

EXAMPLE #1 – LACK OF A REQUIREMENT

From the NH Drafting and Procedural Manual for Administrative Rules

2.11 Excluding Recommendations from the Rules.

Because rules set forth requirements, limitations, or prohibitions, don't include statements that merely recommend.

NOT A RULE:

It is recommended that the licensee keep accurate records.

Preferably the licensee shall keep accurate records.

The licensee is encouraged to keep accurate records.

The licensee should keep accurate records.

THIS IS A RULE:

The licensee shall keep accurate records.

EXAMPLE #2 – LACK OF SPECIFICITY

Env-A 605.03 Proof of Legal Authority. Where the applicant is not the legal owner of the source or device that is the subject of the application, **a written statement establishing** that such applicant has the requisite authority to act on behalf of the owner for purposes of the application shall be submitted as part of the application for a permit.

OLS comment: Unclear what is required to “establish” this.

DES amended the rule as follows:

Env-A 605.03 Proof of Legal Authority. Where the applicant is not the legal owner of the source or device that is the subject of the application, **a copy of the agency agreement authorizing the applicant** ~~written statement establishing that such applicant has the requisite authority~~ to act on behalf of the owner for purposes of the application shall be submitted as part of the application for a permit.

EXAMPLE #3 – Combination of #1 and #2

Env-A 1222.04 Alternative Time Periods for Miscellaneous and Multicategory Stationary VOC Sources. The department shall approve an alternative time period pursuant to Env-A 1222.02(a)(2) or Env-A 1222.03(a)(4) for which the source provides a demonstration that the applicable time periods specified therein are unrepresentative of the operation of the facility due to one or more of the following reasons: . . .

(d) The facility **provides other adequate demonstration** that the 1990 calendar year, or the 1990 ozone season, whichever is applicable, was unrepresentative of VOC-emitting facility operations.

OLS comment: Unclear what this means/requires in practice or what criteria will be applied.

The rule was amended to read:

(d) Any other reason that the department, using EPA-approved methods and procedures as specified in 40 CFR § 51.165, determines is adequate to demonstrate that VOC emissions for calendar year 1990, or the 1990 ozone season, whichever is applicable, were unrepresentative of normal VOC-emitting facility operations.

March 25, 2014, NGO Letter, p. 10:

4. Resolving Adverse Impacts:

- a) The facility **should** be proposed and designed to avoid **adverse effects** on the resources identified in NH RSA 162-H:16, IV(c).
- b) In cases where adverse impacts cannot be avoided, measures to minimize adverse effects identified in the SEC's review of the facility **may** support a finding that such adverse effects are not **unreasonable**.
- c) Where adverse impacts have been minimized as much as possible, in certain circumstances on-site mitigation measures or (where on-site mitigation measures are impractical or insufficient) off-site mitigation measures **may** support a finding that such adverse effects are not unreasonable. Mitigation measures must address the resource category adversely affected, reflect the best practical mitigation under the circumstances, and ensure resource benefits that exceed the adverse effects on the impacted resource.