

# *Petition for Rulemaking*

## **Removal of Votes of Persons Who Voted but Died Before Election Day**

The below Petition for Rulemaking (“Petition”) is submitted pursuant to N.C.G.S. § 150B-20 as implemented by 08 NCAC 15 .0101 and arranged in numbered sections, as prescribed therein:

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Petitioner

Steven Ray Holland (“Petitioner”) in my personal capacity only, as a citizen of Buncombe County residing at 39 Al Faye Farm Way near the Town of Weaverville, and reachable at [steve@wncnature.com](mailto:steve@wncnature.com) for purposes relevant to this Petition.

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Citation

The Petitioner proposes the following new rule:  
08 NCAC 22 PROCEDURE FOR REMOVAL OF VOTES OF PERSONS WHO VOTED BUT DIED BEFORE ELECTION DAY. It does not concern the repeal or amendment of an existing rule but **would** supersede a portion of the guidance provided in Numbered Memo 2022-05.

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Proposal

### **08 NCAC 22 .0101 PROCEDURE FOR REMOVAL OF VOTES OF PERSONS WHO VOTED BUT DIED BEFORE ELECTION DAY**

- (a) Subject to the due process rights of every voter, the votes of all persons who voted absentee-by-mail or at an early voting site but died before election day shall not be counted for any election or primary.
- (b) Each county board of elections shall use its best effort to identify persons who voted absentee-by-mail or at an early voting site and died before election day. It shall prominently post on the home page of its web site, at least 70 days prior to election day, the following statement: “The (insert county name here) County Board of Elections makes every effort to ensure the integrity of the election process by removing the votes of those who voted absentee-by-mail or at an early voting site and died before election day, including those who died outside North Carolina. (Deaths occurring outside North Carolina are not reported to North Carolina officials in a timely manner for this purpose.) The Board invites any person to report the death of early voters to the County Board of Elections up until the county canvass meeting following

the election. A report can be made by email to the Chair of the Board of Elections at (insert email address here), by U.S. mail addressed to Chair, (insert county name here) County Board of Elections, (insert street address, city, state, and zip code here), or by appearing in person at the Board of Elections office or at the County Canvass Meeting. Please provide supporting information if possible, such as a copy of a death certificate or published obituary.” This statement shall remain posted until county canvass is complete.

- (c) Under the authority granted to it by G.S. 163-82.14, the State Board of Elections (“SBOE”) shall request from the Department of Health and Human Services (“DHHS”) a list retrieved from the N.C. Database Application for Vital Events (“NCDAVE”) of all deceased persons who:
- (1) were submitted to NCDAVE by an authorized funeral home, medical certifier, or medical examiner;
  - (2) died before election day; and
  - (3) have not previously been reported to SBOE by DHHS.

SBOE shall request that the list be generated six days following each general election, primary, and second primary, and four days following each partisan municipal primary or second primary, each nonpartisan municipal election when using the election and runoff method, and each nonpartisan municipal primary. SBOE shall request that the list contain the name, date of birth, date of death, last known address, and social security number of each deceased person and that the list be provided to SBOE electronically on the same day generated.

- (d) On the day the list described in Paragraph (c) is received, SBOE shall:
- (1) compile a list of deceased voters for prospective removal by county boards of elections (the “Deceased Voter List”) containing the names of all persons who meet all of the following criteria:
    - (A) named in the list prescribed in Paragraph (c) or named in a previous list of deceased state residents obtained from DHHS;

- (B) died between 70 days prior to election day and election day; and
- (C) voted absentee-by-mail or at an early voting site;

and

- (2) submit the Deceased Voter List to the county boards of elections and prominently post it on the SBOE website as public information.

The Deceased Voter List shall contain for each deceased person, his or her name, date of birth, date of death, residential address, county of registration, voter registration number, and date voted.

- (e) Under uniform procedures promulgated by SBOE for county board challenges, on or before seven days following each general election, primary, and second primary, and on or before four days following each partisan municipal primary or second primary, each nonpartisan municipal election when using the election and runoff method, and each nonpartisan municipal primary, each county board of elections shall:
  - (1) review that portion of the Deceased Voter List that contains voters registered in its county and determine for each person, if that person's vote shall be removed due to the voter dying before election day;
  - (2) identify any additional voters to whom the board's attention was called from any source, who voted absentee-by-mail or at an early voting site and died before election day but who are not on the Deceased Voter List and determine if the vote of each person so identified shall be removed due to the voter dying before election day; and
  - (3) take formal action to remove those votes determined in subparagraphs (1) and (2) to have been cast by voters who died before election day.
- (f) One hour prior to the applicable canvass meeting time prescribed in G.S. 163-182.5.(b), -291(5), -293(c), or -294(b), each county board of elections shall compile a supplemental list of all persons to whom the county board of election's attention was called from any source, who voted absentee-by-mail or at an early voting site

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Proposal  
(continued)

and died before election day but whose vote was not previously removed, nor considered for removal through the procedures of Paragraph (e). If the number of persons on the supplemental list equals or exceeds the vote margin of any ballot item in the county or could affect the outcome of a multi-county ballot item, the county board shall delay its canvass meeting under its authority to do so pursuant to G.S. 163-182.5(b) until the votes of those voters on the supplemental list determined to have died before election day have been removed following the voter having been given due process. To determine if the outcome of a multi-county ballot item may be affected, the county board shall divide the number of people on the supplemental list by the then-current total number of votes cast in the county on that ballot item. The board shall then multiply that number by the then-current multi-county total number of votes cast on that ballot item. If this resulting number is equal to or greater than the total margin of the multi-county ballot item, the supplemental list shall be considered as outcome-determinative.

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Explanation  
and Effect

### ***Jurisdiction***

In North Carolina, the State Board of Elections has broad powers outlined in N.C.G.S. §163-182.12 to assure that an election is determined without irregularities which may have changed the result of an election. This proposed rule is well within the scope of the powers granted under this statute and well-suited to the statute's purpose. In addition, the State Board has reasonably taken the position that county boards of elections have authority to initiate board challenges after election day under the provisions of N.C.G.S. § 163-182.5. (a), as indicated in Footnote #6 of Numbered Memo 2022-05, revised December 15, 2023.

The State Board thus possesses clear jurisdiction over the subject matter of this Petition. In fact, the State Board of Elections has a responsibility and obligation to greatly reduce or eliminate the irregularities addressed by this rule. Further, regarding similar election matters, the State Board of Elections has previously exercised its rulemaking authority and has promulgated instructions via

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Explanation  
and Effect  
(continued)

Numbered Memos. Petitioner has standing to bring this matter, as any “person” may file a Petition for Rulemaking under 08 NCAC 15 .0101. So, the Board may proceed to the substance.

### **Problems With Current Procedures**

Petitioner’s investigation indicates that in actual practice there is a wide variance in how county boards of elections conduct research to find and remove the votes of those who voted absentee-by-mail or at an early voting site and died before the election.

The current inconsistent adjudication of votes cast by this class of voters results in disparate and unequal treatment of voters within this class. It is prima facie evidence of an irregularity.

These less-than-adequate procedures unnecessarily subject the election process to justifiable protests filed under the procedures outlined in 08 NCAC 02 because the irregularity could affect the outcome of an election. These protests are a time-consuming and inefficient way to deal with this issue. Such was the case with the 2020 Supreme Court Chief Justice race where protests were filed with numerous county boards of elections. Approximately seven of those protests were appealed to the State Board of Elections, including the one filed by Petitioner. Petitioner’s protest appeal can be found at [www.tinyurl.com/hollandprotest2020](http://www.tinyurl.com/hollandprotest2020) and is hereby incorporated into this Petition by reference. Additional details and evidence of irregularity are contained therein.

It is important to note that unfortunately, SBOE has recently exacerbated the problem by restricting which votes a county board of elections can consider for removal depending on how the death is discovered. Restrictions outlined in the December 15, 2023 update to Numbered Memo 2022-05 prohibit a county board of elections from removing a vote because it was made aware of a death by an “outside individual or group.” Under the guidance in this memo, the Brunswick County Board of Elections would have presumably been prohibited from challenging and removing the vote of the Election Director’s mother when the Director reported it to the Board following the 2020 General Election because the Director is an outside individual and her

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### Explanation and Effect (continued)

mother's name did not appear in a "uniform review of records in its possession." These restrictions unnecessarily create ambiguity. Who is and is not an "outside individual?" The restrictions increase the potential for non-uniformity in the treatment of persons called to the board's attention in various ways who voted absentee-by-mail or at an early voting site and died before election day.

Failure to thoroughly research and remove the votes of those who voted absentee-by-mail or at an early voting site and died before election day unnecessarily perpetuates the narrative that "dead people are allowed to vote."

Ideally each county election office currently contacts its register of deeds and the registers of deeds in other counties to find out who has died between the time that absentee ballots are issued and election day. Contacting registers of deeds in other counties rarely, if ever, happens. Each county election office would have to check with all 100 North Carolina registers of deeds to be thorough because a death certificate is filed in the county in which a person dies - which is not necessarily the county in which that person is registered to vote. This is a tedious, time-consuming, and labor-intensive process. It usually takes at least several days after someone dies for a death certificate to be filed, making it challenging for county boards of elections to discover deaths that happen shortly before election day. That problem has been compounded in the past by a lag in reporting from DHHS to SBOE. Also, if a person dies in another state, that person's vote is likely to be missed for removal because the death is not reported to DHHS.

Guidance on how to handle removal of the votes of those who voted absentee-by-mail or at an early voting site and died before election day has been circulated but has not been consistently followed across the state. An unnumbered memo circulated on March 2, 2020, and updated November 2, 2020, titled, "Reminders for One-Stop and Absentee by Mail Challenges" says that a county board of elections cannot enter a challenge after 5 p.m. on election day, but Numbered Memo 2022-05 issued later, says a county board can enter challenges after election day. This numbered memo does not say that it supersedes the November 2, 2020 memo, leaving the issue unclear.

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Explanation  
and Effect  
(continued)

**Summary of New Procedures Under Proposed Rule**

1. Under its authority granted by N.C.G.S. §163-82.14, the State Board of Elections requests that the Department of Health and Human Services query NC-DAVE to provide a list of names of those persons who died between 70 days prior to election day and election day. By utilizing the relatively new NCDAVE system, the list from DHHS will result in SBOE efficiently receiving the most up-to-date reporting of deaths, including the names of those who have been submitted by authorized reporters (usually funeral homes) but whose name has not yet been forwarded to county registers of deeds.
2. Immediately upon receipt, the State Board of Elections cross-checks all names on this list against its database of those persons who have voted absentee-by-mail or at an early voting site. The names appearing on both lists are compiled into a Deceased Voter List which is immediately sent to all county boards of elections and posted on the SBOE web site.
3. Within two days of receipt of the list, each county board of elections reviews each person on the Deceased Voter List who is registered in its county and makes a final determination through the challenge process, prior to county canvass, on whether to remove that person's vote due to dying before election day.
4. Each county board of elections considers immediately before its canvass meeting, the number of any additional voters called to the board's attention who died before election day to see if such numbers could affect the outcome of any ballot item, including multi-county ballot items. If any such votes could affect the outcome, canvass is delayed, and those votes are considered for removal.

**Merits of Proposed Rule**

Agency rulemaking is most appropriate when used to formalize often-repeated administrative acts. An agency should consider rulemaking, especially where ministerial functions are foreseeable and frequent,

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### Explanation and Effect (continued)

because discretion is best confined to unforeseen and non-standard scenarios where ordinary deliberation and reliance interests necessarily yield to exigencies. The need to remove the votes of those who died before election day is a foreseeable event. As the popularity of voting absentee-by-mail or at an early voting site increases, the number of people who do so but die before election day will likely increase as well.

This proposed rule contains a specific, well-thought-out timeline which: 1) allows authorized reporters of deaths (usually funeral homes) six full days after the election to enter them in NCDAVE before the database is queried (four full days for elections with a shorter canvass period); 2) allows county boards of elections two days to decide on removal of each vote; 3) coincides with timelines set forth for removal of votes for other reasons; 4) preserves the due process rights of those whose votes are removed by providing them adequate notice of the right to appear before the board at canvass to dispute the removal of his or her vote (even though the person is presumably dead); and 5) allows county boards to delay canvass if needed to provide due process in instances where additional deaths called to its attention could be outcome-determinative.

The proposed rule lays out a specific formula to be used for multi-county races to determine if additional votes called to the attention of a county board of elections close to its scheduled canvass meeting could be outcome-determinative.

This proposed rule improves upon those procedures specified in Numbered Memo 2022-05 regarding how those persons who voted absentee-by-mail or at an early voting site and died before election day may be identified. By each county board of elections expressly inviting and empowering all members of the public to report such a death, a more thorough process can be achieved without the board needing to interpret who is an “outside individual” or be concerned with a person’s motive for reporting a death.

The procedures in this proposed rule would ensure a timely, uniform, and consistent removal of those votes cast absentee-by-mail or at an early voting site by a person who died before election day and keep validly cast votes from being diluted. The failure to remove such votes



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Explanation  
and Effect  
(continued)

could result in a candidate who garnered fewer validly cast votes winning a race.

The procedures in this proposal deserve to be codified in State Board of Election rules to give voters confidence in the integrity of our election system and to provide fairness to all voters and candidates under the law.

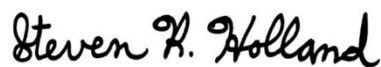
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Any Other  
Information

It is important to note that N.C.G.S. § 163-82.14 requires DHHS to provide monthly reports to SBOE. Since this statute does not require those reports to be made specifically on a calendar month basis, DHHS has the flexibility within the month to provide reports to SBOE to fulfill the requirements of this Proposed Rule and should indeed do so in the interests of keeping North Carolina elections compliant with the law.

Petitioner submits the above for review and decision in the manner and timeframe prescribed by 08 NCAC 15.0101. Petitioner requests an opportunity to address the Board regarding this Petition via remote video link (or in person if Petitioner's schedule allows). Petitioner expressly invites the Board to consider modifications to the proposed procedures specified in this rule that would better achieve the same result of ensuring that all votes cast absentee-by-mail or at an early voting site by a person who died before election day are removed.

Respectfully submitted on the  
28<sup>th</sup> day of March, 2024,



Steven Ray Holland

## *Proposed Rule with Annotations in Blue*

### **Removal of Votes of Persons Who Voted but Died Before Election Day**

#### **08 NCAC 22 .0101 PROCEDURE FOR REMOVAL OF VOTES OF PERSONS WHO VOTED BUT DIED BEFORE ELECTION DAY**

- (a) Subject to the due process rights of every voter [paragraph 8, SBOE order dated November 28, 2016], the votes of all persons who voted absentee-by-mail [also called “mail-in absentee” in G.S. Chapter 163 as updated by Session Law 2023-140, Senate Bill 747)] or at an early voting site [Session Law 2023-140, Senate Bill 747, Section 20] but died before election day [for purposes of this rule, “election day” means the date of any general election, primary election, or second primary election] shall not be counted for any election or primary [G.S. § 163-82.1(c)].
- (b) Each county board of elections shall use its best effort to identify persons who voted absentee-by-mail or at an early voting site and died before election day. It shall prominently post on the home page of its web site, at least 70 days prior to election day, [which is approximately 10 days prior to when absentee ballots begin to be mailed out for a general election] the following statement: “The (insert county name here) County Board of Elections makes every effort to ensure the integrity of the election process by removing the votes of those who voted absentee-by-mail or at an early voting site and died before election day, including those who died outside North Carolina. (Deaths occurring outside North Carolina are not reported to North Carolina officials in a timely manner for this purpose.) The Board invites any person to report the death of early voters to the County Board of Elections up until the county canvass meeting following the election [which is scheduled to be held 10 days or 7 days after an election, see G.S. 163-182.5.(b), -291(5), -293(c), and -294(b)]. A report can be made by email to the Chair of the Board of Elections at (insert email address here), by U.S. mail addressed to Chair, (insert county name here) County Board of Elections, (insert street address, city, state, and zip code here), or by appearing in person at the Board of Elections office or at the County Canvass Meeting. Please provide supporting information if possible, such as a copy of a death certificate or published obituary.” This statement shall remain posted until county canvass is complete.
- (c) Under the authority granted to it by G.S. 163-82.14, the State Board of Elections (“SBOE”) shall request from the Department of Health and Human

Services (“DHHS”) a list retrieved from the N.C. Database Application for Vital Events (“NCDAVE”) [NC’s centralized electronic system where deaths are registered since 2022] of all deceased persons who:

- (1) were submitted to NCDAVE by an authorized funeral home, medical certifier, or medical examiner;
- (2) died before election day; and
- (3) have not previously been reported to SBOE by DHHS.

SBOE shall request that the list be generated six days following each general election, primary, and second primary [allowing a full week for deaths occurring through the day before election day to be reported], and four days following each partisan municipal primary or second primary, each nonpartisan municipal election when using the election and runoff method, and each nonpartisan municipal primary [since canvass for these elections is seven days following election day instead of ten, this list generation day needs to be sooner to allow time for due process after the board removes the votes]. SBOE shall request that the list contain the name, date of birth, date of death, last known address, and social security number of each deceased person and that the list be provided to SBOE electronically on the same day generated.

- (d) On the day the list described in Paragraph (c) is received, SBOE shall:
- (1) compile a list of deceased voters for prospective removal by county boards of elections (the “Deceased Voter List”) containing the names of all persons who meet all of the following criteria:
    - (A) named in the list prescribed in Paragraph (c) or named in a previous list of deceased state residents obtained from DHHS;
    - (B) died between 70 days prior to election day and election day; [This timeframe begins about 10 days before the period during which absentee-by-mail ballots are mailed to voters and ends the day before election day.] and
    - (C) voted absentee-by-mail or at an early voting site;
- and
- (2) submit the Deceased Voter List to the county boards of elections and prominently post it on the SBOE website as public information.

The Deceased Voter List shall contain for each deceased person, his or her name, date of birth, date of death, residential address, county of registration, voter registration number, and date voted.

- (e) Under uniform procedures promulgated by SBOE for county board challenges, on or before seven days following each general election, primary, and second primary, and on or before four days following each partisan municipal primary or second primary, each nonpartisan municipal election when using the election and runoff method, and each nonpartisan municipal primary, [this would be the day of or day after the county board's receipt of the Deceased Voter List] each county board of elections shall:
- (1) review that portion of the Deceased Voter List that contains voters registered in its county and determine for each person, if that person's vote shall be removed due to the voter dying before election day;
  - (2) identify any additional voters to whom the board's attention was called from any source, who voted absentee-by-mail or at an early voting site and died before election day but who are not on the Deceased Voter List and determine if the vote of each person so identified shall be removed due to the voter dying before election day; and
  - (3) take formal action to remove those votes determined in subparagraphs (1) and (2) to have been cast by voters who died before election day.

[This timeline fulfills the due process requirements found in paragraph 8 of the SBOE order dated November 28, 2016, under which the county board notifies the voter three days before the canvass meeting that he or she has a right to appear before the board at canvass to dispute the removal of his or her vote (even though the voter is presumably dead).]

- (f) One hour prior to the applicable canvass meeting time prescribed in G.S. 163-182.5.(b), -291(5), -293(c), or -294(b), each county board of elections shall compile a supplemental list of all persons to whom the county board of election's attention was called from any source, who voted absentee-by-mail or at an early voting site and died before election day but whose vote was not previously removed, nor considered for removal through the procedures of Paragraph (e). If the number of persons on the supplemental list equals or exceeds the vote margin of any ballot item in the county or could affect the outcome of a multi-county ballot item, the county board shall delay its canvass meeting under its authority to do so pursuant to G.S. 163-182.5(b) until the votes of those voters on the supplemental list determined to have died before election day have been removed following the voter having been given due process. To determine if the outcome of a multi-county ballot item

may be affected, the county board shall divide the number of people on the supplemental list by the then-current total number of votes cast in the county on that ballot item. The board shall then multiply that number by the then-current multi-county total number of votes cast on that ballot item. If this resulting number is equal to or greater than the total margin of the multi-county ballot item, the supplemental list shall be considered as outcome-determinative.