Burgos, Alexander N

Subject: FW: [External] Re: N.C. Commission for MH/DD/SAS - Amended Rule 10A NCAC 26F .0105

From: Coste, Joonu-Noel <jncoste@NCDOJ.GOV>
Sent: Friday, November 20, 2026 2:02 PM
To: Ascher, Seth M <seth.ascher@oah.nc.gov>; Scott, Pam <Pam.Scott@dhhs.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] Re: N.C. Commission for MH/DD/SAS - Amended Rule 10A NCAC 26F .0105

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From: Ascher, Seth M <seth.ascher@oah.nc.gov>
Sent: Friday, 20 November 2026 13:48:34
To: Scott, Pam <Pam.Scott@dhhs.nc.gov>
Cc: Coste, Joonu-Noel <jncoste@NCDOJ.GOV>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: N.C. Commission for MH/DD/SAS - Amended Rule 10A NCAC 26F .0105

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Pam,

Attached is my staff opinion recommending approval of this rule but noting my concerns about how this comports with the APA. I do anticipate that there will be some discussion of this issue at the Commission meeting on Tuesday.

Seth Ascher
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984) 236-1934

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Burgos, Alexander N

Subject: FW: N.C. Commission for MH/DD/SAS - Amended Rule 10A NCAC 26F .0105

From: Scott, Pam <Pam.Scott@dhhs.nc.gov>
Sent: Thursday, November 19, 2026 12:33 PM
To: Ascher, Seth M <seth.ascher@oah.nc.gov>
Cc: COSTE, JOONU A <JNCOSTE@NCDOJ.GOV>
Subject: N.C. Commission for MH/DD/SAS - Amended Rule 10A NCAC 26F .0105

Hi, Seth ~

Thank you for making time to touch base yesterday afternoon regarding the amendment of 10A NCAC 26F .0105 adopted by the N.C. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services at its August 27, 2026 meeting. We're responding on behalf of the Commission MHDDSAS and N.C. DHHS Division of Mental Health, Developmental Disabilities, and Substance Use Services, which supports the Commission.

We appreciate the opportunity to respond to your inquiry regarding the State's Controlled Substances Schedules and the statutes and rules that comprise the schedules. The Controlled Substances Schedules are maintained independently and regularly updated. The schedules are amended *administratively* by the Commission through its rulemaking authority pursuant to G.S. 90-88 ***and*** *legislatively* by the General Assembly pursuant to its ultimate law-making authority. The schedules must be read together because at any given time, the schedules consist of a combination of what is in statute in the Controlled Substances Act in Article 5 of Chapter 90 and the rules set out in 10A NCAC 26F. Periodically, the legislature adopts changes (usually in the form of technical amendments or drug control changes) to allow the statutes to align with changes the Commission promulgated by rule. This is how the respective powers of the Commission and General Assembly co-exist as the General Assembly intended.

Unlike many legal frameworks in our State where statutes set out broader authority and parameters and related rules are a mechanism to address details that are not included in statute, due to the fairly unique nature of the authority delegated by the legislature to the Commission, the controlled substances statutes and rules operate separately and independently to define the State's controlled substances schedules.

General Statute 90-88(d) makes clear the General Assembly's intent to leverage the Commission's rulemaking authority to update the State's controlled substances schedules in a timely manner:

> **(d)** 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. (emphasis added)

The Commission fulfilled its obligation under G.S. 90-88(d) in adopting a recent amendment to remove Fenfluramine from the Schedule IV rule after the federal Drug Enforcement Agency found that Fenfluramine does not meet the requirements for inclusion in any schedule of the federal Controlled Substances Act. Following that DEA determination, the Commission adopted an amendment to remove Fenfluramine from 10A NCAC 27F .0105. For these reasons, we respectfully request that you recommend approval of the amended rule adopted by the Commission at its August 27, 2026 meeting, without any changes.

Note that a UNC School of Government post confirms our interpretation regarding the shared authority to amend the State's Controlled Substances Schedule. While the August 2009 Criminal Law Blog post is fairly dated, it is on point. He recognized that the General Assembly and Commission have separate and distinct authority to amend the North Carolina Controlled Substances Schedules. The content of the Controlled Substances Schedules which are maintained in the 10 NCAC 26F administrative rules have the force and effect of law, just as the statutes included in the Controlled Substances Act. The fact that the statutes may lag behind rules does not curtail the scope of the Commission's authority,

Please let us know if you have questions regarding any of the above or need any additional information to recommend approval of amended 10A NCAC 26F .0105 without any changes. We appreciate your thoughtful approach to this matter.

I plan to join the RRC's Nov. 24th meeting via WebEx, so I'll be available should the RRC have any legal questions you'd like me to help address.

Thanks Very Much and Best Regards,

Pam

Pam Scott
Assistant General Counsel
Office of the Secretary, General Counsel's Office
NC Department of Health and Human Services

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Burgos, Alexander N

From: Ascher, Seth M
Sent: Friday, November 13, 2026 3:44 PM
To: SVC_DHHS.dmhddsasrules
Cc: Burgos, Alexander N
Subject: MHDDSAS RFC November 2026
Attachments: MH-DD-SAS RFC November 2026.docx

Good afternoon,

I'm the attorney who reviewed the Rules submitted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, for the November 2026 RRC meeting. The RRC will formally review these Rules at its meeting on Tuesday, November 24, 2026, at 10:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get close to the meeting. If there are any other representatives from your agency who want to attend virtually, let me know prior to the meeting, and we will get evites out to them as well.

Attached is my initial Request for Changes Pursuant to G.S. 150B-21.10. Please submit your responses, the revised Rules, and forms to me via email, no later than 5 p.m. on November 19, 2026.

Please let me know if you have any questions of concerns.

Seth Ascher
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984) 236-1934

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