

Hammond, Abigail M

From: Peace-Bunch, Loretta Y
Sent: Monday, May 15, 2017 2:15 PM
To: Hammond, Abigail M
Cc: Hoomani, A. John; Duke, Margaret
Subject: RE: OSFM Rules for Submission

Abby,

We have a meeting scheduled for Thursday, May 18th to work on the 11 NCAC 05A .0500 rules with the plan to have the work completed and submissions made to OAH by May 31st.

Loretta

From: Hammond, Abigail M
Sent: Monday, May 15, 2017 1:26 PM
To: Peace-Bunch, Loretta Y <loretta.peace-bunch@ncdoi.gov>
Cc: Duke, Margaret <margaret.duke@ncdoi.gov>; Hoomani, A. John <john.hoomani@ncdoi.gov>
Subject: RE: OSFM Rules for Submission

Good afternoon,

As we prepare for the Rules Review Commission meeting this week, please let me know of any status update regarding the 11 NCAC 05A .0500 rules.

Thank you,
Abby

*Abigail M. Hammond
Counsel to the Rules Review Commission
Office of Administrative Hearings
Direct Dial: (919) 431-3076*

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From: Peace-Bunch, Loretta Y
Sent: Thursday, April 13, 2017 3:44 PM
To: Hammond, Abigail M <abigail.hammond@oah.nc.gov>
Cc: Duke, Margaret <margaret.duke@ncdoi.gov>; Hoomani, A. John <john.hoomani@ncdoi.gov>
Subject: RE: OSFM Rules for Submission

Abby,

April 13, 2017

Via Email Only: abigail.hammond@oah.nc.gov
Office of Administrative Hearings
Abigail Hammond, Commission Council
6714 Mail Service Center
Raleigh, NC 27699-6700

Re: Objection to Rules – 11 NCAC .0501, .0505, .0508, .0511

Dear Ms. Hammond;

This letter is being written in response to the Office Administrative Hearings' objections to the above-captioned rules under the Office of the State Fire Marshal (OSFM) within the Department of Insurance. The Department of Insurance requests that **11 NCAC 05A .0501, 11 NCAC 05A .0505, 11 NCAC 05A .0508, and 11 NCAC 05A .0511** remain under the review of the Commission to allow additional time for the department to make revisions to the rules to satisfy the Commission's objections.

Please contact me if additional information is needed. Thank you for working with the Department of Insurance through this process.

Sincerely,



Loretta Peace-Bunch
Rules Coordinator

cc: John Hoomani, General Counsel

February 24, 2017

Via Email Only: abigail.hammond@oah.nc.gov

Office of Administrative Hearings
Abigail Hammond, Commission Council
6714 Mail Service Center
Raleigh, NC 27699-6700

Dear Ms. Hammond;

This letter is being written in response to your letter dated January 20, 2017, regarding the objections to rules – 11 NCAC .0105, .0201, .0301, .0501, .0505, .0508, .0511, .0603, .0703, and .0704 which are under the Office of the State Marshal. Due to new leadership and administrative changes within the Office of the State Fire Marshal, the Department of Insurance will need additional time to review and response to the objections. A meeting to review the objections to the rules has been tentatively scheduled for Thursday, March 2. The department anticipates having responses submitted to the Office of Administrative Hearings by March 31, 2017. Thank you for your consideration in this matter.

Sincerely,



Loretta Peace-Bunch
Rules Coordinator

cc: John Hoomani, General Counsel



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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January 20, 2017

Via Email Only: loretta.peace-bunch@ncdoi.gov
Loretta Peace-Bunch, Rulemaking Coordinator
Department of Insurance
1201 Mail Service Center
Raleigh, NC 27699-1201

Re: Objection to Rules – 11 NCAC .0105, .0201, .0301, .0501, .0505, .0508, .0511, .0603, .0703, .0704

Dear Ms. Peace-Bunch:

At its meeting on January 19, 2017, the Rules Review Commission objected to the above-captioned Rules in accordance with G.S. 150B-21.10(2).

The Commission objected to 11 NCAC 05A .0105, .0501, and .0505 based upon lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1). The Commission found that the content of the rules pertains to actions within the statutory authority of the State Fire and Rescue Commission.

Please note that during the meeting, Chairman Dunklin expressed concerns about 11 NCAC 05A .0105 and the following legislative directive set forth in G.S. 58-78-10(b):

[State Fire and Rescue] Commission shall adopt such rules and regulations, not inconsistent with the laws of this State as may be required by the federal government for programs and grants-in-aid for fire protection, firefighting, and rescue purpose...

Additionally, Commissioner Bryan questioned the necessity of 11 NCAC 05A .0105 if the content of the Rule was addressing internal management of an agency.

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11 NCAC 05A .0501 was further objected to by the Commission, as it is unclear whether the rate making authority vested in the Commissioner of Insurance by G.S. 58-40-25(4) was being implemented in Rule 05A .0501 by the State Fire Marshall. The Commission further objected to this Rule based upon lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1), as it appears as though the State Fire Marshal is determining eligibility for death benefits provided by Article 12A of Chapter 143 of the General Statutes. The statutory authority for implementation of Article 12A of Chapter 143 of the General Statutes is exclusively within the jurisdiction of the Industrial Commission.

11 NCAC 05A .0505 was further objected to by the Commission, as it is unclear if the State Fire Marshal has changed the statutory requirements set forth in G.S. 58-86-25 by using different terms and requirements than those set forth in the statute, creating unclear and ambiguous content in this Rule in violation of G.S. 150B-21.9(a)(2).

The Commission objected to 11 NCAC 05A .0201, and .0301 based upon a lack of necessity. 11 NCAC 05A .0201 recites G.S. 58-80-1. 11 NCAC 05A .0301 recites G.S. 58-84-40. G.S. 150B-19(4) prohibits an agency from adopting a rule that “repeats the content of a law.” Therefore, these Rules fail to comply with G.S. 150B-21.9(a)(3). 11 NCAC 05A .0301 was further objected to by the Commission, as it is unclear if the State Fire Marshal has changed the statutory requirements set forth in G.S. 58-84-40, creating unclear and ambiguous content in this Rule in violation of G.S. 150B-21.9(a)(2).

The Commission objected to 11 NCAC 05A .0508 based upon a lack of clarity, as it is unclear whether the rate making authority vested in the Commissioner of Insurance by G.S. 58-36-10(3) is being implemented in this Rule by the State Fire Marshall. In the alternative, if the State Fire Marshal is implementing the rate making authority set forth in G.S. 58-36-10(3), the Commission objected to this Rule for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).

The Commission objected to 11 NCAC 05A .0511 based upon a lack of clarity, as it is unclear whether the rate making authority vested in the Commissioner of Insurance by G.S. 58-40-25(2) is being implemented in this Rule by the State Fire Marshall. In the alternative, if the State Fire Marshal is implementing the rate making authority set forth in G.S. 58-40-25(2), the Commission objected to this Rule for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).

The Commission objected to 11 NCAC 05A .0603 based upon a lack of clarity, as it is unclear whether the rate making authority vested in the Commissioner of Insurance by G.S. 58-36-10(3) is being implemented in this Rule by the State Fire Marshall. In the alternative, if the State Fire Marshal is implementing the rate making authority set forth in G.S. 58-36-10(3), the Commission objected to this Rule for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1). The Commission further objected to this Rule for imposing a penalty set forth in Paragraph (d) of the Rule that is not authorized by the cited statutory authority, and therefore lacks statutory authority and fails to comply with G.S. 150B-21.9(a)(1). The Commission further objected to this Rule

based upon a lack of clarity, as the Rule references an application not identified by name and not providing any information on how to obtain the application, creating unclear and ambiguous content in this Rule in violation of G.S. 150B-21.9(a)(2). The Commission further objected to this Rule for referencing an application that is outside the rulemaking process and is not implementing a process prescribed by a rule or statute, and therefore fails to comply with G.S. 150B-21.9(a)(4).

The Commission objected to 11 NCAC 05A .0703 based upon a lack of clarity, as the Rule references an application not identified by name and not providing any information on how to obtain the application, creating unclear and ambiguous content in this Rule in violation of G.S. 150B-21.9(a)(2). The Commission further objected to this Rule for referencing an application that is outside the rulemaking process and is not implementing a process prescribed by a rule or statute, and therefore fails to comply with G.S. 150B-21.9(a)(4). The Commission further objected to this Rule for imposing a penalty set forth in Paragraph (d) of the Rule that is not authorized by the cited statutory authority, and therefore lacks statutory authority and fails to comply with G.S. 150B-21.9(a)(1).

The Commission objected to 11 NCAC 05A .0704 based upon a lack of necessity and for that the language in the Rule is unclear and ambiguous. This Rule duplicates, by the use of a contradictory statement, one of the requirements set forth in Rule 11 NCAC 05A .0703. G.S. 58-87-5(a)(2) states when an applicant must match funds and 11 NCAC 05A .0703(f)(3) indicates what an applicant that must match funds shall file with the State Fire Marshal. This Rule is unclear and ambiguous in light of the requirements set forth in 11 NCAC 05A .0703(f)(3), and restates requirements set forth in 11 NCAC 05A .0703(f)(3), creating unclear and ambiguous content in this Rule in violation of G.S. 150B-21.9(a)(2). G.S. 150B-19(4) prohibits an agency from adopting a rule that "repeats the content of a...rule." Therefore, this Rule fails to comply with G.S. 150B-21.9(a)(3).

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,



Abigail M. Hammond
Commission Counsel

1 11 NCAC 05A .0501 is amended as published in 31.04 NCR 283 as follows:

2 **SECTION .0500 - INITIAL CERTIFICATION AND RESPONSE RATINGS FOR FIRE DEPARTMENTS**

3
4 **11 NCAC 05A .0501 PURPOSE**

5 The purpose of this Section is to determine set forth the minimum requirements that a fire department must [shall] meet in
6 order to qualify for eligibility for death benefits under Article 12A of Chapter 143 of the North Carolina General
7 Statutes, and the North Carolina Firemen's Pension Fund under G.S. 58-86-25; for initial recognition in insurance
8 premiums for a responding fire department; and for the response rating for fire districts. to designate insurance
9 premiums. Upon meeting the initial requirements for certification, a fire district shall be given a rating of ["9S"]
10 "9S." A fire district may get a rating from "1 through 8" upon improving its response capabilities with "1" being
11 the best rating. For ratings of 1 through 8, the fire department-district shall be evaluated using the current NCFIRS. If
12 at any time a [department] district is determined through a "9S" inspection conducted by OSFM to be unable to meet
13 the requirements set forth in these standards for up to twelve months from the issuance date of the notification letter,
14 [a given period of time;] [they] the district may be designated a "Class 10" (non-certified).

15
16 *History Note: Authority G.S. 58-2-40; 58-86-25;*

17 *Eff. September 1, 1985;*

18 *Amended Eff. January 1, 2017; October 1, 2006; July 1, 1992; July 1, 1986.*

11 NCAC 05A .0505 is amended as published in 31.04 NCR 283-284 as follows:

11 NCAC 05A .0505 ~~DRILLS AND MEETING~~ TRAINING REQUIREMENTS

(a) All members of fire departments shall comply with the ~~drills and meetings~~ training requirements of G.S. 58-86-25.

(1) Fire departments shall provide [at least] four hours of training per [month, with each firefighter obtaining a minimum of 36 hours of training per year. A roster of personnel containing the names and hours of training attendance shall be kept for each training session.] month for eligible firefighters to comply with G.S.58-86-25. The fire department shall maintain copies of the reports submitted in compliance with G.S. 58-86-25 and kept for a period of five years.

(b) The chief officer of each fire department shall:

(1) within one year of appointment, complete a class on basic management of fire department operations ~~—and records approved~~ and provided by the North Carolina State Fire and Rescue Commission for chief officer based upon National Fire Protection Association (NFPA) standards for chief officer. NFPA Standard 1021 is incorporated into this Subchapter by reference, including ~~but not limited to~~ subsequent amendments or editions. NFPA Standard 1021 is available from the National Fire Protection Association at <http://www.nfpa.org/> for a fee [subject to change] of thirty-seven dollars (\$37.00); forty-four dollars and fifty cents (\$44.50); and

(2) complete the course as described in Subparagraph (1) of this Paragraph, which shall be titled "Chief 101"—~~a minimum of~~ every five years.

History Note: Authority G.S. 58-2-40; ~~58-36-10;~~ 58-78-5; ~~58-86-25;~~

Eff. September 1, 1985;

Amended Eff. January 1, 2017; October 1, 2010; October 1, 2006; July 1, 1992.

11 NCAC 05A .0508 is amended as published in 31.04 NCR 284-285 as follows:

11 NCAC 05A .0508 APPARATUS

To qualify for ~~initial inspection~~ certification by OSFM and receive or maintain a minimum rating of Class "9S", the fire department shall have the following apparatus, ~~and equipment, equipment, and documentation:~~

(1) ~~Pumper Engine.~~

- (a) The fire department shall have an approved ~~pumper engine~~ (automotive fire apparatus equipped with a fire pump and tank). To be approved, the fire department ~~pumper engine~~ ~~must shall~~ be certified by Underwriters Laboratories, Inc., and constructed in accordance with the National Fire Protection Association Standard 1901 - Standard for Automotive Fire Apparatus. The apparatus shall not be loaded beyond limits certified by the "Gross Vehicle Weight" label attached to the vehicle; nor shall the vehicle be modified in a manner that would invalidate ~~this~~ the manufacturers' certification. NFPA Standard 1901 is incorporated into this Subchapter by reference, but not including subsequent amendments or editions. NFPA Standard 1901 is available from the National Fire Protection Association at <http://www.nfpa.org/> for a ~~[fee,] fee~~ [subject to change] ~~of fifty dollars (\$50.00). forty-~~ four dollars and fifty cents (\$44.50).
- (b) The pump shall have a rated capacity of not less than 750 gallons per minute at 150 pounds per square inch net pump pressure.
- (c) The ~~pumper engine~~ shall be equipped with at least a ~~500~~ 300 gallon water tank.
- (d) A service test ~~must shall~~ have been performed on the "first responding" ~~pumper engine~~ during the 12-month period before the inspection. If the ~~pumper engine~~ ~~has had~~ been purchased as new within the 12-month period before the "9S" inspection, the U.L. Certificate meets this requirement.
- (e) The fire departments shall maintain documentation of all equipment and apparatus including engines, tankers, service ~~[trucks]~~ trucks, and aerial apparatus through an inventory list. Monthly inventory checks shall be recorded for 12 consecutive ~~[months]~~ months required by the North Carolina Fire Suppression Rating Schedule as defined in 11 NCAC 05A .0101.
- (f) The fire departments shall maintain documentation of maintenance checklists for all apparatus including engines, tankers, service ~~[trucks]~~ trucks, and aerial apparatus and records verifying that all apparatus is checked monthly for 12 consecutive months.

(2) ~~Tanker.~~ Tanker (or mobile water supply capacity).

- (a) The fire department shall have a motorized tank truck of at least 1000 gallons water capacity ~~capacity~~, or enough to equal at least ~~1500~~ 1300 gallons of water total ~~for pumper~~ combined between the engine and tanker-tanker.
- (b) The tanker shall be equipped with the necessary hose for filling or refilling the tank with ~~and hose~~ hoses or equipment for transferring water to the ~~pumper engine~~ engine or other

1 devices.

- 2 (c) The tanker, when fully loaded, shall not exceed the Gross Vehicle Weight limits as certified
3 on the label attached to the vehicle; nor shall the vehicle be modified in a manner that would
4 invalidate this certification. All tankers shall be baffled in accordance with the National Fire
5 Protection Association Standard 1901 – Standard for Automotive Fire Apparatus which is
6 available from the National Fire Protection Association.

7 (3) The following equipment shall be carried on responding fire department pumpers:

- 8 (a) The ~~pumper~~ engine shall be equipped with 2-~~150~~ 200 foot 1-1/2 inch or 1-3/4 inch pre-
9 connected hose lines with fog nozzles attached;
- 10 (b) One booster reel or a third three 200 foot pre-connected hose ~~lines~~; line of 1-1/2 inch or
11 larger with a nozzle attached;
- 12 (c) Suction hose - size necessary to flow the capacity of pumper on the engine - 2 - 10 foot
13 ~~sections~~; sections (If the insurance district is 85% or more covered by useable hydrants the
14 engine may have a 15 foot section of soft suction hose size necessary to flow the capacity
15 of the pump on the engine);
- 16 (d) Four OSHA approved self-contained breathing apparatus in proper working condition;
- 17 (e) The fire department shall provide OSHA approved protective clothing for all firefighters
18 including helmets, hoods, coats, pants, boots, and gloves or issued to all firefighters; ~~and~~
19 ~~reflective clothing and helmet for traffic control personnel~~;
- 20 (f) One 12 foot or 14 foot roof ladder;
- 21 (g) One ~~24 foot~~ 24 foot, 28 foot, or 35 foot extension ladder;
- 22 (h) One axe;
- 23 (i) One claw tool ~~(Halligan (One Halligan Tool may replace claw tool and or crowbar)~~;
24 crowbar but not both);
- 25 (j) One crowbar ~~(Halligan (One Halligan Tool may replace crowbar and or claw tool)~~; claw
26 tool but not both);
- 27 (k) One pike pole, minimum 8 foot;
- 28 (l) Two mounted rechargeable type portable hand lights suitable for hazardous conditions; ~~("4V"~~
29 ~~wet or "6V" dry)~~;
- 30 (m) 100 feet of utility rope, minimum ~~1/2 inch~~; 1/2 inch diameter;
- 31 ~~(n) Two shovels;~~
- 32 ~~(n)~~ Two 20 ~~pound~~; pound, Class B-C portable extinguishers;
- 33 ~~(p)(o)~~ One First Aid kit; and
- 34 ~~(p)~~ One bolt cutter, with 14 inches or longer; ~~longer handles.~~

36 *History Note:* Authority G.S. 58-2-40; 58-36-10(3); 58-86-25;

37 *Eff. September 1, 1985;*

11 NCAC 05A .05011 is amended as published in 31.04 NCR 285-286 as follows:

11 NCAC 05A .0511 SIX MILE INSURANCE DISTRICT

To extend its insurance district to six miles, each fire department shall apply and meet the following criteria:

(1) ~~The the~~ fire department shall provide ~~the~~ OSFM with a hand drawn map and written description or a GIS computer generated map of its fire ~~district.~~ insurance district as approved by the County Commissioners as set forth in G.S. 153A-233;

~~(2) The the map and written description [description, or GIS maps] shall be presented to the County Commissioners county commissioners for their approval, as set forth in G.S. 153A-233. G.S. 153A-233;~~

~~(3)(2)~~ The the fire department applying to extend its insurance district to six miles shall enter into a written automatic aid contract with the adjoining districts to the area being extended specifying that "an apparatus capable of transporting" a minimum of 1000 gallons of water shall be dispatched simultaneously with the department whose district the incident is occurring within. within; and

~~(4)(3)~~ The the County county shall establish automatic aid response protocols. These protocols shall be maintained at the county communication center and shall be used on all alarms involving reported structure fires.

History Note: Authority G.S. 58-2-40; ~~58-86-25;~~ 58-40-25(4);

Eff. October 1, 2006;

Amended Eff. January 1, 2017.

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: All Rules in 11 NCAC 05A for State Fire Marshal

RECOMMENDED ACTION:

Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

X Extend the period of review

COMMENT:

On October 20, 2016, the Department of Insurance filed 26 rules for review by the Rules Review Commission. Staff counsel issued numerous technical changes requests, along with various staff opinions. Staff counsel was unable to receive revised rules prior to the Rules Review Commission's November 17th meeting. At that meeting, staff counsel recommended and the Rules Review Commission approved to extending the period of review for the 26 rules set forth in 11 NCAC 05. Staff counsel has been working with the agency since the grant of the extension of the period of review, but as of 4:00 p.m. on Monday, December 12, 2016, staff counsel still does not have properly formatted revised rules from the agency. Staff counsel has issued a total of 11 staff opinions on nine rules, and an advisory opinion for the use of "general rulemaking" power on 11 other rules. If the Rules Review Commission does not accept all of the recommended objections of staff counsel, staff counsel does not have properly formatted revised rules for the consideration of the Rules Review Commission at the December meeting.

Based upon the current procedural status of the pending 26 rules, staff counsel will recommend continuing the extension of the period of review for one more month, until the January

Abigail M. Hammond
Commission Counsel

19, 2017 meeting. The Rules Review Commission must act on these rules at the January 2017 meeting.

§ 150B-21.10. Commission action on permanent rule.

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes. (1991, c. 418, s. 1.)

§ 150B-21.13. Procedure when Commission extends period for review of permanent rule.

When the Commission extends the period for review of a permanent rule, it must notify the agency that adopted the rule of the extension and the reason for the extension. After the Commission extends the period for review of a rule, it may call a public hearing on the rule. Within 70 days after extending the period for review of a rule, the Commission must decide whether to approve the rule, object to the rule, or call a public hearing on the rule. (1991, c. 418, s. 1.)

Summary:

Properly revised rules have not been submitted by the agency and staff counsel is unable to fully advise and make recommendation to the Rules Review Commission about the 26 rules filed by the State Fire Marshal and pending before the Rules Review Commission for their review and approval. Therefore, staff counsel is recommending continued extension of the period of review.



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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November 17, 2016

Via Email Only: loretta.peace-bunch@ncdoi.gov

Loretta Peace-Bunch, Rulemaking Coordinator
Department of Insurance
1201 Mail Service Center
Raleigh, NC 27699-1201

Re: State Fire Marshal – 11 NCAC 0101, .0105, .0201, .0202, .0301, .0302, .0303, .0501, .0503, .0504, .0505, .0506, .0507, .0508, .0510, .0511, .0512, .0601, .0602, .0603, .0604, .0701, .0702, .0703, .0704, .0705.

Dear Ms. Peace-Bunch:

At its meeting this morning, the Rules Review Commission extended the period of review for the above-captioned rules in accordance with G.S. 150B-21.10. They did so in response to a request from the rulemaking coordinator to extend the period in order to allow the agency additional time to make technical changes, and to review and prepare responses to the staff opinions.

Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days.

If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Abigail M. Hammond
Commission Counsel

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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 .0501

RECOMMENDED ACTION:

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

COMMENT:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0501 Purpose, cites the statutory authority as G.S. 58-2-40; 58-86-25. Those statutes are set forth below:

§ 58-2-40. Powers and duties of Commissioner.

The Commissioner shall:

Abigail M. Hammond
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

§ 58-86-25. Determination and certification of eligible firefighters.

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually

determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

In a technical change request, an inquiry was made to the purpose of citing G.S. 58-86-25. The statute is cited as authority for the rulemaking, but the statute is an independent requirement that this Rule is merely identifying in the content of this Rule. Rule 11A NCAC 05A .0501 states the following:

11 NCAC 05A .0501 PURPOSE

The purpose of this Section is to set forth the ~~minimum~~ requirements that a fire department ~~must~~shall meet in order to qualify for eligibility for death benefits under Article 12A of Chapter 143 of the North Carolina General Statutes, and the North Carolina Firemen's Pension Fund under G.S. 58-86-25; for initial recognition in insurance premiums for a responding fire department; and for response rating to designate insurance premiums. (remainder of the rule not provided)

The agency responded that there is no opposition to deleting the reference to G.S. 58-86-25, which leaves the remaining statute of G.S. 58-2-40.

In further review of the content of this Rule, the language of this Rule appears to indicate that the determination of the death benefits under Article 12A of Chapter 143 of the North Carolina General Statutes is governed by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1. However, this determination and the award of such death benefits is exclusively within the jurisdiction of the North Carolina Industrial Commission, a separate agency, as set forth in G.S. 143-166.3:

§ 143-166.3. Payments; determination.

(a) When any law-enforcement officer, fireman, rescue squad worker or senior Civil Air Patrol member shall be killed in the line of duty, the Industrial Commission shall award a death benefit to be paid...

Article 12A of Chapter 143 further defines "line of duty" as follows:

§ 143-166.2. Definitions.

...

(c) The term "killed in the line of duty" shall apply to any law-enforcement officer, firefighter, rescue squad worker who is killed or dies as a result of bodily injuries sustained or of extreme exercise or extreme activity experienced in the course and scope of his official duties while in the discharge of his official duty or duties.

When applied to a senior member of the Civil Air Patrol as defined in this Article, "killed in the line of duty" shall mean any such senior member of the North Carolina Wing-Civil Air Patrol who is killed or dies as a result of bodily injuries sustained or of extreme exercise or extreme activity experienced in the course and scope of his official duties while engaged in a State requested and approved mission pursuant to Article 13 of Chapter 143B of the General Statutes. For purposes of this Article, when a law enforcement officer, firefighter, rescue squad worker, or senior Civil Air Patrol member dies as the direct and proximate result of a myocardial infarction suffered while on duty or within 24 hours after participating in a training exercise or responding to an emergency situation, the law enforcement officer, firefighter, rescue squad worker, or senior Civil Air Patrol member is presumed to have been killed in the line of duty.

(d) The term "law-enforcement officer", "officer", or "firefighter" shall mean a sheriff and all law-enforcement officers employed full-time, permanent part-time, or temporarily by a NC General Statutes - Chapter 143 Article 12A 2 sheriff, the State of North Carolina or any county or municipality thereof, whether paid or unpaid; and all full-time custodial employees and probation and parole officers of the Division of Adult Correction of the Department of Public Safety; and all full time institutional and full-time, permanent part-time, and temporary detention employees of the Division of Juvenile Justice of the Department of Public Safety and full-time, permanent part-time, and temporary detention officers employed by any sheriff, county or municipality, whether paid or unpaid. The term "firemen" shall mean both firefighter or firemen as defined in G.S. 58-84-5(3a), or "eligible firemen" as defined in Article 86 of Chapter 58 of the General Statutes, notwithstanding any age requirements set out in that Article, and all full-time, permanent part-time and temporary employees of the North Carolina Forest Service of the Department of Agriculture and Consumer Services during the time they are actively engaged in firefighting activities; or engaged in emergency response activities pursuant to G.S. 166A-19.77; and shall mean all full-time employees of the North Carolina Department of Insurance during the time they are actively engaged in firefighting activities, during the time they are training firefighters or rescue squad workers, and during the time they are engaged in activities as members of the State Emergency Response Team, when the Team has been activated; and shall mean all otherwise eligible persons who, while actively engaged as firefighters or rescue squad workers, are acting in the capacity of a fire or rescue instructor outside their own department or squad. The term "rescue squad worker" shall mean a person who is dedicated to the purpose of alleviating human suffering and assisting anyone who is in difficulty or who is injured or becomes suddenly ill by providing the proper and efficient care or emergency medical services. In addition, this person must belong to an organized rescue squad which is eligible for membership in the North Carolina Association of Rescue and Emergency Medical Services, Inc., and the person must have attended a minimum of 36 hours of training in the last calendar year. Each rescue squad belonging to the North Carolina Association of Rescue and Emergency Medical Services, Inc., must file a roster of those members meeting the above requirements with the State Treasurer on or about January 31 of each year, and this roster must be certified to by the secretary of said association. In addition, the term "rescue squad worker" shall mean a member of an ambulance service certified by the Department of Health and Human Services pursuant to Article 7 of Chapter 131E of the General Statutes. The Department of Health and Human Services shall furnish a list of ambulance service members to the State Treasurer on or about January 31 of each year. The term "Civil Air Patrol members" shall

mean those senior members of the North Carolina Wing-Civil Air Patrol 18 years of age or older and currently certified pursuant to G.S. 143B-1031. The term "firefighter" shall also mean county fire marshals when engaged in the performance of their county duties. The term "rescue squad worker" shall also mean county emergency services coordinators when engaged in the performance of their county duties.

Based upon the directives to the North Carolina Industrial Commission as set forth in Article 12A of Chapter 143 of the North Carolina General Statutes, it does not appear that the Commissioner of Insurance acting in the capacity of State Fire Marshal has the authority "to set forth the requirements that a fire department shall meet in order to qualify for eligibility for death benefits."

The language of this Rule further references insurance premiums for fire departments. Based upon the cited statutory authority, this rate discussion by the Commissioner of Insurance acting in the capacity of State Fire Marshal appears to lack statutory authority. Article 40 of Chapter 58 of the General Statutes sets forth a process for rating property insurance.

§ 58-40-25. Rating methods.

In determining whether rates comply with the standards under G.S. 58-40-20, the following criteria shall be applied:

...

(4) In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 16; 1991, c. 644, s. 40; 2000-176, s. 2; 2004-203, s. 5(b).)

It is unclear if the authority granted to the Commissioner of Insurance to set rates in G.S. 58-40-25 is being implemented in this Rule by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

SUMMARY:

Staff counsel has concerns that this Rule is attempting to regulate a determination within the exclusive jurisdiction of the North Carolina Industrial Commission. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(1). Further, staff counsel is concerned that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate premium rates in a process that is contrary to the requirements of G.S. 58-40-25(4). It is staff counsel's recommendation to the Rules Review Commission to object to this Rule for issues of clarity in applicability of this Rule. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2).

Abigail M. Hammond
Commission Counsel

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0501

DEADLINE FOR RECEIPT: Thursday, November 10, 2016

NOTE WELL: *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Lines 7 thru 8 reference two phrases of insurance premiums. The statutory authority for this Rule is G.S. 58-2-40, which is the general rulemaking authority for the Commissioner of Insurance, who serves as the State Fire Marshal, and G.S. 58-83-25. G.S. 58-86-25 deals with identifying "eligible firefighters" under the North Carolina Firefighters' and Rescue Squad Workers' Pension Fund. Neither of the cited statutes reference premium or rate determinations. Please review and either update the history note accordingly, or delete the references to premium or rate determinations.

Line 8, delete "initial"

Line 9, move period outside the quotation marks inside the quotation marks

Line 11, please clarify how this determination is made by the OSFM.

Line 12, please clarify what is meant by "given period of time." Is there not a standard period, such as 60 or 90 days?

Line 15, review the provided statutory authority. G.S. 58-2-40 is the general rulemaking authority for the Commissioner of Insurance, who serves as the State Fire Marshal. However, what is the purpose of citing G.S. 58-86-25 when the statute is specifically discussed in the rule? The citation does not appear to support the authority for this Rule. Please update accordingly.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Abigail M. Hammond
Commission Counsel

Date submitted to agency: Thursday, October 27, 2016

11 NCAC 05A .0501 is amended as published in 31.04 NCR 283 as follows:

SECTION .0500 - INITIAL CERTIFICATION AND RESPONSE RATINGS FOR FIRE DEPARTMENTS

11 NCAC 05A .0501 PURPOSE

The purpose of this Section is to set forth the ~~minimum~~ requirements that a fire department ~~must~~shall meet in order to qualify for eligibility for death benefits under Article 12A of Chapter 143 of the North Carolina General Statutes, and the North Carolina Firemen's Pension Fund under G.S. 58-86-25; for initial recognition in insurance premiums for a responding fire department; and for response rating to designate insurance premiums. Upon meeting the initial requirements for certification, a fire district shall be given a rating of "9S". A fire district may get a rating from "1 through 8" upon improving its response capabilities with "1" being the best rating. For ratings of 1 through 8, the fire department shall be evaluated using the current NCFSTRS. If at any time a department is determined by OSFM to be unable to meet the requirements set forth in these standards for a given period of time, they may be designated a "Class 10" (non-certified).

History Note: Authority G.S. 58-2-40; 58-86-25;

Eff. September 1, 1985;

Amended Eff. December 1, 2016; October 1, 2006; July 1, 1992; July 1, 1986.

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 .0505

RECOMMENDED ACTION:

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

COMMENT:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina. (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

In addition to the general rulemaking authority vested in the Commissioner of Insurance by G.S. 58-2-40, this Rule, 11 NCAC 05A .0505 Training Requirements, cites G.S. 58-78-5 and 58-86-25. Article 78 of Chapter 58 of the General Statutes is a separate agency, the State Fire and Rescue Commission. The State Fire and Rescue Commission, as a separate agency from the Commissioner of Insurance, has independent rulemaking authority:

Abigail M. Hammond
Commission Counsel

§ 58-78-10. State Fire and Rescue Commission - Organization; rules and regulations; meetings.

- (a) Organization. - The Commission shall elect from its voting members a chair and vice-chair to serve as provided by the rules adopted by the Commission.
- (b) Rules and Regulations. - The Commission shall adopt such rules and regulations, not inconsistent with the laws of this State as may be required by the federal government for programs and grants-in-aid for fire protection, firefighting, and rescue purposes which may be made available to the State by the federal government. The Commission shall be the single State agency responsible for establishing policy, planning and carrying out the State's duties with respect to all programs of and grants to the State by the United States Fire Administration, Federal Emergency Management Agency. In respect to such programs and grants, the Commission shall have authority to review, approve and maintain general oversight to the State plan and its implementation, including subgrants and allocations to local units of government and local fire prevention and control and rescue agencies. All actions taken by the Commission in the performance of its duties shall be implemented and administered by the Department.
- (c) Meetings. - The Commission shall meet quarterly. Seven members shall constitute a quorum. All meetings shall be open to the public. (1977, c. 1064, s. 1; 1981, c. 791, s. 5; 1983, c. 840, s. 3; 1985, c. 757, s. 167(b), (c), (e), (f); 1989, c. 750, s. 1; 2015-39, s. 3.)

The State Fire and Rescue Commission, in compliance with the following directives of the General Assembly, has promulgated and adopted rules set forth in 11 NCAC 05B:

§ 58-78-5. State Fire and Rescue Commission - Powers and duties.

- (a) The Commission shall have the following powers and duties:
 - (1) To formally adopt a State Fire Education and Training Plan, a State Master Plan for Fire Prevention and Control, a Rescue Training Plan, and a State Master Plan for Rescue Services;
 - (2) To assist and participate with State and local fire prevention and control agencies in the improvement of fire prevention and control in North Carolina and to work with State and local rescue agencies to improve rescue services in the State;
 - (3) To increase the professional skills of fire protection and fire-fighting personnel and rescue personnel;
 - (4) To encourage public support for fire prevention and control and rescue services;
 - (5) To accept gifts, devises, grants, matching funds, and other considerations from private or governmental sources for use in promoting its work;
 - (6) To make grants for use in pursuing its objectives, under such conditions as are deemed to be necessary and such other powers as may be necessary to carry out the State's duties with respect to all grants to the State by the United States Fire Administration and the National Fire Academy; and all support programs brought into the State by these two entities shall be coordinated and controlled by the Commission;
 - (7) To make studies and recommendations for the improvement of fire prevention and control and rescue services in the State and to make studies and recommendations for the coordination and implementation of effective fire prevention and control and rescue

- services and for effective fire prevention and control and rescue services education;
- (8) To set objectives and priorities for the improvement of fire prevention and control and rescue services throughout the State;
 - (9) To advise State and local interests of opportunities for securing federal assistance for fire prevention and control and rescue services and for improving fire prevention and control and rescue services administration and planning within the State of North Carolina;
 - (10) To assist State agencies and institutions of local government and combinations thereof in the preparation and processing of applications for financial aid and to support fire prevention and control, rescue services, and planning and administration;
 - (11) To encourage and assist coordination at the federal, State and local government levels in the preparation and implementation of fire prevention and control and rescue services administrative improvements and crime reduction plans;
 - (12) To apply for, receive, disburse and audit the use of funds received from any public and private agencies and instrumentalities for fire prevention and control and rescue services, their administration and plans therefor;
 - (13) To enter into monitoring and evaluating the results of contracts and agreements necessary or incidental to the discharge of its assigned responsibilities;
 - (14) To provide technical assistance to State and local fire prevention and control and rescue agencies in developing programs for improvement;
 - (14a) To serve as a central office for the collection and dissemination of information relative to fire service and rescue service activities and programs in State government. All State government agencies conducting fire service and rescue service related programs and activities shall report the status of these programs and activities to the Commission on a quarterly basis and they shall also report to the Commission any new programs or changes to existing programs as they are implemented;
 - (14b) To establish voluntary minimum professional qualifications for all levels of fire service and rescue service personnel, and to issue, deny, suspend, revoke or take similar actions with respect to certifications issued by the Commission of minimum professional qualifications established under this subdivision.
 - (14c) To prepare an annual report to the Governor on its fire prevention and control activities and plans, rescue activities and plans, and to recommend legislation concerning fire prevention and control and rescue services;
 - (14d) To reimburse the members of the Commission's certification board, in accordance with G.S. 138-5, for travel and subsistence expenses incurred by them in their duties as certification board officers; and
 - (15) To take such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities.
 - (16) To provide workers' compensation benefits under G.S. 58-87-10, to create a Volunteer Safety Workers' Compensation Board to assist it in performing this duty, and to reimburse the members of the Commission's Volunteer Safety Workers' Compensation Board in accordance with G.S. 138-5 for travel and subsistence expenses incurred by them.

- (b) Each State agency involved in fire prevention and control or rescue related activities shall furnish the executive director of the Commission such information as may be required to carry out the intent of this section. (1977, c. 1064, s. 1; 1981, c. 791, ss. 3, 4; 1985, c. 757, s. 167(b); 1989, c. 750, s. 1; 1993, c. 321, s. 41; 1995, c. 507, s. 7.21A(c); 2011-284, s. 58; 2015-39, s. 2.)

In addition to the staff counsel's recommendation to object based upon the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 to adopt rules within the authority of the State Fire and Rescue Commission, lines five through seven of this Rule has added the following language:

Fire departments shall provide at least 4 hours of training per month, with each firefighter obtaining a minimum of 36 hours of training per year. A signed or verified roster of personnel containing the names and hours of training attendance shall be kept for each training session.

The proposed amended rule language does not indicate who is signing or verifying the roster, or who is responsible for keeping the documentation. G.S. 58-86-25 addresses the requirements for rosters of the training. G.S. 58-86-25 states the following:

§ 58-86-25. Determination and certification of eligible firefighters.

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

The proposed amended rule language does not appear to clarify G.S. 58-86-25, but appears to add unclear additional requirements. The proposed amended rule language replaces the statutory requirement of the record being a "certified roster" to being a "signed or verified roster." G.S. 58-86-25 should control the reporting requirements.

G.S. 150B-21.9 requires the following of the Rules Review Commission:

- (a) Standards. - The Commission must determine whether a rule meets all of the following criteria:
- (1) It is within the authority delegated to the agency by the General Assembly.

- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

SUMMARY:

It is staff counsel's opinion that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(1), as the State Fire and Rescue Commission is a separate agency and rulemaking body. The agency and rulemaking body that promulgated this Rule is the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

Further, the proposed amended rule language on lines five through seven is unclear and appears to contradict G.S. 58-86-25. It is staff' counsel's opinion that this Rule should also be objected to for failure to comply with G.S. 150B-21.9(a)(2).

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0505

DEADLINE FOR RECEIPT: Thursday, November 10, 2016

NOTE WELL: *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Line 5, spell out "4" in accordance with [26 NCAC 02C .0108\(9\)](#)

Lines 6 thru 7, what is the purpose of the proposed amendment? It appears to change the requirements of G.S. 58-86-25, which requires the following:

"Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association."

This Rule appears to change "certified" to "signed or verified" and does not indicate who keeps these records. Please consider the following re-write:

"Fire departments shall provide at least four hours of training per month for eligible fireman to comply with G.S. 58-86-25. The fire department shall maintain copies of the reports submitted in compliance with G.S. 58-86-25."

In light of G.S. 58-86-2(4), what is the purpose of this amendment? Is the certification of departments of members occurring in this Section outside the scope of the North Carolina Firefighters' and Rescue Squad Workers' Pension Fund? Please clarify.

Considering adding something to this Rule to clarify how long the fire department must maintain the reports. Please note that G.S. 58-79-45 requires that those records be kept for only five years.

Lines 9 thru 17, who is providing the course referenced in these two Subparagraphs? The State Fire Marshal or the State Fire and Rescue Commission? Please clarify. Why is the title only in the second Subparagraph, and who is titling this course? If this course is

Abigail M. Hammond
Commission Counsel

Date submitted to agency: Thursday, October 27, 2016

created by the State Fire and Rescue Commission in accordance with G.S. 58-78-5, how is this Rule mandating the title of the course? If the State Fire and Rescue Commission has rules addressing this training, consider simply replacing this language with a cross-reference to the appropriate rule.

Line 10, add "State" between "Carolina" and "Fire"

Line 12, delete "but not limited to"

Line 14, delete "subject to change,"

Line 19, review the provided statutory authority. G.S. 58-2-40 is the general rulemaking authority for the Commissioner of Insurance, who serves as the State Fire Marshal. However, G.S. 58-78-5 is the rulemaking authority for a separate and distinct agency of the State Fire and Rescue Commission. That is not rulemaking authority for the Commissioner of Insurance, who serves as the State Fire Marshal. Please review and updated accordingly.

Line 19, changes in the text of the rule and history note must be tracked in accordance with [26 NCAC 02C .0405](#). Please update the authority line to match the current content of the NC Administrative Code and the amendment.

Line 19, what is the purpose of citing G.S. 58-86-25 when the statute is specifically discussed in the rule? The citation does not appear to support the authority for this Rule. Please update accordingly.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Abigail M. Hammond
Commission Counsel
Date submitted to agency: Thursday, October 27, 2016

1 11 NCAC 05A .0505 is amended as published in 31.04 NCR 283-284 as follows:

2 **11 NCAC 05A .0505 TRAINING REQUIREMENTS**

3 (a) All members of fire departments shall comply with the ~~drills and meetings training~~ requirements of G.S. 58-
4 86-25.

5 (1) Fire departments shall provide at least 4 hours of training per month, with each firefighter obtaining
6 a minimum of 36 hours of training per year. A signed or verified roster of personnel containing the
7 names and hours of training attendance shall be kept for each training session.

8 (b) The chief officer of each fire department shall:

9 (1) within one year of appointment, complete a class on basic management of fire department operations
10 ~~and records~~ approved by the North Carolina Fire and Rescue Commission for chief officer based
11 upon National Fire Protection Association (NFPA) standards for chief officer. NFPA Standard 1021
12 is incorporated into this Subchapter by reference, including but not limited to subsequent
13 amendments or editions. NFPA Standard 1021 is available from the National Fire Protection
14 Association at <http://www.nfpa.org/> for a fee subject to change, of ~~thirty-seven dollars (\$37.00);~~
15 forty-four dollars and fifty cents (\$44.50); and

16 (2) complete the course as described in Subparagraph (1) of this Paragraph, which shall be titled "Chief
17 101" ~~a minimum of~~ every five years.

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19 *History Note: Authority G.S. 58-2-40; 58-78-5; 58-86-25;*

20 *Eff. September 1, 1985;*

21 *Amended Eff. December 1, 2016; October 1, 2010; October 1, 2006; July 1, 1992.*
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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 .0508

RECOMMENDED ACTION:

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

COMMENT:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0508 Apparatus, cites the statutory authority as G.S. 58-2-40; 58-36-10(3); 58-86-25. Those statutes are set forth below:

§ 58-2-40. Powers and duties of Commissioner.

The Commissioner shall:

Abigail M. Hammond
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

§ 58-36-10. Method of rate making; factors considered.

The following standards shall apply to the making and use of rates:

- (1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.
- (2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.
- (3) In the case of property insurance rates under this Article, consideration may be given to the experience of property insurance business during the most recent five-year period for which that experience is available. In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply.
- (4) Risks may be grouped by classifications and lines of insurance for establishment of rates, loss costs, and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions or both. Those standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. The Bureau shall establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction. No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or gender of the persons insured. The Bureau shall at least once every three years make a complete review of the filed classification rates to determine whether they are proper and supported by statistical evidence, and shall at least once every 10 years make a complete review of the territories for nonfleet private passenger motor vehicle insurance to determine whether they are proper and reasonable.
- (5) In the case of workers' compensation insurance and employers' liability insurance written in connection therewith, due consideration shall be given to the past and prospective effects of changes in compensation benefits and in legal and medical fees that are provided for in General Statutes Chapter 97.
- (6) To ensure that policyholders in the beach and coastal areas of the North Carolina Insurance Underwriting Association whose risks are of the same

class and essentially the same hazard are charged premiums that are commensurate with the risk of loss and premiums that are actuarially correct, the North Carolina Rate Bureau shall revise, monitor, and review the existing territorial boundaries used by the Bureau when appropriate to establish geographic territories in the beach and coastal areas of the Association for rating purposes. In revising these territories, the Bureau shall use statistical data sources available to define such territories to represent relative risk factors that are actuarially sound and not unfairly discriminatory. The new territories and any subsequent amendments proposed by the North Carolina Rate Bureau or Association shall be subject to the Commissioner's approval and shall appear on the Bureau's Web site, the Association's Web site, and the Department's Web site once approved.

- (7) Property insurance rates established under this Article may include a provision to reflect the cost of reinsurance to protect against catastrophic exposure within this State. Amounts to be paid to reinsurers, ceding commissions paid or to be paid to insurers by reinsurers, expected reinsurance recoveries, North Carolina exposure to catastrophic events relative to other states' exposure, and any other relevant information may be considered when determining the provision to reflect the cost of reinsurance. (1977, c. 828, s. 6; 1979, c. 824, s. 1; 1981, c. 521, s. 5; c. 790; 1987, c. 632, s. 1; 1991, c. 644, s. 39; 1999-132, s. 3.3; 2000-176, s. 1; 2004-203, s. 5(a); 2009-472, s. 2; 2012-162, s. 3.)

§ 58-86-25. Determination and certification of eligible firefighters.

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

In a technical change request, an inquiry was made regarding the applicability of G.S. 58-86-25 to this Rule. The agency responded that there is no opposition to deleting the reference to G.S. 58-86-25, which leaves the remaining statutes of G.S. 58-2-40 and 58-36-10(3).

The use of G.S. 58-36-10(3) as the authority for Rule 11 NCAC 05A .0508 is questionable, as Article 36 of Chapter 58 of the General Statutes pertains to the Rate Bureau, a separate entity, and the specific cited statutes sets forth a process for rating property insurance. It is unclear if the authority granted to the Commissioner of Insurance to set rates in G.S. 58-36-10(3) is being implemented in this Rule by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

G.S. 150B-21.9 requires the following of the Rules Review Commission:

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

(4) It was adopted in accordance with Part 2 of this Article.

SUMMARY:

Staff counsel is concerned that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate premium rates in a process that is contrary to the requirements of G.S. 58-36-10(3). It is staff counsel's recommendation to the Rules Review Commission to object to this Rule for issues of clarity regarding applicability of G.S. 58-36-10(3) in implementation of this Rule. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2). Alternatively, if the Commissioner of Insurance is implementing the rate review process of G.S. 58-36-10(3) as a rule of the State Fire Marshal, it is staff counsel's recommendation that this Rule should be objected to for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0508

DEADLINE FOR RECEIPT: Thursday, November 10, 2016

NOTE WELL: This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Who is providing the "certification" as discussed in this Rule? The reference to certification in G.S. 58-86-2(4) provides that "fire department which is certified to the Commissioner of Insurance by the governing body" and G.S. 58-86-25 provides the following:

"...the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board."

In light of the above statutes, review the provided statutory authority. G.S. 58-2-40 is the general rulemaking authority for the Commissioner of Insurance, who serves as the State Fire Marshal. However, G.S. 58-36-10(3) is the authority of rate making, which is not the content of this Rule. It is unclear how the Commissioner of Insurance may address the apparatus required based upon the statutes provided.

Line 12, whose "certification"? Please clarify.

Line 15, delete the comma after "fee"

Line 15, delete "subject to change,"

Lines 24 through 29, what is the authority for requiring this record keeping? Please clarify.

Lines 25 and 28, add a comma after "service trucks"

Line 32, add a comma after "capacity"

Abigail M. Hammond
Commission Counsel

Date submitted to agency: Thursday, October 27, 2016

Line 32, replace “for” with “combined between the”

Lines 34 thru 35, is this sentence an accurate description of the process? Could “the necessary” be replaced with “a”? Is the clause “or refiling” necessary language? Is the added “with hoses or equipment” necessary language? Consider the following re-write:

“The tanker shall be equipped with a hose for filling the tank for transferring water to the engine or other devices.”

Line 36, define or delete “fully”

Page 2, line 1, is “baffled” a known industry term? If not, define or delete.

Page 2, line 15, who is doing the “issu[ing] to all firefighters” in this Rule? Please clarify.

Page 2, line 29, should there be a period after “pound” or should it be a comma? Please clarify.

Page 2, line 33, what is the purpose of citing G.S. 58-86-25 when the statute is specifically discussed in the rule? The citation does not appear to support the authority for this Rule. Please update accordingly.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Abigail M. Hammond
Commission Counsel
Date submitted to agency: Thursday, October 27, 2016

11 NCAC 05A .0508 is amended as published in 31.04 NCR 284-285 as follows:

11 NCAC 05A .0508 APPARATUS

To qualify for ~~initial inspection~~ certification and receive or maintain a minimum rating of Class "9S", the fire department shall have the following apparatus, ~~and equipment: equipment, and documentation:~~

(1) ~~Pumper. Engine.~~

(a) The fire department shall have an approved ~~pumper engine~~ (automotive fire apparatus equipped with a fire pump and tank). To be approved, the fire department ~~pumper engine~~ ~~must shall~~ be certified by Underwriters Laboratories, Inc., and constructed in accordance with the National Fire Protection Association Standard 1901 - Standard for Automotive Fire Apparatus. The apparatus shall not be loaded beyond limits certified by the "Gross Vehicle Weight" label attached to the vehicle; nor shall the vehicle be modified in a manner that would invalidate this certification. NFPA Standard 1901 is incorporated into this Subchapter by reference, but not including subsequent amendments or editions. NFPA Standard 1901 is available from the National Fire Protection Association at <http://www.nfpa.org/> for a fee, subject to change, of fifty dollars (\$50.00)-forty-four dollars and fifty cents (\$44.50).

(b) The pump shall have a rated capacity of not less than 750 gallons per minute at 150 pounds per square inch net pump pressure.

(c) The ~~pumper engine~~ shall be equipped with at least a ~~500~~ 300 gallon water tank.

(d) A service test ~~must shall~~ have been performed on the "first responding" ~~pumper engine~~ during the 12-month period before the inspection. If the ~~pumper engine~~ ~~has had~~ been purchased as new within the 12-month period before the "9S" inspection, the U.L. Certificate meets this requirement.

(e) The fire departments shall maintain documentation of all equipment and apparatus including engines, tankers, service trucks and aerial apparatus through an inventory list. Monthly inventory checks shall be recorded for 12 consecutive months.

(f) The fire departments shall maintain documentation of maintenance checklists for all apparatus including engines, tankers, service trucks and aerial apparatus and records verifying that all apparatus is checked monthly for 12 consecutive months.

(2) ~~Tanker. Tanker (or mobile water supply capacity).~~

(a) The fire department shall have a motorized tank truck of at least 1000 gallons water capacity or enough to equal at least ~~1500~~ 1300 gallons of water total for ~~pumper engine~~ and ~~tanker tanker~~.

(b) The tanker shall be equipped with the necessary hose for filling or refilling the tank ~~with and~~ ~~hose hoses or equipment~~ for transferring water to the ~~pumper engine or other devices~~.

(c) The tanker, when fully loaded, shall not exceed the Gross Vehicle Weight limits as certified on the label attached to the vehicle; nor shall the vehicle be modified in a manner that

would invalidate this certification. All tankers shall be baffled in accordance with the National Fire Protection Association Standard 1901 – Standard for Automotive Fire Apparatus which is available from the National Fire Protection Association.

(3) The following equipment shall be carried on responding fire department pumpers:

- (a) The ~~pumper engine~~ shall be equipped with 2-~~150~~ 200 foot 1-1/2 inch or 1-3/4 inch pre-connected hose lines with fog nozzles attached;
- (b) One booster reel or a third three-200 foot pre-connected hose ~~lines; line of 1-1/2 inch or larger with a nozzle attached;~~
- (c) Suction hose - size necessary to flow the capacity of pump on the ~~Engine engine~~ - 2 - 10 foot ~~sections; sections~~ (If the insurance district is 85% or more covered by useable hydrants the ~~Engine~~ engine may have a 15 foot section of soft suction hose size necessary to flow the capacity of the pump on the Engine engine);
- (d) Four OSHA approved self-contained breathing apparatus in proper working condition;
- (e) OSHA approved protective clothing for all firefighters including helmets, hoods, coats, pants, boots, and gloves or issued to all firefighters; and reflective clothing and helmet for traffic control personnel;
- (f) One 12 foot or 14 foot roof ladder;
- (g) One ~~24 foot~~ 24 foot, 28 foot, or 35 foot extension ladder;
- (h) One axe;
- (i) One claw tool ~~(Halligan- (One Halligan Tool may replace claw tool and or crowbar); crowbar but not both);~~
- (j) One crowbar ~~(Halligan- (One Halligan Tool may replace crowbar and or claw tool); claw tool but not both);~~
- (k) One pike pole, minimum 8 foot;
- (l) Two mounted rechargeable type portable hand lights suitable for hazardous conditions; (~~"4V" wet or "6V" dry~~);
- (m) 100 feet of utility rope, minimum ~~1/2 inch;~~ 1/2 inch diameter;
- ~~(n) Two shovels;~~
- ~~(o)(n)~~ Two 20 pound. Class B-C portable extinguishers;
- ~~(p)(o)~~ One First Aid kit; and
- ~~(q)(p)~~ One bolt cutter, with 14 inches or ~~longer; longer handles.~~

*History Note: Authority G.S. 58-2-40; 58-36-10(3); 58-86-25;
Eff. September 1, 1985;
Amended Eff. December 1, 2016; October 1, 2006; August 3, 1992.*

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 .0511

RECOMMENDED ACTION:

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

COMMENT:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0511 Six Mile Insurance District, cites the statutory authority as G.S. 58-2-40; 58-40-25(4); 58-86-25. Those statutes are set forth below:

§ 58-2-40. Powers and duties of Commissioner.

The Commissioner shall:

Abigail M. Hammond
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

§ 58-40-25. Rating methods.

In determining whether rates comply with the standards under G.S. 58-40-20, the following criteria shall be applied:

...

(4) In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 16; 1991, c. 644, s. 40; 2000-176, s. 2; 2004-203, s. 5(b).)

§ 58-86-25. Determination and certification of eligible firefighters.

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

In a technical change request, an inquiry was made regarding the applicability of G.S. 58-86-25 to this Rule. The agency responded that there is no opposition to deleting the reference to G.S. 58-86-25, which leaves the remaining statutes of G.S. 58-2-40 and 58-40-25(4).

It is unclear if the authority granted to the Commissioner of Insurance to set rates in G.S. 58-40-25 is being implemented in this Rule by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

G.S. 150B-21.9 requires the following of the Rules Review Commission:

- (a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

SUMMARY:

Staff counsel is concerned that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate premium rates in a process that is contrary to the requirements of G.S. 58-40-25(4). It is staff counsel's recommendation to the Rules Review Commission to object to this Rule for issues of clarity regarding applicability of G.S. 58-40-25(4) in implementation of this Rule. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2). Alternatively, if the Commissioner of Insurance is implementing the rate review process of G.S. 58-40-25(4) as a rule of the State Fire Marshal, it is staff counsel's recommendation that this Rule should be objected to for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0511

DEADLINE FOR RECEIPT: Thursday, November 10, 2016

NOTE WELL: *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Line 3, where does "six miles" come from? This limitation does not appear to be within Chapter 58 of the G.S.. Is there another rule of the Commissioner that could be cross-referenced? Please clarify.

Lines 4 thru 13 appears to be a list. Begin clauses on lines 4, 6, 8, and 12 with lowercase letters. Replace the periods on lines 5, 7, and 11 with semicolons. Line 11, add an "and" at the end of the clause.

Lines 6 thru 7, uncapitalize "County Commissioners"

Line 7, what is the purpose of the clause "as set forth in G.S. 153A-233" as that statute does not require any maps. Please clarify.

Line 8, who is the "department"? If it is the "fire department" than add "fire" to clarify.

Line 12, is it the "County" or the "fire department" that is establishing the protocols? Please clarify.

Line 12, if "County" remains, uncapitalize the term

Line 15, what is the purpose of citing G.S. 58-86-25 when the statute is specifically discussed in the rule? The citation does not appear to support the authority for this Rule. Please update accordingly.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Abigail M. Hammond
Commission Counsel

Date submitted to agency: Thursday, October 27, 2016

1 11 NCAC 05A .0511 is amended as published in 31.04 NCR 285-286 as follows:

2 **11 NCAC 05A .0511 SIX MILE INSURANCE DISTRICT**

3 To extend its insurance district to six miles, each fire department shall apply and meet the following criteria:

- 4 (1) The fire department shall provide ~~the~~ OSFM with a hand drawn map and written description or a
5 GIS computer generated map of its fire district.
- 6 (2) The map and written ~~description~~description, or GIS maps shall be presented to the County
7 Commissioners for their approval, as set forth in G.S. 153A-233.
- 8 (3) The department applying to extend its insurance district to six miles shall enter into a written
9 automatic aid contract with the adjoining districts to the area being extended specifying that "an
10 apparatus capable of transporting" a minimum of 1000 gallons of water shall be dispatched
11 simultaneously with the department whose district the incident is occurring within.
- 12 (4) The County shall establish automatic aid response protocols. These protocols shall be maintained at
13 the county communication center and shall be used on all alarms involving reported structure fires.

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15 *History Note: Authority G.S. 58-2-40; 58-86-25; 58-40-25(4);*
16 *Eff. October 1, 2006;*
17 *Amended Eff. December 1, 2016.*
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