

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0603

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - X Failure to comply with the APA
- Extend the period of review

COMMENT:

Lines 3 and 5 reference an "application forms" or "application." The location and content of the application is not contained within this Rule or the governing statute. G.S. 150B-2 defines "rule" and "form" as follows:

- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - ...
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - ...

Staff counsel is uncertain what application is being referenced by this Rule, but the agency has indicated the form requests approximately thirty items from the applicant. The requested items do not appear to be set forth in another rule or statute within the authority of the State Fire Marshal.

Abigail M. Hammond
Commission Counsel

Summary:

As written, this Rule is referencing an application that is outside the process of rulemaking and is not implementing a process prescribed by rule or statute. It is staff counsel's recommendation to object to this Rule for being unclear and ambiguous by referencing an application that is not identified by name and providing no information on how to obtain this form. Furthermore, it is staff counsel's recommendation to object to this Rule for failure to comply with the Administrative Procedure Act by using a form that is not prescribed by rule or statute.

1 11 NCAC 05A .0603 is amended as published in 31.04 NCR 286-287 as follows:

2 **11 NCAC 05A .0603 REQUIREMENTS**

3 (a) The Volunteer Fire Department Fund online application forms for requesting grants for equipment purchases and
4 capital expenditures, shall be made available by ~~the Division OSFM~~ to all departments registered with ~~the Division~~
5 OSFM and approved by ~~the Division OSFM~~ by the first business day of January of each year. This application will
6 be on a form as prescribed by the Commissioner and will contain information to determine grant eligibility and score.

7 (b) Online Applications applications shall be submitted to ~~the Division OSFM~~ and be ~~postmarked or~~ electronic date
8 stamped no later than March 1. Applications bearing ~~postmarks or~~ electronic date stamps later than March 1 are
9 disqualified. The names of grant recipients shall be announced on May 15. If May 15 falls on a weekend, the
10 announcement shall be made on the following Monday.

11 (c) Any application received by ~~the Division OSFM~~ that is incorrect or incomplete shall be returned to the department
12 with a request that the correct or complete information be sent to ~~the Division OSFM~~ within 10 business days after
13 receipt by the department. The failure of the department to return the requested correct or complete information shall
14 result in the forfeiture by the department of its eligibility for a grant during that grant cycle.

15 (d) Any department that is on the North Carolina Department of Insurance Noncompliance list or Office of State
16 Budget and Management Suspension of Funding List for Non State Entities at <http://www.osbm.state.nc.us/> shall be
17 ineligible to participate in the Volunteer Fire Department Fund grant program. If a department is awarded a grant and
18 becomes ineligible to receive funding due to being noncompliant with the requirements in this section, the grant shall
19 be forfeited 10 business days after notification of noncompliance by OSFM. A department that provides false
20 application information shall be ineligible for the following two grant cycles and shall forfeit any grant award already
21 awarded during the current cycle.

22 ~~(d)(e)~~ If the application includes a request for a motor vehicle, the vehicle specifications shall accompany the
23 application and, if used, if a used vehicle is requested, then the previous year's maintenance records shall accompany
24 the application.

25 ~~(e)(f)~~ The following documents shall accompany a grant application:

- 26 (1) A contract verification form showing an agreement between the department and a county for the
27 department to provide fire protection to a district;
- 28 (2) A current roster comprising a list of ~~eligible firemen~~ "eligible firemen" as defined in G.S. 58-86-25;
- 29 (3) A statement verifying the population that the department serves;
- 30 (4) A financial statement of the department; and
- 31 (5) A statement verifying that the department is financially able to match the grant.

32 ~~(f)(g)~~ Statements that there are no overdue taxes, conflict of interest statements as defined in G.S. 143C-6-23(b),
33 payment agreements, and equipment invoices shall be received by ~~the Division OSFM~~ no later than September 30
34 following the announcement of grant recipients. Departments submitting incorrect invoices, such as sales orders,
35 acknowledgements, and packing slips, on or before September 30 shall be contacted by ~~the Division OSFM~~ and given
36 10 business days to submit correct documents. The failure of any department to comply shall result in the department
37 forfeiting its eligibility for a grant from the Fund. Equipment or capital improvements that are ordered by a department

1 before May 15 or equipment that is back-ordered by a vendor for a department or equipment not received by a
2 department on or before September 30 shall not be funded by grants from the Fund.

3 (h) OSFM may extend the September 30 deadline for invoice submission for the following:

4 (1) new fire apparatus;

5 (2) self contained breathing apparatus;

6 (3) firefighter turnout gear;

7 (4) capital improvements; or

8 (5) specialized equipment.

9 ~~(h)(i)~~ Equipment purchased with grants is subject to inspection by ~~Division~~ OSFM personnel.

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11 *History Note: Authority G.S. 58-2-40(1); 58-36-10(3); 58-87-1; 143C-6-23(b);*

12 *Eff. February 1, 1993;*

13 *Amended Eff. December 1, 2016.*

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AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0703

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - X Failure to comply with the APA
 - Extend the period of review

COMMENT:

Lines 3 and 5 reference an “application forms” or “application.” The location and content of the application is not contained within this Rule or the governing statute. G.S. 150B-2 defines “rule” and “form” as follows:

- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
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 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
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Staff counsel is uncertain what application is being referenced by this Rule, but the agency has indicated the form requests approximately thirty items from the applicant. The requested items do not appear to be set forth in another rule or statute within the authority of the State Fire Marshal.

Abigail M. Hammond
Commission Counsel

Summary:

As written, this Rule is referencing an application that is outside the process of rulemaking and is not implementing a process prescribed by rule or statute. It is staff counsel's recommendation to object to this Rule for being unclear and ambiguous by referencing an application that is not identified by name and providing no information on how to obtain this form. Furthermore, it is staff counsel's recommendation to object to this Rule for failure to comply with the Administrative Procedure Act by using a form that is not prescribed by rule or statute.

1 11 NCAC 05A .0703 is amended as published in 31.04 NCR 288 as follows:

2 **11 NCAC 05A .0703 REQUIREMENTS FOR UNITS REQUIRED TO MATCH GRANTS**

3 (a) The Volunteer Rescue/EMS Fund online application forms for requesting grants for equipment purchases and
4 capital expenditures, shall be made available by ~~the Division OSFM~~ to all departments registered ~~with Division~~ and
5 approved by ~~the Division OSFM~~ by the first business day of August of each year. This application will be on a form
6 as prescribed by the Commissioner and will contain information to determine grant eligibility and score.

7 (b) ~~Online Applications applications~~ shall be submitted to ~~the Division OSFM~~ and be ~~postmarked or~~ electronic date
8 stamped no later than October 1. Applications bearing ~~postmarks or~~ electronic date stamps later than October 1 are
9 disqualified. The names of the grant recipients shall be announced on December 15. If December 15 falls on a
10 weekend, the announcement shall be made on the following Monday.

11 (c) Any application received by ~~the Division OSFM~~ that is incorrect or incomplete shall be returned to the unit with
12 a request that the correct or complete information be sent to ~~the Division OSFM~~ within 10 business days after receipt
13 by the unit. The failure by the unit to return the requested correct or complete information shall result in the forfeiture
14 by the unit of its eligibility for a grant during that grant cycle.

15 (d) Any department that is currently on the North Carolina Department of Insurance Noncompliance list or Office of
16 State Budget and Management Suspension of Funding List for Non State Entities at <http://www.osbm.state.nc.us/>
17 shall be ineligible to participate in the Volunteer Rescue/EMS fund grant program. If a department is awarded a grant
18 and becomes ineligible to receive funding due to being noncompliant with the requirements in this section, the grant
19 shall be forfeited after 10 business days of notification of noncompliance from OSFM. A department that provides
20 false application information shall be ineligible for the following two grant cycles and shall forfeit any grant award
21 already awarded during the current cycle.

22 ~~(d)(e)~~ If the application includes a request for a motor vehicle, the vehicle specifications shall accompany the
23 application. and, if used, if a used vehicle is requested, then the previous year's maintenance records shall accompany
24 the application

25 ~~(e)(f)~~ The following documents shall accompany a grant application;

- 26 (1) A Rescue Provider Statement showing that a county recognizes the unit as providing rescue or
27 rescue/EMS services to a specified district. As used in this Subparagraph, "rescue provider
28 statement" means a statement, signed by representatives of a unit and the county in which the rescue
29 or rescue/EMS services are provided, that the unit provides rescue or rescue/EMS services within
30 the county;
- 31 (2) A current roster of unit members;
- 32 (3) A statement verifying that the unit is financially able to match the amount of the grant; and
- 33 (4) A financial statement of the unit.

34 ~~(f)(g)~~ Statements that there are no overdue taxes, conflict of interest statements as defined in G.S. 143C-6-23(b),
35 payment agreements, and equipment invoices shall be received by ~~the Division OSFM~~ no later than April 30. Units
36 submitting incorrect invoices, such as sales orders, acknowledgements, and packing slips, before April 30 shall be
37 contacted by ~~the Division OSFM~~ and given 10 business days to submit the correct documents. The failure of any unit

1 to comply shall result in the unit forfeiting its eligibility for a grant from the Fund. Equipment or capital improvements
2 that are ordered by a unit before December 15 or equipment that is back-ordered by a vendor for a unit or equipment
3 not received by a unit on or before April 30 shall not be funded by grants from the Fund.

4 (h) OSFM may extend the April 30 deadline for invoice submission for the following:

- 5 (1) new vehicles;
- 6 (2) self-contained breathing apparatus;
- 7 (3) firefighter turnout gear;
- 8 (4) capital improvements; and
- 9 (5) specialized equipment.

10 (h)(i) Equipment purchased with grants is subject to inspection by ~~Division~~ OSFM personnel

11
12 *History Note: Authority G.S. 58-2-40(1); 58-87-5; 143C-6-23(b);*

13 *Eff. February 1, 1993;*

14 *Amended Eff. December 1, 2016; September 1, 2010; January 1, 2007.*

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AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0704

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - X Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

The Rule, as submitted by the agency on October 20, 2016, states the following:

11 NCAC 05A .0704 REQUIREMENTS FOR UNITS NOT REQUIRED TO MATCH GRANTS

Units that are not required to match funds ~~must~~shall comply with 11 NCAC 5A .0703 except for Subparagraph ~~(f)(4)~~ (f)(3) of that Rule, which requires the filing of a statement verifying that a unit is financially able to match a grant.

In a technical change request, staff counsel inquired whether this Rule was necessary, in light of a technical change request for Rule .0703 to clarify the statutory citation to G.S. 58-87-5(a)(2). The cited statute states the following:

§ 58-87-5. Volunteer Rescue/EMS Fund.

(a) There is created in the Department of Insurance the Volunteer Rescue/EMS Fund to

provide grants to volunteer rescue units, rescue/EMS units, and EMS units providing rescue or rescue and emergency medical services to purchase equipment and make capital improvements. An eligible unit may apply to the Department of Insurance for a grant under this section. The application form and criteria for grants shall be established by the Department. The North Carolina Association of Rescue and Emergency Medical Services, Inc., shall provide the Department with an advisory priority listing for rescue equipment eligible for funding, and the Department of Health and Human Services shall provide the Department with an advisory priority listing of EMS equipment eligible for funding. The State Treasurer shall invest the Fund's assets according to law, and the earnings shall remain in the Fund. On December 15, or on the first business day after December 15 if December 15 falls on a weekend or a holiday, of each year, the Department shall make grants to eligible units subject to all of the following limitations:

(1) A grant to an applicant who is required to match the grant with non-State funds may not exceed twenty-five thousand dollars (\$25,000), and a grant to an applicant who is not required to match the grant with non-State funds may not exceed three thousand dollars (\$3,000).

(2) An applicant whose liquid assets, when combined with the liquid assets of any corporate affiliate or subsidiary of the applicant, are more than one thousand dollars (\$1,000) shall match the grant on a dollar-for-dollar basis with non-State funds.

(3) The grant may be used only for equipment purchases or capital expenditures.

(4) An applicant may receive no more than one grant per fiscal year.

(5) The grant may be used only for purposes related to services that the unit is authorized to provide.

In awarding grants under this section, the Department shall to the extent possible select applicants from all parts of the State based upon need, subject to the following priority order: (i) rescue units, (ii) rescue/EMS units, (iii) EMS units that are licensed as EMS providers under G.S 131E-155.1, and, finally, (iv) EMS units that are volunteer fire departments that are a part of a county's EMS system plan. Up to two percent (2%) of the Fund may be used for additional staff and resources to administer the Fund in each fiscal year. In addition, notwithstanding G.S. 58-78-20, up to four percent (4%) of the Fund may be used for additional staff and resources for the North Carolina Fire and Rescue Commission.

Rule 11 NCAC 05A .0703, which is not the subject of this staff opinion, requires documents "verifying that the unit is financially able to match the amount of the grant" and pursuant to a technical change requests, specifies "in accordance with G.S. 58-87-5(a)(2). This Rule duplicates, by the use of a contradictory statement, one of the requirements set forth in Rule .0703. Staff counsel is concerned that the rule language in Rule 11 NCAC 05A .0704 is redundant of Rule 11 NCAC 05A .0703(f)(3), and is therefore an unnecessary rule. Alternatively, staff counsel finds the

use to a second rule to negate a requirement in the first rule to be confusing and potentially ambiguous to a grant applicant.

Summary:

As written, this Rule is duplicating a statement set forth in a prior rule and Rule 11 NCAC 05A .0704 appears to be redundant and unnecessary. It is staff counsel's recommendation to object to this Rule for being unnecessary. Further, this Rule appears to create an exception of a requirement that is not necessary after review of the governing statute. The exclusive reading of Rule 11 NCAC 05A .0704 creates a clarity issue. Therefore, it is staff's recommendation to object to this Rule as being unclear and ambiguous.

1 11 NCAC 05A .0704 is amended as published in 31.04 NCR 288 as follows:

2 **11 NCAC 05A .0704 REQUIREMENTS FOR UNITS NOT REQUIRED TO MATCH GRANTS**

3 Units that are not required to match funds ~~must~~shall comply with 11 NCAC 5A .0703 except for Subparagraph ~~(f)(3)~~
4 (f)(3) of that Rule, which requires the filing of a statement verifying that a unit is financially able to match a grant.

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6 *History Note: Authority G.S. 58-2-40(1); 58-87-5;*

7 *Eff. February 1, 1993;*

8 *Amended Eff. December 1, 2016.*

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§ 58-87-5. Volunteer Rescue/EMS Fund.

(a) There is created in the Department of Insurance the Volunteer Rescue/EMS Fund to provide grants to volunteer rescue units, rescue/EMS units, and EMS units providing rescue or rescue and emergency medical services to purchase equipment and make capital improvements. An eligible unit may apply to the Department of Insurance for a grant under this section. The application form and criteria for grants shall be established by the Department. The North Carolina Association of Rescue and Emergency Medical Services, Inc., shall provide the Department with an advisory priority listing for rescue equipment eligible for funding, and the Department of Health and Human Services shall provide the Department with an advisory priority listing of EMS equipment eligible for funding. The State Treasurer shall invest the Fund's assets according to law, and the earnings shall remain in the Fund. On December 15, or on the first business day after December 15 if December 15 falls on a weekend or a holiday, of each year, the Department shall make grants to eligible units subject to all of the following limitations:

- (1) A grant to an applicant who is required to match the grant with non-State funds may not exceed twenty-five thousand dollars (\$25,000), and a grant to an applicant who is not required to match the grant with non-State funds may not exceed three thousand dollars (\$3,000).
- (2) An applicant whose liquid assets, when combined with the liquid assets of any corporate affiliate or subsidiary of the applicant, are more than one thousand dollars (\$1,000) shall match the grant on a dollar-for-dollar basis with non-State funds.
- (3) The grant may be used only for equipment purchases or capital expenditures.
- (4) An applicant may receive no more than one grant per fiscal year.
- (5) The grant may be used only for purposes related to services that the unit is authorized to provide.

In awarding grants under this section, the Department shall to the extent possible select applicants from all parts of the State based upon need, subject to the following priority order: (i) rescue units, (ii) rescue/EMS units, (iii) EMS units that are licensed as EMS providers under G.S 131E-155.1, and, finally, (iv) EMS units that are volunteer fire departments that are a part of a county's EMS system plan. Up to two percent (2%) of the Fund may be used for additional staff and resources to administer the Fund in each fiscal year. In addition, notwithstanding G.S. 58-78-20, up to four percent (4%) of the Fund may be used for additional staff and resources for the North Carolina Fire and Rescue Commission.

(b) A unit is eligible for a grant under this section if it meets all of the following conditions:

- (1) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1066, s. 33(a).
- (2) It consists entirely of volunteer members, with the exception that the unit may have paid members to fill the equivalent of 10 full-time paid positions.
- (3) It has been recognized by the Department as a rescue unit, a rescue/EMS unit, or an EMS unit.
- (4) It satisfies the eligibility criteria established by the Department under subsection (a) of this section.

(c) For the purpose of this section and Article 88 of this Chapter, "rescue" means the removal of individuals facing external, nonmedical, and nonpatient related peril to areas of relative safety. A "rescue unit" or "rescue squad" means a group of individuals who are not necessarily trained in emergency medical services, fire fighting, or law enforcement, but who expose themselves to an external, nonmedical, and nonpatient related peril to effect the removal of individuals facing the same type of peril to areas of relative safety. The unit or squad must comply with existing State statutes and with eligibility criteria established by the North Carolina Association of Rescue and Emergency Medical Services, Inc.

(d) For the purposes of this section, "emergency medical services" or "EMS" has the same meaning as in G.S. 131E-155(6). Unless otherwise more narrowly specified, an "EMS unit" means either (i) an EMS provider licensed under G.S 131E-155.1 or (ii) a volunteer fire or fire/rescue department that is part of its county's EMS system plan. The unit or squad must comply with existing State statutes and with eligibility criteria established by the North Carolina Association of Rescue and Emergency Medical Services, Inc.

(e) Report. - The Commissioner must submit a written report to the General Assembly within 60 days after the grants have been made. This report must contain the following:

- (1) The amount of the grant and the name of the recipient.

- (2) The Fund balance at the beginning of the grant cycle.
- (3) Cash receipts through the grant cycle.
- (4) Cash disbursements through the grant cycle.
- (5) The Fund balance at the end of the grant cycle. (1987 (Reg. Sess., 1988), c. 1062, s. 2; 1989, c. 115; c. 534, s. 2; 1989 (Reg. Sess., 1990), c. 1066, s. 33(a); 1991 (Reg. Sess., 1992), c. 943, s. 2; 1995, c. 507, s. 7.21A(1); 1997-443, s. 11A.20; 1998-212, s. 25(b); 1999-319, s. 2; 2005-283, s. 1; 2014-64, s. 4(c).)