

VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: H. A. **Manosh** Corp. by Findings of Fact, **Conclu-**
Martin K. Miller, Esq. sions of Law and Order
Miller, Eggleston & Land Use Permit #5L0690-1-EB
Rosenberg, Ltd.
P.O. Box 1489
Burlington, Vermont 05402-1489

On July 17, 1987, the H. A. **Manosh** Corporation (**Manosh**) appealed to the Environmental Board (Board) from the decision issued June 2 by District #5 Environmental Commission (Commission). In that decision, the Commission concluded that the landfill component of **Manosh's** Land Use Permit #5L0690/5L0690 (**Revised**) was deemed abandoned and expired pursuant to 10 V.S.A. § 6091(b) and that **Manosh** would have to submit an original application for a permit to operate the landfill.

The Board convened a public hearing on July 15, 1987 in Middlebury, Vermont and heard oral arguments from **Manosh**, represented by Martin K. Miller, Esq., and the Garfield Road Association (Association) represented by Steven F. Stitzel, Esq. The Board recessed the hearing pending submission of legal memoranda from the parties. On July 21 **Manosh** submitted a Memorandum In Support of its Appeal: on July 27 the Association filed a Memorandum: and on July 31 **Manosh** submitted a Reply Brief. On August 5 the Board conducted a deliberative session. On August 26 the Board conducted a second deliberative session.

On September 14 the Board issued a decision in which it concluded that an evidentiary hearing was required to determine whether **Manosh** commenced landfill operations before October 24, 1986, the date specified in Condition 8 of the permit.

On September 21 a public hearing was convened by Chairman Leonard U. Wilson acting as hearing officer for the Board, pursuant to Board Rule 41. The following parties participated in the hearing:

H. A. **Manosh** Corp. by Martin K. Miller, Esq. and Gary Nolan
Garfield Road Association by **Vicki** Emerson-Mason

On October 15, 1987, the Garfield Road Association filed a response to the proposed decision and on October 19 **Manosh** filed a response to the Association's Memorandum. The Board conducted a deliberative session on October 20. This matter is now ready for decision.

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I. BACKGROUND OF THE CASE

On October 24, 1985, **Manosh** received a permit from the Commission to operate a landfill and a gravel pit. That permit was appealed to the Board by the Association on January 20, 1986 and a cross-appeal filed by **Manosh** on February 11. On August 8, 1986, the Board issued Land Use Permit #5L0690-EB which incorporated by reference the Commission's permit except for certain modifications made by the Board. On October 9, after considering several motions filed by **Manosh** for reconsideration, the Board issued an amended order. In April 1987, after being notified by the District Environmental Coordinator that its permit may have expired, **Manosh** filed a motion to extend the expiration date of the landfill component of the permit. On June 2, the Commission denied the amendment request and deemed the permit for the landfill operation expired and abandoned. **Manosh** has a valid State Solid Waste Certification to operate the landfill.

II. ISSUES

Condition No. 8 of the Commission's permit provides: "Should the landfill operation not commence by October 24, 1986, approval for that land use shall be deemed expired pursuant to 10 V.S.A. § 6091(b)." Section 6091(b) states that "[n]onuse of a permit for a period of one year following the date of issuance shall constitute abandonment of the project and the permit shall be considered expired." Rule 38(B) further defines abandonment by non-use by stating that "[u]se of a permit within one year as required by 10 V.S.A., § 6081(b) shall include but not be limited to actions by the permit holder to ... demonstrate an intention to proceed with the project."

The Association argues that Condition 8 established requirements for commencement of operation different from those established in § 6091(b) and the rules interpreting that section, and that since the October 24, 1986 date passed and was not appealed by **Manosh**, the permit has expired by its own terms. The Association further contends that **Manosh** had the opportunity to include Condition 8 in its cross-appeal to the Board of Land Use Permit #5L0690/5L0690 (Revised) or to timely file for an extension of the expiration date pursuant to § 6091(c). Since **Manosh** took neither of those actions, the Association argues that **Manosh** cannot now attack that condition or claim that it was not aware of the expiration date. The Association believes that **Manosh** has a long history of ignoring administrative decisions when it is to its benefit to do so, and that this is another example of **Manosh's** disregard of the law.

Manosh argues that the language in § 6091(b) controls since Condition 8 refers to, that section. The actual date by which the landfill operations had to commence, therefore, was one year from the date of issuance of the permit, and **Manosh** contends that "issuance" refers to the date of the permit as amended by the Board. **Manosh** further claims that it paved the access road to the landfill site on August 22, 1986, and commenced construction on a buffer zone and berm around the landfill during the summer of 1986, thereby commencing landfill operations before October 24, 1986 as required by the permit.

The Association believes that **Manosh** was required to pave the access road to alleviate the dust and mud problems caused by the trucks leaving the gravel pit that was operating at the time the condition was imposed. The Association also believes that the purpose of the buffer strips and berms was to mitigate the noise, dust, and visual impact of the existing gravel pit operation regardless of the landfill.

III. FINDINGS OF FACT

1. On October 24, 1985, District #5 Environmental Commission issued Land Use Permit #5L0690 (Revised) to H. A. **Manosh** Corp. This Permit authorized the Permittee to operate a sanitary landfill and conduct a commercial sand and gravel operation on a 73± acre tract of land located off Garfield Road in Hyde Park, Vermont. Condition 8 of that permit provided:

"Should the landfill operation not commence by October 24, 1986, approvals for that land use shall be deemed expired pursuant to 10 V.S.A. § 6091(b)."

2. After several reconsideration motions were considered by the Commission on January 20 and February 12, 1986, appeals were filed with the Board by adjoining landowners, the Garfield Road Association, and **Manosh**.
3. On August 8, 1986, the Board issued Land Use Permit #5L0690-EB.
4. Land Use Permit #5L0690 incorporated a Disposal Facility Certification issued by the Agency of Environmental Conservation (now Agency of Natural Resources) (ANR) in 1984 and provided that any changes to that certification would require an amendment of the land use permit.

5. On January 3, 1986, **Manosh** applied for a modification of its Solid Waste Disposal Facility Certification from the ANR to extend the date by which **Manosh** had to commence landfill operations. On December 8, 1986 such amended certification was issued.
6. The site of the first phase of the landfill and the current gravel pit operation is located within a 15-acre area of the 73 acre tract. The project site is bounded on the west by Garfield Road a paved Class III town road, and lands owned by **Benton Emerson**. At the northwest corner of the site, the intersection of Town Highway #50 and Garfield Road create a four corners. The site is bounded on the south by the Morristown-Hyde Park town line, on the north by T.H. 50, and on the east by lands owned by **Bernie Emerson**.
7. An access road extends from Garfield Road into the gravel pit and landfill area. In late 1985, **Manosh** paved a 300 foot section of the road extending from Garfield Road to the top of the landfill area.
8. In Land Use Permit #5L0690-EB, the Board required **Manosh** to extend the access road pavement to the base of the landfill area to help mitigate the adverse environmental impacts caused by the landfill and gravel operation.
9. On August 22, 1986, **Manosh** paved another section of the access road that leads to the base of the landfill area, approximately 250'-300' in length.
10. Gravel trucks frequently use the paved portion of the road for exiting from the gravel pit and sometimes use it for entering the gravel pit, as part of a loop.
11. **Manosh** was required to create 50 foot buffers horizontally from all property borders to the edge of the excavation limits and a 5 foot high, 25 foot wide berm along the entire northerly end of the pit and along the northerly-most 250 feet of the easterly pit face, to be planted with trees for screening, in order to mitigate the noise, dust, and visual impacts of the project.
12. During the summer of 1986, **Manosh** began construction work to create the 50 foot buffer zones and construct the berms. This involved hauling in material and pushing it up to create slopes. This work continued through the fall and was completed in the spring of 1987 when topsoil was brought in and trees planted.

13. The landfill is not currently receiving refuse but **when** it is, those trucks will solely use the paved access road. The gravel trucks will continue to use that road.

IV. CONCLUSIONS OF LAW

The Board concludes that **Manosh** commenced landfill operations before October 24, 1986, the date by which **Manosh** was required to do so by Condition 8 of the Commission's permit, by paving the access road and initiating construction of the buffer zones and berms. The Board acknowledges that these actions were not taken solely in association with the landfill operation. Because the gravel pit operation and the landfill operation are so closely physically **inter-**connected, however, the Board cannot find that the actions were undertaken solely in association with the gravel pit. Rather, an examination of both the Commission's permit and the Board's amendment indicates that the two operations were being reviewed as one project and that a number of **condi-**tions were imposed to mitigate the environmental impacts of the project as a whole, including noise and dust from both gravel pit and landfill trucks entering and exiting the site, and the aesthetic intrusion created by both a gravel pit and a landfill. The access road that was paved in August, 1986 will be used by both gravel trucks and landfill trucks, and the berms and buffer strips will screen both the gravel pit and the landfill operation from view.

Title 10 V.S.A. § 6081(a) prohibits the commencement of construction on a development without a permit. Under the Board rules and declaratory rulings, commencement of construction means any physical action on a project site which initiates development, once the jurisdictional threshold is met. Any physical improvement to the landfill site would have been considered commencement of development for which a permit must be obtained. Had **Manosh** paved the access road or begun earthwork to create berms and buffer zones before obtaining a permit for the landfill operation, it would have been subject to prosecution for commencing development without a permit. Furthermore, **Manosh** would have been subject to an enforcement action for violation of the permit conditions that related to both aspects of the project if the access road had not been paved or the berms and buffer strips not created. Therefore, it must follow that by paving the access road in August 1986, and by commencing earthwork in the summer of 1986, **Manosh** did commence the landfill operation before October 24, thereby satisfying Condition No. 8 of the permit. The Board will therefore reverse the Commission's decision that the permit authorizing operation of the landfill is expired and order the Commission's June 2 order null and void.

The Board is concerned that nowhere in the Commission's decision of June 2 that deemed the permit for the landfill operation expired is there any indication that **Manosh** presented any evidence to the Commission on the actions taken in the landfill operation before October 24, or otherwise informed the Commission of its position that it had commenced operation of the landfill before that date. The Board reminds the Permittee that presenting evidence to the Board on appeal that was not before the Commission for its consideration results in prolonging the permit proceedings unnecessarily.

ORDER

1. The Commission's decision of June 2, 1987 that **Manosh's** Land Use Permit #5L0690/5L0690 (Revised) is deemed abandoned and expired is hereby reversed.
2. Paragraph 1 of the Commission's order of June 2, 1987 is void.

Dated at Montpelier, Vermont this 3rd day of November, 1987.

ENVIRONMENTAL BOARD



Leonard U. Wilson, Chairman
Ferdinand Bongartz
Jan S. Eastman
Arthur Gibb
Samuel Lloyd
Roger N. Miller

FF 5L0690-1-EB