



**April 20, 2020**

North Carolina State Board of Elections  
Attn: Rulemaking Coordinator  
P.O. Box 27255, Raleigh, NC 27611-7255

**Re: Proposed Amendment to 08 NCAC 01 .0106**

The current National Health Emergency which has been declared in response to the spread of COVID-19 in the United States, along with Executive Orders signed by the Governor of North Carolina and regulations enacted by many North Carolina counties limit certain activities including participation in events with large gatherings of people and engaging in activities which may present a danger to public health.

The North Carolina Republican Party agrees with many of the steps which have been taken to date by the State Board of Elections (“SBOE”) in response to the current health emergency, including having its employees working to prepare for the upcoming November 3, 2020 elections, monitoring developments related to COVID-19 and communicating regularly with federal and state partners. The NCGOP appreciates the SBOE’s commitment to providing updates about voting and elections to the media, stakeholders and the public on its website and social media accounts.

However, the North Carolina Republican Party opposes the Temporary Rule proposed by the Executive Director of the SBOE which would amend 08 NCAC 01 .0106 because it is unnecessary, fails to follow proper procedure, exceeds the statutory authority delegated to the Executive Director of the SBOE and is ambiguous.

**The Proposed Amendment is Unnecessary**

Although the federal, state and local regulations which have been adopted in response to the spread of the COVID-19 coronavirus have directly affected many aspects of our lives, none of them have addressed the voting process in North Carolina. And while the NCGOP commends the SBOE and its Executive Director for proactively taking steps to ensure safe and accessible elections for North Carolina voters, adoption of the Proposed Amendment is unnecessary because in-person voting can be conducted safely, and North Carolina currently provides for absentee voting.

Federal, state and local regulations currently in place in every county in North Carolina allow citizens to engage in activities so long as they adhere to best health practices such as minimizing the number of people in any given room or facility and maintaining social distancing. These can easily be implemented as local regulations governing voting locations. Also, the SBOE has posted

U.S. Elections Assistance Commission guidance about the cleaning of voting equipment and intends to make sure that all county boards of elections and poll workers receive this information and that supplies are available to clean voting booths and equipment regularly.

Importantly, any voter in North Carolina who believes voting in-person would pose an unreasonable risk can vote using an Absentee Ballot. Given that we are currently more than 190 days out from the November 3 elections, it is reasonable to expect that the SBOE and County Boards of Elections would be able to suitably prepare for any expected increase in Absentee Voting which may arise from concerns over the spread of COVID-19.

### **The Proposed Amendment Fails to Follow Proper Procedure**

The Proposed Amendment fails to meet the two-part test set forth by the General Assembly for adopting a temporary rule. N.C. Gen. Stat. §150B-21.1 states that an Agency may adopt a temporary rule only when it finds that adherence to the notice and hearing requirements of N.C. Gen. Stat. §150B-21.2(a)(11)(c) would be contrary to the public interest and there is a need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

The NCGOP understands that there may be situations where a catastrophe arising from a disease epidemic or other public health incident may make it impossible or extremely hazardous for election officials or voters to reach or otherwise access the voting place or that creates a significant risk of physical harm to persons in the voting place. However, neither the SBOE nor the Executive Director has claimed, let alone demonstrated, that such a situation has disrupted or will disrupt the normal schedule for the upcoming November 3 election. As such, there is no need for the language in the Proposed Amendment to become effective immediately in order to preserve the integrity of the upcoming election and adopting it without adhering to the notice and hearing requirements of N.C. Gen. Stat. §150B-21.2(a)(11)(c) would be contrary to the public interest.

### **The Proposed Amendment Exceeds the Executive Director's Authority**

N.C. Gen. Stat. §163-27.1(a) allows the Executive Director to exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by a natural disaster, extremely inclement weather or an armed conflict or mobilization of the Armed Forces of the United States. §163-27.1(a) also specifically requires the Executive Director to adopt rules describing the emergency powers and the situations in which the emergency powers will be exercised.

Neither the current version of 08 NCAC 01 .0106 nor the Proposed Amendment comply with the statute's requirement to describe the emergency powers which the Executive Director may take in the event that a normal schedule for an election is disrupted by a natural disaster. Rather the SBOE

has simply enumerated several factors that it shall consider in exercising some undefined emergency powers. See 08 NCAC 01 .0106(c).

### **The Proposed Amendment is Ambiguous**

The proposed temporary rule is sought pursuant to N.C. Gen. Stat. § 163-27.1(a), which provides that the SBOE Executive Director “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 . . . .” That statutory section further directs that the SBOE Executive Director “shall adopt rules describing the emergency powers and the situations in which the emergency powers will be exercised.”

Currently, 08 NCAC 01 .0106, the SBOE’s only administrative rule on point, provides in section (b)(1) the situations the SBOE considers to constitute a “natural disaster or extremely inclement weather.” The enacted, permanent version of the rule provides in subsection (b)(1)(H) that “a natural disaster or extremely inclement weather” includes the following: “Catastrophe arising from natural causes resulted in a disaster declaration by the President of the United States or the Governor.”

The temporary rule sought by the SBOE would change subsection (b)(1)(H) as follows:

Catastrophe arising from natural causes ~~resulted~~ 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. 20 166A-19.3(19). “Catastrophe arising from natural causes” includes a disease epidemic or other public health incident that makes it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting place or that creates 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.

SBOE Notice of Public Comment, March 19, 2020.

The quoted language above is ambiguous to extent that it’s unclear whether (1) a disaster or emergency declaration from the President of the United States or the Governor is a prerequisite that must then be followed by a determination by the Executive Director about the nature of the emergency or disaster for which the declaration was issued or (2) the Executive Director can simply decide that there is some public health incident which would convince voters not to go to the polling place.

The ambiguity has a real impact here because if that provision is read to mean that the Executive Director can simply decide that there is some public health incident which would convince voters not to go to the polling place then it is also in excess of the SBOE’s statutory authority.

As discussed above, N.C. Gen. Stat. § 163-27.1 states that in order for the SBOE Executive Director to exercise emergency powers to conduct an election in a district there must (1) be a natural disaster in that district and (2) that natural disaster must disrupt the normal election schedule in that district. The Proposed Amendment conflates the two requirements by essentially saying that if there might be a disruption to a scheduled election then there is automatically a natural disaster. That position defies common sense and exceeds the SBOE's statutory authority.

### **Conclusion**

The State Board of Elections should not move forward with a Proposed Amendment which neither complies with the statutory requirement to describe the emergency powers which could be exercised in the event of a natural disaster nor adheres to statutory notice and hearing requirements. Rather, the SBOE should withdraw the Proposed Amendment and propose a permanent rule which sets forth the emergency powers that the Executive Director may take during a natural disaster which disrupts the normal schedule for the election. This will allow the public to participate in a process which includes notice and opportunity for public comment.

The North Carolina Republican Party appreciates the opportunity to comment on the Proposed Rule and looks forward to working with the State Board of Election throughout the process of adopting changes to its regulations in response to the spread of COVID-19.