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North Carolina Rules Review Commission  
Jeffery T. Hyde, Chair  
Amanda Reeder, Commission Counsel  
1711 New Hope Church Road  
Raleigh, NC 27609

May 11, 2020

Re: 08 NCAC 01 .0106 Emergency Powers of Executive Director

Dear Rules Review Commission Members and Staff:

We are in receipt of Commission Counsel's Request for Technical Changes dated May 7, 2020, which included some concerns and questions about both the authority for the rule amendment as well as additions that were made to the proposed rule during the notice and comment period. As a result, this letter explains the statutory authority for the rule, how both the rule and statute have been used to date, and why significant additions were made to the rule during the notice and comment period. The agency makes the following assertions:

1. The proposed new Paragraph (d) directly addresses concerns that were raised during the temporary rulemaking public comment period.
2. The examples provided in Paragraph (d) of ways in which the Executive Director may exercise emergency powers have been used before.
3. The emergency powers statute grants the Executive Director broad authority to exercise emergency powers, and the proposed amendment and underlying rule actually constrain that broad power.

If the Rules Review Commission plans to object to the temporary amendment to Rule 08 NCAC 01 .0106 for Paragraph (d), the agency will remove Paragraph (d) and only ask for the changes to Paragraph (b).

**The Proposed Paragraph (d) Addresses Concerns Raised During the Temporary Rulemaking Public Comment Period**

One concern raised in the Request for Technical Changes is that all of Paragraph (d) was added after publication of the temporary rule and questions whether the public had notice that this language would be added. The Executive Director of the State Board of Elections received over [25,000 public comments](#) in response to the proposed text of the temporary rule, and the addition of Paragraph (d) directly addresses some of the concerns raised by the public during the comment period.

During the public comment period, the North Carolina Republican Party submitted a comment asserting that the proposed rule does not comply with the statute's requirement to describe the emergency powers the Executive Director may exercise in the event that the normal schedule for an election is disrupted by a natural disaster. The current rule and proposed amendment actually constrain the situations in which the Executive Director can act. G.S. § 163-27.1 requires the Executive Director to adopt rules "describing the emergency powers and the situations in which the emergency powers will be exercised" (emphasis added), not the exact emergency powers the Executive Director may take in those situations.

While the agency believes the current rule and proposed amendment actually constrain the situations in which the Executive Director can act, *the agency added the list of items in Paragraph (d) in response to the concerns raised by the Republican Party. The new language further defines situations in which the Executive Director may exercise her emergency powers authority.*

Further, the vast majority of the comments received by the agency were unrelated to the proposed amendment and reflected a misunderstanding that the Executive Director could use the rule to require that all voting take place by-mail during the November general election as a result of the COVID-19 pandemic. Other comments reflected support or opposition to voting by-mail in general. Any eligible voter in North Carolina can already cast an absentee by-mail ballot, and the proposed amendment does not change the ability of voters to request a ballot and vote using that method. Voters do not need an excuse or reason to use this option in lieu of in-person voting. It is important to note that the proposed amendment to Rule 08 NCAC 01 .0106 does not authorize the Executive Director to call a vote-by-mail election and neither the Executive Director nor the State Board of Elections has advocated for all-mail balloting. Rather, the agency has proceeded with processes – and has proposed legislative changes – to address an expected increase in absentee by-mail voting while also maintaining options for in-person voting through one-stop voting and Election Day. *The last sentence of Paragraph (d) clarifies that emergency powers do not include the ability to restrict any of the statutorily authorized methods of voting in our State, whether in-person early voting, in-person voting on Election Day, or absentee by-mail voting.*

#### **The Examples Listed in Paragraph (d) Fall Within the Executive Director's Emergency Powers Authority and Have Largely Been Used Before**

The non-exhaustive list of actions the Executive Director may take as part of her emergency powers authority have largely been used before and are within the Executive Director's emergency powers authority granted in both statute and rule. On March 20, 2020, the Executive Director exercised these emergency powers by [executive order](#) to reschedule the Republican second primary in Congressional District 11 from May 12, 2020, to June 23, 2020. The move of the second primary from May 12 to June 23 has received broad bipartisan support and could not have been done without the Executive Director exercising her emergency powers under statute and rule. The Executive Director ordered this change on March 20, 2020, only eight days in advance of the federal deadline for military-overseas ballots to go out by March 28. Further, one-stop early voting was scheduled to begin on April 23. If the SBE had waited for the General Assembly to return on April 28, it would have been too late to change the date of the second primary and comply with both state and federal law. Other changes in the order include: temporarily allowing the transfer of voters to a non-adjacent precinct if necessary due to COVID-19; staying pending election protests until May 20, 2020; extending the deadline for the 30-day precinct sort to May 20, 2020; and requiring county boards of elections that closed their offices to the public to accept forms from the public via secure drop box.

During Hurricane Dorian, the Executive Director exercised emergency powers by [executive order](#) to extend the early voting period in six counties, requiring them to conduct early voting on the Sunday

prior to the election from 12 p.m. to 3 p.m. She also extended hours on the last Saturday of early voting, with voting taking place from 9 a.m. to 5 p.m. in eleven counties. Hours were extended because counties had closed their one-stop sites for one or more days earlier in the week due to the hurricane. It also extended the deadline for receipt of absentee ballots postmarked on or before election day due to mail delays caused by the hurricane. Additionally, all county boards conducting the special election in Congressional District 3 were permitted to appoint nonresidents of the precinct for a majority of the positions. This change was made due to pollworkers being displaced by the storm, and it provided county boards flexibility with respect to assigning precinct officials while making it possible to keep precincts open that they otherwise might not have been able to staff.

Further, in 2016, a Wake County Superior Court judge [ordered](#) that the voter registration deadline be extended due to the disruption caused by Hurricane Matthew “and the resultant and ongoing power outages, flooding, and closure of roads, bridges, government agencies, and post offices” that prevented North Carolina residents from being able to register to vote by the statutorily established voter registration deadline. The judge found that it was an abuse of discretion for the executive director not to have exercised emergency powers under G.S. § 163-27.1 to extend the voter registration deadline under this circumstance.

### **The Proposed Amendment and Underlying Rule Appropriately Refine the Executive Director’s Broad Emergency Power Authority Granted by Statute**

The Request for Technical Changes questions the Executive Director’s authority to waive statutory deadlines. G.S. § 163-27.1 requires the Executive Director to adopt rules “describing the emergency powers and the *situations in which the emergency powers will be exercised*” (emphasis added), not the exact emergency powers the Executive Director may take in those situations. Moreover, the statute requires the Executive Director to “avoid unnecessary conflict with the provisions of this Chapter,” but does not prohibit the Executive Director from waiving statutory deadlines when necessary under statute and rule. In fact, the statute appears to contemplate that statutory provisions may be altered in the exercise of emergency powers, as it only explicitly prevents the Executive Director from changing redistricting plans (see G.S. § 163-27.1(b) and (c)).

To that end, the current rule and proposed amendment define the narrow situations that would precipitate the exercise of emergency powers, must be narrowly calculated to offset the nature and scope of the disruption, and require the Executive Director to consider the following factors:

- (1) Geographic scope of disruption;
  - (2) Effects on contests spanning affected and non-affected areas;
  - (3) Length of forewarning and foreseeability of disruption;
  - (4) Availability of alternative registration or voting opportunities;
  - (5) Duration of disruption;
  - (6) Displacement of voters or election workers;
  - (7) Access to secure voting locations;
  - (8) Sufficiency of time remaining for the General Assembly and the Governor to adopt emergency legislation addressing the disruption;
  - (9) Detrimental effects on election integrity and ballot security; and
  - (10) Aggregate effects on important Federal and State certification deadlines.
- (08 NCAC 01 .0106(c))

### Conclusion

Thank you for the opportunity to provide background on the proposed temporary rule language for 08 NCAC 01 .0106 regarding the Executive Director's emergency powers authority. We reiterate that if the Rules Review Commission plans to object to the temporary amendment to Rule 08 NCAC 01 .0106 for Paragraph (d), the agency will remove Paragraph (d) and only ask for the changes to Paragraph (b).

Sincerely,

A handwritten signature in black ink, appearing to read "Kelly Tornow". The signature is written in a cursive, flowing style with a large initial "K" and a distinct "T" at the end.

Kelly Tornow  
Associate General Counsel/Rulemaking Coordinator

CC: Karen Brinson Bell, Executive Director, North Carolina State Board of Elections  
Katelyn Love, General Counsel, North Carolina State Board of Elections