THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Granite State Landfill, LLC

v.

State of New Hampshire Department of Environmental Services

Docket No. 217-2025-CV-00316

Memorandum of Law in Support of Motion for Summary Judgment

Petitioner, Granite State Landfill, LLC, ("GSL"), by and through its attorneys, Cleveland, Waters and Bass, P.A., and Lehmann Major List, PLLC, hereby moves, pursuant to Superior Court Civil Rule 12(g), this Honorable Court to enter summary judgment for GSL and against the Respondent, State of New Hampshire Department of Environmental Services ("NHDES"), as set forth below.

I. Background and Introduction

This case arises out of GSL's application for a standard landfill in Dalton, New Hampshire. NHDES reviewed the application and determined it was incomplete. *See* Statement of Material Facts, ¶¶1-2. After that initial incompleteness determination, under NHDES's rules and its interpretation of those rules, GSL had one year to complete the application. GSL submitted hundreds of pages of additional materials within a year of the first application deadline. *Id*. at ¶¶3-10. After GSL's final submission, NHDES found the application incomplete and deemed the application dormant resulting in a denial without prejudice of the application. *Id.* at ¶11.

GSL is not aware of any equivalent case where NHDES denied an application as dormant. *Id.* at ¶12. In every single application where NHDES denied the application based on the dormancy rules the applicant failed to submit any response to the initial incompleteness determination –

essentially where the applicant abandoned the application. *Id.* at 13. Such a rule might be reasonable; but one that sets an arbitrary deadline for completing an application does not support the statutory purpose of RSA ch. 149-M. This is evident from NHDES's application of these rules and the fact that all the time limitations in the statute are designed to protect the applicant's rights and not arbitrarily punish the applicant.

II. Statement of Material Facts

Pursuant to Superior Court Civil Rule 12(g)(2), a separate Statement of Material Facts is attached hereto with supporting exhibits, all of which are hereby incorporated by reference.

III. Legal Standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA § 491:8-a, III. In reviewing the summary judgment motion, the court will consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. *See Big League Entm't, Inc. v. Brox Industries, Inc.*, 149 N.H. 480, 482 (2003). One opposing a motion for summary judgment must support his or her objection with "specific facts showing the existence of a genuine issue for trial." *Lake v. Sullivan*, 145 N.H. 713, 715 (2001). General and bare allegations of expected proof are insufficient to raise genuine issues of fact. *Lourie v. Keene State Coll.*, 121 N.H. 233, 236 (1981).

IV. Argument

A. Statutory Framework

RSA chapter 149-M governs solid waste management in New Hampshire and defines the scope of DES's authority over solid waste facility permits. RSA 149-M:6 confers upon DES the responsibility to administer and enforce the solid waste management laws and to regulate facilities

through a permit system. RSA 149-M:7 further authorizes the DES Commissioner to adopt rules "relative to" various aspects of the solid waste program. Of particular relevance, RSA 149-M:7, III permits 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, deny, approve, or transfer permits." As discussed below, this provision addresses the *department's* obligations to act within certain time frames; it does not expressly or implicitly authorize DES to create new substantive grounds for denying permit applications on account of applicant "dormancy."

The legislature carefully delineated the criteria and process for issuing or denying solid waste facility permits in RSA 149-M. Under RSA 149-M:9, VIII, once an application is deemed complete, DES must act on it within specified time periods. Specifically, for permits requiring a public hearing, once the department determines the application to be complete, it must issue or deny the permit within 180 days unless the applicant agrees in writing to an extension. For permits not requiring a public hearing, the department must issue or deny the permit within 120 days, unless the applicant agrees to an extension.[1] More importantly, RSA 149-M:9, paragraphs IX and X, enumerate the *exclusive grounds* on which DES may deny or withhold a permit. RSA 149-M:9, IX authorizes DES to deny a permit application if, *and only if*, certain disqualifying conditions apply – for example, if the applicant fails to demonstrate the requisite "reliability, expertise, integrity, and competence" to operate the facility, or if the applicant or its key personnel have a recent felony conviction. RSA 149-M:9, X provides that DES "shall not issue a permit" unless the proposed facility meets all terms and conditions established by DES rules, such as requirements

[1] This was not always the case. A prior version of RSA 149-M:9, VIII, required the department to act upon the application within a reasonable time. *See* RSA 149-M:9, VIII (1996). The reasonableness requirement was defined more specifically by RSA 541-A:29 which set explicit deadlines. The legislature modified those time frames in RSA 149-M:9, VIII in 2019. Nevertheless, the inclusion of specific timeframes highlights that the deadlines are not intended to hinder applications but set reasonable expectations of when an application will be reviewed.

for monitoring, financial responsibility, and other enumerated factors. Additionally, RSA 149-M:12, I mandates that DES *approve* an application "only if" the proposed facility or activity will comply with RSA 149-M and "all rules adopted under it". In other words, the statute directs DES to deny or refrain from issuing a permit when an application fails to meet the substantive requirements of the law or rules – but it does not give it discretion or authority to deny a permit for reasons outside those statutory criteria.

Significantly, nothing in RSA 149-M:9 or RSA 149-M:12 authorizes DES to deny a permit application because it has been deemed "dormant." The statute's focus is solely on qualitative grounds for denial, such as the applicant's qualifications or the facility's compliance with standards, not on any temporal or inactivity-based cutoff for applicants. Indeed, RSA 149-M:7, III's reference to "time frames" plainly relates to the *department's* duty to act in a timely manner on permit applications, rather than imposing a deadline on applicants that, if missed, would result in automatic denial. The absence of any statutory "dormancy" or default-denial provision is telling. Where the legislature intended applications to lapse or be denied due to timing, it said so explicitly – for example, in RSA 541-A:29, II, the Administrative Procedure Act provides default timelines for agency action on applications. And RSA 149-M:9, VIII sets deadlines for DES decisions once an application is complete. By contrast, the legislature did not enact any statute imposing a time limit on applicants or allowing DES to deny an application for lack of completeness tied to any time period. Under fundamental principles of administrative law, DES cannot fill that void by creating its own new ground for denial via rulemaking.

B. The "Dormant Application" Rules Conflict with RSA 149-M

Despite the lack of statutory authority, DES promulgated administrative rules that do exactly that – they allow the agency to deem an application "dormant" and deny it by default.

Specifically, Env-Sw 305.03(b)(6) (a subsection of the DES Solid Waste Rules) provides that DES "shall deny" a permit application if the application is found to be "dormant." Related rule Env-Sw 304.06(d) sets a procedural trigger for dormancy: it requires that all information needed to complete an application be submitted within one year of DES's initial request, and if the applicant fails to meet that deadline, the application will be deemed dormant (and thus subject to denial under Env-Sw 305.03(b)(6)). In effect, these rules establish a one-year statute of limitations on responding to DES information requests – a "use it or lose it" mechanism not found anywhere in RSA 149-M.

To illustrate, DES's own rules (Env-Sw 305.03(b)) enumerate the grounds on which a solid waste permit application will be denied. According to DES rule Env-Sw 305.03(b), denial is warranted only if one or more of the following circumstances exist:

- **Non-compliance with law:** The proposed facility or activity fails to comply with applicable statutory and regulatory requirements;
- **Disqualifying applicant:** The applicant has a felony conviction in the past 5 years or lacks sufficient reliability, expertise, integrity, and competence;
- **No legal right to site:** The applicant has no legal right to the property proposed for the facility; or
- **Other rule-based denial provision:** Any other specific provision for denial as stated in the solid waste rules applies.

Notably, the first, third, and fourth grounds in the list above correspond to or derive directly from the statutory criteria in RSA 149-M:9 and RSA 149-M:12. For example, the "felon or unreliable" ground mirrors RSA 149-M:9, IX(a)-(c), and the requirement of compliance with statutes and rules reflects RSA 149-M:12, I. In contrast, the inclusion of an "insufficient, ambiguous or dormant" application as a basis for denial is nowhere to be found in RSA 149-M. This is an invention of the DES rules. The legislature did not list "dormant application" or applicant delay as a ground for denying a permit – yet DES's rule treats it as equivalent to the substantive statutory grounds.

By promulgating Env-Sw 304.06(d) and 305.03(b)(6), DES has expanded the scope of its permit denial authority beyond what the legislature authorized. The agency has effectively created a new condition under which an application will be denied (failure to submit all information within one year, i.e. dormancy), even though the enabling statute does not empower DES to deny permits on that basis. This conflict between the agency's rule and the statute is irreconcilable. The New Hampshire Supreme Court has made clear that when a *regulation* adds criteria or conditions not contemplated by the *statute*, the regulation cannot stand: "administrative rules may not add to, detract from, or modify the statute which they are intended to implement" *Bach v. N.H. Dept. of Safety*, 169 N.H. 87, 92 (2016). Stated differently, an agency does not "possess the power to contravene a statute," and any rule that attempts to impose requirements beyond those the legislature established is *ultra vires* and invalid. *Formula Dev. Corp. v. Town of Chester*, 156 N.H. 177, 182 (2007).

Here, Env-Sw 305.03(b)(6) adds dormancy as a new basis for permit denial that detracts from and modifies the statutory scheme enacted in RSA 149-M. The legislature enumerated specific grounds to deny a permit and it set forth certain timing requirements for DES's processing of applications. But it did not authorize DES to automatically reject an application simply because an applicant needs more time to gather information or–importantly–because *the department itself* requires additional information to review to make an informed decision. By deeming applications "dormant" and denying them, DES has created a *de facto* deadline on applicants that the legislature never imposed. This is exactly the kind of rulemaking overreach that New Hampshire courts forbid. As the New Hampshire Supreme Court has cautioned, an agency cannot, through rulemaking, "import into [the law] requirements different from those set forth in [the statute]"

Back, 169 at 92. If a rule "effectively impose[s] a higher standard" or additional requirement beyond the statute's terms, the rule is *ultra vires* and void. *Id.*

C. Ultra Vires Rulemaking and the Separation of Powers

Because Env-Sw 304.06(d) and 305.03(b)(6) create an unauthorized "dormancy" denial mechanism, they must be invalidated as *ultra vires*. This conclusion is strongly supported by New Hampshire case law. In *Appeal of Old Dutch Mustard Co*., 166 N.H. 501 (2014), a case involving a DES permit, the Supreme Court implicitly recognized that DES can only deny permits on grounds authorized by RSA 149-M. The Court recited the various grounds for denial under DES's rules, including that an application may be denied if it is "insufficient, ambiguous or dormant," but noted that DES is "compelled to deny" a permit only if one of those specified grounds exists. *Id.* at 511. Critically, the only grounds identified were those in the rules that trace back to the statute – the Court did not suggest that DES has any free-floating authority to deny for other reasons. Rather, the Court's analysis underscored that the denial of a permit hinges solely on failure to meet statutory/regulatory requirements or other enumerated criteria. The inclusion of "dormant" in the DES rules went unchallenged in *Old Dutch Mustard*, but in the present case, that inclusion is squarely at issue – and it is clear that **"**dormancy" is *not* a condition grounded in the statute.

More directly, *in Bach v. N.H. Dept. of Safety*, 169 N.H. 87 (2016), the New Hampshire Supreme Court struck down administrative rules that attempted to impose extra-statutory conditions on license applicants. In *Bach*, the Department of Safety's rules required non-resident concealed carry license applicants to prove they held a valid license from their home state – a requirement found nowhere in the governing statute, RSA 159:6. The Court held that, by "requiring nonresidents to submit proof that they hold resident state licenses" as a condition of a New Hampshire license, the agency's rules had "change[d] the requirements of [the statute]" and thus "add[ed] to, detract[ed] from, or modif[ied] the statute which they [were] intended to

implement." *Id.* at 94 (quoting *Appeal of Mays,* 161 N.H. 470, 473 (2011)). Accordingly, the rules were declared ultra vires and, therefore, invalid. *Id.* The parallel to the present case is strong: just as the Department of Safety in *Bach* added a new licensing prerequisite beyond the statute, DES has added a new ground for permit denial –"dormancy" – beyond the statute's exhaustive list of criteria. Under *Bach* and the long line of New Hampshire cases it reaffirms, such a rule cannot withstand judicial scrutiny.

It is a fundamental principle of New Hampshire law that administrative agencies are creatures of statute and cannot exceed the authority granted to them by the legislature. Any attempt by an agency to enlarge its powers or to create rules that alter the legislative scheme violates the separation of powers embodied in the New Hampshire Constitution. Part I, Article 37 of the New Hampshire Constitution mandates that the executive, legislative, and judicial branches remain within their distinct spheres, and it is violated by an encroachment by one branch upon a constitutional function of another." *State v. Lafrance,* 124 N.H. 171, 176 (1983). In the context of administrative rulemaking, an agency that promulgates rules beyond the scope of its statutory delegation is effectively usurping the legislature's exclusive power to make law. Here, by adopting a "dormant application" denial rule unsupported by RSA 149-M, DES assumed a lawmaking role that the Constitution reserves for the legislature. This Court should therefore strike down Env-Sw 304.06(d) and Env-Sw 305.03(b)(6) as an unlawful *intra-branch* power grab in addition to being inconsistent with the statute.

Finally, it bears emphasis that RSA 149-M:7, III – the only plausible source of rulemaking authority for "time frames" – cannot be stretched to save these rules. That provision authorizes DES to adopt rules governing the "terms, conditions, and time frames *under which the department shall issue*" permits. Nothing in that section suggests a legislative intent to penalize

applicants or deem applications abandoned on a timetable. If the legislature had intended to create a default-denial mechanism for inactive applications, it would have said so in RSA 149-M:9 or RSA 149-M:12. Indeed, the legislature knows how to provide for permit expirations or deadlines on applicants when it so intends. The conspicuous absence of any such provision in RSA 149-M means DES lacks the power to invent one by rule. As the Court noted in *Bach*, an administrative rule that "effectively import[ed] into New Hampshire law requirements different from those set forth in [the statute]" is beyond the agency's authority and invalid. *Bach,* 169 N.H. at 92. Env-Sw 304.06(d) and 305.03(b)(6) do exactly that – they import a new dormancy-based denial condition not set forth in RSA 149-M – and must accordingly be invalidated.

V. Conclusion

The sole basis for NHDES's denial was that the application was dormant. There is no provision in the statute that defines dormancy or authorizes NHDES to deny an application based on its definition of dormancy. The Dormancy Rules also do not further the statutory purpose of RSA ch. 149-M or NHDES. The rule NHDES relied on is therefore *ultra vires* and this court must annul NHDES's ruling based on that unlawful rule and for the reasons stated above, GSL is entitled to summary judgment on its claim against NHDES.

Respectfully submitted,

GRANITE STATE LANDFILL, LLC
By Its Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

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By: */s/ Jacob M. Rhodes*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this day, September 15, 2025, through the court's ecf-filing system upon all parties who have filed appearances.

/s/ Jacob M. Rhodes

Jacob M. Rhodes, Esq.