



HOUSE BILL 264: Emergency Powers Accountability Act.

2021-2022 General Assembly

Committee:	House Judiciary 1. If favorable, re-refer to Rules, Calendar, and Operations of the House	Date:	March 14, 2021
Introduced by:	Reps. Kidwell, D. Hall, Bell, Moffitt	Prepared by:	Erika Churchill
Analysis of:	First Edition		Staff Attorney

OVERVIEW: *House Bill 264 would create a definition of "concurrence of the Council of State" under the North Carolina Emergency Management Act, which would clarify how the Governor is to seek such a concurrence when exercising certain authorities and would require the Governor to seek concurrence of the Council of State in additional instances. The act would be effective when it becomes law, and would apply to declarations of emergency in effect on that date.*

CURRENT LAW: Under Article 1A of Chapter 166A of the General Statutes, known as the Emergency Management Act, the Governor, the General Assembly, counties, and cities have concurrent authority to declare a 'state of emergency.' An "emergency" for this purpose is defined as "an occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made accidental, military, paramilitary, terrorism, weather related, public health, explosion related, riot related cause, or technological failure or accident, including, but not limited to, a cyber incident, an explosion, a transportation accident, a radiological accident, or a chemical or other hazardous material incident." G.S. 166A-19.3.

Upon a state of emergency being declared by the Governor or the General Assembly, the Governor is granted certain powers to issue executive orders with prohibitions and restrictions applicable in the emergency area until the emergency terminates, or the prohibition or restriction is terminated. Such restrictions and prohibitions include:

- To utilize all available State resources that are reasonably necessary to cope with the emergency.
- To take such action and give such directions to State and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the orders, rules, and regulations made under the Emergency Management Act.
- To take steps to assure that measures are taken when necessary to qualify for temporary housing assistance from the federal government when that assistance is required to protect the public health, welfare, and safety.
- To impose prohibitions and restrictions in the emergency area that a county or city could, under the Emergency Management Act, impose, together with amending or rescinding any prohibitions and restrictions imposed by those local authorities, if during a gubernatorially or legislatively declared state of emergency, the Governor determines that local control of the emergency is insufficient to assure adequate protection for lives and property because any of the following apply:
 - Needed control cannot be imposed locally because local authorities responsible for preservation of the public peace have not enacted appropriate ordinances or issued appropriate declarations as authorized by G.S. 166A-19.31.

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Legislative Analysis
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House Bill 264

Page 2

- Local authorities have not taken implementing steps under such ordinances or declarations, if enacted or declared, for effectual control of the emergency that has arisen.
- The area in which the emergency exists has spread across local jurisdictional boundaries, and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered.
- The scale of the emergency is so great that it exceeds the capability of local authorities to cope with it.

Also, per G.S. 166A-19.30(b), during a gubernatorially or legislatively declared state of emergency, ***with the concurrence of the Council of State***, the Governor has powers such as the following:

- To direct and compel the evacuation of all or part of the population from any stricken or threatened area within the State.
- To prescribe routes, modes of transportation, and destinations in connection with evacuation.
- To control ingress and egress of an emergency area, the movement of persons within the area, and the occupancy of premises therein.
- To establish a system of economic controls over all resources, materials, and services to include food, clothing, shelter, fuel, rents, and wages, including the administration and enforcement of any rationing, price freezing, or similar federal order or regulation.
- To regulate and control the flow of vehicular and pedestrian traffic, the congregation of persons in public places or buildings, lights and noises of all kinds, and the maintenance, extension, and operation of public utility and transportation services and facilities.
- To waive a provision of any regulation or ordinance of a State agency or a political subdivision which restricts the immediate relief of human suffering.
- To procure, by purchase, condemnation, seizure, or by other means to construct, lease, transport, store, maintain, renovate, or distribute materials and facilities for emergency management without regard to the limitation of any existing law.

Besides during a declared state of emergency, the Governor is granted the authority to use contingency and emergency funds (i) "as necessary and appropriate to provide relief and assistance from the effects of an emergency" and (ii) "as necessary and appropriate for National Guard training in preparation for emergencies ***with the concurrence of the Council of State***."

The Emergency Management Act does not clarify what is meant by "concurrence of the Council of State."

Under Chapter 130A of the General Statutes, the Secretary of Health and Human Services, and all county health directors, have the authority to declare a property an "imminent hazard" and to issue an order of abatement of the imminent hazard. Similar authority exists for the Secretary of Environmental Quality and local health directors with respect to solid waste and drinking water regulated under Articles 9 and 10 of Chapter 130A, respectively.

BILL ANALYSIS: The bill would do all of the following:

- Define "concurrence of the Council of State" for purposes of the Emergency Management Act and declarations of imminent hazards. The term would mean the consensus, within 48 hours of contact, of a majority of the Council of State prior to the Governor exercising a power or authority requiring a concurrence of the Council of State. The Governor is to document the contact and response of each Council of State member and release the concurrence, nonconcurrence, or lack of response provided by each member by name and position. All documentation is a public record. Failure to respond after 48 hours is deemed a concurrence. This definition would automatically be

House Bill 264

Page 3

applied to the following, existing provisions in the Emergency Management Act, thereby requiring the Governor to contact all members of the Council of State for their concurrence or non-concurrence prior to exercising the authority:

- For the powers authorized by G.S. 166A-19.30(b), as listed out above. The Governor would need to seek this concurrence separate and apart from the concurrence with the declaration of emergency. However, nothing in the bill would preclude the Governor seeking both concurrences of the Council of State simultaneously if such powers were needed at the time of a declaration or extension thereof.
 - The use of contingency and emergency funds by the Governor "as necessary and appropriate for National Guard training in preparation for emergencies."
- Provide that a gubernatorial or legislatively declared statewide state of emergency expires in seven calendar days unless a majority concurrence of the Council of State is sought and granted. Any extensions could be for no more than 30 days without additional concurrence of the Council of State. For this purpose, statewide would mean an emergency area of 67 or more counties.
 - Provide that if the concurrence of the Council of State is not granted for initial declaration or any extensions thereof for a statewide emergency area (67 or more counties), the Governor cannot issue the same or a substantially similar declaration of emergency based on the same emergency; this would not preclude further legislative declaration of emergency under G.S. 166A-19.20. It is unclear how FEMA would treat a failure to concur by the Council of State that ended a declaration of disaster. When seeking federal assistance under the Stafford Act for any given disaster, the Governor must certify that "In response to this incident, I have taken appropriate action under State or tribal law and have directed the execution of the State or Tribal Emergency Plan on _____ in accordance with the Stafford Act." "As part of such request, and as a prerequisite to major disaster assistance under this Act, the Governor shall take appropriate response action under State law and direct execution of the State's emergency plan." 42 USC 5170, Sec. 401 of The Stafford Act.
 - Require the Governor to seek the concurrence of the Council of State, during a gubernatorially or legislatively declared state of emergency, prior to imposing prohibitions or restrictions appropriate to deal with the emergency in lieu of a county or city exercising its own authority under the Emergency Management Act. Nothing in the bill would preclude the Governor seeking both concurrences of the Council of State simultaneously if such powers were needed at the time of a declaration or extension thereof.
 - Require the Secretary of Health and Human Services and the Secretary of Environmental Quality to inform the Governor, and the Governor to seek the concurrence of the Council of State, prior to determining that a class or category of property uses present an imminent hazard and issuing an order of abatement to close that class or category of properties.

EFFECTIVE DATE: Effective when it becomes law, and applies to the exercise of powers under a state of emergency or declaration of emergency in effect on that date. If concurrence of the Council of State is not obtained within two days after the effective date of this act, any power exercised requiring that concurrence would expire.

BACKGROUND: Similar legislation was considered and enacted during the 2019-20 biennium. In June 2020, the General Assembly ratified Senate Bill 105, which was vetoed by the Governor on July 2, 2020.