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: Commission for Mental Health/DD/SAS

RULE CITATION: 10A NCAC 26F .0105

RECOMMENDATION DATE: November 20, 2026

RECOMMENDED ACTION:

No 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:

The proposed rule deletes a drug (Fenfluramine) from Schedule IV, mirroring an action taken by federal regulation. G.S. 90-92(a)(2) explicitly lists Fenfluramine as Schedule IV, and as a result this rule appears to contradict a general statute. However, G.S. 90-88(a) appears to give the agency the explicit authority to change statutorily created schedules, and G.S. 90-88(d) appears to obligate the agency to take action based on the circumstances here. While the rule here raises serious questions about clarity under the APA, the statutory direction in 90-88 appears to be explicit and clear. Therefore, I am recommending approval of this rule.

***

G.S. 90-88(a) provides, in relevant part that "The [agency] may add, delete, or reschedule substances with Schedules I through VI of this Article on the petition of any interested party, or its own motion." Adding substances to the various schedules via rule creates no issues under the APA, since rules can ordinarily supplement and add detail to statutes when an agency is given the authority to do so. However, any time the agency deletes or reschedules a substance, their rule will be inconsistent with the statute scheduling the drug.

G.S. 90-88(d) provides in full:

> *If any substance is designated, rescheduled or deleted as a controlled substance under federal law, the Commission shall similarly control or cease control of, the*

substance under this Article unless the Commission objects to such inclusion. The Commission, at its next regularly scheduled meeting that takes place 30 days after publication in the Federal Register of a final order scheduling a substance, shall determine either to adopt a rule to similarly control the substance under this Article or to object to such action. No rulemaking notice or hearing as specified by Chapter 150B of the General Statutes is required if the Commission makes a decision to similarly control a substance. However, if the Commission makes a decision to object to adoption of the federal action, it shall initiate rulemaking procedures pursuant to Chapter 150B of the General Statutes within 180 days of its decision to object.

*This statute appears to require the agency to pass a rule that contradicts state statute in a circumstance where federal law has changed. The agency has the option to either conform to the federal change by rule, or "object" to the federal change. While it is not relevant here, I am not certain what it would mean for the agency to "object" to the federal change, particularly given that the last sentence requires the agency to initiate rulemaking procedures based on its objection. That circumstance would appear to require the agency to initiate rulemaking procedures to *not* change their rule in response to federal changes, and it is unclear to me what that rulemaking would look like.*

The agency is correct that fenfluramine is no longer a schedule IV drug under federal law, see https://www.ecfr.gov/current/title-21/chapter-II/part-1308/subject-group-ECFRf62f8e189108c4d/section-1308.14. It appears that the federal government descheduled fenfluramine in 2022, see https://www.federalregister.gov/documents/2022/12/23/2022-27400/schedules-of-controlled-substances-removal-of-fenfluramine-from-control. It does appear that the agency failed to meet the timing requirement under G.S. 90-88(d), but given the broad authority granted by G.S. 90-88(a), this does not seem to prevent the agency from correcting their mistake now.

***

If this rule goes into the code, there will be a period of time where the NCAC says that fenfluramine is not schedule IV but the NCGS says fenfluramine is schedule IV. The agency has assured staff counsel that this circumstance has happened before, and that it is the General Assembly's practice to update the statute based on the administrative rule change. While this appears to be the case, it does seem to turn the normal administrative process on its head.

In the meantime, this inconsistency appears to make the rule unclear for as long as this contradiction exists. Specifically, faced with a contradictory rule and statute it would be difficult for the regulated public to know whether or not fenfluramine was a controlled substance in North Carolina. However, this circumstance seems to be a predictable outcome from the clear directives of G.S. 90-88.

Therefore, even though it is difficult for me to see how this kind of rulemaking comports with the administrative structure set up by the APA, the specific and explicit directions in G.S. 90-88 lead me to recommend approval of the rule.

Seth Ascher
Commission Counsel

10A NCAC 26F .0105 is proposed for amendment without notice or hearing as follows.

10A NCAC 26F .0105 SCHEDULE IV

(a) Schedule IV shall consist of the drugs and other substances by whatever official name, common or usual name, chemical name, or brand name designated and listed in either G.S. 90-92 or this Rule. Each drug or substance has been assigned the Drug Enforcement Administration (DEA) controlled substances code number set forth in the Code of Federal Regulations, Title 21, Section 1308.l4.

(b) As specified in G.S. 90-88, the Commission for MH/DD/SAS adds the following substances within Schedule IV for Depressants:

(1) Dichloralphenazone - DEA controlled substances code number 2467;

(2) Zopiclone - DEA controlled substances code number 2784;

(3) Fosporopol - DEA controlled substances code number 2138;

(4) Carisoprodol - DEA controlled substances code number 8192;

(5) Lemborexant - DEA controlled substances code number 2245; and

(6) Remimazolam - DEA controlled substances code number 2846.

(c) As specified in G.S. 90-88, the Commission for MH/DD/SAS adds the following substances within Schedule IV for Stimulants: Serdexmethylphenidate – DEA controlled substances code number 1729.

(d) As specified in G.S. 90-88, following the Drug Enforcement Agency's decision to delete Fenfluramine, including its salts, isomers, and salts of such isomers, as a controlled substance under federal law, the Commission for MH/DD/SAS deletes Fenfluramine, including its salts, isomers, and salts of such isomers, from Schedule IV.

History Note: *Authority G.S. 90-88; 90-92; 143B-147;*
Eff. June 30, 1978;
Amended Eff. July 1, 1993; January 1, 1989; December 1, 1987; August 1, 1987;
Temporary Amendment Eff. May 28, 1998;
Temporary Amendment Expired March 12, 1999;
Amended Eff. August 1, 2000;
Temporary Amendment Eff. January 1, 2002; February 15, 2001;
Amended Eff. July 1, 2012; July 1, 2011; November 1, 2005; April 1, 2003; August 1, 2002;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016;
Amended Eff. November 1, 2026; December 1, 2021.