**STATE OF HAWAII**
**OFFICE OF ELECTIONS**
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August 21, 2014

To: Elections Commission

From: Scott T. Nago
Chief Election Officer

Re: 2014 PRIMARY ELECTION

The following memorandum addresses the various issues that we experienced in the Primary Election, including the postponement of the election for two precincts due to Tropical Storm Iselle and the reconciliation of over 800 absentee ballots in the County of Maui.

## I. TROPICAL STORM ISELLE'S IMPACT ON THE PRIMARY ELECTION

Hawaii State Law governs the conduct of elections in the case of a natural disaster, with differing responsibilities between the Governor and the Office of Elections.

Hawaii Revised Statutes (HRS), Section 11-92.3, authorizes the Office of Elections to consolidate precincts, postpone elections, or require the use of absentee ballots to conduct an election in the event of a flood, tsunami, earthquake, volcanic eruption, high wind, or other natural disaster occurring prior to an election that makes a precinct inaccessible.

Additionally, while HRS § 11-92.3 addresses the authority of the Office of Elections to consolidate and postpone an election prior to the opening of polls, the law provides that once the polls open, only the Governor, pursuant to his emergency powers under Act 111, SLH 2014, can specifically extend polls or otherwise use his general emergency powers as he sees fit to protect the health, safety, and welfare of the people. Sections 1 and 13(9) in section 2 of Act 111, SLH 2014 (Policy and Purpose & Additional Powers in an Emergency Period).

Given this, once we became aware of then Hurricane Iselle approaching the State, the Office of Elections, along with other state agencies, participated in telephone conference calls with representatives of the State Civil Defense and the county civil defense agencies. The office publicized that in view of the approaching hurricane, voters were encouraged to vote early by absentee ballot. Finally, we also consulted with the Department of the Attorney General as to our authority were Hurricane Iselle to strike the State of Hawaii.

## A. LEGAL BACKGROUND RELATING TO NATURAL DISASTERS, ABSENTEE VOTING, AND STATE AND COUNTY RESPONSIBILITIES

As it relates to the Office of Elections' authority regarding a natural disaster, it is important to note that it is limited by the law as to what actions it can take and that it is not its place to unreasonably delay an election or to otherwise undermine the law by taking actions which cannot be based on objective evidence. The very nature of a natural disaster is that adjustments need to be made to our standard operating procedures that are already in place to ensure the integrity and even handedness of our elections. This includes important considerations such as the ability for all voters to vote on the same day in the same manner, that election results are released at the same time, so as not to permit voters to know the putative outcome of an election before they vote, and that the results are released in a timely manner to permit the public to know the outcome of their vote.

Having said that, once a disaster occurs the Office of Election does not have the authority to discard these fundamental concepts. It must carefully consider adjustments to our normal processes to address a natural disaster without undermining the integrity of our elections. In other words, we must be careful about creating any unnecessary disparate impact between voters. We have a duty to all voters. This includes those voters who voted before the natural disaster strikes and those who vote after the natural disaster.

### 1. LEGISLATIVE HISTORY REGARDING NATURAL DISASTERS & HURRICANE INIKI

With this in mind, in looking at the law, we saw the balance that the law had attempted to strike and we sought to execute those laws. In terms of the history of HRS § 11-92.3, it was originally enacted in 1983 and only provided for consolidation of polling places and did not provide for postponement. Act 34, SLH 1983.

The law was severely tested in 1992, when on September 11th, Hurricane Iniki struck the County of Kauai only eight days prior to the Primary Election. Through the hard work of all involved, despite the massive impact the hurricane inflicted upon the County of Kauai, the election was held as scheduled.

In the aftermath of Hurricane Iniki, in 1993, the law was amended to provide for a postponed election, but for a period no greater than seven days. Additionally, the law specifically noted that "provided that any such postponement shall not affect the conduct of the election, tabulation, or distribution of results for those precincts, districts, or counties not designated for postponement." Act 304, SLH 1993.

The balancing of interests noted earlier about postponing an election and the disparate treatment of voters were resolved by permitting a postponement of no more than seven days but permitting those voters in precincts who had already voted to know the preliminary results of the election. This postponement was in relation to conducting a polling place election, as the conducting of all mail elections had not yet been established in our law.

In 1996, the law was further amended to provide for the option to conduct an all mail election following a natural disaster and that an election could be postponed up to 21 days. In conjunction with the amendment of HRS § 11-92.3, an absentee ballot law was enacted, HRS § 15-2.5, which stated, in part, that "if the opening of a designated polling place will adversely affect the health and safety of voters or precinct officials" the Chief Election Officer may require all registered voters to vote by absentee ballot. Related to such a decision the Chief Election Officer would have to provide notice to all registered voters within 30 days of the order and within ten days after the ballots are available cause the ballots to be delivered to the voters. Act 215, SLH 1996.

That same year, on September 16, 1996, an administrative rule implementing HRS § 11-92.3 was enacted. HAR § 2-51-88 [Eff and comp 9/16/96; am and comp Sept 18 2000, repealed and reenacted on Jan 9 2010 as HAR § 3-172-88]. The rule stated that an election could only be postponed 7 days. Given the history of the HRS § 11-92.3 and that the rule implements HRS § 11-92.3 and not HRS § 15-2.5, it was understood that a polling place election should not be postponed more than 7 days, while an absentee mail election, may out of necessity, given the work involved to carry out this method of voting, require a postponement of more than 7 days but less than 21 days.

## 2. CONDUCTING OF AN ABSENTEE MAIL ELECTION

The conducting of an all absentee mail election is an extraordinary remedy as it is distinctly different from the voting experience of all other voters, whose default manner of voting is at the polls on election day, with options to specifically request on an individual basis to vote by absentee ballot at an absentee walk location or by absentee mail in advance of an election. Consistent with this, other than a natural disaster, the law does not permit an all-mail election in conjunction with a regularly scheduled primary or general election to occur. HRS § 11-91.5. All mail elections have been called for special elections to fill vacancies that are not held in conjunction with our regularly scheduled election. In those situations, all voters are mailed a ballot and there is a uniform deadline for all voters to have their ballots received by the county clerk.

The following administrative steps, associated with conducting an absentee mail postponed election, have the potential to take up the bulk of the 21 day postponement period permitted under the law: (1) preparing of ballot for mailing; (2) printing of envelopes - initial mailing envelope, return envelope, secret ballot envelope; (3) printing of standard election instructions and information related to the postponed election; (4) obtaining of volunteer election officials to assist in processing of absentee mail ballots; (5) updating the list of eligible voters to remove voters who had already voted by absentee mail or absentee walk ballot prior to the natural disaster; (6) coordinating with the United States Postal Service to confirm that postal service is in operation and that voters actually have mailboxes to receive the ballot; and (7) making arrangements for disability accessible direct recording electronic voting machines (DREs) to be available at an absentee walk site for disabled voters who have a right to vote independently, without assistance, under federal law and who may not be able to otherwise vote on an absentee mail ballot.

## 3. CONSULTATION AND COORDINATION WITH THE IMPACTED COUNTY

In addition to these issues, is the consultation and coordination with the impacted county. Specifically, while the State is responsible for election day polling places and the counting of ballots, the counties are statutorily responsible for voter registration and absentee voting. HRS §§ 11-11 & 15-4.

Given that the Office of Elections is based on Oahu, we rely on the neighbor island counties for most of the state responsibilities. This delegation of responsibility is financially offset through the proration schedule between the counties and the State in which various expenses by the neighbor island counties are charged to the State as part of the overall apportioning of costs between the State and counties under HRS § 11-184 for combined State and county

elections. Additionally, the State provides technical support and works with the counties to ensure that the state responsibilities are met.

Given the foregoing, the State must work cooperatively with the counties to ensure a successful election. This includes consulting with the counties in regards to how a postponed election due to a natural disaster will be best addressed and understanding the resources and logistical issues that may be unique to each county.

With this backdrop, the Office of Elections understood that it did not have unfettered discretion and that it must consider the input of and work cooperatively with all impacted state and county government agencies.

B. DECISION TO POSTPONE THE PRIMARY ELECTION IN PRECINCTS 04-01 AND 04-02 (8/8/14)

On August 8, 2014, then Hurricane Iselle approached the State and eventually made landfall on the Hawaii island as a tropical storm. That same day, the Office of Elections consulted with County of Hawaii Civil Defense to ascertain whether there were any conditions that would impair the ability of voters to access their polling places, and we learned, among other things, that there were fallen trees, power outages, and damage to structures.

Based on our discussions with Civil Defense, we determined routes leading out of the communities served by precincts 04-01 and 04-02 were compromised, rendering precincts 04-01 and 04-02 inaccessible, but that other polling places were accessible.

We were informed by County of Hawaii Civil Defense that road blockages impacting access to precincts 04-01 and 04-02 could not be guaranteed to be cleared by the Primary Election or even within a few days. If the roads could have been cleared in a few days, it would have been more feasible to consider opening up polling places later in the week.

Because the road blockages were unlikely to be cleared in sufficient time to allow access to precincts 04-01 and 04-02, a proclamation was issued postponing the election and authorizing the use of absentee ballots pursuant to Hawaii Revised Statutes § 15-2.5. The proclamation stated that additional details would be forthcoming in a subsequent proclamation.

C. ELECTION DAY COMMUNICATION WITH THE GOVERNOR THROUGH THE ATTORNEY GENERAL REGARDING WHETHER THE GOVERNOR WOULD EXERCISE HIS AUTHORITY UNDER

ACT 111, SLH 2014 TO EXTEND POLLS OR TAKE OTHER EMERGENCY ACTION (8/9/14)

On August 9, 2014, during the Primary Election, a State Senator requested the polls be extended due to the inability of voters to access the polls on Hawaii island. Our office does not have the authority to take action regarding the polls once they open on election day, as only the Governor has such authority under his emergency powers, pursuant to Act 111, SLH 2014.

Given this, we relayed the concerns of the State Senator to the Department of the Attorney General to inform the Governor. Ultimately, the Governor did not extend the polls that day. It should be noted, however, that the County of Hawaii that day stated that it did not have any objective information to justify extending the polls.

D. DECISION TO CONDUCT A POLLING PLACE POSTPONED ELECTION FOR PRECINCTS 04-01 AND 04-02 AFTER CONSULTATION WITH THE COUNTY OF HAWAII AND THE ATTORNEY GENERAL (8/11/14)

On August 11, 2014, the Office of Elections participated in a telephone conference call with County of Hawaii Corporation Counsel, County of Hawaii County Clerk, and the County of Hawaii Election Administrator, to discuss conditions on Hawaii island. The County of Hawaii Corporation Counsel stated that the roadways accessing precincts 04-01 and 04-02 were clear. A discussion then ensued about what would be the best manner in which to conduct the postponed election.

As a result of this discussion, it was mutually agreed that a polling place election would be the most appropriate under the circumstances. Before taking action on the proposed polling place election, we consulted with the Attorney General. The Attorney General immediately began our discussion, similar to the Corporation Counsel, by telling us that State Civil Defense had said that the roadways were clear in precincts 04-01 and 04-02.

As our office has a duty to conduct elections in a timely manner without unjust delay and considering the credible information received from government sources that roadways accessing precincts 04-01 and 04-02 were clear and their stated preference for a polling place election, we initiated the process of coordinating the conduct of such an election.

While each factual situation is different, the precedent for holding elections in the face of natural disasters in a timely manner has been clearly established.

For example, our state's own experience with Hurricane Iniki, a Category 4 hurricane, that in no uncertain terms devastated the County of Kauai and that it took a significant amount of time to recover from, was that the regularly scheduled Primary Election was still held on September 19, 1992, eight days after Hurricane Iniki struck the County of Kauai.

In 1992, Dade County in the State of Florida postponed its primary election by a week in the aftermath of Hurricane Andrew. This postponement affected a total of 102 precincts, involving 132,000 voters.

On September 11, 2001, the State of New York was conducting its primary election when the terrorist attacks occurred. The election was postponed that afternoon and eventually rescheduled less than two weeks later.

Our country's record for postponement of general elections is more striking. No general election has ever been postponed or delayed due to a natural disaster, or for any other reason, including war.

As previously stated, our office has a duty to conduct elections in a timely manner without unjust delay. In considering the credible information received from government sources that roadways accessing precincts 04-01 and 04-02 were clear and their stated preference for a polling place election, it was appropriate to coordinate the timely conclusion of the 2014 Primary Election.

Upon review of various facilities it was determined that Keonepoko Elementary School would serve as an appropriate polling place for the postponed election. Keonepoko Elementary was the original polling place for precinct 04-02. Attempts to contact Hawaiian Paradise Community Center, the original polling place for precinct 04-01, were unsuccessful. Due to the inability to communicate with Hawaiian Paradise Community Center and the fact that precincts 04-01 and 04-02 are neighboring precincts within the same district, we made the determination to use Keonepoko Elementary School to accommodate both precincts. The earliest date that Keonepoko could be used for election purposes was August 15, 2014, as that day was a state holiday.

On August 11, 2014, a proclamation was issued establishing that the postponed election for precincts 04-01 and 04-02 would be conducted on August 15, 2014, between the normal polling hours of 7:00 a.m. and 6:00 p.m.

Public notice of the postponed election was made in various ways: (1) information of the election was reported by various television news reporters, by newspapers, and on the internet; (2) letters were mailed to each registered voter who had not already voted in precincts 04-01 and 04-02; and (3) the

proclamation was sent to various newspapers to publish prior to the election. Additionally, the County of Hawaii stated that it would erect banners that would be placed along the highways informing voters of the election, provide flyers to public schools in the area to be sent home with students, post flyers in public areas, and provide shuttle services to transport voters in the impacted areas to the polling place.

### E. LITIGATION REGARDING THE CONDUCTING OF THE POSTPONED PRIMARY ELECTION (8/13/14)

Subsequent to the issuance of the proclamation, one of the candidates filed a complaint for an emergency temporary restraining order to preclude the postponed election from occurring on August 15, 2014, and to postpone it to a later date. The complaint was filed on August 13, 2014, in Circuit Court in Hilo and was assigned to the Honorable Greg Nakamura. A hearing was scheduled for August 14, 2014.

Prior to the hearing a memorandum in opposition was filed by the State restating the events leading up to the proclamation and making the legal arguments for why the Plaintiff's motion should be denied. The memorandum explained the timeline of events that would occur after the postponed Primary Election and the cascade effect that further postponing the Primary Election would have on preparations for the General Election.

For example, the law requires absentee ballots for the General Election to be mailed to overseas and military voters 45 days prior to the election, or September 19, 2014. The ballots for the General Election can only be printed once the results of the Primary Election are certified. Certification can only be done after the deadline for filing an election contest or the resolution of any contest by the Hawaii State Supreme Court.

Specifically, a complaint can be filed within 6 days of the election. Here, that would be August 21, 2014. After filing the complaint, a summons will be issued with a return date not later than the fifth day after service, with weekends and state holidays excluded from the calculation. A complainant is not required to immediately serve the complaint. If the complaint is not served until August 25, 2014, the return date could be as late as September 1, 2014. The law then provides the Hawaii State Supreme Court has until 4:30 p.m. on the fourth day after the return to issue its decision, or September 5, 2014.

If the Office of Elections received the Court's decision the same day, the Office of Elections could begin the proofing process for the ballots, printing, filling envelopes, and mailing. Receiving the decision on September 5, 2014 allows the

Office of Elections adequate time to ensure compliance with state and federal law requiring the timely provision of ballots to overseas and military voters.

To the extent the postponed polling place election was further delayed or an absentee mail election was ordered, it was understood that we would in all likelihood miss the federally mandated mail out date and litigation would ensue with the Department of Justice to address the violation of federal law.

Finally, our office noted in the filing that there were various contests on the ballots for precincts 04-01 and 04-02. Amongst these are statewide federal and state contests for which results have already been released as required by Hawaii Revised Statutes § 11-92.3. Given this, the longer voting in precincts 04-01 and 04-02 was delayed, the greater it compromised the concept that all voters vote at the same time, in the same manner, and all results are known at the same time.

Ultimately, the Court denied the temporary restraining order and the election was allowed to proceed on August 15, 2014 for the precincts 04-01 and 04-02.

F. CONDUCTING OF THE POSTPONED PRIMARY ELECTION (8/15/14)

On August 15, 2014, in order to reduce the amount of possible issues with ballots being spoiled due to multiparty voting or similar issues and in order to address any accessibility issues for voters with disabilities, the polling place was set up with eight eSlates, direct recording electronic voting machines, for precinct 04-01 and eight for precinct 04-02, as opposed to the typical one eSlate assigned per precinct.

Of note, a loose connection temporarily disrupted power to some of the eSlates. However, power was restored within approximately 15 minutes, affecting the wait time for voters in line. Additionally, eSlates were added to deal with the heavy morning turnout. There were also reports of disgruntled voters assigned to other precincts wishing to vote. We received no other reports of significant disruptions or issues related to conducting the postponed polling place election.

The final turnout of registered voters for precincts 04-01 and 04-02, composed of election day and absentee voting, was similar to that of the rest of the County of Hawaii, with the actual election day turnout rate at Keonepoko Elementary on August 15, 2014 actually being higher than the election day turnout for both the County of Hawaii and the State of Hawaii on August 9, 2014.

## II. GENERAL OPERATIONS DURING THE PRIMARY ELECTION

With the notable exception of postponement of the Primary Election in two precincts due to Tropical Storm Iselle and the reconciliation of ballots in the County of Maui, which will be discussed below, the Primary Election on August 9, 2014, had the typical issues associated with a Primary Election.

### A. PROBLEMS REGARDING VOTER FAMILIARITY WITH THE SINGLE PARTY PRIMARY AND VOTER GOING TO THE WRONG PRECINCTS

The most significant of these issues were: (1) voters accidentally going to the wrong polling place and being directed to the correct polling place; and (2) voters not being familiar with the nuances of a primary election in which voters are restricted to voting for candidates solely of one party or solely nonpartisan.

In regard to voters going to the wrong polling place, the counties send a Notice of Voter Registration and Address Confirmation Card ("yellow card") to all registered voters, which includes information on which polling place to go to. Given this, voters who go to the wrong polling place are typically limited to voters who failed to review their yellow cards or voters who have moved after the yellow cards have been mailed out. Voters who go to the wrong polling place are directed to the correct polling place. To the extent a voter has actually moved to a new address after the yellow cards were mailed out, they are required to update their voter registration and then are directed to the polling place associated with their current address.

As for the issue of voters attempting to vote for more than one party, this has been a continuing voter education issue. Voters do not necessarily only support candidates of one particular party. Given this, similar to the General Election voters expect that they can vote for candidates of different political parties for different offices. This results in multi-party votes not being counted.

Instructions are printed on the ballot, posted in each voting booth, and included in the absentee ballot instructions sheet with each absentee mail ballot, explaining that voters may either only select candidates of one particular party or only select candidates designated as nonpartisan. Further, the ballot includes a section where the voter needs to designate a political party or nonpartisan for purposes of the ballot (i.e. Republican Party, Independent Party, Green Party, Libertarian Party, Democratic Party, or Nonpartisan Ballot). The act of marking a box next to one of these political parties or the nonpartisan category, act as guide to the voter that he or she must only vote for candidates within that category.

B. COUNTY OF MAUI ABSENTEE BALLOTS

As we reported to the media, over 800 absentee ballots from the County of Maui were added to the results prior to the conclusion of the postponed Primary Election.

As background, after every election, there is an auditing and reconciliation process that must occur before a certification of results can be issued. The certification of results occurs after the expiration of the time for filing an election contest or the resolution of any contest that is filed. In regards to the Primary Election, this works out to six days after the election. Given that the Primary Election concluded on August 15, 2014, the deadline is August 21, 2014.

The law provides that the certification of results is to be based on a comparison and reconciliation of the following:

(1) The results of the canvass of ballots conducted pursuant to chapter 16;

(2) The audit of pollbooks (and related record books) and resultant overage and underage report;

(3) The audit results of the manual audit team;

(4) The results of the absentee ballot reconciliation report compiled by the clerks; and

(5) All logs, tally sheets, and other documents generated during the election and in the canvass of the election results.

HRS § 11-155.

This is a detailed process that in other states can take several weeks to complete. It is normal to expect that election results are adjusted due to this process. In the State of Hawaii, however, the majority of the process is completed on election night, with additional checks occurring the week immediately following an election. Typically, the final report issued during the week includes some slight adjustments due to the inclusion of provisional ballots that have been confirmed by the county clerk as having been voted by qualified registered voters.

As noted in HRS § 11-155, the final certification includes "[t]he results of the absentee ballot reconciliation report compiled by the clerks." While the absentee ballot reconciliation report is not technically due until after the election, we attempt to weigh that against the public's interest in having preliminary unofficial results of the election the night of the election, so as to have some type of provisional closure on the election. This is addressed through the utilization of a provisional absentee ballot reconciliation process on election night, subject to subsequent further review and finalization under HRS § 11-155.

On election night, there was a concern that a memory card containing vote data was read more than once. While the computerized voting counting system safeguards vote totals by preventing memory cards from being entered more than once, in an abundance of caution, the staff decided to start over and re-read all memory cards. It is at this point that one memory card was not read again and it was subsequently sealed away with the other memory cards and associated voting materials. As part of the standard process of reading memory cards into the system, the vendor has a check off system whereby a notation is made as to reading each memory card. This process was not modified by the vendor under these circumstances to include an additional notation that each memory card had been read a second time. In this case, the card that was not read was from a batch of absentee mail ballots, which is comprised of a variety of ballot types from the entire County of Maui.

Given this anomalous situation, the initial provisional absentee ballot reconciliation report used by the County Clerk on election night was compromised. Subsequently, as part of the previously mentioned post-election comparison and reconciliation process, the issue was addressed and the memory card was unsealed in front of official observers and the data uploaded for reporting purposes.

The specific timing of the final reconciliation and reporting of results for the County of Maui was as follows:

(1) on August 12, 2014 (Tuesday), the Office of Elections conducted the audit for the County of Hawaii to assist with the post-election comparison and reconciliation process;

(2) on August 13, 2014 (Wednesday), the Office of Elections conducted the audit for the County of Maui and the reconciliation issue was addressed and the memory card was unsealed in front of official observers and the data uploaded for reporting purposes;

(3) given the structure of the statewide reporting system for results, results could only be printed out on Oahu at the State Capitol, where computer services staff and the vendor would need to be present to receive the data and update the County of Maui reports and correspondingly update the statewide reports that are based on the results of all four counties (i.e. statewide summary report, precinct report, and associated reports);

(4) these resources were not present at the State Capitol on August 13, 2014 (Wednesday) and would not be present until August 15, 2014 (Friday);

(5) the Office of Elections was scheduled to complete its neighbor island audit in the County of Kauai on August 14, 2014 (Thursday); and

(6) the Office of Elections was also involved in final preparations for the August 15, 2014 (Friday) postponed election and in working with the Department of the Attorney General to defend itself against the motion for an emergency temporary restraining order filed by one of the candidates.

Given the foregoing, the votes associated with the memory card, were included in the election results report issued on August 15, 2014, in conjunction with the reporting of results from precincts 04-01 and 04-02.

The outcomes of no elections were changed by the reading of the memory card. Additionally, as the reporting of the updated results coincided with the issuance of results at the conclusion of the postponed Primary Election on August 15, 2014, the public and all candidates received the provisional results six days in advance of the certified results, as occurs in a typical Primary Election.

While the certification process consisting of checks and balances on the back end of our elections successfully worked, as the law intended, to resolve this issue, all stakeholders agree that steps need to be taken to avoid this from happening again. As such, the Office of Elections will be working with the vendor to develop new procedures to address these types of situations.

While the decision to update results on August 15, 2014 (Friday) was made, in retrospect, removing ourselves from the pressure to first complete the neighbor island audit and to complete preparations for the postponed election on August 15, 2014 (Friday), arrangements should have been made by the Office of

Elections at a minimum to inform the public of the memory card on August 13, 2014 (Wednesday), even if the notice were to state for technical reasons the uploading of results could not be accomplished until August 14, 2014 (Thursday) or August 15, 2014 (Friday).

The Office of Elections faced a number of challenges not typical of a regular election. Decisions had to be made in accordance with the law, under less than ideal time frames, utilizing the best information available at the time action was needed. The Primary Election could not have been carried out without the hard work and dedication of our county election partners, especially the County of Hawaii and its Elections Division, as well as the professionals in the various agencies responsible for disaster response.

If you have any questions, please feel free to contact me at (808) 453-VOTE (8683) or 1-800-442-VOTE (8683).