

## PART 2 BASIC DRAFTING AND STRUCTURE PRINCIPLES

### 2.1 Clarity.

All rule writing must follow the requirement of RSA 541-A:7:

*Rules shall be written in a clear and coherent manner using words of common and everyday meanings for those persons who engage in the activities regulated by the rules, which may include technical language as necessary.*

DON'T SAY:	WHEN WHAT YOU MEAN IS:
shall be 18 years old	shall be <u>at least</u> 18 years old
shall be responsible for ensuring that the rule is complied with	<u>shall comply</u> with the rule

Here are 2 examples. Be clear and precise so that the substance of the rule is readily understood by the average person. Use language that does not leave the rule open to different interpretations.

Vague or general words or phrases must be defined or avoided altogether in favor of precise language. Select one term in the rules, instead of several terms, to express the same concept.

Technical or scientific terms may be used instead of words with common or everyday meanings for the lay person, provided the technical or scientific terms are common and everyday for those regulated by the rule.

### 2.2 Specificity.

See "The Nature of a Rule" in 1.1 in Chapter 3. As defined, a rule is adopted to "implement, interpret or make specific a statute enforced or administered" by an agency.

Be specific in your rules. Rules that need oral clarifications or interpretations to be understood are not detailed enough. This leads to so-called "oral rulemaking" where the written rules need oral rules in order to be implemented. Enforcement of such "unadopted" rules is prohibited:

*No agency rule is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required by this chapter: RSA 541-A:22, I.*

Usually	Significant
Normally	Hardship
Substantially	Reasonable
Appropriate	

Avoid ambiguous words, as in these examples. The words leave it unclear when the rule applies or when less than full compliance is acceptable. These kinds of words imply a case-by-case variation in meaning but with unstated criteria.

NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL  
Chapter 4 Rule Numbering and Drafting

### 3.2 Use of Verbs “Shall” and “May.”

Use the verb “shall” when setting a requirement or limitation and “shall not” for a prohibition.

To the right are just some examples of improper wording for a requirement and prohibition and how to use “shall” and “shall not” instead.

DON'T SAY:	SAY:
The applicant must sign the form.	The applicant shall sign the form.
The applicant is required to sign the form.	
The owner is prohibited from transferring the permit.	The owner shall not transfer the permit.

DON'T SAY:	SAY:
The party has the right to have an attorney.	The party may have an attorney.
The party shall be permitted to have an attorney.	

Use the verb “may” to indicate that the agency is granting a person or entity **other than the agency** the right to exercise an option or a privilege to act.

At left is an example. Note how “has the right to” and “shall be permitted to” mean the same thing as “may.”

Do not use “may” in the following circumstances, but instead use the words indicated:

- To denote uncertainty or mere possibility, use “might”;
- To mean “is able to” or “are able to,” use “can”; and
- To govern discretionary actions or decisions by the agency, use “shall” instead in phrases like “the agency shall...if” or “the agency shall...unless” or “the agency shall...when,” followed by the conditions or criteria that are required to exist or be met for the agency to take the action specified. Be specific enough that the reader can know how the agency will “implement, interpret, or make specific” the discretionary authority the legislature has given it without resorting to oral interpretations to be understood. See 3.8 in this chapter for how to draft discretionary decisions.

Since packages <u>might</u> be damaged, the licensee shall examine all packages received.
“Safe working load” means the maximum rated load as established by the manufacturer which <u>can</u> be safely handled by the structure.
The department <u>shall</u> revoke the license after opportunity for a hearing <u>if</u> the licensee has committed a felony.

### 3.3 Purpose and Scope Statements.

Purpose statements are rules which simply explain the goals of other rules, as for example, “The purpose of this part is to....” Do not use “shall.” Place any purpose statement separately as an individual part, section, or paragraph at the beginning of the relevant chapter, part, or section, respectively, to which the purpose statement refers.

## NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL

### Chapter 4 Rule Numbering and Drafting

- Do use **one term** in the rules and define that term instead of using several terms to mean the same thing, unless quoting a definition in a statute or federal regulation. To clarify the term defined, the definition may specify examples of the term, or synonyms in use by the public or regulated community, as in the example to the right, so long as **the term defined is the term used in the substantive rules.**

#### DON'T SAY:

Abc 102.14 "Property owner" or "Landowner" means the record owner of the parcel of land or structures, or both, where a facility is or is proposed to be located.

#### SAY:

Abc 102.14 "Property owner" means the record owner of the parcel of land or structures, or both, where a facility is or is proposed to be located. The term includes "landowner."

As noted above, you may include a statutory definition, or a definition in a federal regulation enforced by your agency, as a rule definition. Cite the statute or regulation or quote it verbatim as in the example below, but with the following limitations and exceptions:

#### Citing the statute:

Abc 101.01 "Asbestos" means "asbestos" as defined in RSA 141-E:2.

#### Quoting the statute verbatim:

Abc 101.01 "Asbestos" means "asbestos" as defined in RSA 141-E:2, namely "amosite, chrysolite, crocidolite, or asbestiform tremolite, actinolite, or anthophyllite."

- The statute or regulation must be cited specifically;
- The definition must be prefaced with the word "namely" and enclosed within quotation marks; and
- The quotation must be used in its entirety.

### *WHERE TO PLACE THE DEFINITION*

Once a definition is drafted, number and place it as follows:

- If a word appears in the rule more than once, then define it in the beginning of the relevant chapter, part, section, or paragraph. For definitions that apply to the entire title or subtitle, place them in the Chapter 100 organizational rules, as described in 3.5;
- If a word is used only once in the body of an agency's rules, then define it in context, not in the subdivision of the rules used for definitions; and
- If definitions are grouped together, then arrange them in alphabetical order and number them accordingly.

### 3.8 How to Include Criteria for Discretionary Decisions.

Discretionary decisions by an agency involve situations where the legislature has granted authority by statute to an agency to act, and the agency must apply its judgment on a case-by-case basis—such as to approve or deny a permit, to continue or suspend or revoke a license, or to grant or deny a waiver. Through rulemaking the agency must "implement, interpret, or make specific" that statute.

**NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL**  
**Chapter 4 Rule Numbering and Drafting**

**MAKING SURE YOUR ACTIONS ARE VALID AND ENFORCEABLE**

To avoid being arbitrary in your decision, some requirements (in the form of criteria) must be met by the public or considered by your agency for the decision to be made one way or the other. Since these criteria meet the definition of a “rule,” then they will have to be proposed and adopted as rules. Otherwise your agency will not be specific and might fall inadvertently into the “oral rulemaking” trap. See 2.2.

Even if it is impossible to foresee all the particular criteria that will govern your agency’s discretion for every conceivable situation, you can still avoid oral rulemaking by determining what overall theme or goal governs your agency’s decision-making process. You have to give both your agency personnel who must make the decision and the public who must comply a good idea of what you are requiring.

To “implement, interpret, or make specific” your agency’s discretionary authority in a rule, choose one of the following 2 formats, with the option of a concluding or “catch-all” phrase:

- **There are preconditions that must exist or be met for your agency to make its decision.**

As in the example below, use the word “shall”, state what shall happen if the specified criteria that trigger the decision exist or are met, and insert the criteria.

Abc 408.06 Mooring Lights.

(a) The licensee shall light the corners or perimeter of a mooring field containing fewer than 10 moorings if the board determines that:

- (1) The moorings are situated in the path of boating traffic;
- (2) The mooring is in a shallow or rocky area;
- (3) A public launch site is within 100 feet of the mooring field perimeter; or
- (4) Any other condition exists in the mooring location which poses a hazard to navigation.

**NOTE THESE ELEMENTS:**

←The discretionary requirement indicated by “shall light...if.”

←Specific criteria in subparagraphs (1) through (3) the agency shall apply to reach the discretionary decision indicated by the words “the board determines.”

←The optional “catch-all” clear enough to establish a theme or limiting criterion so that the reader is put on notice that other criteria within this theme or limitation could be considered.

- **There is a single criterion or goal that must be met for your agency to make its decision after considering certain factors.**

As in the example below, use the word “shall” and state what shall happen if the agency finds that the criterion or goal has been met after considering the specified factors.

**NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL**  
**Chapter 4 Rule Numbering and Drafting**

Abc 408.06 Mooring Lights.

(a) The licensee shall light the corners or perimeter of a mooring field containing fewer than 10 moorings if the board determines, after considering the following factors, that the mooring field will be a hazard to navigation:

- (1) The moorings are situated in the path of boating traffic;
- (2) The mooring is in a shallow or rocky area;
- (3) A public launch site is within 100 feet of the mooring field perimeter; and
- (4) Any other factor exists which negatively impacts public boating safety due to the location of the mooring field.

**NOTE THESE ELEMENTS:**

←The discretionary requirement indicated by “shall light...if.”

←The criterion—“will be a hazard to navigation”—to be met.

←The factors as in subparagraphs (1), (2), and (3) so that it is clear how the agency shall apply them in deciding if the overall criterion or goal has been met.

←The optional “catch-all” phrase as in subparagraph (4) to establish a theme set by the factors so the reader is put on notice that other factors within this theme might be considered.

**NOTE:**

Don't use a “catch-all” phrase with the words “shall include, but not be limited to” when introducing the factors as in paragraph (a) in the example above. This implies that even the “catch-all” phrase is not broad enough and that rules might be added orally.

### 3.9 Use of Parentheses in Rules.

Use parentheses in rules only in the following 5 instances:

- Rule numbering pursuant to Part 1;
- Enclosing acronyms or initials when they are first used after the word spelled out, such as “intermediate care facility (ICF)”;
- Pairing Latin scientific terms with their English equivalent, such as “*Ammophila breviligulata* (American beach grass)” or “American beach grass (*Ammophila breviligulata*)” and the Latin in italics or underlined;
- Indicating that both the singular and plural of a word is intended, such as “year(s)”;
- Indicating publication dates, editions, access and print dates, or website directions when citing and incorporating by reference documents or Internet content pursuant to 3.12 and 4.7.