

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 217-2025-CV-00316

Granite State Landfill, LLC

v.

State of New Hampshire Department of Environmental Services

**STATE’S MOTION FOR SUMMARY JUDGMENT WITH INCORPORATED
MEMORANDUM OF LAW**

NOW COMES the Respondent, the State of New Hampshire Department of Environmental Services (“Department”), by and through its attorneys, the Office of the Attorney General (collectively, the “State”), and submits this Motion for Summary Judgment with Incorporated Memorandum of Law in the above-captioned declaratory judgment matter pursuant to RSA 491:8 and N.H. Super. Ct. R. 12(g). In support hereof, the State avers as follows:

I. BRIEF PROCEDURAL BACKGROUND

Petitioner, Granite State Landfill, LLC, filed a Petition for Declaratory Judgment pursuant to RSA 541-A:24 on April 8, 2025 (the “Petition”). The Petition raised one claim: that Department administrative rules N.H. Admin. R. Env-Sw 304.06(d) and N.H. Admin. R. Env-Sw 305.03(b)(6) are *ultra vires* “because they purport to enable [the Department] to deny a permit application on a ground not included in the agency’s enabling statute” and that, accordingly, the Petitioner is entitled to a declaratory judgment that the rules are “unlawful because they exceed [the Department’s] statutory authority.” Petition, ¶¶25-27.

The State filed an Answer to the Petition on May 9, 2025 denying that the rules are *ultra vires*. The State now moves for summary judgment with respect to the Petitioner’s claim

because, as a matter of law, the challenged rules are not *ultra vires* as they do not add to, detract from, or modify the statute and are otherwise consistent with the statutory authority provided by N.H. RSA 149-M. On July 1, 2025, following a scheduling conference, this Court ruled that the “issues raised in the complaint appear to be a legal dispute that can be addressed by cross-motions for summary judgment, without the need for any discovery.” July 1, 2025 Court Order.

No factual inquiry is necessary for the Court to decide summary judgment in this matter. As explained herein, determinations of whether administrative rules are *ultra vires* require only that the Court engage in statutory interpretation.

II. STANDARD OF REVIEW

RSA 491:8-a, III provides that “summary judgment shall be rendered...if... there is no genuine issue of material fact and...the moving party is entitled to judgment as a matter of law.” See *Genworth Life Ins. Co. v. N.H. Dep’t of Ins.*, 174 N.H. 78, 82 (2021). “An issue of fact is material if it affects the outcome of the litigation.” *Panciocco v. Lawyers Title Ins. Corp.*, 147 N.H. 610, 613 (2002) (internal citation omitted).

III. SUMMARY STATEMENT OF MATERIAL FACTS

RSA 541-A:24 allows a person to seek a declaratory judgment regarding the validity or applicability of rules “if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.” Beyond facts necessary to demonstrate such interference with or impairment of Petitioner’s legal rights via the application of the rules Petitioner challenges, no other facts are material or relevant to Petitioner’s claim that N.H. Admin. R. Env-Sw 304.06(d) and N.H. Admin. R. Env-Sw 305.03(b)(6) are *ultra vires* of the Department’s statutory authority provided by RSA 149-M. The State stipulates as to the Petitioner’s standing necessary to bring an RSA 541-A:24 claim for

a declaratory judgment and does not contest such standing. Because no facts are necessary to decide summary judgment on the Petitioner's claim, no separate statement of material facts accompanies this motion, as is typically required by N.H. Super. Ct. R. 12(g)(2)(a).

IV. LEGAL ARGUMENT

The Petitioner alleges that N.H. Admin. R. Env-Sw 304.06(d) and N.H. Admin. R. Env-Sw 305.03(b)(6) (the "Dormancy Rules") are *ultra vires* of the enabling authority provided by RSA 149-M. Petition, ¶¶25-27. Specifically, Petitioner argues that RSA 149-M:9, VIII prescribes application processing timelines, that RSA 149-M:9, IX-X and RSA 149-M:12 already set forth the criteria governing approvals and denials, and that nowhere in RSA 149-M is the Department "empowered to deny an application as dormant." Petition, Pg. 1 and ¶¶24-26.

For the reasons explained herein, the Dormancy Rules are consistent with RSA 149-M's rulemaking authority and the remainder of the statute and do not add to, detract from, or modify the statutory authority that the rules are intended to implement. Accordingly, this Court should grant summary judgment in favor of the State.

a. Statutory and Regulatory Framework

The Dormancy Rules are rules that provide for the handling of solid waste facility permit applications that become "dormant applications" due to the applicant's failure to provide sufficient information to complete the application within 12 months after an initial Department determination that the application is incomplete. N.H. RSA 149-M provides that the Department is responsible for the "regulat[ion of] facilities through administration of a permit system...." RSA 149-M:6, III. RSA 149-M:9 establishes the permit requirement for solid waste facilities and provides other information regarding application processing, application content, and further

provides some instances in which the Department may deny an application. Specific relevant sections of RSA chapter 149-M are set forth below:

RSA 149-M:9 provides, in relevant part, that:

- VIII. The department shall act upon each permit application within the time periods specified in rules adopted under RSA 149-M:7. For permits requiring a public hearing under rules adopted under RSA 149-M:7, once the department determines that an application is complete, in no case, without prior written agreement regarding an extension with the applicant, shall the department take longer than 180 days to issue or deny the permit. For permits that do not require a public hearing under rules adopted under RSA 149-M:7, once the department determines that the application is complete, in no case, without the prior written agreement regarding an extension with the applicant, shall the department take longer than 120 days to issue or deny the permit....
- IX. The department may deny a permit application under this section to a person if any of the following conditions applies:
 - (a) The person fails to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility.
 - (b) The person has been convicted of, or pled guilty or no contest to, a felony in any state or federal court during the 5 years before the date of the permit application.
 - (c) In the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of, or pled guilty or no contest to, a felony in any state or federal court during the 5 years before the date of the permit application.
- X. The department shall not issue a permit for a solid waste facility unless the facility meets the terms and conditions required in rules adopted by the commissioner. These terms and conditions include, but are not limited to, monitoring, contingency plans, closure, and evidence of financial responsibility in the amount set by the department after consultation with the commissioner of insurance. This amount shall be whatever is necessary to:
 - (a) Protect the public health and welfare of the environment; and

- (b) Insure that appropriate measures will be taken to prevent present and future damage to the public health and safety or to the environment, in the event that the operations at the facility are abandoned, interrupted, or stopped.

RSA 149-M:12 provides, in relevant part, that:

- I. The department shall approve an application for a permit only if it determines that the facility or activity for which the permit is sought will:
 - (a) Comply with this chapter and all rules adopted under it;
 - (b) Be consistent with the provisions of the state, district, and local plans; and
 - (c) Comply with federal and state air or water pollution statutes, regulations, and rules...

Next, RSA 149-M:7 “Rulemaking” provides, in relevant part, that “the commissioner shall have the responsibility and authority to adopt rules, under RSA 541-A, relative to this chapter, including rules relative to:

- III. Administration 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 required by this chapter, and means of noticing the public about such permits including, but not limited to, using electronic means via notice on the department’s Internet website, and communicating permitting information with affected municipalities....

Part Env-Sw 300 of the “Solid Waste Programs” administrative rules (N.H. Admin. R. Env-Sw 100-2100), relate to permit applications, the Department’s application review determinations and time frames, and permitting decisions. As contemplated by RSA 149-M:9, VIII above, these rules outline the first phase of the Department’s review process, which is an application completeness review that results in a determination of whether “the application satisfies the content and format requirements specified by the solid waste rules for the type of application filed.” *See* N.H. Admin. R. Env-Sw 304.04 through 304.07. Following application

completeness, the Department then conducts the substantive application review, which involves the determination of whether “the application provides sufficient information to conclude that the proposed activity meets all applicable requirements for issuance of approval.” *See* N.H. Admin. R. Env-Sw 304.08 through 304.09. Part Env-Sw 305 relates to the Department’s decisions to approve and deny requested approvals and to allow termination of a permit following facility closure.

The Dormancy Rules relate to the application completeness determination phase of the permit application review process. The Dormancy Rules and a relevant definition are provided in full below. N.H. Admin. R. Env-Sw 304.06 “Completing an Incomplete Application” provides within subsection (d) 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 Env-Sw 102 shall be deemed denied without further action by the department.

N.H. Admin. R. Env-Sw 102.65 defines “[d]ormant application” to mean:

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.

Finally, N.H. Admin. R. Env-Sw 305.03 “Denial of a Requested Approval” provides in subsection (b) that “[a] requested approval shall be denied if one or more of the following conditions applies...(6) [t]he application becomes a dormant application....”

b. Standard for Determining Whether an Administrative Rule is *Ultra Vires*

An *ultra vires* claim tests the text of the regulations at issue against the plain language of the statute being implemented to determine if the regulations fall within the scope of the enabling authority and are otherwise consistent with the statutory text. *See, e.g., Genworth Life Ins. Co. v.*

N.H. Dep't of Ins., 174 N.H. 78 (2021) (determining that the challenged regulations conflicted with the statute's specific grant of rulemaking authority by comparing the statutory provision and the regulation); *Bach v. N.H. Dept. of Safety*, 169 N.H. 87, 92 (2016) (determining that regulation conflicted with statutory scheme by comparing the two and observing that the regulation added a requirement that was not present in the statute); *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180 (2014) (determining that town ordinance was within the town's statutory authority by interpreting the relevant statute and comparing it to the ordinance); *Appeal of Mays*, 161 N.H. 470 (2011) (determining that the rule added requirements into the statutory scheme by interpreting the statutory scheme and comparing it to the regulation).

In conducting this analysis, the New Hampshire Supreme Court has observed the following principles. “[T]he legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws.” *Bach*, 169 N.H. at 92 (quoting *Appeal of Mays*, 161 N.H. at 473). “[T]he ‘authority to promulgate rules and regulations is designed only to permit the [agency] to fill in the details to effectuate the purpose of the [enabling] statute.’” *Id.* (quoting *Appeal of Mays*, 161 N.H. at 473). “Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement.” *Id.* (quoting *Appeal of Mays*, 161 N.H. at 473).

c. The Dormancy Rules are not *Ultra Vires*

Under this analysis, the Dormancy Rules are not *ultra vires*. The Department has the responsibility to “[r]egulate facilities through administration of a permit system...” RSA 149-M:6, III. The Department’s authority to adopt the Dormancy Rules emanates directly from RSA 149-M:7, the rulemaking section, which provides that the Department “shall have the responsibility and authority to adopt rules...relative to...III. [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 required by this chapter....” RSA 149-M:7, III. “RSA 149-M:7...grants [the Department] broad authority to adopt rules necessary to enforce RSA chapter 149-M....” *North Country Env'tl. Servs. v. Town of Bethlehem*, 150 N.H. 606, 614 (2004).

The Dormancy Rules are administrative permit processing time frame measures that relate to the application completeness phase of the permitting process. These rules fall squarely into the above-cited RSA 149-M:7, III grant of rulemaking authority and do not otherwise add to, detract from, or modify that authority or any other provision elsewhere in the Solid Waste Management Act. These rules, like many other rules within the New Hampshire Solid Waste Programs rules fill in administrative aspects of the statutory solid waste permitting scheme. Contrary to Petitioner’s claim, the Dormancy Rules also do not add to, detract from, or modify the plain language of RSA 149-M:9, VIII with respect to permit application processing timeframes nor the plain language of RSA 149-M:9, IX-X, or RSA 149-M:12 regarding authority to approve or deny applications but are rather consistent with those provisions.

With respect to RSA 149-M:9, VIII, as Petitioner references, this subsection indeed outlines certain permit application processing timeframes for the department to follow “once the [D]epartment determines that an application is complete...” RSA 149-M:9, VIII. However, by the plain language in this provision, the 120- or 180-day (depending on necessity of public hearings) decision periods only begin “once the [D]epartment determines that an application is complete.” *Id.* As discussed above, the Dormancy Rules relate specifically to the application completeness phase of permitting. Where the application is not yet deemed complete, the time periods set forth in RSA 149-M:9, VIII are not yet triggered. Once an application is complete,

the Department indeed follows the time periods established by this subsection or seeks agreements from the applicant for extensions. *See* N.H. Admin. R. Env-Sw 305.02(a). Accordingly, the Dormancy Rules do not add to, detract from, or modify the requirements of RSA 149-M:9, VIII regarding application processing timeframes for complete applications. The Dormancy Rules instead remain consistent with the rulemaking authority of RSA 149-M:7, III, which specifically provides authority to establish rules regarding the “time frames under which the department shall issue, modify, suspend, revoke, deny, approve, or transfer permits...”

The Petitioner next claims that RSA 149-M:9, IX-X and RSA 149-M:12 already provide the criteria for approving and denying permit applications. Petition, ¶24. RSA 149-M:9, IX, as quoted above, outlines certain situations in which the Department “may” deny a permit application. This discretionary authority allows the Department to deny a permit application if the applicant has competency, integrity, expertise issues, or certain felony convictions. Contrary to the Petitioner’s claim, the ability to deny for these reasons are additional to the ability to deny for failure to satisfy any terms and conditions required by rules adopted by the Department. *See* RSA 149-M:7 and RSA 149-M:9, X. The logical import of the Petitioner’s claim is that because RSA 149-M:9, IX provides a set of circumstances in which the Department may deny a permit application, the Department cannot promulgate rules that enable it to deny for any other reason. Such an interpretation of RSA 149-M:9, IX to be so limiting would conflict with each of the following: (1) the specific grant of rulemaking authority to establish the “criteria for all types of facilities” (RSA 149-M:7, II); (2) the specific grant of rulemaking authority to establish a permit system and rules and time frames under which the Department “shall issue, modify, suspend, revoke, deny, approve, or transfer permits...,” as discussed above (RSA 149-M:7, III); (3) the requirement that the Department “shall not issue a permit for a solid waste facility unless the

facility meets the terms and conditions required in rules adopted by the commissioner” (RSA 149-M:9, X); and (4) the requirement that the Department shall “approve an application for a permit only if...the facility...will...comply with [the] chapter and all rules adopted under it (RSA 149-M:12, I). *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 186 (2014) (the Court “must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words”).

Further, interpreting RSA 149-M:9, IX to only allow the Department to deny applications in those select narrow circumstances would lead to absurd consequences. This interpretation would take away any ability for the Department to deny for any of the many other important administrative requirements or for any of the important detailed and highly technical substantive requirements involved in solid waste facility design, construction, and operation. *See State v. Wilson*, 169 N.H. 755, 766 (2017) (citing *Appeal of Marti*, 169 N.H. 185, 190 (2016)) (“It is a fundamental principle of statutory construction that whenever possible, a statute will not be construed so as to lead to absurd consequences. Thus, as between a reasonable meaning and unreasonable meaning of the language used, the reasonable meaning is adopted.”).

With respect to RSA 149-M:9, X, this subsection provides that the Department shall not issue a permit “unless the facility meets the terms and conditions adopted by the commissioner.” As previously referenced, the Dormancy Rules fit squarely within and are consistent with RSA 149-M:9, X’s directive. The Dormancy Rules are such terms and conditions associated with the permitting process that must be followed to achieve a permit. With respect to RSA 149-M:12, the same argument applies. This subsection indeed outlines the criteria for approval of a permit application but does so by again requiring that the Department only approve an application to the extent it complies with the “chapter and all rules adopted under it.” The Dormancy Rules, as

discussed above, are among such rules. The Dormancy Rules therefore, do not conflict with the authority provided by RSA 149-M:12.

Contrary to Petitioner's claims, the Dormancy Rules do not add to, detract from, or modify the language of RSA 149-M and are accordingly not *ultra vires*. Rather, the rules are duly promulgated administrative permit processing measures that fit squarely within the statutory grant of authority. As such, this Honorable Court should grant summary judgment in favor of the State.

V. CONCLUSION

For the above reasons, the State is entitled to judgment as a matter of law because the Dormancy Rules are not *ultra vires*. Summary judgment must therefore be entered for the State with respect to the sole claim made in the Petition.

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Grant the State's Motion for Summary Judgment with Incorporated Memorandum of Law;
- B. Enter judgment in favor of the State on the claim raised by the Petition; and
- C. Grant such other relief as this Court deems necessary and just.

Respectfully submitted,

STATE OF NEW HAMPSHIRE DEPARTMENT
OF ENVIRONMENTAL SERVICES

By its Attorney,

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Dated: September 15, 2025

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via this Court's electronic filing service on counsel for the Plaintiffs, Cleveland Waters & Bass, P.A. and Lehmann Major List, PLLC and upon counsel for the North Country Alliance for Balanced Change, the intervenor, BCM Environmental & Land Law, PLLC.

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