

## **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: State Board of Elections

RULE CITATION: 08 NCAC 02 .0110

RECOMMENDATION DATE: July 25, 2025

RECOMMENDED ACTION:

- X 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:

*I am recommending approval, but note that the Commission could object if it determines that the adopted rule differed substantial from the proposed rule.*

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G.S. 150B-21.2(g) states in relevant part:

*An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.*

*An adopted rule differs substantially from a proposed rule if it does one or more of the following:*

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.*
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.*
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.*

Seth Ascher  
Commission Counsel

Here, the Board of Elections changed who needed to be notified by email of election protests as highlighted below:

- (a) The county board shall ~~deliver~~ transmit by email a copy of any filed election protest, including any attachments to the State [Board] Board, affected candidates, and county party chairs as follows:

The relevant question is whether sending these emails to additional recipients could have reasonably been expected based on the published requirement to email the State Board.

The agency's response on this issue:

The agency believes this is not a substantial change. The county boards, the regulated parties here, would have already known that they would be sending an email with a copy of the recently filed protest by the dates stated in the rule. All this change does is add names to the "To" line of an email that the county board would have been required to send anyway. So, this is an insubstantial difference to the regulated party. Additionally, the county boards are agencies whose "conduct" is under the "dominion" of the State Board, as a matter of law. *Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm'rs*, 212 N.C. App. 313, 321, 712 S.E.2d 372, 378 (2011). The State Board is authorized to "advise the county boards of elections as to the proper methods of conducting primaries and elections" and "shall require all reports from the county boards of elections and election officers as provided by law, or as are deemed necessary by the State Board." G.S. 163-22(c) (emphasis added). Accordingly, regardless of the rule here, the State Board could require county boards to provide this information to interested parties in the context of a protest. The rule simply ensures this is done uniformly and predictably (for the parties to the protest). Finally, a filed election protest is a public record under Chapter 132; so the regulated parties here, which are public agencies, would have to provide it to any requesting party "as promptly as possible" under existing law anyway. G.S. 132-6(a). Accordingly, in addition to the difference to the county board being insubstantial, it also does not produce an effect that could not have reasonably been expected, since the county boards would already be required to disclose this information to any requester.

Ultimately, this issue turns on whether the factors described here are sufficient to make such an effect "reasonably" expected. I am unaware of any analogous precedent, so this appears to be a question of fact and judgment. I am persuaded by the agency's response, so I am ultimately recommending approval. However, if the Commission believes that under these circumstances the addition of email recipients post-publication is "an effect that could not reasonably have been expected based on the proposed text of the rule," the Commission should object.