client's home, in the provider's home, in a nursing home, in a swing-bed facility, in a basic care facility, or in a hospital, if:~~
  - a. The client has a full-time primary caregiver;
  - b. The client needs a qualified caregiver or it would be inappropriate to use an unqualified caregiver in the absence of the primary caregiver;
  - c. The primary caregiver's need for the relief is intermittent or occasional; and
  - d. The primary caregiver's need for relief is not due to the primary caregiver's employment or attendance at school as a part-time or full-time student.

11. The department may provide other services as the department determines appropriate.

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-01(3), 50-06.2-03(5)

**75-03-23-06. Services covered under the medicaid waiver program - Programmatic criteria.** Room and board costs may not be included in the medicaid waiver service payment. The following services are covered under the medicaid waiver program and may be provided to a client:

1. Adult The department may provide adult day care services may be provided to a client:
  - a. Who requires assistance in activities of daily living or instrumental activities of daily living;
  - b. ~~Who is able to function in an ambulatory care setting;~~
  - c. ~~Who is able to participate in group activities; and~~
  - d. ~~Whose If the client does not live alone, the client's primary caregiver, who shall reside with the client, will benefit from the temporary relief of care giving.~~
2. The department may provide adult family foster care, using a licensed adult family foster care provider, to a client who resides in a licensed adult family foster care home who:
  - a. Is eighteen years of age or older;
  - b. Requires care or supervision;
  - c. Would benefit from a family environment; and
  - d. Requires care that does not exceed the capability of the foster care provider.
3. The department may provide residential care to a client who:
  - a. Has chronic moderate to severe memory loss; or
  - b. Has a significant emotional, behavioral, or cognitive impairment.
4. The department may provide attendant care to a client who:
  - a. Is ventilator-dependent a minimum of twenty hours per day;

- b. Is medically stable as documented at least annually by the client's primary care physician.
  - c. Has identified an informal caregiver support system for contingency planning; and
  - d. Is competent to participate in the development and monitoring of the care plan as documented at least annually by the client's primary care physician.
5. ~~Chore~~ The department may provide chore services may be provided to a client who is unable to perform intermittent or occasional home tasks, including heavy housework and periodic cleaning, minor home repair, and walk maintenance for one-time, intermittent, or occasional activities that would enable the client to remain in the home, such as heavy housework and periodic cleaning, professional extermination, and snow removal. The task activity must be the responsibility of the client and not the responsibility of the landlord. Chore services may also be used to install bathroom safety rails or other equipment that enables self-care.
  3. ~~Home and community-based services case management services may be provided to a client who needs a comprehensive assessment and the coordination of cost-effective delivery of services. The case management services must be provided by a licensed social worker in accord with North Dakota Century Code section 43-41-04.~~
  4. ~~Home health aide services may be provided to a client who needs nonprofessional help with personal care tasks or activities on an intermittent or occasional basis.~~
  5. ~~Homemaker services may be provided to a client who needs assistance with environmental maintenance tasks, including light housekeeping, laundry, meal planning and preparation, and shopping on an intermittent or occasional basis. Shopping assistance may be provided only if at least one other task is performed and no other shopping assistance is available through informal networks or other community providers.~~
  6. ~~Nonmedical transportation services may be provided to clients who are unable to provide their own transportation and need transportation to access essential community services such as grocery stores or pharmacies. "Nonmedical transportation services" are transportation services not related to the receipt of medical care. The department may provide an emergency response system to a client who lives alone or with an incapacitated adult, or who lives with an individual whose routine absences from the home present a safety risk for the client, and the client is cognitively and physically capable of activating the emergency response system.~~

7. ~~Personal attendant care services, including adult foster care, may be provided to a client:~~

- ~~a. Who is at least eighteen years of age;~~
- ~~b. Who lives alone or is alone due to the employment of the primary caregiver or the incapacity of other household members; and~~
- ~~c. Who needs nonprofessional care or supervision on a daily basis.~~

~~Personal attendant care may be provided in the client's home or, if the client would benefit from a family environment, in the provider's home. If the care is provided in the provider's home, the provider must be licensed in accord with chapter 75-03-22. Medicaid waiver payments may not be used to pay room and board costs for adult foster care. When no alternative community resource is available, the department may provide environmental modification to a client, if the client owns the home to be modified and when the modification will enable the client to complete the client's own personal care or to receive care and will allow the client to safely stay in the home for a period of time that is long enough to offset the cost of the modification.~~

8. ~~a. Respite care services may be provided to a client in the client's home, in the provider's home, in a nursing home, or in a hospital, if:~~

- ~~a. The client has a full-time primary caregiver;~~
- ~~b. The client needs a qualified caregiver or it would be inappropriate to use an unqualified caregiver in the absence of the primary caregiver;~~
- ~~c. The primary caregiver's need for the relief is intermittent or occasional; and~~
- ~~d. The primary caregiver's need for relief is not due to the primary caregiver's employment. The department may provide family personal care to a client who:~~

~~(1) Lives in the same residence as the care provider on a twenty-four-hour basis;~~

~~(2) Agrees to the provision of services by the care provider; and~~

~~(3) Is the legal spouse of the care provider.~~

~~b. Family personal care payments may not be made for assistance with the activities of communication, community integration,~~

housework, laundry, meal preparation, money management, shopping, social appropriateness, or transportation.

9. ~~Specialized equipment and supplies may be provided to a client who is at least eighteen years of age, if:~~
  - a. ~~The specialized item's need is based on an adaptive assessment;~~
  - b. ~~The specialized item directly benefits the client's ability to perform personal care or household tasks;~~
  - c. ~~The specialized item will reduce the intensity or frequency of human assistance required to meet the client care needs;~~
  - d. ~~The specialized item is necessary to prevent the client's institutionalization;~~
  - e. ~~The specialized item is not available under the medicaid state plan; and~~
  - f. ~~The client is motivated to use the specialized item. The department may provide home and community-based services case management services to a client who needs a comprehensive assessment and the coordination of cost-effective delivery of services. Case management services provided under this subsection must be provided by a social worker licensed under North Dakota Century Code section 43-41-04.~~
  
10. ~~Training for family caregivers may be provided to family members who provide care to a client:~~
  - a. ~~The client shall be at least eighteen years of age.~~
  - b. ~~The client and family member receiving the training shall be related by blood or marriage.~~
  - c. ~~The family member shall provide primary care to the client.~~
  - d. ~~The training must directly benefit the family member's ability to meet the care needs of the client.~~
  - e. ~~The family member is motivated to learn and perform care techniques and therapies. The department may provide home-delivered meals to a client who lives alone and is unable to prepare an adequate meal for himself or herself or who lives with an individual who is unable or not available to prepare an adequate meal.~~

11. ~~At a cost that is proportional to the benefit outcome, environmental modification may be provided to a client:~~
- ~~a. Who owns the home to be modified and owned it prior to making application for the modification;~~
  - ~~b. Whose home is structurally sound;~~
  - ~~c. For whom the modification will enable the client to complete the client's own personal care or to receive care; and~~
  - ~~d. When no alternative community resource, such as housing grants, is available. The department may provide homemaker services to a client who needs assistance with environmental maintenance activities, including light housekeeping, laundry, meal planning and preparation, and shopping on an intermittent or occasional basis when the client lives alone or with an adult who is unable or is not obligated to complete homemaking activities. Essential homemaking activities such as meal preparation may be provided if the responsible adult not receiving care who resides in the home is unavailable due to employment. Shopping assistance may be provided only if at least one other activity is performed and no other shopping assistance is available through informal networks or other community providers.~~
12. a. The department may provide extended personal care services to a client who:
- (1) Requires skilled or nursing care that requires training by a nurse licensed under North Dakota Century Code chapter 43-12.1; and
  - (2) Has a cognitive or physical impairment that prevents the client from completing the required activity.
- b. Extended personal care services do not include assistance with activities of daily living and instrumental activities of daily living.
13. The department may provide nonmedical transportation services to a client who is unable to provide his or her own transportation and who needs transportation to access essential community services such as grocery stores or pharmacies. "Nonmedical transportation services" are transportation services not related to the receipt of medical care.
14. The department may provide respite care services to a client in the client's home, in the provider's home, in a nursing home, in a swing-bed facility, in a basic care facility, or in a hospital, if:
- a. The client has a full-time primary caregiver;

- b. The client needs a qualified caregiver or it would be inappropriate to use an unqualified caregiver in the absence of the primary caregiver;
  - c. The primary caregiver's need for the relief is intermittent or occasional; and
  - d. The primary caregiver's need for relief is not due to the primary caregiver's employment or attendance at school as a part-time or full-time student.
- 15. The department may provide specialized equipment and supplies to a client, if:
  - a. The client's need for the items is based on an adaptive assessment;
  - b. The items directly benefit the client's ability to perform personal care or household activities;
  - c. The items will reduce the intensity or frequency of human assistance required to meet the client care needs;
  - d. The items are necessary to prevent the client's institutionalization;
  - e. The items are not available under the medicaid state plan; and
  - f. The client is motivated to use the item.
- 16. The department may provide supported employment to a client who is unlikely to obtain competitive employment at or above the minimum wage; who, because of the client's disabilities, needs intensive ongoing support to perform in a work setting; and who has successfully completed the supported employment program available through the North Dakota vocational rehabilitation program.
- 17. The department may provide transitional living services to a client who needs supervision, training, or assistance with self-care, communication skills, socialization, sensory and motor development, reduction or elimination of maladaptive behavior, community living, and mobility. The department may provide these services until the client's independent living skills development has been met or until an interdisciplinary team determines the service is no longer appropriate for the client.

18. The department may provide other services as permitted by an approved waiver.

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-01(3), 50-06.2-03(5)

**75-03-23-07. Qualified service provider standards and agreements.**

1. ~~The An~~ individual or agency seeking designation as a qualified service provider shall complete and return the applicable forms supplied by the department in the form and manner prescribed. The qualified service provider shall meet all licensure ~~and~~ certification, or competency requirements applicable under state or federal law and departmental standards.
2. ~~All providers shall~~ A provider or an individual seeking designation as a qualified service provider:
  - a. ~~Have~~ Must have the basic ability to read, write, and verbally communicate;
  - b. ~~Not have been convicted of an offense in the last three years that has a direct bearing on the individual's fitness to be a direct care provider;~~ Must not be an individual who has been found guilty of, pled guilty to, or pled no contest to:
    - (1) An offense described in North Dakota Century Code chapter 12.1-16, homicide; 12.1-17, assaults - threats - coercion - harassment; or 12.1-18, kidnapping; North Dakota Century Code section 12.1-20-03, gross sexual imposition; 12.1-20-03.1, continuous sexual abuse of a child; 12.1-20-04, sexual imposition; 12.1-20-05, corruption or solicitation of minors; 12.1-20-06, sexual abuse of wards; 12.1-20-06.1, sexual exploitation by therapist; 12.1-20-07, sexual assault; 12.1-22-01, robbery; or 12.1-22-02, burglary, if a class B felony under subdivision b of subsection 2 of that section; North Dakota Century Code chapter 12.1-27.2, sexual performances by children; or North Dakota Century Code section 12.1-29-01, promoting prostitution; 12.1-29-02, facilitating prostitution; 12.1-31-05, child procurement; 12.1-31-07, endangering a vulnerable adult; or 12.1-31-07.1, exploitation of a vulnerable adult; or an offense under the laws of another jurisdiction which requires proof of substantially similar elements as required for conviction under any of the enumerated North Dakota statutes; except that a person found guilty of misdemeanor simple assault described in North Dakota Century Code section 12.1-17-01, or equivalent conduct in another jurisdiction

which requires proof of substantially similar elements as required for conviction may be considered rehabilitated if the requirements of subparagraph a or b of paragraph 2 of subdivision b of subsection 2 are met; or

- (2) An offense, other than a direct-bearing offense identified in paragraph 1 of subdivision b of subsection 2, if the department determines that the individual has not been sufficiently rehabilitated.
  - (a) The department may not consider a claim that the individual has been sufficiently rehabilitated until any term of probation, parole, or other form of community corrections or imprisonment without subsequent charge or conviction has elapsed, or sufficient evidence is provided of completion of any relevant rehabilitation program.
  - (b) An individual's completion of a period of three years after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent charge or conviction, is prima facie evidence of sufficient rehabilitation;
- c. Not Must not have an infectious or contagious disease, according to the centers for disease control and prevention's personnel health guidelines, and shall be physically capable of performing the service demonstrate any related infection control skills;
- d. Practice Shall maintain confidentiality; and
- e. Participate in at least one hour of continuing skill development for every two hundred hours of service or care provided, up to a maximum of ten hours per year. Shall submit a request to be a qualified service provider every twenty-four months using applicable forms and shall provide documentation as required by the department;
- f. Must be physically capable of performing the service for which they were hired; and
- g. Must be at least eighteen years of age.
3. Evidence of competency must be provided in: The offenses enumerated in paragraph 1 of subdivision b of subsection 2 have a direct bearing on an individual's ability to be enrolled as a qualified service provider.

- a. An individual enrolled as a qualified service provider prior to January 1, 2009, who has been found guilty of, pled guilty to, or pled no contest to, an offense considered to have a direct bearing on the individual's ability to provide care may be considered rehabilitated and may continue to provide services if the individual has had no other offenses and provides sufficient evidence of rehabilitation to the department.
  - b. A decision to approve or deny an application for an individual who applies to enroll as a qualified service provider and who has been charged with an offense considered to have a direct bearing on the individual's ability to provide care will not be made until final disposition of the criminal case against the individual.
4. Evidence of competency for adult family foster care providers serving clients eligible for the developmental disability waiver must be provided in accordance with subdivision b of subsection 2 of section 75-03-21-08.
5. A provider of services for adult day care, adult family foster care, attendant care, extended personal care, family personal care, personal care, residential care, respite care, and transitional living care shall provide evidence of competency in generally accepted procedures for:
  - a. ~~The generally accepted procedure for infection~~ Infection control and proper handwashing methods;
  - b. ~~The generally accepted procedure for handling~~ Handling and disposing of body fluids;
  - c. ~~The generally accepted procedure for tub~~ Tub, shower, and bed bathing techniques;
  - d. ~~The generally accepted procedure for hair~~ Hair care techniques, sink shampoo, and shaving;
  - e. ~~The generally accepted procedure for oral~~ Oral hygiene techniques of brushing teeth and cleaning dentures;
  - f. ~~The generally accepted procedure for caring~~ Caring for an incontinent resident client;
  - g. ~~The generally accepted procedure for feeding~~ Feeding or assisting a resident client with eating;
  - h. ~~The generally accepted procedure for basic~~ Basic meal planning and preparation;

- i. ~~The generally accepted procedure for assisting Assisting a resident client with the self-administration of medications;~~
  - j. ~~The generally accepted procedure for changing a dressing on noninfected sores;~~
  - k. ~~The generally accepted procedures and techniques, including dusting, vacuuming, floor care, garbage removal, changing linens, and other similar tasks, for maintaining Maintaining a kitchen, bathroom, and other rooms used by residents a client in a clean and safe condition, including dusting, vacuuming, floor care, garbage removal, changing linens, and other similar tasks;~~
  - t. ~~k. The generally accepted procedures in laundry Laundry techniques, including mending, washing, drying, folding, putting away, ironing, and related work;~~
  - m. ~~l. The generally accepted procedure for assisting Assisting a resident client with bill paying and balancing a check book;~~
  - n. ~~m. The generally accepted procedure for dressing Dressing and undressing a resident client;~~
  - o. ~~n. The generally accepted procedure for assisting Assisting with toileting;~~
  - p. ~~o. The generally accepted procedure for routine Routine eye care;~~
  - q. ~~p. The generally accepted procedure for proper Proper care of nails and feet fingernails;~~
  - r. ~~q. The generally accepted procedure for caring Caring for skin, including giving a back rub;~~
  - s. ~~r. The generally accepted procedure for turning Turning and positioning a resident client in bed;~~
  - t. ~~s. The generally accepted procedure for transfer Transfer using a belt, standard sit, or bed to wheelchair;~~
  - u. ~~t. The generally accepted procedure for assisting Assisting a resident client with ambulation; and~~
  - v. ~~u. The generally accepted procedure for making Making wrinkle-free beds.~~
4. 6. A An applicant for qualified service provider status for attendant care, adult family foster care, extended personal care, family personal

care, personal care, residential care, transitional living care, respite care, or adult day care must secure written verification that the applicant is competent to perform procedures specified in subsection 5 from a physician, chiropractor, registered nurse, licensed practical nurse, occupational therapist, physical therapist, or other person an individual with a professional degree in specialized areas of in-home care shall verify, in writing, on forms furnished by the department, that a provider is competent to perform procedures specified in subsection 3. Verification that a provider is competent to perform a procedure is evidence of competence with respect to that procedure health care. Written verification of competency is not required if the individual holds one of the following licenses or certifications in good standing: physician, chiropractor, registered nurse, licensed practical nurse, registered physical therapist, registered occupational therapist, or certified nurse assistant. A certificate or another form of acknowledgment of completion of a program with a curriculum that includes the competencies in subsection 5 may be considered evidence of competence.

7. The department may approve global and client-specific endorsements to provide particular procedures for a provider based on written verification of competence to perform the procedure from a physician, chiropractor, registered nurse, occupational therapist, physical therapist, or other individual with a professional degree in a specialized area of health care or approved within the scope of the individual's health care license or certification.

5- 8. Competence may be demonstrated in the following ways:

- a. A demonstration of the procedure being performed;
- b. A detailed verbal explanation of the procedure; or
- c. A detailed written explanation of the procedure.

6- 9. The department shall notify the individual or the agency of its decision on designation as a qualified service provider. If the decision is not favorable, the individual or agency shall be notified why the requirements for designation as a qualified service provider were not met. If the decision is favorable, the individual's or the agency's name shall be added to the qualified service provider list for each identified county, along with the specific services, endorsements, and unit rates.

7- 10. The county social service board department shall maintain a list of qualified service providers. Once the client's need for services has been determined, the client selects a provider from the list and the county social service board department's designee issues an authorization to provide services to the selected qualified service provider.

8. 11. A service payment may be issued only to a qualified service provider who bills the department after the delivery of authorized services.

**History:** Effective June 1, 1995; amended effective March 1, 1997; January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-03(5)

**75-03-23-08. Termination of qualified service provider status and denial of application to become a qualified service provider.**

1. The department may ~~remove~~ terminate a qualified service provider ~~from a county social service board's list of approved providers~~ if the qualified service provider:
  1. ~~a. Voluntarily~~ The qualified service provider voluntarily withdraws from participation as a qualified service provider;
  2. ~~b. Is~~ The qualified service provider is not in compliance with applicable state laws, state regulations, or program issuances concerning governing providers;
  3. ~~c. Is~~ The qualified service provider is not in compliance with the terms of the set forth in the application or provider agreement;
  4. ~~d. Is~~ The qualified service provider is not in compliance with the provider certification terms on the claims submitted for payment;
  5. ~~e. Has~~ The qualified service provider has assigned or otherwise transferred the right to payment of a program claim, except as provided in 42 U.S.C. 1396a(a)(32);
  6. ~~f. Has~~ The qualified service provider has demonstrated a pattern of submitting inaccurate billings or cost reports;
  7. ~~g. Has~~ The qualified service provider has demonstrated a pattern of submitting billings for services not covered under ~~the SPED program or the medicaid waiver program~~ department programs;
  8. ~~h. Has~~ The qualified service provider has been debarred or the provider's license or certificate to practice in the provider's profession or to conduct business has been suspended or terminated;
  9. ~~i. Has~~ The qualified service provider has delivered goods, supplies, or services that are of an inferior quality or are harmful to individuals;

40. ~~j. Is insolvent; or~~ The qualified service provider has been convicted of an offense determined by the department to have a direct bearing upon the provider's ability to be enrolled as a qualified service provider, or the department determines, following conviction of any other offense, the provider is not sufficiently rehabilitated; or
41. ~~k. Has been removed from a county's list of approved providers for~~ For other good cause.
2. The department may deny an application to become a qualified service provider if:
- a. The applicant voluntarily withdraws the application:
  - b. The applicant is not in compliance with applicable state laws, state regulations, or program issuances governing providers:
  - c. The applicant, if previously enrolled as a qualified service provider, was not in compliance with the terms set forth in the application or provider agreement:
  - d. The applicant, if previously enrolled as a qualified service provider, was not in compliance with the provider certification terms on the claims submitted for payment:
  - e. The applicant, if previously enrolled as a qualified service provider, had assigned or otherwise transferred the right to payment of a program claim, except as provided in 42 U.S.C. 1396a(a)(32):
  - f. The applicant, if previously enrolled as a qualified service provider, had demonstrated a pattern of submitting inaccurate billings or cost reports:
  - g. The applicant, if previously enrolled as a qualified service provider, had demonstrated a pattern of submitting billings for services not covered under department programs:
  - h. The applicant has been debarred or the applicant's license or certificate to practice in the applicant's profession or to conduct business has been suspended or terminated:
  - i. The applicant has delivered goods, supplies, or services that are of an inferior quality or are harmful to individuals:
  - j. The applicant has been convicted of an offense determined by the department to have a direct bearing upon the applicant's ability to be enrolled as a qualified service provider, or the department determines, following conviction of any other offense, the applicant is not sufficiently rehabilitated; or

k. For other good cause.

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-03(5)

**75-03-23-09. Payment under the SPED program and the medicaid waiver program.**

1. The department shall establish provider rates for each home and community-based service in ~~accord~~ accordance with a procedure that factors in:
  - a. Whether a provider is an individual or an agency; and
  - b. The range of rates submitted by various providers; and
  - c. ~~The average cost of county social service boards in delivering certain services.~~
2. The rate for a specific qualified service provider is established at the time the provider agreement is signed.
3. ~~A~~ The department shall grant a request for a rate decrease must be accepted at any time and granted when the department receives a written request for the decrease from the qualified service provider.
4. ~~A~~ The department shall grant in full or in part, or shall deny, a request for a rate increase must be granted in full or in part, or denied, when the department receives a written request for the rate increase from the qualified service provider.
5. The department shall determine the maximum amount allowable per client each month for a specific service.
6. The department shall establish the aggregate maximum amount allowable per client each month for all services. The aggregate maximum amount per client depends on whether the client is receiving services under the SPED program, under the medicaid waiver program, or under both programs.
7. The department or designee may grant approval to exceed the monthly service program maximum for a specific client who is only receiving SPED funds and no medicaid funds if:
  - a. ~~The~~ the client has a special or unique circumstance;
  - b. ~~The~~ the SPED client is not eligible for medicaid; and

- e. The the need for additional service program funds will not initially exceed three months. Under emergency conditions, the department may grant a one-time extension not to exceed an additional three months.
8. The department may grant approval to exceed the monthly service program maximum for a specific client who is receiving SPED funds and medicaid funds or only medicaid funds if:
- a. The the client has a special or unique circumstance; and
  - b. The the need for additional service program funds does not exceed three months; and.
  - e. ~~The total need for service program funds per month must not exceed the aggregate monthly maximum amount for a client who receives services under both the SPED program and the medicaid waiver program, excluding home and community-based services case management.~~ Under emergency conditions, the department may grant a one-time extension not to exceed an additional three months.
9. ~~The county social service board~~ department's designee shall notify the client of the department's determination regarding the request to exceed the monthly service program maximum. If the department denies the request to exceed the monthly aggregate maximum, the ~~county social service board~~ department's designee shall inform the client in writing of the reason for the denial, the client's right to appeal, and the appeal process, as provided for in chapter 75-01-03.
10. ~~Providers are limited to a maximum of two hundred hours of care per month, unless an emergency or unusual circumstances is determined by the county social service board. The county social service board shall submit a written request to exceed the monthly aggregate maximum or the monthly service maximum before authorizing any service in excess of the maximum monthly amount. The department shall provide written notice of its decision to the county social service board and the qualified service provider.~~
11. The department will grant approval to exceed the monthly program maximum or service maximum for individuals receiving SPED funds or medicaid funds, or both, whose service units exceed the program caps as a result of the qualified service provider rate increase. This

extension is limited to individuals who were receiving services prior to July 1, 2007.

**History:** Effective June 1, 1995; amended effective September 27, 2007; January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-03(5)

**75-03-23-11. Denial, reduction, and termination of services - Appeal.**

1. ~~A~~ The department's designee shall inform a person who is determined to be ineligible for covered services or who becomes ineligible while receiving services shall be informed in writing of the denial, termination, or reduction, the reasons for the denial, termination, or reduction, the right to appeal, and the appeal process as provided in chapter 75-01-03.
2. ~~Clients shall~~ A client must receive ten calendar days' written notice before termination of services occurs. The ten-day notice ~~does not apply~~ is not required if the:
  - a. The client enters a basic care facility; or a nursing facility; or;
  - b. The termination is due to changes in federal or state law;
  - c. The client requests termination of services; or
  - d. The client moves from the service area.
3. An applicant denied services or a client terminated from services should be given an appropriate referral to other public or private service providers and should be assisted in finding other resources.
4. For denial or termination of services, a review of the decision by the county social service board director or the designee may be requested. A request for review does not change the time within which the request for an appeal hearing must be filed.
5. ~~Termination of all~~ The department shall deny or terminate SPED program and medicaid waiver program services ~~or immediate termination of a specific service must be considered by the department through its aging services division when continued service to the client presents an immediate threat to the health or safety of the client, the provider of services, or others or when services that are available are not adequate to prevent a threat to the health or safety of the client, the provider of services, or others. Examples of client behaviors that could lead to termination of services~~ health and safety threats include physical abuse of the provider by the client, client self-neglect, an unsafe living environment for the client, or contraindicated practices, like smoking while using oxygen. The county social service board shall

~~inform the client in writing the reason for the termination, the right to appeal, and the appeal process, as provided for in chapter 75-01-03.~~

**History:** Effective June 1, 1995; amended effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03(6)

**Law Implemented:** NDCC 50-06.2-03(5), 50-06.2-03(6), 50-06.2-04(1), 50-06.2-04(3)

**75-03-23-12. Provider - Request for review.**

1. A qualified service provider may request a review of a decision made by the department regarding provider reimbursement.
2. A qualified service provider who requests a review of a decision regarding provider reimbursement under this section must do so in writing within ten days of the date the qualified service provider was notified of the determination by the department. The written notice must identify each disputed item and the reason or basis for the dispute. A provider may not request a review under this section of the rate paid for each disputed item.
3. Within thirty days after requesting a review, a provider shall provide to the department all documents, written statements, exhibits, and other written information that supports the provider's request for review.
4. The department shall assign a provider's request for review to someone other than an individual who was involved in the initial disputed decision.
5. The department shall make and issue its final decision within seventy-five days of the date the department received the notice of request for review.
6. A provider may contact the department employee who made the disputed decision for an informal conference regarding the disputed decision any time before that provider submits a formal request for review to the department.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03

**Law Implemented:** NDCC 50-06.2-03

**75-03-23-13. Provider - Appeals.** An applicant or provider may appeal a decision to deny or revoke a qualified service provider enrollment by filing a written appeal with the department within ten days of receipt of written notice of the denial or revocation. Upon receipt of a timely appeal, an administrative hearing may be conducted in the manner provided in chapter 75-01-03. A provider or applicant who receives notice of termination or denial of the individual's qualified service provider status and requests a timely review of that decision is not eligible to provide services

until a final decision has been made by the department that reverses the decision to terminate or deny qualified service provider status.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 50-06.2-03

**Law Implemented:** NDCC 50-06.2-03

**75-03-23-14. Disqualifying transfers.**

1. An individual is not eligible for SPED benefits under this chapter if the department determines that the individual or the spouse of the individual has made any assignment or transfer of any asset for the purpose of making the individual eligible for benefits before or after making application for SPED services except as provided in subsection 2.
2. An individual is not ineligible for SPED benefits under this chapter by reason of subsection 1 to the extent that:
  - a. The value of the transferred assets when added to the value of the individual's other assets would not otherwise make the individual ineligible for SPED or does not decrease the individual's service fee.
  - b. The asset transferred was a home, and title to the home was transferred to:
    - (1) The individual's spouse; or
    - (2) The individual's son or daughter who is under the age of twenty-one or who is blind or disabled.
  - c. The assets:
    - (1) Were transferred to the individual's spouse or to another person for the sole benefit of the individual's spouse; or
    - (2) Were transferred from the individual's spouse to another person for the sole benefit of the individual's spouse.
  - d. The individual makes a satisfactory showing that:
    - (1) The individual intended to dispose of the assets at fair market value or for other valuable consideration, and the individual had an objectively reasonable belief that fair market value or its equivalent was received;
    - (2) The assets were transferred exclusively for a purpose other than to qualify for SPED benefits under this chapter; or

- (3) All assets transferred for less than fair market value have been returned to the individual.
- e. If a disqualifying transfer occurred five years prior to the date an individual initially applies for SPED services, the department will presume that the transfer was not for the purpose of obtaining SPED benefits.
3. There is a presumption that a transfer was made for purposes of making an individual eligible for SPED services under this chapter:
- a. If an inquiry about SPED benefits or benefits under this chapter was made, by or on behalf of the individual to any other individual, before the date of transfer:
- b. If the individual or the individual's spouse was an applicant for or recipient of SPED benefits under this chapter before the date of transfer:
- c. If a transfer is made by or on behalf of the individual's spouse, if the value of the transferred asset, when added to the value of the individual's other assets, would exceed SPED asset limits; or
- d. If 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 assets were transferred exclusively for a purpose other than to qualify for SPED benefits under this chapter must show a desire to receive SPED benefits under this chapter played no part in the decision to make the transfer and must rebut any presumption arising under subsection 3.
5. If the transferee of any assets is the child, grandchild, brother, sister, niece, nephew, parent, grandparent, stepparent, stepchild, son-in-law, daughter-in-law, or grandchild-in-law 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 asset unless the transfer is made pursuant to a valid written contract entered into prior to rendering the services.
6. 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.

7. For purposes of this section, fair market value is received:
- a. When one hundred percent of apparent fair market value is received for an asset whose value is not subject to reasonable dispute, such as cash, bank deposits, stocks, and fungible commodities;
  - b. When seventy-five percent of estimated fair market value is received for an asset whose value may be subject to reasonable dispute; and
  - c. When one hundred percent of fair market value is received for an asset considered to be income to the individual or individual's spouse.
8. If an applicant or client is denied medicaid based on a disqualifying transfer of assets, the SPED applicant or client is also ineligible for SPED-funded services.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 50-06.2-07

**Law Implemented:** NDCC 50-06.2-07

## CHAPTER 75-05-00.1

**75-05-00.1-03. Department to conduct human service center licensure reviews.** The department shall conduct a review of departmental licensure standards, procedures, and rules prior to the departmental ~~biannual~~ biennial licensure review of the human service center.

**History:** Effective February 1, 1996; amended effective January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-00.1-05. Licensure team.** The chairperson designated under section 75-05-00.1-04 shall develop a licensure team to conduct onsite reviews at each regional human service center. The licensure team ~~may~~ must be composed of ~~any, at a minimum,~~ of the following individuals:

1. A psychologist or a psychiatrist;
2. A psychiatric nurse, clinical nurse specialist, or nurse practitioner;
3. A representative from the aging services division;
4. ~~A representative from the alcohol and drug services division;~~
5. A representative from the children and family services division;
- 6: ~~5.~~ A representative from the developmental disabilities division;
7. ~~A representative from the management services division;~~
- 8: ~~6.~~ Two representatives from the division of mental health and substance abuse services division, one representing mental health services and one representing substance abuse services;
- 9: ~~7.~~ A representative from the vocational rehabilitation services division; and
- 10: ~~8.~~ A regional human service center consumer or a member of the consumer's family.

**History:** Effective February 1, 1996; amended effective January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-00.1-06. Programs and services reviewed.** The licensure team shall review the following major programs and services:

1. Administration;
2. Physical plant;

3. Clinical services;
4. 2. Client Consumer management; and
5. 3. Specialized services.

**History:** Effective February 1, 1996; amended effective January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-00.1-07. Licensure team reporting procedures.**

1. At the conclusion of the review, each team member shall write a report on the programs and services reviewed. Each report must contain:
  1. a. A description of programs and services reviewed;
  2. b. ~~Strengths of the programs and services reviewed;~~
  3. c. Concerns;
  4. d. Conditions; and
  5. e. Recommendations.
2. A member not onsite for the core review shall issue a report that coincides with the timeframe of the overall licensure team report. The member's report is due on the date specified by the chairperson of the licensure team.

**History:** Effective February 1, 1996; amended effective January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-00.1-10. Provisional or restricted license.** If the human service center does not, for reasons beyond its control, is unable to satisfy the cited condition or does not develop and implement a plan to satisfy the cited condition, or if the nature of the condition warrants, a provisional or restricted license may be issued. A provisional license allows the human service center to operate while the center makes changes to its operation to satisfy human service center licensing standards. The provisional license may be in effect for a maximum of three twelve months. A restricted license allows the human service center to operate for certain functions, but prohibits the center from operating for other functions when those functions do not meet human service center licensing standards and a provisional license would not give the center sufficient opportunity to meet those standards. A restricted license is issued for the same period of time as a nonrestricted license for the functions for which the human service center will be operating. A restricted license is in effect for the period specified in the license not to exceed twenty-four months. Prior to removing a restriction on a license and issuing an unrestricted

license, the department shall conduct an onsite review to determine that the licensee is in full compliance with the standards contained in this article.

**History:** Effective February 1, 1996; amended effective January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-00.1-11. Licensure team review followup.** After the human service center has corrected the cited conditions or has developed a plan to correct the cited conditions, at least two members of the original licensure team shall conduct followup visits, if deemed appropriate based on the nature of the condition, to verify that the human service center has met corrected the conditions or completed their its correction plan. Site compliance with the previous survey's licensing review conditions and recommendations must be reviewed during the next survey licensing review.

**History:** Effective February 1, 1996; amended effective January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

## CHAPTER 75-05-01

### 75-05-01-01. Definitions. As used in this article:

1. "Acute treatment services" means a group of core services designed to address the needs of vulnerable children, adolescents, adults, elderly, and families who have problems.
2. "Addiction evaluation" means an assessment by an addiction counselor to determine the nature or extent of possible alcohol abuse, drug abuse, or chemical dependency.
3. "Admission process" means an initial face-to-face contact with the client consumer intended to define and evaluate the presenting problem and make disposition for appropriate services.
4. "Adult diagnosed with a serious mental illness" means an adult that meets the definition of "chronically mentally ill" as defined in North Dakota Century Code section 57-38-01.
5. "Adult family foster care licensure services" means the technical assistance provided by a human service center to a county social service board or adult family foster care provider to implement the adult family foster care law, rules, and policies and procedures and authorization to operate an adult family foster care home through issuance of a license.
6. "Aftercare services" means activities provided for an individual with ~~serious mental illness~~ and who is in an inpatient facility or an intensive outpatient program and ready for discharge. These services assist an individual in gaining access to needed social, psychiatric, psychological, medical, vocational, housing, and other services in the community.
- 5- 7. "~~Case management for an individual with serious mental illness~~" means services which will provide or assist an individual ~~with serious mental illness~~ in gaining access to needed ~~medical, psychological, social, educational, vocational, housing, and other services~~ social, psychiatric, psychological, medical, vocational, housing, and other services in the community.
- 6- 8. "Client" or "consumer" means an individual who receives ~~clinical or extended~~ services from the human service center and for whom a client or consumer record is maintained.
- 7- 9. "Client record" or "consumer record" means a compilation of those events and processes that describe and document the evaluation, care, treatment, and service of the client or consumer.

8. 10. "Clinical services" means a variety of services, including acute treatment services, emergency services, extended care services, medications, community consultation and education, psychological services, and regional intervention services to meet the care and treatment needs of ~~clients~~ consumers.
- ~~9.~~ "Clinical staff privileges" means ~~approval of human service center staff, who have been identified by the regional director to render client care and treatment services within well-defined limits, based on the individual's professional qualifications, experiences, competence, ability, and judgment.~~
40. 11. "Community home counselor" means an individual who provides care, supervision, and training for an individual with serious mental illness or serious emotional disturbance in a community residential care facility and assists a resident in reorientation to the community.
44. 12. "Community living supervisor" means a professional who is responsible for the planning and implementation of training and treatment in a community residential care facility for an individual with serious mental illness.
42. 13. "Community residential service" means a variety of residential options which may include transitional living, supported living, crisis residential, in-home residential services, and other residential services necessary to assist an individual in becoming successful and satisfied in the individual's living environment.
- ~~43.~~ "Community supportive care service" means ~~the use of noncenter staff to assist an individual with serious mental illness to remain in the community.~~
14. "Core services" means a minimum set of services that all human service centers provide.
15. "Crisis residential services" means temporary housing to provide crisis intervention, treatment, and other supportive services necessary for an individual to ~~achieve stabilization and crisis resolution~~ remain in the community.
45. 16. "Department" means the department of human services.
46. 17. "Diagnosis" means the process of identifying specific mental or physical disorders based on standard diagnostic criteria.
47. 18. "Educational programs" means planned, time-limited educational programs, including child management or parenting courses.

- 18- 19. "Emergency services" means a service that is available at all times to handle crisis situations.
20. "Evidence-based practice" is defined as an intervention that has been demonstrated, by scientific methods and peer review, to be an effective treatment strategy for the individual, family, or group being served.
- 19- 21. "Extended care services" means services provided to an individual with serious mental illness to maintain or promote social, emotional, and physical well-being through opportunities for socialization, work participation, education, and other self-enhancement activities. Extended care services include community residential services, work skills development, community supportive care services, case management and aftercare services, and psychosocial rehabilitation centers.
- 20- 22. "Extended services" means a federally mandated [34 CFR part 363.50(a)(2)] component designed to provide employment-related, ongoing support for an individual in supported employment. Extended services may include job development, replacement in the event job loss occurs, and, except for an individual with serious mental illness, must include a minimum of two onsite job skills training contacts per month and other support services as needed to maintain employment. It may also mean providing other support services at or away from the worksite.
23. "Family therapy" means a form of treatment in which the family is treated as a whole.
- 21- 24. "Group counseling" or "group therapy" means a form of treatment in which a group of clients consumers, with similar problems, meet with a counselor or therapist to discuss difficulties, provide support for each other, gain insight into problems, and develop better methods of problem solving.
- 22- 25. "Human service center" means a facility established in accordance with ~~the provisions of~~ North Dakota Century Code section 50-06-05.3.
- 23- 26. "Human service council" means a group appointed in accordance with ~~the provisions of~~ North Dakota Century Code section 50-06-05.3.
- 24- 27. "Individual counseling" or "individual therapy" means a form of treatment in which a counselor or therapist works with a client consumer on a one-to-one basis.
- 25- 28. "Individual plan" means a document which describes an individual plan of treatment or service for each client consumer, including a description of the client's consumer's problems and goals for treatment and the individuals responsible for initiating and implementing the plan.

- 26- 29. "Individual service plan (ISP)" means an individual plan that identifies service needs of the eligible client consumer and the services to be provided, and which is developed by the mental retardation-development disabilities case manager and the client consumer or that client's consumer's legal representative, or both, considering all relevant input.
27. ~~"Individual with serious mental illness" means a chronically mentally ill individual as defined in subsection 0.1 of North Dakota Century Code section 57-38-01.~~
- 28- 30. "Individualized ~~written rehabilitation program (IWRP)~~ plan for employment (IPE)" means a statement of the ~~client's rehabilitation a consumer's employment~~ goal and a detailed outline of the program to be followed in achieving the goal. The individualized ~~written rehabilitation program plan for employment~~ is not a contract, but rather a tool in the rehabilitation process used for informational, planning, and assessment purposes. Participatory planning by the counselor and the client consumer is required to establish communication and a mutual understanding of the goals and the objectives.
31. "Long-term care ombudsman program" means a program that advocates for the rights and interests of residents in long-term care and tenants in assisted living facilities.
- 29- 32. "Medication review" means prescription monitoring and consultation, with a client consumer, performed by a ~~psychiatrist or medical doctor prescribing professional~~, regarding the client's consumer's use of medication. A prescribing professional is one whose license allows the professional to prescribe medications.
- 30- 33. "Mental retardation-developmental disabilities case management" means services which will assist an individual with mental retardation and related conditions in gaining access to needed medical, social, educational, vocational, and other services, review of client consumer outcomes and satisfactions, monitoring and evaluation of services, and includes related paperwork, ~~collaterals~~ collateral contacts with significant others and other agencies, phone contacts, and consultation with other staff, supervisors, and peers.
- 34- 34. "Mental retardation-developmental disabilities case manager" means a qualified mental retardation professional who is responsible for providing a single point of entry, program coordination, monitoring, and review for assigned clients consumers.
- 32- 35. "Mental status" means an evaluation of an individual's appearance, posture, mood, affect, attitude toward assessment, orientation, speech, recent and remote memory, abstract reasoning, insight, judgments,

preoccupations, hallucinations, delusions, and suicidal or homicidal ideation.

- ~~33.~~ 36. "Minorities" means all individuals who are ethnic black, hispanic, Asian or Pacific islander, American Indian, or Alaskan native.
- ~~34.~~ 37. "Multidisciplinary team" means at least three staff members representing two different professions, disciplines, or services. At least one of the three must be a psychiatrist or psychologist. As determined appropriate by the human service center, a clinical nurse specialist may substitute for a psychiatrist if neither a psychiatrist nor a psychologist can be in attendance. The exception must be noted on the multidisciplinary case conference note prepared at the time of staffing.
38. "National family caregiver support program" means a multifaceted system of support services for family caregivers of older adults, and for grandparents or relative caregivers of children not more than eighteen years of age as required in title III-E of the Older Americans Act [42 U.S.C. 3030s].
39. "Older Americans Act" means Public Law 89-73, first enacted in 1965, to improve the lives of America's older individuals, particularly in relation to income, health, housing, employment, long-term care, retirement, and community services.
- ~~35.~~ 40. "Outreach" means the process of reaching into a community systematically for the purposes of identifying individuals in need of services, alerting and referring an individual and an individual's family to the availability of services, locating needed services, and enabling an individual to enter and accept the service delivery system provision of services, including direct services, and information and referral, to areas outside of the main office of a regional human service center.
- ~~36.~~ 41. "Program" means an organized system of services designed to meet the service needs of clients consumers.
- ~~37.~~ 42. "Progress notes" means the documentation in the client's consumer's record which describes the client's consumer's progress or lack of progress in treatment as it relates to the approved treatment plan.
- ~~38.~~ 43. "Psychiatric evaluation" means the assessment or evaluation of a client by a psychiatrist a psychiatric diagnostic interview examination, including a history, mental status, and a disposition, and may include communication with family members or other sources.
- ~~39.~~ 44. "Psychiatrist" means a physician, with three years of approved residency training in psychiatry, who is American board of psychiatry

and neurology eligible, and who is licensed to practice medicine in the state of North Dakota.

- 40- 45. "Psychological evaluation" means the assessment or evaluation of a client consumer by or under the supervision of a licensed psychologist.
- 41- 46. "Psychologist" means a professional who holds a doctor's degree in psychology and who is licensed by the state of North Dakota or who qualifies as a psychologist under North Dakota Century Code section 43-32-30.
- 42- 47. "Psychosocial rehabilitation center" means a facility whose staff ~~may provide~~ provides socialization, social skill building, information and referral, and community awareness for the purpose of enhancing the ability of an individual diagnosed with serious mental illness to live in the community.
- 43- 48. "Qualitative and quantitative indicator" means an expected standard of care or outcome that can be measured.
- 44- 49. "Regional aging services program administrator" means an individual ~~assigned the responsibility to plan, develop, implement, and assess programs under the Older Americans Act~~ responsible for regional planning and development of aging programs, monitoring and assessment of regional Older Americans Act title III programs, management and supervision of regional vulnerable adult protective services activities, management and supervision of the regional family caregiver support program activities, management and supervision of the regional long-term care ombudsman program activities, and advocacy activities on behalf of older individuals, and may include supervision of regional adult family foster care licensure services.
- 45- ~~"Regional mental retardation-developmental disabilities program administrator" means a professional designated by the regional director who is responsible for the overall management and administration of the mental retardation-developmental disabilities case management system.~~
- 46- 50. "Regional director" means the human service professional who is appointed by the executive director of the department to be responsible for the overall management and administration of the human service center.
- 47- 51. "Regional intervention service" means a service unit within a human service center which provides crisis intervention and support services in a community as an alternative to state hospital admission.
52. "Regional mental retardation-developmental disabilities program administrator" means a professional designated by the regional director

who is responsible for the overall management and administration of the mental retardation-developmental disabilities case management system.

48. 53. "Regional representative of county social services programs" means an individual, designated by the regional director of the human service center, to whom is delegated the responsibility of supervising and assisting with county social service board programs as assigned.
49. ~~"Residential treatment team" means multidisciplinary staff who make decisions regarding admissions, treatment, training, and disposition of clients in the community residential service.~~
50. ~~"Risk management" means an ongoing process of systematically reviewing the activities which monitor and evaluate the quality and appropriateness of clients', staffs', and visitors' safety and protection.~~
51. 54. "Semi-independent living arrangement" means ~~services which are provided to an individual with serious mental illness in the individual's chosen environment to assist and enhance an individual's abilities to be successful and satisfied in the individual's living environment. Services may include assessment, education and training, monitoring, financial assistance, advocacy, or other supported activities~~ an arrangement that, through the use of intensive, in-home support services, gives a consumer the ability to reside in the consumer's own home.
52. ~~"Seriously mentally ill (SMI) day treatment" means center or community-based services provided to individuals to maintain or promote social, emotional, and physical well-being through opportunities for socialization, therapy, work preparation, education, and other self-enhancement activities.~~
53. 55. "SMI Seriously mentally ill (SMI) group care" means the provision of meals and lodging-related services to an individual in a twenty-four-hour per day community-based living environment established for an individual who does not need the protection offered in an institutional setting, but is not yet ready for independent living.
54. ~~"Staff orientation and inservice training" means orientation of new employees and inservice training of staff provided or approved by the department.~~
55. 56. "Supervision of county social services" means the activities of supervision, consultation, evaluation, licensure, certification of various county social service programs, program planning, implementation, monitoring, receiving and reviewing reports, generation of statistical reports, staff development, and inservice training of county social service board staff and board members.

56. ~~57.~~ "Utilization review" means a program designed to ensure optimal use of center resources to determine if professionally recognized standards are being practiced for service utilization.
57. ~~58.~~ "Vocational adjustment counseling" means assisting the individual and the individual's family to understand and accept any physical or mental limitations placed on activities because of a disability. This includes working with the client consumer, teacher, trainer, and employer to help the client consumer learn adaptive behavior or techniques to attain the vocational objective and function appropriately in the family and community.
58. ~~59.~~ "Vocational assessment diagnosis and evaluation" means acquisition and analysis of medical, psychological, vocational, educational, and social information to determine the effect of a ~~handicapping condition~~ disability on preparing for or obtaining employment. This also includes the medical and psychological consultations, as well as consultations with social workers, teachers, and employers, on behalf of a specific client consumer.
59. ~~60.~~ "Vocational rehabilitation administrator" means the professional responsible for the overall management and implementation of all vocational rehabilitation services within a region.
60. ~~61.~~ "Vocational rehabilitation counselor" means the qualified rehabilitation professional who provides vocational counseling and guidance, and placement services, and who assists an individual with physical or mental disabilities.
- ~~62.~~ "Vulnerable adult protective services" means remedial, social, legal, health, mental health, and referral services provided for prevention, correction, or discontinuation of abuse or neglect which are necessary and appropriate under the circumstances to protect an abused or neglected vulnerable adult, ensure that the least restrictive alternative is provided, prevent further abuse or neglect, and promote self-care and independent living.
64. ~~63.~~ "Work skills development" means a range of services designed to assess clients' consumers' vocational strengths and weaknesses, provide prevocational skills training, job exploration, and followup.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-01-02. Administration. Repealed effective January 1, 2009.**

- ~~1. The regional director shall have direct responsibility for the overall management and implementation of services and programs of the human service center and must be a full-time employee.~~
- ~~2. The regional director shall employ personnel who meet applicable federal and state laws, rules, and court orders. The employed personnel shall meet the criteria for employment as set forth by state merit system standards and the central personnel division. All human service center employees are department employees.~~
- ~~3. The human service center shall have a system of verifying licensure for all employees, who, by state law, are required to have a license to perform assigned duties.~~
- ~~4. The regional director shall appoint supervisory staff to provide performance evaluations of personnel.~~
- ~~5. The regional director shall develop an organizational chart which reflects the line of authority of staff.~~
- ~~6. If necessary, the regional director may contract for services with nonemployees according to the department's policies.~~

~~History: Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996.~~

~~General Authority: NDCC 50-06-05.2~~

~~Law Implemented: NDCC 50-06-05.2~~

**75-05-01-04. Fiscal management. Repealed effective January 1, 2009.**

- ~~1. The regional director shall designate a business manager who shall oversee the financial management of the center.~~
- ~~2. The business manager, or the business manager's designee, shall:
  - ~~a. Prepare the biennial budget;~~
  - ~~b. Collect data for ratesetting purposes;~~
  - ~~c. Collect and enter data into the departmental data collection systems;~~
  - ~~d. Close audit recommendations;~~
  - ~~e. Timely and accurately respond to financial information requests;~~
  - ~~f. Supervise all assets, inventories, and receivables under the control of the human service center;~~~~

- ~~g. Manage day-to-day business affairs of the human service center, including collection and payment of bills consistent with departmental manuals; and~~
- ~~h. Follow established departmental contracting procedures.~~

~~History: Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996.~~

~~General Authority: NDCC 50-06-05.2~~

~~Law Implemented: NDCC 50-06-05.2~~

**75-05-01-06. Staff orientation and inservice training. Repealed effective January 1, 2009.**

- ~~1. The human service center shall develop and implement a written plan for the orientation and inservice training of all new employees. The orientation program must:
  - ~~a. Be initiated upon employment and completed within thirty working days; and~~
  - ~~b. Include policies and procedures of the department, operations of the human service center, and any other information deemed necessary by the regional director and the supervisor of the individual being employed.~~~~
- ~~2. Employees of the human service center shall attend training programs relevant to the human service center programs and clients.~~
- ~~3. All orientation training and inservice training must be documented.~~

~~History: Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996.~~

~~General Authority: NDCC 50-06-05.2~~

~~Law Implemented: NDCC 50-06-05.2~~

**75-05-01-10. Clients' Consumers' rights.**

- 1. Individuals responsible for admissions shall provide all human service center clients consumers, and the clients' consumers' families or guardians, as appropriate, with a written statement regarding the exercise and protection of the clients' consumers' civil rights. The statement must include the assurance of civil rights for all clients consumers of the human service center regardless of the clients' consumers' race, color, religion, national origin, sex, age, political beliefs, or handicap disability in accordance with title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act, the Americans with Disabilities Act of 1990,

and the North Dakota Human Rights Act (North Dakota Century Code chapter 14-02.4).

2. The clients consumers, and families, custodians, or guardians, as appropriate, must receive written information concerning their rights under each program within the human service center from which the client consumer is receiving services.
3. Each client consumer, and family or guardian, as appropriate, will receive written information describing:
  - a. The conditions under which a decision, action, or inaction may be appealed;
  - b. The method of filing the appeal;
  - c. The various steps in the appeal; and
  - d. The assistance which can be furnished in the preparation and submission of the appeal.
4. The human service center shall provide assistance in obtaining protective or advocacy services, if necessary.
5. Clients' Consumers' rights may not be limited, unless the limitation is essential to protect the clients' consumers' safety, the safety of others, or is determined to be of therapeutic value. The restriction must follow the limitations and restrictions of the patient's rights according to North Dakota Century Code section 25-03.1-41.
6. This article may not be construed as creating, for the benefit of a client consumer, or a client's consumer's family or guardian, any civil right or other right.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-01-11. Risk, safety, and security management. Repealed effective January 1, 2009.**

- ~~1. The human service center shall develop and implement a procedure for infection control based on recognized guidelines, such as occupational safety and health association bloodborne pathogen standards.~~
- ~~2. The human service center shall develop and implement a procedure for the management of episodes of aggressive and violent client, staff, and visitor behavior in facilities operated by the center.~~

3. ~~The regional director shall designate a risk manager who shall oversee the risk management of the center.~~
4. ~~The risk manager, or the risk manager's designee, shall:~~
  - a. ~~Develop and maintain the workers compensation bureau's risk management program for the center;~~
  - b. ~~Collect data and file reports as needed for workers' compensation, liability, fire and tornado, bonding fund, and any other entities providing insurance or the equivalent for the center, its staff, or its assets;~~
  - c. ~~File claims as needed with the insuring entities;~~
  - d. ~~Close recommendations resulting from reviews by loss control staff; and~~
  - e. ~~Actively promote risk management throughout the human service center.~~

**History:** ~~Effective February 1, 1996.~~  
**General Authority:** ~~NDCC 50-06-05.2~~  
**Law Implemented:** ~~NDCC 50-06-05.2~~

## CHAPTER 75-05-03

### 75-05-03-01. Acute treatment Outpatient services.

4. Outpatient services. An outpatient service is an organized, nonresidential service or an office practice which provides professionally directed aftercare, individual, group, and other services to consumers.
- a- 1. Each human service center shall offer a range of outpatient services to consumers based on consumers' needs regarding emotional, social, and behavioral problems. These outpatient services include services provided or arranged for:
  - a. Individual counseling;
  - b. Group counseling;
  - c. Family counseling;
  - d. Psychological and psychometric evaluations of testing; and
  - e. Psychiatric assessments.
2. Each human service center shall define and provide general outpatient services to vulnerable children, adolescents, adults, elderly, and families who have problems as outlined in chapter 75-05-06 are experiencing psychosocial, psychiatric, or substance abuse issues, including any combination of those issues.
- b- 3. Each human service center shall develop written program descriptions of each program provided by the center.
- e- 4. Outpatient services must be available to clients consumers during the day and on designated evenings or weekends.
- d- 5. All significant client consumer contacts and treatment provided must be documented in the client's consumer's record.
- e- 6. With the client's consumer's permission, acute treatment outpatient services must be coordinated with other private and public agencies.

2. ~~The human service center shall have an addiction program which meets the requirements of article 75-05, article 75-09, and North Dakota Century Code section 23-01-03.~~

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-03-02. Emergency services.** An "emergency service" is a service that is available at all times to handle crisis situations.

1. The human service center shall maintain or contract for a twenty-four-hour emergency service. ~~At a minimum, telephone Telephone~~ or face-to-face contact must be part of the service. All contacts must be documented.
2. Emergency service personnel ~~shall~~ must be trained to handle crisis situations. Training must include: suicide intervention; violent behavior of ~~elents~~ consumers; and crisis telephone calls. The human service center shall document training in the each employee's personnel file.
3. Face-to-face crisis counseling must be provided in an environment conducive to treatment and control of the ~~elient~~ consumer in the event of ~~suicide~~ suicidal or violent behavior.
4. A complete list of community resources must be available to emergency service personnel and updated by the human service center on an annual basis.
5. An individual receiving emergency services must be given information concerning available resources and treatment services.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-03-03. Extended care services.**

1. Community residential services.
  - a. The regional director shall designate a community living supervisor to supervise the community residential services.
  - b. The human service center shall provide or contract for at least two of the following ~~options~~ services:
    - (1) SMI group care.

(a) SMI group care facilities shall must:

- [1] ~~Comply with the provisions of the chapter entitled "Lodging Rooming Houses" of the 1985 life safety code. The community living supervisor shall assure that the appropriate officials provide onsite review and documentation of review once every two years;~~
- [2] ~~House no more than fourteen clients~~ sixteen consumers;
- [3] [2] Have the ability to house both male and female ~~elients~~ consumers while accommodating privacy for individuals;
- [4] [3] Provide at least one full bathroom, consisting of at least a sink, toilet, and shower, for every four ~~elients~~ consumers; and
- [5] [4] Have bedrooms which are outside rooms with a window that is in good working order and may operate as a secondary exit from the room, accommodate one or two ~~elients~~ consumers, provide each ~~elient~~ consumer with a bed appropriate for the ~~elient's~~ consumer's size and weight, with a clean and comfortable mattress, bedding appropriate for weather and climate, and provide other appropriate bedroom furniture.;
- [5] Comply with the provisions of the chapter governing lodging or rooming houses as outlined in the most recent edition of the national fire protection association's life safety code; and
- [6] Have an annual fire and safety inspection by the state or local fire marshal's office or other accepted local authority.

(b) The staff of the SMI group care facility shall:

- [1] Assure that the ~~elient's~~ consumer's individual plan includes input from the community home counselors and the residential treatment team.
- [2] Maintain an inventory of the ~~elient's~~ consumer's personal belongings when the ~~elient~~ consumer enters the SMI group care facility.

(c) A brochure of client consumers' rights according to section 75-05-01-10 must be given to all new residents of the SMI group care facility upon admission and explained in terms the resident can understand.

(2) Semi-independent living arrangement. A semi-independent living arrangement is one which, through the use of intensive, in-home support services, gives a consumer the ability to reside in the consumer's own home.

(a) The human service center shall develop policies and procedures that which facilitate conformance with all local building and fire safety codes to encourage that safe and sanitary conditions are maintained.

(b) Human service center staff shall develop policies and procedures to ensure that semi-independent living services are being provided in the client's consumer's residence.

(c) An evaluation of the client's consumer's progress in semi-independent living services must be documented in the client's consumer's record on at least a monthly basis or in response to a significant event that has an impact on life domains.

(3) Crisis residential services.

(a) Human service center staff shall develop policies and procedures to assure that safe and effective crisis residential services are provided.

(b) Documentation of Human service center staff shall document the individual's consumer's progress must occur, or lack thereof, on a daily basis.

## 2. Work skills development.

a. The human service center shall either provide or contract for:

(1) Methods to assess the abilities of individuals adults diagnosed with serious mental illness as related to employment;

(2) Prevocational skills development and training;

(3) Job exploration; and

(4) Followup.

- b. The human service center shall document the client's consumer's progress in work skills development at least monthly.
3. Case management and aftercare services for an individual adult diagnosed with serious mental illness.
- a. Case management services must be available to ~~all eligible individuals~~ adults diagnosed with serious mental illness ~~throughout the human service center's catchment area~~ and who have a global assessment of functioning score less than fifty (unless otherwise clinically indicated, with and without supports).
- b. Case management for an individual adult diagnosed with serious mental illness must be identified on the client's consumer's individual plan and must be documented in the progress notes.
- c. Aftercare services must be available to all ~~individuals~~ adults diagnosed with serious mental illness ~~in an inpatient facility a treatment or correctional facility~~ who are returning to the region community after discharge. The regional director shall designate one or more staff members to provide aftercare services. Services must include the following activities, pursuant to appropriately signed releases and adherence to applicable privacy provisions:
- (1) Regular visits or communication by aftercare staff with the treatment facility to monitor progress of those consumers who are admitted to the facility from the human service center's service area.
  - (2) Regular visits or communication by aftercare staff with the correctional facility when contacted by the facility regarding a consumer's pending release to monitor progress of those consumers who are admitted to the facility from the human service center's service area.
  - (3) Attendance by aftercare staff at meetings established for the purpose of improving communication and coordination between the treatment or correctional facility and the regional human service center.
  - (4) Provision of knowledge and communicating by aftercare staff to other regional human service center staff regarding treatment or correctional facility admission and discharge procedures.
- d. The human service center, through case management services, ~~shall, through case management services,~~ ensure that extended services are provided for an individual adult diagnosed with serious mental illness who has completed the training and stabilization

components of the supported employment program and continues to require ongoing support services to maintain competitive employment.

- e. If individual plans dictate, case management services must provide or arrange for daily living skills training in the community.

4. ~~Community supportive care services.~~

- a. ~~The human service center shall provide or contract with a private, nonprofit group to provide a community supportive care program.~~

- b. ~~The program must include:~~

- ~~(1) Designation of an individual to serve as the community supportive care supervisor;~~
- ~~(2) Assignment of responsibility to the community supportive care supervisor for the recruitment, scheduling, and training of all community supportive caregivers; and~~
- ~~(3) Provision of companionship services for an individual with serious mental illness who has been referred by a multidisciplinary staff. These services may include: transportation; assisting in meal preparation; leisure activities; and assisting in shopping for food, clothes, and other essential items by community supportive caregivers.~~

5. Psychosocial rehabilitation centers.

- a. The human service center shall provide or contract for the operation of a psychosocial rehabilitation center.

- b. The psychosocial rehabilitation center shall:

- ~~(1) Provide evening and weekend activities;~~
- ~~(2) Be open seven days a week;~~
- ~~(3) Be located in an ADA accessible location in the community which provides a minimum of forty hours of programming a week. Evening hours must be included in the programming. "Evening hours" means after six p.m. This does not include support groups.~~
- ~~(4) Develop a written plan delineating expected programs and services provided.~~

- (5) Employ a full-time director and part-time staff sufficient to provide services that support adults diagnosed with serious mental illness in their recovery by providing opportunities for learning appropriate socialization and leisure or recreational skills through social and recreational milieu, information and referral, and community awareness activities.
- c. The psychosocial rehabilitation center must be open a minimum of forty hours per week. The hours of operation for the psychosocial rehabilitation center must be determined with member participation during a regularly held and announced membership meeting. Documentation of the meeting, including a compilation of consumer comments and votes, must be maintained by the psychosocial rehabilitation center and be open for review.
- d. The psychosocial rehabilitation center shall employ a full-time director and part-time staff sufficient to provide services.
- e. The psychosocial rehabilitation center shall must have a mechanism for client member participation in policy formation. The psychosocial rehabilitation center shall maintain documentation of this participation and the documentation must be open for review.
- f. The psychosocial rehabilitation center shall develop a calendar of events seven to ten days in advance which must be made available to the membership and the regional human service center.
- ~~d. g.~~ The regional director shall appoint a human service center staff member as a liaison between the human service center and the psychosocial rehabilitation center.
- ~~e.~~ ~~The psychosocial rehabilitation center shall provide written monthly reports to the human service center and the division of mental health and substance abuse services.~~

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; March 1, 1997; August 1, 1997; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

#### **75-05-03-04. Medications.**

1. The human service center shall must have written policies and procedures designed to ensure that all medications, including those medications administered or supervised by contracted providers, are administered safely and properly in accordance with state laws.
2. Medication orders must be written only by a physician or other professional licensed by law and permitted by license to write

medication orders and who is in direct care and treatment of clients consumers.

3. All prescribed medications, including those prescribed by a prescribing professional employed by the human service center, prescribed by non-human service center prescribing professionals, or those taken over the counter must be recorded in the client's consumer's record at admission and reviewed at each psychiatric appointment, and any changes must be documented in the record.
4. When medications are prescribed by a physician prescribing professional and administered by human service center staff who are certified or licensed to administer medications, the physician's prescribing professional's orders must be signed and a record of the administration of the medications must be kept.
5. There must be a system of checking to detect unhealthy side effects or toxic reactions of medications administered to a consumer.
6. Medication storage areas must be well-lighted, safely secured, and maintained in accordance with the security requirements of federal, state, and local laws. Only those individuals certified or licensed to administer medications may have access to medication storage areas.
7. The human service center staff shall inform each client consumer who receives medications prescribed at a human service center or shall inform a consumer's family, custodian, or guardian, as appropriate, of the benefits, risks, side effects, and consequences of medication noncompliance. At a minimum, the individual prescribing professional prescribing the medication shall record that this information was provided. A client's consumer's signed informed consent statement is acceptable in addition to the record, but not in lieu of the record. The record must include:
  - a. A statement An entry documenting that a discussion regarding medications prescribed has occurred.
  - b. Documentation that a specific discussion of tardive dyskinesia has occurred, if that is a potential side effect of the any prescribed antipsychotic medication.
  - c. If the client, in the opinion of the individual prescribing the medication, does not appear to understand the discussion, the record must document discussions with the client's guardian, the client's family, or other responsible individuals.
8. An assessment instrument used to detect signs of tardive dyskinesia must be administered every six months or as sooner if medically indicated to all clients consumers on antipsychotic medications for

which tardive dyskinesia is a potential side effect. Documentation of the results must be entered into the consumer record. Each human service center must have a mechanism for tracking when the assessment is due for each consumer.

9. Each human service center shall ~~must~~ have written policies and procedures for any supported medication program performed at the center or performed under a contract for services. A supported medication program includes filling pill boxes, supervising medication, or other self-administered medication programs. Documentation of training received must be entered in the client's consumer's record will show education and training provided to a consumer to move or to attempt to move the patient toward medication independence.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; ~~January 1, 2009.~~

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

#### **75-05-03-05. Psychiatric services.**

1. The regional director shall employ or contract with a psychiatrist to be the medical director. The medical director shall provide consultation, treatment, and psychiatric evaluations for ~~clients~~ consumers at the human service center and shall provide input in program planning and development of services.
2. Psychiatric services must be available at a minimum of one hundred sixty hours per month. This includes psychiatrist, clinical nurse specialist, and nurse practitioner time combined.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; ~~January 1, 2009.~~

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-03-06. Community consultation and education.** The human service center shall:

1. ~~Maintain a systematic approach for providing~~ Provide information to the general public and local agencies regarding center services.
2. ~~Have a systematic approach for informing clients~~ Inform consumers and agencies about center services and how to access those services.
3. Respond to requests for educational presentations and inservice training for public and private agencies, as staff time allows, or refer the requests to other community resources.

4. Provide technical assistance to communities in assessing mental health needs and service options.
5. Document the number of hours, clients consumers, and type of activity spent on community consultation and education.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-03-07. Psychological services.**

1. The regional director shall employ or contract with one or more psychologists who meet the requirements of North Dakota Century Code chapter 43-32.
2. Psychological services include: psychological evaluations, psychometric testing, psychological consultations, and psychotherapy services.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-03-08. Regional intervention service.**

1. The regional director shall designate staff to coordinate, administer, and supervise the regional intervention service.
2. ~~The regional intervention service must assess all individuals who are under consideration for voluntary admission to the North Dakota state hospital.~~
3. The regional intervention service must refer clients consumers to appropriate community-based treatment in lieu of state hospital admission, when available.

**History:** Effective December 1, 1991; amended effective February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-03-09. Substance abuse treatment.** The human service center must have an addiction program which meets the requirements of articles 75-05 and 75-09.1.

**History:** Effective January 1, 2009.

**General Authority:** NDCC 50-31

**Law Implemented:** NDCC 50-31

## CHAPTER 75-05-04

### 75-05-04-01. Admission process.

1. The regional director shall designate admission personnel who are responsible for the initial contact with the individual and, as determined appropriate, the individual's family to define and evaluate the presenting problems and make disposition for necessary services.
2. If, in the judgment of the admission personnel, the contact which has been made is of an emergency nature, the admission personnel shall comply with emergency service procedures.
3. If, in the judgment of the admission personnel, the contact which has been made is not of an emergency nature, the admission personnel shall determine if the human service center can provide the treatment or services that the individual and the individual's family require. Upon determination that required services are available, the admission personnel shall assure that an appointment is scheduled.
4. A signed application for services must be completed at the time of admission.
5. The initial admission process must involve a face-to-face interview with the client consumer and include the following:
  - a. A statement of the presenting problems;
  - b. An assessment of the consumer's current emotional, cognitive, and behavioral functioning;
  - c. ~~The client's~~ consumer's history, including family background, social history, psychiatric history, medical history (including a list of the consumer's current medications, both prescribed and over the counter, and allergies), developmental history, educational history, and employment history;
  - e. ~~The client's medical history encompassing relevant findings of previous physical or psychiatric evaluations, psychiatric mental status, a list of the client's current medications and allergies, and additional evaluations, as deemed necessary. If the client is being considered for community residential services, a physical examination must have been completed within the last three months; and~~
  - d. A signed release of information form from the client consumer and the client's consumer's parent or guardian, when deemed necessary.

6. If the elient consumer is being referred for community residential services, the ~~elient shall~~ consumer, if possible, should visit the residential facility. ~~If arrangements can be made, an overnight stay may be considered.~~
7. The human service center must have a mechanism to review service needs and formulate recommendations for consumers when the initial unit to which the consumer was referred cannot provide services. If the human service center or the unit to which the elient consumer has been referred cannot provide services, the professional staff member shall document, in the elient consumer record, the reasons why the elient consumer is not provided services. ~~The human service center shall have a mechanism to review service needs and formulate recommendations for applicants, when the initial unit to which the elient was referred cannot provide services.~~ The ~~applicant shall~~ consumer, or parent or guardian, must be informed of the results of the review and the results must be documented in the ~~individual's admission file or elient consumer~~ consumer record.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

#### **75-05-04-03. Individual plans.**

1. Each elient consumer who has been admitted for service to the human service center shall have an individual plan based on the admission data and needs of the elient consumer.
2. Overall development and implementation of the individual plan are the responsibility of the professional staff member assigned the elient consumer.
3. The individual plan must be developed in accordance with the following:
  - a. ~~Elients Consumers~~ who are eligible for clinical services shall must have an individual plan.
  - b. ~~Elients Consumers~~ who are eligible for vocational rehabilitation services shall must have an ~~individual written rehabilitation program (IWRP)~~ individual plan for employment (IPE).
  - c. ~~Elients Consumers~~ who are eligible for mental retardation-developmental disabilities case management shall must have a case plan and an individual services plan (ISP).
4. The individual plan must contain the ~~elient's~~ consumer's name, problems, service strategies to resolve problems, goals, measurable

objectives, names of staff members responsible for service strategies, and the signature of the case manager. In the case of clients consumers who are eligible for medical assistance benefits, and receiving clinic service, the client consumer's record must document physician approval.

5. The professional staff member assigned to the client consumer shall develop and review the individual plan with the client and consumer, shall document the review in the client's consumer's record the consumer's input in the development and review indicating the extent of the involvement in developing the individual plan, and shall have the consumer sign the treatment plan. If the consumer refuses or is unable to sign the treatment plan, this must be documented in the consumer's record.
6. Upon completion of the admission process, admission personnel shall make a provisional diagnosis and initiate a treatment plan.
7. ~~Within~~ Except in the case of emergency services, within twenty working days from the date of admission, which is the time when the client consumer and the staff member first meet to begin the admission process, the multidisciplinary team ~~must~~ shall hold a case staffing to confirm or to revise the diagnosis and treatment plan, or to reassign the client consumer to an appropriate member of the professional staff.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

#### **75-05-04-04. Progress notes.**

1. ~~Progress notes must be entered into the client's service record and must be updated after each visit. The human service center shall develop and implement an acceptable format to update client records which meet the goals of the individual plan. Group therapy progress notes must be documented in the individual client's record at least weekly. The date, signature, and title of the staff member making an entry must be included with each entry related to the consumer's treatment plan goals and objectives must describe the consumer's progress in treatment chronologically and must document the consumer's response to services related to the treatment.~~
2. Progress notes must address the following:
  - a. Activities and services provided as they relate to the goals and objective of the treatment plan, including ongoing reference to the treatment plan;

- b. Documentation of the progress or lack of progress made in treatment as it relates to the treatment plan:
  - c. Documentation of the implementation of the individualized treatment plan, including consumer activities and services and all treatment rendered:
  - d. Documentation of the consumer's response to treatment services, changes in behavior and mood, and outcome of treatment or services; and
  - e. Plans for continuing therapy, for transfer, or for discharge, whichever is appropriate.
3. Progress notes must be documented according to the following timeframes:
  - a. Individual and family therapy must be documented after each visit or transaction, including missed appointments; and
  - b. Group therapy must be documented at least weekly.
4. Progress notes must include service date, signature of staff member and any professional credentials of the staff member, and the signature date.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

#### **75-05-04-05. Individual plan review.**

1. For clinical services, the consumer, case manager, and the case manager's supervisor shall review individual plans at least every six months, except for chronic cases, which must be reviewed when consumer circumstances necessitate a change to the treatment plan.
2. For extended care cases, the consumer, case manager, and case manager's supervisor shall review individual plans at least every twelve months, except when consumer circumstances necessitate a change to the treatment plan.
3. For vocational rehabilitation services, the vocational rehabilitation counselor and the client must consumer shall review and evaluate the individual written rehabilitation program plan for employment at least every twelve months.

4. For developmental disabilities case management, the counselor and the ~~client~~ consumer shall review the individual service plan at least every twelve months.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; March 1, 1997; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

#### **75-05-04-06. Completion of treatment or service.**

1. The case manager shall enter a treatment or service completion ~~statement~~ summary in the ~~client's progress notes~~ consumer's record when ~~clients~~ consumers have not received treatment ~~in~~ within six months ~~or after documented attempts to contact the consumer have been made.~~ when termination is mutually agreed upon by the ~~client~~ consumer and the case manager, or when it has been determined by a multidisciplinary team that a ~~client~~ consumer no longer needs treatment or that treatment is inappropriate.
2. The treatment or service completion summary must include at a minimum:
  - a. Presenting problem at intake;
  - b. Medication summary when applicable;
  - c. Treatment provided and treatment outcome and results;
  - d. Discharge plan; and
  - e. Signature of staff member, professional credentials, if any, and date of summary.
3. When the service completion ~~statement~~ summary has been finalized, the closure must be entered on the data collection system.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

#### **75-05-04-07. Client Consumer referrals.**

1. When a ~~client~~ consumer needs treatment or service which the human service center does not provide, staff shall assist the ~~client~~ consumer in obtaining the services, if available.

2. The staff shall provide pertinent information to the referral agency. Before any referral is made, a release of information must be signed by the client consumer, or the consumer's parent or guardian, or a determination must be made that the signed release of information form is not necessary for the referral.

**History:** Effective November 1, 1987; amended effective January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-04-08. Records maintenance.**

1. The regional director shall designate a staff member who is responsible for the safekeeping of each client's consumer's record.
2. All data and information in the client's consumer's record is confidential.
  - a. Records must be maintained in accordance with federal and state confidentiality requirements.
  - b. Upon written request, the client's consumer's record is available to the client consumer, or to any individual designated by the client consumer, for review unless a legally sufficient basis for denying the client consumer access to the record has been established. In those cases, the request and the reason for the denial must be documented in the consumer's record. The human service center shall establish policies which encourage clients consumers to seek professional assistance while undertaking a review of records, and which prevent the alteration of any record during a review.
3. The human service center shall comply with department policies and procedures concerning records management.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

## CHAPTER 75-05-05

### 75-05-05-01. Mental retardation-developmental disabilities program - Case management.

1. The regional director shall designate a regional mental retardation-developmental disabilities program administrator.
2. The average caseload of the mental retardation-developmental disabilities case management unit must be no more than sixty ~~elient~~ consumers per case manager.
3. Mental retardation-developmental disabilities case management eligibility must be determined in accordance with chapter 75-04-06. Individuals found eligible for mental retardation-developmental disabilities case management prior to the effective date of chapter 75-04-06 may be maintained in services in accordance with departmental policy.
4. The human service center shall maintain and implement written procedures to provide for:
  - a. ~~Elient~~ Consumer intake and admission;
  - b. Review of ~~elient~~ consumer rights upon intake and at least annually thereafter for adult ~~elient~~ consumers;
  - c. Review of 34 CFR 303, part H, parental rights for infants and toddlers, age zero through two years, in accordance with part H requirements;
  - d. Assignment of a mental retardation-developmental disabilities case manager;
  - e. Development of case planning and an individual service plan;
  - f. The completion of program reviews;
  - g. Completion of level of care screening;
  - h. Completion of preadmission screening annual resident review;
  - i. A regional referral ~~committee~~ process to coordinate adult referrals;
  - j. A regional review team to review out-of-home placement options for children;
  - k. Interregional transfers;

- l. Case closings;
  - m. Orientation and training of developmental disabilities case managers;
  - n. Periodic record reviews completed within the regional mental retardation-developmental disabilities unit on a regularly scheduled basis for quality assurance; and
  - o. A regional quality improvement planning process.
5. A human service center that operates programs subject to licensure under chapter 75-04-01 shall maintain a current license from the division of developmental disabilities for those programs. Programs in compliance with chapter 75-04-01 are not subject to human service center licensure standards.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-05-02. Vocational rehabilitation.**

- 1. The regional director shall designate a full-time vocational rehabilitation administrator.
- 2. The vocational rehabilitation administrator shall establish performance goals and objectives.
- 3. The vocational rehabilitation administrator shall follow the appeals procedures outlined in chapter 75-01-03, 75-08-01, and the vocational rehabilitation state plan, and shall inform all ~~clients~~ consumers or potential clients consumers of the client consumer assistance program and of the right to request mediation.
- 4. ~~Client files~~ Consumer records must be monitored to assure appropriateness of services. At least ten percent of the ~~client files~~ consumer records must be reviewed annually using the case review schedule. A report of the results and recommendations of the review must be available to the regional director.
- 5. The vocational rehabilitation administrator assists in developing the vocational rehabilitation budget and monitors the obligation of funds

and bills paid to ensure that funds are appropriately expended or ~~canceled~~ deobligated.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-05-03. Supervision and direction of county social services.**

1. The regional director, in coordination with the director of children and family services, shall designate a regional representative of county social services programs and any other staff to fulfill the objectives of this chapter.
2. With respect to the supervision and direction of the child welfare programs, the regional representative shall be responsible programmatically to the director of children and family services and shall work in consultation with children and family services staff.
3. With respect to child protective services, the regional representative shall:
  - a. Review all reports of suspected child abuse and neglect in the region and determine if the reports are assessed in accordance with North Dakota Century Code ~~chapters~~ chapter 50-25.1 and North Dakota Administrative Code chapter 75-03-19;
  - b. Determine if the assessment completion timeframes and appropriate child protective services are provided in accordance with North Dakota Century Administrative Code chapter 75-03-19;
  - c. Provide technical assistance in child ~~abuse and neglect~~ protection services;
  - d. Provide final decisions for all child abuse and neglect cases in the region;
  - e. ~~Provide investigative services for~~ Complete assessments of reports of suspected institutional child abuse or neglect in the region;
  - f. Ensure county access to a multidisciplinary child protection ~~team~~ team;
  - g. Ensure that child ~~abuse and neglect~~ protection information is entered into the department's ~~data base~~ database; and
  - h. Provide or arrange for an orientation in ~~children's~~ child protection services for appropriate county social service board personnel.

3. 4. With respect to foster care services for children, the regional representative shall:
- a. Monitor all placements and review all court orders for compliance with the provisions of ~~title I of the Adoption Assistance and Child Welfare Act of 1980 [Pub. L. 96-272, 42 U.S.C. 670 et seq.] and section 427 of title IV-B of the Social Security Act [42 U.S.C. 627]~~ the Adoption and Safe Families Act of 1997 [Pub. L. 105-89; 42 U.S.C. 620 et seq.];
  - b. ~~Chair each county or multicounty permanency planning committee in the region and ensure conformance with section 75-03-14-06~~ Cochair quarterly child and family team meetings in each region and ensure conformance with section 75-03-14-06;
  - c. Review all foster care placements and pending placements and services provided with the appropriate permanency planning committee child and family team members;
  - d. Issue approvals or denials for group, therapeutic foster care, and residential foster care placements for the region;
  - e. Review all foster care grievances in the region to determine whether they are carried out in compliance with state law and policy;
  - f. ~~Maintain a regional log of all children in foster care~~ Participate in all regional child and family services reviews and assist in developing all county program improvement plans;
  - g. Approve and arrange for all specialized, therapeutic, and shelter foster care service payments for all appropriate cases in the region;
  - h. Develop and supervise special projects in the region;
  - i. ~~Conduct~~ Assist in conducting an annual licensing study of each group home or residential child care facility in the region and forward the study and recommendation to the department;
  - j. Review each family foster care licensing study conducted in the region, approve and issue the license, or deny the license and provide appropriate notice to the applicant;
  - k. Revoke foster care licenses and provide notice to the licensee;
  - l. Provide technical assistance and interpretation of policies, procedures, rules, and laws related to foster care services; and

- m. Provide or arrange for regular inservice training related to foster care issues for county social workers, division of juvenile services staff, and private agencies: related to child and family service review compliance and other appropriate service-related topics; and
  - n. Monitor compliance with the provisions of the Foster Care Independence Act of 1999 [Pub. L. 106-169; 42 U.S.C. 677 et seq.], and title II, section 201 of the promoting safe and stable families amendments of 2001 [Pub. L. 107-133; 42 U.S.C. 677].
4. ~~5.~~ With respect to early childhood services (day care services), the regional representative shall:
- a. Approve, deny, or revoke all early childhood home, group, and center license applications, license applications for preschool educational facilities, and applications for standard compliance certification, and provide formal notification to all applicants;
  - b. Provide technical assistance regarding policies, procedures, rules, and laws for early childhood services in the region; and
  - c. Provide or arrange inservice training for early childhood licensing staff regionwide.
5. ~~With respect to unmarried minor parent services, the regional representative shall provide technical assistance to the county social service board for services to unmarried minor parents.~~
6. ~~With respect to children's special health services, the regional representative shall:~~
- a. ~~Provide technical assistance to county social service staff in the administration of children's special health services; and~~
  - b. ~~Assist in and coordinate with the department's division of children's special health services and the county social service boards for the provision of all children's special health field clinics.~~
7. ~~With respect to adult family foster care licensure services, the regional representative shall:~~
- a. ~~Review each adult family foster care licensing study conducted in the region, approve and issue the license, or deny the license and provide timely notice to applicant;~~
  - b. ~~Revoke adult family foster care licenses and provide notice to the licensee; and~~

- e. ~~Provide technical assistance and interpretation of policies, procedures, rules, and laws related to adult family foster care licensure standards.~~

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; March 1, 1997; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

**75-05-05-05. Aging services.** The regional director shall designate a regional aging services program administrator and other staff as necessary to fulfill the objectives of this chapter. The regional aging services program administrator shall:

1. Support the state plan on aging and elder rights advocacy activities in the region.
2. Conduct or arrange for public hearings concerning the state plan on aging, ~~including the state funding plan for the various titles of the Older Americans Act as amended [Pub. L. 89-73; 42 U.S.C. 3001 note].~~
3. Publish and distribute information, including such as a newsletter published a minimum of six four times per year to older individuals, agencies, and organizations serving older individuals.
4. Provide and document technical assistance ~~to service providers on:~~ aging issues.
  - a. ~~Stewardship activities, as identified by the administration in aging;~~
  - b. ~~Program and service development and implementation;~~
  - c. ~~Targeting resources and services;~~
  - d. ~~Funding requests under the various titles of the Older Americans Act, as amended, [Pub. L. 89-73, 42 U.S.C. 3001 note];~~
  - e. ~~The Older Americans Act audit resolution; and~~
  - f. ~~Program and service accessibility.~~
5. ~~Provide and document technical assistance to family members, agencies, organizations, and individuals working with older individuals.~~ Conduct and document a minimum of two formal onsite programmatic and fiscal assessments of all Older Americans Act-funded service providers, one of which must be a year-end assessment and shall submit the assessments to the aging services division office upon completion.

- ~~6. Review and evaluate Older Americans Act funding requests and grant or contract revisions for fiscal and programmatic accuracy and compliance with grant application and contracting requirements. Provide or arrange training for Older Americans Act-funded service providers, as appropriate.~~
- ~~7. Conduct and document a minimum of two formal onsite programmatic and fiscal assessments of all Older Americans Act funded service providers, one of which must be a yearend assessment. Provide or arrange community education and implement special projects which support selected federal and state focus areas.~~
- ~~8. Monitor monthly case manager requests for reimbursements and payments and resolve any discrepancies.~~
- ~~9. Provide or arrange for program training for Older Americans Act-funded service providers, as appropriate.~~
- ~~10. Provide or arrange community education which supports selected federal and state initiatives or state plan objectives.~~
- ~~11. Implement selected federal and state aging program initiatives included in the state plan on aging.~~
- ~~12. Provide training and technical assistance to entities administering mill levy match funds under North Dakota Century Code section 57-15-56.~~
- ~~13. Provide and document the provision of information and supportive activities for aging service programs, including adult protective services, home and community-based services, and long-term care ombudsman. Provide and document the provision of information and supportive activities for vulnerable adult protective services.~~
9. Provide and document the provision of information and supportive activities for the national family caregiver support program.
10. Provide and document the provision of information and supportive activities for the long-term care ombudsman program.
11. All documentation addressed in subsections 4, 6, 7, 8, 9, and 10 shall be recorded in the form as prescribed by the aging services division and submitted to the division on a monthly basis.
12. For adult family foster care licensure services, the regional representative of county social services programs, the regional aging services program administrator, or other designated staff shall:

- a. Review each adult family foster care licensing study conducted in the region, approve and issue the license, or deny the license and provide timely notice to the applicant;
- b. Assure that each consumer record includes the required documentation as outlined in the department of human services service chapter 660-05;
- c. Revoke adult family foster care licenses in consultation with the aging services division and provide notice to the licensee; and
- d. Provide technical assistance regarding policies, procedures, rules, and laws related to adult family foster care licensure standards.

**History:** Effective November 1, 1987; amended effective December 1, 1991; February 1, 1996; January 1, 2009.

**General Authority:** NDCC 50-06-05.2

**Law Implemented:** NDCC 50-06-05.2

