

Clerk's Notice of Decision
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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Denied

Docket No. 217-2025-CV-00316

Granite State Landfill, LLC

v.

State of New Hampshire Department of Environmental Services

Honorable John C. Kissinger, Jr.
August 31, 2026

MOTION FOR RECONSIDERATION

Granite State Landfill, LLC (“GSL”) moves under Superior Court Rule 12(e) for reconsideration of the Court’s July 27, 2026 Order (the “Order”) granting summary judgment to the New Hampshire Department of Environmental Services (“DES”) and denying GSL’s cross-motion. The Order overlooks or misapprehends the statutory subjects and limits that control DES’s rulemaking authority, the narrower construction supported by the undisputed record, and the necessary consequence of DES’s categorical interpretation under RSA chapter 541-A.

- I. The Order Misconstrues the Statutory Text Governing Permit Time Frames and Denials**
- A. RSA 149-M:7, III governs time frames for Department action, not applicant forfeiture through deemed dormancy.**

RSA 149-M:7, III authorizes rules for the “[a]dministration of a permit system, including the terms, conditions, and time frames under which the department shall issue, modify, suspend, revoke, terminate, deny, approve, or transfer permits.” The phrase “under which the department shall” supplies the subject for every verb – the department. The Department issues, modifies, suspends, revokes, terminates, denies, approves, or transfers a permit. The referenced time frames, therefore, govern Department action. The statute does not establish a period within which an *applicant* must complete an application or provide that missing it automatically extinguishes the application. If it did that, it would be adding a substantive component rather than one related to “administration.”

The Order adopted a broad definition of “administration” and the nonexclusive meaning of “including” in the statute. Order at 5. Neither word permits the Court to disregard the words that follow. “Including” may leave room for other administrative subjects, but it does not change *who* must act under the relevant time frames. Treating “administration” as authority for any permit consequence DES might select renders the predicate words “under which the department shall” surplusage and divorces the rule from its enabling statute.

The surrounding provisions confirm that distinction. RSA 149-M:9, VIII requires DES to “act upon each permit application within the time periods specified in rules adopted under RSA 149-M:7” and limits the time DES may take after an application requiring a hearing is complete. RSA 149-M:12, III likewise directs DES, “[i]n processing applications,” to comply with those time limits. These provisions regulate DES’s processing and decision; none creates a limitations period that terminates an active application.

The distinction is between administering the permitting standards the Legislature enacted and creating an additional standard that it did not. New Hampshire distinguishes substance from procedure according to a requirement’s function: procedural law prescribes the method by which rights are adjudicated and ordinarily facilitates a decision on the merits, while a requirement that fundamentally alters the parties’ relationship and significantly bears upon the ultimate determination of their rights is substantive. *In re M.M.*, 174 N.H. 281, 289–91 (2021); *Petition of N.H. Sec’y of State*, 171 N.H. 728, 736 (2019). “Administration” therefore concerns the machinery by which DES receives and reviews applications—prescribing forms and required information, determining completeness, sequencing review, providing notice and hearings, setting time frames for Department action, and closing applications actually abandoned. The substantive provisions answer a different question: the grounds upon which a permit application may be granted or denied. RSA 149-M:9 and :12 supply those standards by identifying applicant

qualifications and requiring determinations concerning the proposed facility or activity. DES may adopt procedures to carry out those standards, but it may not use “administration” to add a new, outcome-determinative condition. Yet the Dormancy Rules, as construed by the Order, do exactly that: they convert failure to achieve administrative completeness within twelve months into an independent ground for automatic denial, even while the applicant continues responding and without any determination under RSA 149-M:9 or :12.

GSL’s construction does not prevent DES from defining completeness, from requiring responses, or from closing applications actually abandoned by their applicants. The narrower question is whether a general power to administer permit applications authorizes an applicant-side forfeiture that is not found in the statute and that applies regardless of continuing responses. The answer to that question is: no, it does not.

B. RSA 149-M:9, X and :12, I require “facility” or “activity” compliance, not compliance with every procedural rule by an applicant.

The Order also concluded that DES has “equally broad authority to deny a permit where an applicant fails to meet the Department’s rules.” Order at 6. But RSA 149-M:9 bars issuance unless “the facility” meets rule-based terms regarding matters such as monitoring, contingency plans, closure, and financial responsibility, where evidence of financial responsibility is pegged to an amount necessary to protect the public health and welfare of the environment and ensure appropriate measures will be taken to prevent environmental damage in the event of abandoned operations. RSA 149-M:12, I asks whether “the facility or activity for which the permit is sought” will comply with the chapter, rules, plans, and pollution-control law. Those provisions concern the proposed facility or activity, not whether an applicant achieved administrative completeness within a DES-selected period.

That choice is deliberate and apparent. RSA 149-M:9, IX separately identifies applicant-specific disqualifications involving reliability, expertise, integrity, competence, and criminal history. When the legislature intended an applicant's qualifications to control, it said so. Substituting an applicant's failure to satisfy an administrative rule guiding application processing for the statutory environmental protection functions of the facility or activity determination changes the criteria set by the legislature. Nor can the requirement to comply with rules adopted under RSA chapter 149-M validate the Dormancy Rules by circular reasoning. The rules must be adopted within the scope of constitutionally delegated authority. A regulation that contradicts, adds to, or modifies the statute exceeds that authority. *Genworth Life Insurance Co. v. N.H. Department of Insurance*, 174 N.H. 78, 83–84 (2021); *Bach v. N.H. Department of Safety*, 169 N.H. 87, 92–94 (2016). Env-Sw 304.06(d) and 305.03(b)(6) determine the application's legal outcome—denial “without further action”—without any of the findings of the type RSA 149-M:12, I otherwise requires. Simply labeling that consequence “administrative” does not establish the legislative delegation necessary for it to apply.

II. The Order Overlooks A Narrower Construction and the Undisputed Record

The parties directly joined the issue of whether dormancy may be confined to abandonment. GSL agreed that, under some circumstances, DES may close an application after complete nonresponse. GSL Objection at 5. The State answered that denial is required even when an applicant continues substantial submissions but has not achieved completeness within twelve months. State Reply at 3. The question is therefore whether “dormant” may operate as a categorical time bar against an active applicant or whether DES may have any dormancy mechanism to address truly abandoned applications.

After DES's February 28, 2024 initial incompleteness letter, GSL responded in April and June. After the second letter, GSL submitted another 174 pages; after the third, another 98 pages. DES's fourth letter raised new issues based on rules adopted during the review, and GSL responded with more than 300 pages. GSL Statement of Material Facts ("SMF") ¶¶ 1–10 (Doc. 22). DES nevertheless denied the application on April 3, 2025, solely as dormant. *Id.* ¶ 11; Stevens Aff. ¶ 16.

Every prior dormancy denial in the summary-judgment record involved a complete failure to respond to the first incompleteness determination. SMF ¶¶ 12–13 & Exs. 2–8. That uniform application, by itself, does not establish a formally adopted policy. But it does show that before GSL, DES used dormancy as the term ordinarily suggests: to close an application on which the applicant had ceased acting. It also demonstrates that GSL's narrower construction is administratively workable.

DES's own handling of this application reinforced that understanding. Rather than treating the first response as GSL's single opportunity to complete the application, DES reviewed it, issued a second determination, reviewed GSL's 174-page response, issued a third determination, reviewed another 98 pages, and issued a fourth determination containing issues generated by newly effective rules. That course of dealing objectively conveyed an ongoing review in which GSL could respond to each successive determination. It is difficult to reconcile that process with DES's litigation position that the first letter had already set an unalterable forfeiture date unaffected by everything that followed.

The Order did not address that record or decide whether the adopted rule's text unambiguously covers an iterative review in which the applicant repeatedly responds, DES reviews each submission, and DES then requests additional or newly required information. Env-Sw 304.06(d) and the definition cited by the Order turn on whether the applicant "failed to

submit the information required to complete” the application. Read with the enabling statute, that language can and should be confined to abandonment. At a minimum, the record defeats the premise that DES’s categorical result is inherent in the ordinary meaning of dormancy.

III. DES’s Categorical Construction Is Either *Ultra Vires* or an Unpromulgated Rule

A. If the adopted Rules compel denial despite continued responses, they add a condition the legislature did not enact.

Under the State’s construction, the first incompleteness determination starts an unalterable twelve-month clock. Later submissions and determinations do not affect it, and denial follows even when the applicant timely responds. And it would also apply when DES adds requirements during review. State Reply at 2–3; Order at 4–6. That rule does not “fill in the blanks” by providing a procedural detail. It adds a dispositive condition: the applicant must achieve administrative completeness within DES’s period, regardless of responsiveness or later requests.

Bach invalidated an agency rule that added a licensing prerequisite beyond the legislature’s prescribed determinations because an agency may fill gaps but may not change statutory requirements. 169 N.H. at 92–94; see *Appeal of Mays*, 161 N.H. 470, 473–76 (2011). The same principle applies here. RSA 149-M:9 and :12 prescribe applicant qualifications and compliance criteria that apply to a facility or activity. Automatic denial of an active application without either determination adds a separate, new, prerequisite.

The consequence is substantive. DES makes no merits finding and exercises no judgment about abandonment, prejudice, bad faith, or responsiveness; the application is simply “deemed denied without further action.” Env-Sw 304.06(d). A nominally without-prejudice denial still destroys the pending process and requires the applicant to restart at substantial cost and delay—and potentially subject to different rules. Administrative procedural convenience

cannot supply missing legislative substantive authority. If the filed Rules compel that result, they exceed RSA 149-M:7, III and modify RSA 149-M:9 and :12.

Moreover, If DES may continually add new criteria while an applicant-side dormancy period continues to run, the practical result is that the Department can determine whether an application survives regardless of the applicant's diligence. This lacks the objective limiting principles required by Part I, Article 37 and creates a substantial risk of arbitrary administration. That concern is magnified where the proposed project has been the subject of highly publicized political opposition at the highest levels of state government. In those circumstances, the need for transparent, predictable, and statutorily constrained decision-making is paramount

B. If the filed Rules do not compel that result, DES is enforcing an unpromulgated rule.

RSA 541-A:1, XV defines a “rule” to include an agency statement of general applicability that implements or interprets a statute or prescribes a policy, procedure, or practice binding persons outside the agency. DES’s construction meets that definition if the filed text does not itself establish that the first incompleteness date invariably controls, intervening submissions never affect the clock, later determinations create no new response period, and denial follows despite continuing responses.

The State defends that construction as the meaning applicable for all solid-waste applicants. In the State’s view, it binds outsiders and determines whether applications survive. Such a requirement is unenforceable unless adopted through rulemaking. RSA 541-A:3; :22, I. *Asmussen v. Commissioner, N.H. Department of Safety* held that a directive affecting substantive change and binding outsiders is a rule, and that RSA 541-A:24 reaches unpromulgated de facto rules. 145 N.H. 578, 586–87, 592–97 (2000). *Bel Air Associates v. N.H. Department of Health*

& Human Services likewise required APA compliance for generally applicable provisions binding outside providers. 154 N.H. 228, 232–35 (2006).¹

The text of the rule does not compel the result. As construed by the Department, the word “first” in Env-Sw 102.65 does an unreasonable amount of statutory work. By measuring the twelve-month period from the date DES “first notifies” the applicant that the application is incomplete, the rule necessarily contemplates that DES may send subsequent communications stating that the application remains incomplete. In the ordinary abandonment case, the applicant may ignore both the initial deficiency notice and later reminders; “first” prevents an unanswered reminder from restarting the twelve-month clock. But it does not make the date of the initial notice dispositive regardless of what follows. The definition also requires that the applicant have “failed to submit the information required to complete the application,” not merely that DES has not yet declared the application complete. Where, as here, the applicant responds to DES’s requests and the parties remain engaged in an iterative process involving revised submissions and new or refined requests, the later communications are not simply repeated, unanswered notices of the original deficiency. Moreover, where, as here, the applicant faces a shifting stream

¹ This argument concerns the same denial, rules, record, and requested declaration pleaded in Count I under RSA 541-A:24. It asks where DES’s categorical no-reset requirement comes from. If it comes from the filed Rules, they are *ultra vires* under that construction; if it comes from DES’s interpretation or practice, it required rulemaking. The point is properly raised because it follows from the Order’s source-of-authority analysis and gives the Court a full opportunity to correct the error. See *First Londonderry Development Corp. v. CNA Insurance Cos.*, 140 N.H. 592, 594 (1995).

This is not a new claim about a different agency action. The petition invokes RSA 541-A:24, alleges DES’s adoption and use of the Dormancy Rules, incorporates the successive-submission facts, and seeks a declaration concerning the Rules’ validity and application. Petition ¶¶ 3–26. The unpromulgated-rule issue is the alternative legal consequence of the Order’s conclusion that RSA 149-M:7 supplies broad authority for DES’s categorical result. It is therefore appropriately resolved on reconsideration or, if necessary, after focused supplemental briefing.

of grounds on which incompleteness is based, treating a “first” notice that does not identify a subsequently identified ground makes no logical sense. Regardless, treating subsequent communications as irrelevant merely because the first incompleteness notice occurred more than twelve months earlier reads the “failed to submit” requirement out of the definition and transforms an anti-abandonment rule into an inflexible limitations period governing even actively pursued applications.

IV. The Order’s Construction Should Be Narrowed to Avoid an Article 37 Violation

The Order’s “broad authority” rationale identifies no legislative standard limiting the applicant-side deadline DES may select or the automatic consequence it may attach. Order at 6. If twelve months is authorized simply because DES calls it administration, the statute supplies no principle explaining why one month, one week, or immediate denial would not be.

Part I, Article 37 prohibits delegation that leaves an agency with “unguided and unrestricted discretion.” *Appeal of Erica Blizzard*, 163 N.H. 326, 331–32 (2012). The statute must provide “basic standards and a reasonably definite policy,” derived when appropriate from the surrounding scheme. *Id.* at 331–34; *N.H. Department of Environmental Services v. Marino*, 155 N.H. 709, 715–16 (2007). *Marino* upheld DES conditions because express statutory purposes and detailed standards confined its authority. *Blizzard* did likewise only after locating statutory policies and specifically defined violations. Neither treated “administration” as a self-defining limit.

The Court’s interpretation would permit the Department to adopt any rule it desired for deny a permit. For example, under the Court’s order the Department could adopt a rule that a permit application is denied automatically one month after an applicant receives a request for more information. Or the Department could do away with dormancy provisions entirely and deny

a permit application immediately rather than issuing a request for more information. Ultimately, the Department could adopt a rule requiring submissions to be made on green paper and could deny applications for failure to comply with that rule. This is exactly the type of unconstrained rulemaking authority prohibited by the Separation of Powers Clause. The grant of authority to an agency cannot amount to a “sweeping and general delegation of power with uncontrolled discretion even in a narrow field.” *Smith Ins., Inc. v. Grievance Committee*, 120 N.H. 856, 861 (1980) (citing *Schechter Corp. v. United States*, 295 U.S. 495, 537-83 (1935)). See also, *Kimball v. New Hampshire Board of Accountancy*, 118 N.H. 567, 569 (1978) (striking down rule that exceeded legislative grant).

The constitutional problem should be avoided through the narrower construction. RSA 149-M:7, III authorizes processing rules and closure of applications actually abandoned. It does not authorize DES to deem an application dormant while the applicant continues responding and DES continues an evolving review. That construction gives effect to DES’s administrative authority while supplying the limiting principle Article 37 requires.

V. Conclusion

The Order changes Department time frames into applicant time frames, facility-or-activity compliance into applicant compliance, and “administration” into authority for an automatic forfeiture untethered to a statutory standard. It also leaves unanswered the source of DES’s categorical no-reset construction. Reconsideration is warranted.

WHEREFORE, GSL respectfully requests that the Court:

- A. Grant this Motion for Reconsideration;
- B. Vacate the Order, grant GSL summary judgment on Count I, and declare the Dormancy Rules invalid to the extent they automatically deny an application despite continuing, substantial responses to successive incompleteness determinations;
- C. Alternatively, vacate or amend the Order and permit focused proceedings on whether DES’s categorical construction is an unpromulgated rule under RSA chapter 541-A; and
- D. Grant such further relief as may be just and equitable.

Respectfully submitted,
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August 6, 2026 */s/Richard J. Lehmann*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this day, August 6, 2026, through the court's ecf-filing system upon all parties who have filed appearances.

August 6, 2026 */s/Richard J. Lehmann*
Richard J. Lehmann