



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: State Board of Elections

2. Rule citation & name: 08 NCAC 09 .0110, ACTIONS OF COUNTY BOARD AS TO ELECTION PROTESTS (amendment); 08 NCAC 02 .0110, FIRST RECOUNT (amendment); and 08 NCAC 09 .0107, SECONDARY RECOUNTS (adoption)

3. Action: ☒ Adoption ☒ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes ☒ No **Effective date:**

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: June 17, 2024
- b. Proposed Temporary Rule published on the OAH website: June 24, 2024
- c. Public Hearing date: July 8, 2024
- d. Comment Period: June 18, 2024 to July 11, 2024
- e. Notice pursuant to G.S. 150B-21.1(a3)(2): June 17, 2024
- f. Adoption by agency on: July 16, 2024
- g. Proposed effective date of temporary rule if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3: August 1, 2024

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☐ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite:
Effective date:
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☐ A recent court order.
Cite order:
- ☒ Other: Pursuant to GS 150B-21.1(a)(11), State Board finds abbreviated notice and hearing to be practical to implement provisions of state law for which the agency may adopt rules, and to preserve the integrity of the elections process.

Explain: The State Board found that the immediate adoption of the proposed rules is required to implement provisions of the General Statutes governing election protests and recounts, both of which are proceedings the Board is authorized to adopt rules for, and to ensure that these post-election proceedings are concluded in enough time to comply with the deadline in federal law for certifying presidential electors. The abbreviated notice and hearing schedule put forth by the State Board were of practical necessity, to gather public input in time to adopt rules in advance of the 2024 general election. Finally, the rules need to become effective immediately in order to preserve the integrity of the elections process, by avoiding unnecessary post-election delays in determining official election results and authorizing election winners to take office, delays which could undermine the public's confidence in the electoral process.

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

The State Board found that adherence to the notice and hearing requirements of permanent rulemaking would be contrary to the public interest, because it would mean that the proposed rules could not go into effect until after the general election, which is when they are needed to ensure prompt resolution of post-election proceedings.

The main purpose of these rules is to avoid protest and recount proceedings taking an unnecessary amount of time during a post-election canvass. The framework of the statutes governing the canvass period intend for post-election processes to be completed in short order, so that election results can be timely certified and elected officials can assume office. But there are some gaps in the rules for the timelines governing election protests and recounts that, at times, unnecessarily lead to the delay of the certification of elections.

The State Board has witnessed such delays in recent years, with protest decisions being delayed for weeks at a time, well past State Board canvass, such that protest appeals do not even reach the State Board until weeks after the State canvass. With the possibility of appealing State Board decisions on protests to Wake Superior Court, the delays in some counties have led to the inability to arrive at finality in certain contests until months after the election is over. For example, in Robeson County, a protest over a 2023 municipal contest was so delayed that it didn't reach superior court until mid-January 2024. That contest is still undecided because a superior court ordered the county board to conduct a new protest hearing, which was recently completed. And as recently as the statewide primary in March 2024, there was a multicounty recount in a state legislative contest that was not completed until the day before the State Board's canvass meeting. These sorts of delays are not what the statutes contemplate for post-election processes.

In addition to these recent examples of unnecessary delays in contest certification, another concern is the ability of the State Board to timely certify the winner of the presidential contest in November. The deadline for certifying presidential electors is governed by federal law. The State Board must certify the winner of the presidential election in sufficient time for the Governor to issue "certificates of ascertainment" to the official slate of electors to attend the Electoral College. The Governor's certificates must be issued on or before December 11, 2024. See 3 U.S.C. § 5(a)(1) (requiring the certificates to issue no later than 6 days before the Electoral College meeting, which takes place on December 17 this year, per 3 U.S.C. § 7). Accordingly, the State Board seeks to avoid the possibility that North Carolina cannot certify the presidential contest on time.

Accordingly, the abbreviated notice and hearing schedule established by the State Board for these rules was of practical necessity, to gather public input in time to adopt rules in advance of the 2024 general election. The rules need to become effective immediately in order to preserve the integrity of the elections process, by avoiding unnecessary post-election delays in determining official election results and authorizing election winners to take office, delays which could undermine the public's confidence in the electoral process.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Paul Cox, General Counsel

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Agency contact, if any:

Phone:

E-Mail:

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Typed Name: Alan Hirsch

Title: Chair

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RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

08 NCAC 02 .0110 is amended under temporary procedures as follows:

08 NCAC 02 .0110 ACTIONS OF COUNTY BOARD AS TO ELECTION PROTESTS

(a) The county board shall ~~deliver~~ transmit by email a copy of any filed election protest, including any attachments, to the State Board as follows:

- (1) if hand delivered or mailed, within 24 hours after the election protest is filed;
- (2) if faxed, the same day the election protest is filed; or
- (3) if emailed, the same day the election protest is filed.

(b) The county board shall not consider election protests not timely filed, but shall ~~refer~~ refer, in the same manner and within the time period provided in Paragraph (a) of this Rule, all such untimely protests, along with copies of the protest and attachments, to the State Board office for consideration under G.S. 163-182.12. For the purposes of this Rule, timely means within the time specified in G.S. 163-182.9.

(c) Upon receipt of a timely filed election protest, the county board of elections shall hold a preliminary consideration ~~meeting hearing~~ in accordance with ~~G.S. 163-182.10~~. G.S. 163-182.10 within two business days of when the protest is filed. If the county board dismisses the protest upon preliminary consideration, the county board shall file its written decision at the board office within two business days of the preliminary consideration meeting and shall serve the written decision in the manner provided under Subparagraph (c)(2) of this Rule. If the county board determines that a hearing is necessary, the board shall set the hearing no later than ~~ten~~ five business days from the date of the preliminary ~~consideration, consideration meeting~~ and shall start no earlier than 8:00 a.m. and no later than 8:00 p.m. at any location set by the county board of elections. The county board may continue hearings for good cause as determined by the county board. Only for good cause and upon informing the State Board office, may a hearing be set on or continued to a weekend day or holiday. Examples of good cause include, but are not limited to, procuring documentary evidence or securing witness testimony necessary to conclude the hearing.

(d) Notice of hearing as required by ~~G.S. 163-182.10(b)~~ G.S. 163-182.10(b)(2) shall be given at least three business days prior to the day of the hearing, and the notice shall be provided by any of the following means: required shall be ~~notice by in-person oral notice, written notice to an email address supplied by any person required to receive notice, or, only if the county board lacks an email address, by U.S. mail to an address supplied by any person required to receive notice followed immediately by a phone call, if the person has supplied a phone number to the board. any means chosen by the county board.~~ Any oral notice of the hearing shall be followed with a written notice sent prior to the hearing date. The oral notice shall constitute valid notice meeting the three-day notice requirement.

(e) The county board shall follow these procedures when considering an election protest: Required procedures include:

- (1) Upon request by a protester or interested person, the chair or any two members of the county board may issue subpoenas for ~~witnesses persons or documents.~~ documents, when the chair or two members of the county board conclude that the witnesses or documents are likely to provide information that is both relevant and material to the questions the county board must adjudicate in the protest. Such subpoenas shall be served in the same ~~manner matter~~ as allowed in the North Carolina Rules of Civil Procedure.
- (2) The county board shall notify the person protesting, any affected candidate, and any affected officeholder of its decision in a protest hearing no later than 5:00 p.m. the next day after the conclusion of the hearing itself. The board shall file at the board office a written decision within the mandates of G.S. 163-182.10(d) by 5:00 p.m. three five business days after the conclusion of the protest hearing oral decision is given to the person filing the protest. Such written decision shall be served at the same time it is filed at the board office by email to an email address supplied by any person required to receive notice under G.S. 163-182.10(b). If the county board has no email address for any person required to receive notice under G.S. 163-182.10(b), the board shall serve that person by U.S. mail and immediately call that person, if the person has supplied a phone number to the board, to notify them that the decision has been filed. any means of delivery upon the protestor and any affected candidate or officeholder within 24 hours after being filed at the board office. Nothing herein shall discourage more prompt decisions and written orders.
- (3) All election protest hearings before county boards shall be recorded by a court ~~reporter.~~ reporter or by mechanical means. The hearing need not be transcribed unless the board's decision is appealed. Upon notice of appeal to the State Board of an election protest, the county board shall cause the record of the hearing to be transcribed and delivered to the State Board, at the county board's expense, within seven business days of the notice of appeal. Transcripts of hearings shall be kept for two years after their creation.

1 ~~(4) If the State Board sets an appeal for hearing, it shall designate who shall appear on behalf of the~~
2 ~~county board.~~

3 (f) A county board of elections shall ~~timely~~ hear and decide all timely filed protests, unless:

4 (1) the protest is administratively dismissed pursuant to 08 NCAC 02 .0114; or

5 (2) the county board of elections receives alternative instructions from the State Board issued under
6 G.S. 163-182.12.

7 If a protest does not concern the manner in which votes were counted or results tabulated, a county board of elections
8 shall not delay canvass in order to hear the protest. A protest that alleges the occurrence of an election law violation
9 regarding an insufficient number of votes to change the outcome of a contest within the jurisdiction of a county board
10 of elections shall not delay canvass by a county board of elections.

11
12 *History Note:* *Authority G.S. 163-22; 163-182.10;*
13 *Temporary Adoption Eff. April 15, 2002;*
14 *Eff. August 1, 2004;*
15 *Readopted Eff. September 1, 2018;*
16 *Amended Eff. November 1, ~~2020~~. 2020;*
17 *Temporary Amendment Eff. August 1, 2024.*
18

08 NCAC 09 .0107 is amended under temporary procedures as follows:

08 NCAC 09 .0107 FIRST RECOUNT

In the first recount conducted by the county board of elections in accordance with G.S. 163-182.7, all ballots that were originally counted shall be ~~counted~~ recounted again by ~~machine~~, machine, notwithstanding the method by which the ballots were originally counted. All ballots that are rejected for tabulation purposes by the machines during the recount shall be recounted by hand by a bi-partisan team of four in accordance with 08 NCAC 09. ~~0106(d)~~0106(d). ~~or duplicated and counted by machine.~~ Ballots accepted by the machines during the recount shall not be counted by hand, regardless of whether the ballot is marked, contains overvotes, or is blank. The board of elections having jurisdiction over the ballot item shall schedule the first recount to begin within 3 business days of the demand for a mandatory recount or the decision to conduct a discretionary recount under G.S. 163-182.7, except the recount shall begin no earlier than the conclusion of the county canvass meeting pursuant to G.S. 163-182.5.

*History Note: Authority G.S. 163-22; 163-182.7;
 Temporary Adoption Eff. April 15, 2002;
 Eff. August 1, 2004;
 Readopted Eff. June 1, 2019;
 Amended Eff. September 1, ~~2021~~, 2021;
 Temporary Amendment Eff. August 1, 2024.*

1 08 NCAC 09 .0110 is adopted under temporary procedures as follows:
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4 **08 NCAC 09 .0110 SECONDARY RECOUNTS**
5

6 For any hand-to-eye recount conducted under G.S. 163-182.7A, each county board of elections involved in
7 the recount shall provide notice at least 24 hours in advance of the recount by email to the county board's
8 notice list under G.S. 143-318.12(b)(2), county party chairs, and the candidates in the contest subject to the
9 recount. No separate notice of a hand-to-eye recount is required if the hand-to-eye recount occurs
10 immediately upon the conclusion of the first recount under 08 NCAC 09 .0107 and the notice of the first
11 recount stated that a hand-to-eye recount, if required, could take place upon the conclusion of the first
12 recount. The board of elections having jurisdiction over the ballot item under G.S. 163-182.7 shall schedule
13 any hand-to-eye recount to begin within 2 business days of the demand for a hand-to-eye recount, whether
14 that recount is a sample recount or a full recount.
15

16 *History Note: Authority G.S. 163-22; 163-182.7; 163-182.7A*
17 *Temporary Adoption Eff. August 1, 2024.*
18