

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

Docket No. 25-07 WMC

GRANITE STATE LANDFILL, LLC

ORDER ON PARTIAL MOTION TO DISMISS

I. BACKGROUND

On May 5, 2025, a Notice of Appeal (“NOA”) was filed before the Waste Management Council (“Council”) and docketed as 25-07 WMC - Appeal of Granite State Landfill, LLC (“GSL”). The appeal relates to Department of Environmental Services, Waste Management Division’s (“NHDES” or Department”) denial of GSL’s solid waste landfill application. On April 3, 2025, the Department denied the application on the basis that the application for a solid waste landfill in Dalton, NH was incomplete and became dormant on February 28, 2025.

On May 8, 2026 the Department filed a Motion to Dismiss claims 1, 2, 3, 6, 11, and 12 as those claims are set forth in the NOA and the Waste Management Council’s February 13, 2026, Acceptance of Appeal and Notice of Prehearing Conference. On June 1, 2026, GSL filed an Objection to the Department’s Motion to Dismiss.

II. RELEVANT LAW AND RULES

Pursuant to RSA 21-O:9, V, the Waste Management Council “shall hear all administrative appeals from Department decisions relative to the functions and responsibilities of the division of waste management, and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.” Appeals before the Council “shall be conducted in accordance with the provisions of RSA 541-A” and the rules of the Council. *See* RSA 541-A:30-a; Ec-Wst 201-203.19. The Council “shall decide all disputed issues of fact in such appeals.” RSA 21-O:9, V. All issues of law are decided by a hearing officer appointed by the Department of Justice pursuant to RSA 21-M:3, VIII. *See* RSA 21-O:14, II; RSA 21-M:3, IX(e). Mixed questions of fact and law are decided by the hearing officer and the Council after deliberation. RSA 21-M:3, IX(d). Pursuant to Ec-Wst 203.03(c)(3), the hearing officer must dismiss any appeal that is not within the jurisdiction of the Council.

N.H. ADMIN R. ENV-SW 102.65 defines “Dormant application” as an application for which the applicant has failed to submit the information required to complete the application within 12 months of the date the department first notifies the applicant that the application is incomplete.

N.H. ADMIN R. ENV-SW 304.06(d) provides that the applicant shall submit all information required to complete an incomplete application within one year from the date the application is initially determined incomplete in writing to the applicant by the department. An incomplete application that becomes a dormant application as defined in N.H. ADMIN R. ENV-SW 102 shall be deemed denied without further action by the department.

N.H. ADMIN R. ENV-SW 305.03(b)(6) provides that a requested approval shall be denied if one or more of the following conditions apply: (6) The application becomes a dormant application.

III. LEGAL STANDARD FOR DISMISSAL

When reviewing a motion to dismiss for failure to state a claim, the standard of review is whether the allegations in the [appellant’s] pleadings are reasonably susceptible of a construction that would permit recovery. *Plaisted v. LaBrie*, 165 N.H. 194, 195 (2013). The hearings officer is required to assume the truth of the Appellants’ well-pleaded allegations of fact and reasonable inferences to be drawn therefrom and construe those allegations and inferences in the manner most favorable to the Appellants. *Id.*; see also, *Cole v. Town of Conway*, 176 N.H. 560, 563, 565 (2024). The hearing officer is then required to test the facts in the petition against the applicable law, and if the allegations constitute a basis for relief the motion to dismiss must be denied. *Id.*, citing *Barufaldi v. City of Dover*, 175 N.H. 424, 427 (2022).

The hearing officer is not required to accept statements in the appeal that are merely conclusions of law.” *Konefal v. Hollis/Brookline Coop. School Dist.*, 143 N.H. 256, 258 (1998). However, the motion to dismiss must be denied if those “facts and inferences so viewed would constitute a basis for legal relief,” *Flags I, Inc. v. Kennedy*, 131 N.H. 412, 414, (1989) (quotation omitted).

In conducting this inquiry, the hearing officer may also consider documents attached to the appellant’s pleadings, or “documents the authenticity of which are not disputed by the parties ... official public records ... or ... documents sufficiently referred to in the complaint,” *Beane v. Dana Beane & Co*, 160 N.H. 708, 711 (2010) citing *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993).

IV. ANALYSIS

A. Background

As noted above, the Motion to Dismiss addresses GSL's claims 1, 2, 3, 6, 11, and 12 as those claims are set forth in the NOA. Under Claim 1, GSL has alleged that N.H. ADMIN. R. ENV-SW 304.06(d) and ENV-SW 305.03(b)(6) (the "Dormancy Rules") under which the Department denied the solid waste permit application are not authorized by statute and are *ultra vires*. Therefore, the denial violates part II, Article 5 of the New Hampshire Constitution. Under Claim 2, GSL alleges that the Department's application of the Dormancy Rules was contrary to the administrative gloss it used to interpret the rule which in the past had been applied only to abandoned applications. Under Claim 3, GSL argues that the Department misapplied the Dormancy Rules because each new incompleteness letter should have reset the one-year dormancy clock.

Under Claim 6, GSL argues that the Department's finding that it provided inadequate documents to meet the requirements of Env-SW 314.03(a)(3) was unlawful and unreasonable because it failed to notify GSL what documents it needed to meet the requirement of the rule. Therefore, GSL was deprived of due process under the New Hampshire and United States Constitution. Under Claim 11, GSL argues that the Department violated its constitutional duty to assist citizens in complying with the laws administered and enforced by the Department. Under Claim 12, GSL argues that the Department selectively enforced the Dormancy Rules against GSL and in doing so violated its right to equal protection.

B. Parties Argument

In its Motion to Dismiss, the Department contends the Council lacks jurisdiction to decide these claims. NHDES argues the Council is an administrative body with limited statutory authority. It may decide only questions of fact and law relating to DES decisions under applicable waste-management statutes and rules, and cannot apply equitable remedies, decide constitutional questions, or consider claims requiring evaluation of motive, discrimination, or bias. The Department argues that all of these claims fall outside the scope of the Council's jurisdiction or legally fail on their face. In its Objection to the Department's Motion to Dismiss, GSL argues that it is not asking the Council to issue constitutional or equitable remedies. GSL invokes constitutional principles only as reasons the denial was unlawful or unreasonable, which is squarely within the Council's statutory review authority. GSL also argues that the Council must

consider legal and factual grounds to determine unlawfulness/unreasonableness of the Department's decision.

As a general matter, the Department argues completeness determinations are not final decisions, and they are not independently appealable. Only the final denial is appealable. GSL states that it is not separately appealing completeness letters, but the denial depends on completeness determinations. Thus, letters must be considered as part of the record when evaluating lawfulness or reasonableness.

With respect to Claim 1, the Department argues that the Council does not have jurisdiction to decide whether the rules under which the dormancy decision was reached was *ultra vires* of the enabling statute, RSA 149-M. The Department argues that Superior Court is the proper forum for that challenge.¹ GSL argues that it is not asking the Council to invalidate a rule, rather that the denial was unlawful because the Department relied on a mechanism that lacks statutory basis. Therefore, it unconstitutionally usurped the General Court's authority under Part II, Article 5 of the New Hampshire Constitution. GSL also maintains that the parallel Superior Court litigation does not remove the issue from the administrative appeal.

Under Claim 2, the Department argues that the Dormancy Rules are unambiguous and the doctrine of administrative gloss does not apply; therefore, GSL's claim that the Department misapplied the doctrine of administrative gloss fails as a matter of law. GSL argues that it is not required to prove administrative gloss at the pleading stage. It alleges the Department changed its practice by applying dormancy to an actively pursuing applicant—an issue of fact requiring a record, not dismissal. In the alternative, GSL argues that apart from its “administrative gloss,” theory, inconsistent treatment of a solid waste application can make a decision unreasonable.

Under Claim 3, the Department argues that plain language of the rule provides that the “initial completeness” determination controls the one-year time period under which the dormancy period is measured. GSL argues that this is a substantive legal interpretation dispute, not a basis for dismissal, and the Department's subsequent incompleteness letters are determinations that should affect the dormancy period. It further argues that the Department's identification of new or revised deficiencies late in the process raises concerns regarding fairness and notice issues that should be resolved with evidence, not dismissal.

¹ The Department notes that GSL has also brought a petition for declaratory judgment in the superior court in which this issue was raised.

Under Claim 6, the Department argues that due process claims raise constitutional issues that fall outside the Council's jurisdiction. GSL counters that it is not seeking a constitutional ruling, but rather challenges the adequacy of the Department's administrative notice. GSL contends the Department did not specify what documents were missing, contrary to its own rules requiring clear notice of deficiencies. This directly concerns whether the denial was unlawful or unreasonable.

Under Claim 11, the Department argues that GSL's claim that the Department did not comply with its constitutional duty to assist its citizens is beyond the jurisdiction of the Council. GSL contends that this is not a constitutional claim; it's about the Department's failure to specify what was required to complete the application, contradicting ENV-SW 304.05 ("identify deficiencies" and "provide instructions"), thus making the denial unreasonable.

Under Claim 12, the Department argues the Council cannot consider constitutional equal-protection claims. The Department also contends the claim fails because GSL has failed to support its selective enforcement claim by pleading the elements thereof including or submitting factual allegations supporting intentional discrimination or disparate treatment of similarly situated parties. GSL argues that it is not asserting a standalone constitutional claim, but rather that the Department's selective or inconsistent application of its rules is relevant to whether its decision was arbitrary or unreasonable. In support of this argument, GSL points to the Department's prior practice of applying dormancy provisions only to abandoned applications. GSL further contends that the factual circumstances surrounding the Department's application of these provisions should be developed through the evidentiary record rather than resolved through dismissal.

C. Discussion

1. Claim 1

GSL asserts that the Dormancy Rules exceed statutory authority and therefore render the permit denial unlawful. Although GSL characterizes this argument as part of its lawfulness/unreasonableness challenge, resolution of the claim would require determining the validity of the rules. RSA 541:24 vests exclusive jurisdiction over such challenges in the Superior Court. *See also* RSA 21-O:9; RSA 21-O:14. Given the authority of the Superior Court and the fact that a declaratory action has been brought regarding a challenge to the Dormancy Rules, the

Council will defer to the Court's ruling.² Accordingly, Claim 1 is dismissed for lack of jurisdiction.

2. Claim 2

GSL alleges the Department departed from an established "administrative gloss" when applying the Dormancy Rules. Administrative gloss is a rule of statutory construction applied to an ambiguous clause by administrators to interpret the clause in a consistent manner, as it affects similarly situated persons over time. *See Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 502 (2007). Fundamental to this claim requires an initial finding that the Dormancy Rules are vague or ambiguous. *Id. at 493. DHB v. Town of Pembroke*, 152 N.H. 314, 321 (2005); *Heron Cove Assoc. v. DVMD Holdings*, 146 N.H. 211, 216 (2001). The Hearing Officer's review of N.H. ADMIN. R. ENV-SW 304.06(d) does not reveal any vague or ambiguous terms. Lack of ambiguity in a [rule] precludes application of the administrative gloss doctrine. *Petition of Kalar*, 162 N.H. 314, 323 (2011). Further, and critical to this inquiry, the Notice of Appeal contains no allegations of ambiguity. Because GSL has not argued, let alone supported allegations of ambiguity or vagueness in the Dormancy Rules then its allegation that the Department did not act in conformity with its past interpretation of the rules lacks a sufficient basis in law or fact. As such, GSL has failed to allege sufficient facts or legal authority to state a claim for which relief can be granted. *Cole, supra*.³

3. Claim 3

GSL contends the dormancy period should have restarted upon each subsequent incompleteness letter. A dormant application is one for which the applicant has failed to submit the information required to complete the application within 12 months of the date the department **first** notifies the applicant that the application is incomplete. ENV-SW 102.65. (Emphasis added).

² Even if the Council were to consider this argument on the merits, GSL did not address why RSA 149-M,:7, III does not provide the Department with sufficient authority to adopt rules related to the administration of a permit system.

³ GSL also argues that apart from the administrative gloss doctrine, the Department's departure from its established interpretation of practice is relevant to whether the decision was arbitrary, unreasonable or unlawful. In this respect GSL's claim appears to argue selective enforcement, which is a separate claim and will be addressed, *infra*.

Further N.H. ADMIN. R. ENV-SW 304.06(d), provides:

[t]he applicant shall submit all information required to complete an incomplete application within one year from the date the application is **initially determined incomplete** in writing to the applicant by the department. An incomplete application that becomes a dormant application as defined in Env-Sw 102 shall be deemed denied without further action by the department.

ENV-SW 304.06(d), (Emphasis added.)

A reading of the plain language of the rules provides no basis to interpret this language as re-setting the twelve (12) month clock in between the Departments responsive letters. *Appeal of Port City Air Leasing, Inc.*, 177 N.H. 149, 152 (2024); *Appeal of Town of Lincoln*, 172 N.H. 244, 247-248, (2019)(Matters of statutory interpretation involve a question of law, and the language of the statute is to be construed according to its plain and ordinary meaning); *see also, Appeal of N.H. Dep't of Envtl. Servs.*, 173 N.H. 282, 292 (2020) (same principles of construction used when interpreting both statutes and rules). The rules clearly state that the clock begins to run from the Department's "initial determination" of incompleteness and when it "first" notifies the applicant that he the application is incomplete. ENV-SW 304.06(d); ENV-SW 102.65. Had the Department intended for the clock to reset with subsequent notices it would have included that language in the rules. *Appeal of Port City Air Leasing, Inc.*, 177 N.H. at 152.

Further, nothing in the GSL's exhibits to the Notice of Appeal supports restarting the dormancy period. The Department's letters dated February 28, 2024 (Exh. 2), June 24, 2024 (Exh. 4) and January 27, 2025 (Exh. 6), show repeated requests for information previously identified as missing. In the April 3, 2025, Denial by Dormancy letter, the Department referred back to those letters and its repeated requests noting that it explained that the legal agreements were heavily redacted preventing the Department's review and referenced other legal agreements, which were not provided. Exh. 1 to NOA. Based upon the documents in the record, GSL had not satisfactorily responded to the Departments initial requests for this information. Therefore, GSL has not submitted sufficient factual allegations to support "restarting the clock". *Beane*, 160 N.H. at 711. As such, GSL has failed to state a claim for which relief can be granted under Claim 3.

4. Claim 6

Although GSL raises a constitutional claim in the NOA, it recasts that claim as a notice and fair process claim. See Objection to Motion to Dismiss at 13. The record demonstrates that the Department's correspondence identified the documents GSL had already provided and also requested additional documents. The information sought in the additional requests were explained in the correspondence. Some of these requests were repeated throughout the correspondence along with an explanation as to why the documents GSL submitted were inadequate. The correspondence also identified the rules under which the documents and information were sought. GSL's responses to the Department's letters, which are also part of the record, raise no issues as to lack of notice, lack of clarity or vagueness. Moreover, GSL has not identified any portions of the Department's additional correspondence and requests that it did not understand. Accordingly, GSL allegations under this claim is unsupported by the record and stand as a mere conclusion of law. *Konefal*, 143 N.H. at 258. Accordingly, GSL under claim 6, fails to state a claim for which relief can be granted.

5. Claim 11

Under Ground 11, GSL claims that the Department violated its constitutional duty to assist citizens with the laws it administers by not specifying what it required beyond GSL's submission to find the application complete. GSL raised this as a constitutional claim under Part I, Art. 1 of the New Hampshire Constitution, but it now recasts this claim "broadly on the Department's obligation to administer its permitting process in good faith and to provide reasonable assistance" to the applicant. See Objection at 14. Presumably, GSL is arguing that this alleged failure by the Department is unreasonable or unlawful.

Assuming that is the claim, as noted above, the Department's correspondence identifies all of the documents, reports and plans that it received from GSL as part of the application. It further identifies required documents with specificity and explains the factual and legal basis for each request. See Exh. 2, 4 & 6 to NOA. GSL has not identified anything about these additional requests that were vague or ambiguous. GSL also has not identified any deficiencies in the Department's rules preventing it from understanding the application process. Further, at no point did GSL notify the Department that its February 28, 2024; June 24, 2024 and January 27, 2025, correspondence contained any unclear or vague requests, or that it did not know how to respond.

See Exh. 3 and Exh. 5 to NOA. The letters also refer to meetings GSL had with Department representatives during the process. GSL has not alleged it left these meetings with questions about what the Department was seeking. Based upon the foregoing, GSL has not submitted sufficient facts or legal authority to support this claim. Accordingly, GSL's allegation that the Department decision was unlawful or unreasonable because it did not provide reasonable assistance or administer its permitting process in good faith stands as a mere conclusion of law. *Konefal*, 143 N.H. at 258. Accordingly, for all of the foregoing reasons, GSL under claim 6, fails to state a claim for which relief can be granted.

6. Claim 12

Under Claim 12, GSL alleged the Department violated its right to equal protection of the law by selectively interpreting and enforcing its rules against GSL, but not against similarly situated parties. Although it has raised an equal protection claim, GSL is now characterizing this claim as whether the Department applied its permitting rules evenhandedly, and whether the denial was unlawful or unreasonable for that reason.

With this understanding, the allegation that the Department did not apply its permitting rules 'evenhandedly' is in essence a 'selective enforcement claim,'. *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 499 (2007) quoting *Bacon v. Town of Enfield*, 150 N.H. 468, 474 (2004). See also, *Kerouac v. Town of Hollis*, 139 N.H. 554, 561 (2007). As such, GSL must assert some facts supporting this claim. It cannot rest on mere conclusory allegations.

Under a selective enforcement claim, GSL must submit some factual allegations that the Department's application of its permitting rules amounted to conscious, intentional discrimination; that the Department impermissibly established classifications and therefore treated similarly situated individuals in a different manner. *Anderson*, 155 N.H. at 499; see also *Devaney v. Windham*, 132 N.H. 302, 308 (1989) (evidence of discriminatory enforcement necessary). Further, GSL has not submitted factual allegations showing a pattern of systemic nonenforcement. *Alexander v. Hampstead*, 129 N.H. 278, 283-284 (1987). GSL has submitted no facts supporting any of those factors. As such, GSL has not asserted sufficient facts or legal authority to support a colorable claim. Having failed to do that, GSL's allegations under Claim 12 stand as mere conclusions of law. *Konefal*, 143 N.H. at 258. Therefore, GSL's allegations under Ground 12 are not reasonably susceptible of a construction that would permit recovery. *Plaisted*, 165 N.H. at 195.

CONCLUSION

For the foregoing reasons, GSL has not stated a claim for which relief can be granted under Claims 1, 2, 3, 6, 11, and 12. The Department's Motion to Dismiss those claims is **GRANTED.**

So ordered,

Dated: September 24, 2026

/s/ Mary E. Maloney

Mary E. Maloney, Esq., NH Bar 1603

Hearing Officer, Waste Management Council

In accordance with EC-WST 203.17(b)(4), the Council hereby notifies the parties that any party whose rights are directly and adversely affected by this decision may move for reconsideration pursuant to RSA 541:3 and EC-WST 203.18.