



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6700

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

June 12, 2020

Katelyn Love, General Counsel
NC Board of Elections
Sent via electronic mail to katelyn.love@ncsbe.gov

Re: Return of Rule 08 NCAC 01 .0106

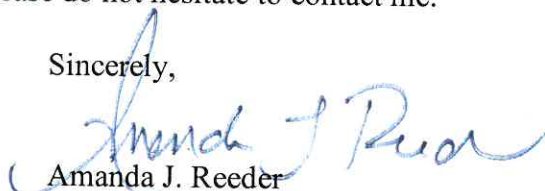
Dear Ms. Love:

At its May 21, 2020 meeting, the Rules Review Commission objected to the adoption of the above-identified Rule in accordance with G.S. 150B-21.1(b1).

The agency responded in accordance with the provisions of G.S. 150B-21.1(b2) on June 11, 2020 and stated that the agency will not be submitting a new statement or additional findings regarding this Rule. Pursuant to G.S. 150B-21.1(b2), the Rule is being returned pursuant to this letter. No further action will be taken by the Rules Review Commission on this temporary Rule.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


Amanda J. Reeder
Commission Counsel

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
919/431-3000
fax: 919/431-3100

Clerk's Office
919/431-3000
fax: 919/431-3100

Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

An Equal Employment Opportunity Employer



NORTH CAROLINA

STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255, Raleigh, NC 27611
(919) 814-0700 or
(866) 522-4723
Fax: (919) 715-0135

June 11, 2020

Dear Ms. Reeder:

I am writing regarding the amendment by temporary rule 08 NCAC 01 .0106, which State Board of Election's Executive Director Karen Brinson Bell adopted on May 4, 2020. In light of the Rules Review Commission's decision at its May meeting that the Executive Director lacks authority to adopt the temporary rule under G.S. § 163-27.1, the Executive Director has decided not to provide additional findings or submit a new statement of need.

Sincerely,

Katelyn Love
General Counsel
State Board of Elections



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6700

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

May 22, 2020

Karen Brinson Bell
Executive Director, Board of Elections
Sent via email only to: Karen.Bell@ncsbe.gov

Re: 08 NCAC 01 .0106

Dear Ms. Bell:

At its meeting on May 21, 2020, the Rules Review Commission declined to approve the above-captioned temporary rule in accordance with G.S. 150B-21.1(b) and G.S. 150B-21.9.

The Commission determined that the Rule did not meet the criteria to qualify as a temporary rule under G.S. 150B-21.1(a). Specifically, the Commission found that the agency failed to show that adherence to notice and hearing requirements required for permanent rulemaking were contrary to the public interest for this amendment, such that immediate adoption would be required.

Further, the Commission objected to this Rule based on lack of statutory authority as set forth in G.S. 150B-21.9(a)(1). Specifically, the Commission found that the agency does not have the authority to expand the definition of "natural disaster" as proposed in Part (b)(1)(H) of the Rule.

The Commission also found Part (b)(1)(H) contained unclear language. As such, the Commission also objected based upon ambiguity, as set forth in G.S. 150B-21.9(a)(2).

In addition, the Commission found that the agency failed to provide notice to the public that the language in Paragraph (d) would be added to the Rule. As such, the Commission objected for lack of notice required by G.S. 150B-21.1(a3).

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
919/431-3000
fax: 919/431-3100

Clerk's Office
919/431-3000
fax: 919/431-3100

Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Commission's action, please let me know.

Sincerely,



Amanda J. Reeder
Commission Counsel

cc: Katelyn Love, General Counsel, Board of Elections

08 NCAC 01 .0106 is proposed for amendment under temporary procedures with changes as follows:

08 NCAC 01 .0106 EMERGENCY POWERS OF EXECUTIVE DIRECTOR

(a) In exercising his or her emergency powers and determining whether the "normal schedule" for the election has been disrupted in accordance with G.S. ~~163A-750, 163-27.1~~, the Executive Director shall consider whether one or more components of election administration has been impaired. The Executive Director shall consult with State Board members when exercising his or her emergency powers if feasible given the circumstances set forth in this Rule.

(b) For the purposes of G.S. ~~163A-750, 163-27.1~~, the following shall apply:

(1) A natural disaster or extremely inclement weather include ~~at any of the following:~~

(A) Hurricane;

(B) Tornado;

(C) Storm or snowstorm;

(D) Flood;

(E) Tidal wave or tsunami;

(F) Earthquake or volcanic eruption;

(G) Landslide or mudslide; or

(H) Catastrophe arising from natural causes ~~resulted and resulting~~ in a disaster declaration by the President of the United States or the ~~Governor~~. Governor, a national emergency declaration by the President of the United States, or a state of emergency declaration issued under G.S. 166A-19.3(19). "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident. The disease epidemic or other public health incident must make [that makes] it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting [place or that creates] place, create a significant risk of physical harm to persons in the voting place, or [that] would otherwise convince a reasonable person to avoid traveling to or being in a voting place. Emergency powers exercised under this Part shall only be exercised for the duration of the disaster declaration, national emergency declaration, or state of emergency declaration.

(2) An armed conflict includes mobilization, pre-deployment, or deployment of active or reserve members of the United States armed forces or National Guard during a national emergency or time of war.

(c) The Executive Director acting under G.S. ~~163A-750 163-27.1~~ to conduct an election in a district where the normal schedule for the election is disrupted must ensure that remedial measures are calculated to offset the nature and scope of the disruption(s). In doing so, the Executive Director shall 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;

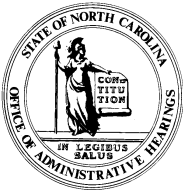
- (5) Duration of disruption;
- (6) Displacement of voters or election workers;
- (7) Access to secure voting locations;
- (8) Sufficiency of time remaining for the General Assembly and the Governor to adopt emergency legislation addressing the disruption;
- (9) Detrimental effects on election integrity and ballot security; and
- (10) Aggregate effects on important Federal and State certification deadlines.

(d) Emergency powers exercised pursuant G.S. 163-27.1 may include the following:

- (1) Delaying the hearing of quasi-judicial proceedings including candidate challenges conducted under Article 11B of Chapter 163, election protests and election protest appeals conducted under Article 15A of Chapter 163 and Chapter 02 of Title 08 of the NC Administrative Code;
- (2) Delaying or modifying statutory and administrative deadlines at the county and State level, including the dates set for the county and State canvass under G.S. 163-182.5, the deadline to complete and report the sorting of ballots by precinct as required by G.S. 163-132.5G, the voter registration deadline under G.S. 163-82.6(d), and the deadline for receipt of postmarked absentee by-mail ballots under G.S. 163-231(b);
- (3) Moving election dates that are not prescribed by Federal law;
- (4) Suspending the requirements of G.S. 163-128 regarding the temporary transfer of voters to an adjacent precinct;
- (5) Allowing county boards of elections to appoint nonresidents of the precinct to a majority of the three positions of chief judge and judges in a precinct, so long as the chief judge and judges are registered voters of the county; and
- (6) Extending one-stop hours beyond the uniform hour and date requirements that county boards can adopt in G.S. 163-227.6(c) in response to a disruption of more than 15 minutes of early voting, provided that any extension is equal to the number of minutes of the disruption.

Emergency powers defined in G.S. 163-27.1 and this Rule shall not include suspending or delaying requirements provided in Federal law or eliminating the option to vote in-person or absentee by-mail.

History Note: Authority G.S. ~~163A-750~~; 163-27.1;
Eff. October 1, 2018;
Emergency Amendment Eff. March 20, 2020;
Temporary Amendment Eff. June 1, 2020.



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency:

2. Rule citation & name:

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:
- b. Proposed Temporary Rule published on the OAH website:
- c. Public Hearing date:
- d. Comment Period:
- e. Notice pursuant to G.S. 150B-21.1(a3)(2):
- f. Adoption by agency on:
- 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]:
- h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]:

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:
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain:

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

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:

Phone:

E-Mail:

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:

Title:

E-Mail:

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

§ 163-27.1. Emergency powers.

(a) The Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following:

- (1) A natural disaster.
- (2) Extremely inclement weather.
- (3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including North Carolina National Guard and reserve components of the Armed Forces of the United States.

In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter. The Executive Director shall adopt rules describing the emergency powers and the situations in which the emergency powers will be exercised.

(b) Nothing in this Chapter shall grant authority to the State Board of Elections to alter, amend, correct, impose, or substitute any plan apportioning or redistricting State legislative or congressional districts other than a plan imposed by a court under G.S. 120-2.4 or a plan enacted by the General Assembly.

(c) Nothing in this Chapter shall grant authority to the State Board of Elections to alter, amend, correct, impose, or substitute any plan apportioning or redistricting districts for a unit of local government other than a plan imposed by a court, a plan enacted by the General Assembly, or a plan adopted by the appropriate unit of local government under statutory or local act authority. (1999-455, s. 23; 2001-319, s. 11; 2011-183, s. 110; 2016-125, 4th Ex. Sess., s. 20(d); 2017-6, s. 3; 2018-146, s. 3.1(a), (b))

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Executive Director of the Board of Elections

RULE CITATION: 08 NCAC 01 .0106

DEADLINE FOR RECEIPT: Wednesday, May 13, 2020

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:

On the Temporary Rulemaking Findings of Need Form, Box 5(a), you state that you submitted the rule to OAH on March 13; however, the OAH website states that it was March 12. Which is correct?

In the Rule:

In (b)(1)(H), line 22, what is "impossible or extremely hazardous"? How will that be determined?

On line 24, what is a "significant risk"? Who determines it?

On line 25, is the "reasonable person"? Is this a known standard? If so, what is it?

I note that all of Paragraph (d) was added after publication of the temporary rule. Was this in response to public comments? I note that the notice only referred to amending the definition in (b)(1)(H). What notice was provided that this language was being added?

Also in Paragraph (d), what is your authority to waive the statutory deadlines set forth here?

In (d), Page 2, line 8, delete "include, but are not limited to," with "include"

In (d)(5), line 20, what is "temporarily" here?

On line 26, where in G.S. 163-27.1 are "emergency powers" defined?

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

Amanda J. Reeder
Commission Counsel
Date submitted to agency: May 7, 2020

08 NCAC 01 .0106 is proposed for amendment under temporary procedures as follows:

08 NCAC 01 .0106 EMERGENCY POWERS OF EXECUTIVE DIRECTOR

(a) In exercising his or her emergency powers and determining whether the "normal schedule" for the election has been disrupted in accordance with G.S. ~~163A-750, 163-27.1~~, the Executive Director shall consider whether one or more components of election administration has been impaired. The Executive Director shall consult with State Board members when exercising his or her emergency powers if feasible given the circumstances set forth in this Rule.

(b) For the purposes of G.S. ~~163A-750, 163-27.1~~, the following shall apply:

(1) A natural disaster or extremely inclement weather include ~~any of the following~~:

(A) Hurricane;

(B) Tornado;

(C) Storm or snowstorm;

(D) Flood;

(E) Tidal wave or tsunami;

(F) Earthquake or volcanic eruption;

(G) Landslide or mudslide; or

(H) Catastrophe arising from natural causes ~~resulted and resulting~~ in a disaster declaration by the President of the United States or the ~~Governor~~. Governor, a national emergency declaration by the President of the United States, or a state of emergency declaration issued under G.S. 166A-19.3(19). "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident. The disease epidemic or other public health incident must make [that makes] it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting [place or that creates] place, create a significant risk of physical harm to persons in the voting place, or [that] would otherwise convince a reasonable person to avoid traveling to or being in a voting place. Emergency powers exercised under this Part shall only be exercised for the duration of the disaster declaration, national emergency declaration, or state of emergency declaration.

(2) An armed conflict includes mobilization, pre-deployment, or deployment of active or reserve members of the United States armed forces or National Guard during a national emergency or time of war.

(c) The Executive Director acting under G.S. ~~163A-750~~ 163-27.1 to conduct an election in a district where the normal schedule for the election is disrupted must ensure that remedial measures are calculated to offset the nature and scope of the disruption(s). In doing so, the Executive Director shall 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.

(d) Emergency powers exercised pursuant G.S. 163-27.1 may include, but are not limited to, the following:

- (1) Delaying the hearing of quasi-judicial proceedings including candidate challenges conducted under Article 11B of Chapter 163, election protests and election protest appeals conducted under Article 15A of Chapter 163 and Chapter 02 of Title 08 of the NC Administrative Code;
- (2) Delaying or modifying statutory and administrative deadlines at the county and State level, including the dates set for the county and State canvass under G.S. 163-182.5, the deadline to complete and report the sorting of ballots by precinct as required by G.S. 163-132.5G, the voter registration deadline under G.S. 163-82.6(d), and the deadline for receipt of postmarked absentee by-mail ballots under G.S. 163-231(b);
- (3) Moving election dates that are not prescribed by Federal law;
- (4) Suspending the requirements of G.S. 163-128 regarding the temporary transfer of voters to an adjacent precinct;
- (5) Temporarily allowing county boards of elections to appoint nonresidents of the precinct to a majority of the three positions of chief judge and judges in a precinct, so long as the chief judge and judges are registered voters of the county; and
- (6) Extending one-stop hours beyond the uniform hour and date requirements that county boards can adopt in G.S. 163-227.6(c) in response to a disruption of more than 15 minutes of early voting, provided that any extension is equal to the number of minutes of the disruption.

Emergency powers defined in G.S. 163-27.1 and this Rule shall not include suspending or delaying requirements provided in Federal law or eliminating the option to vote in-person or absentee by-mail.

History Note: Authority G.S. ~~163A-750~~; 163-27.1;
Eff. October 1, 2018;
Emergency Amendment Eff. March 20, 2020;
Temporary Amendment Eff. June 1, 2020.