

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Doyle, Colleen  
**Sent:** Wed 11/29/2017 6:58:30 PM  
**Subject:** Hanson Aggregates' Request for Guidance Re Common Control - (Part 1 of 2)  
[EPA Letter re Lack of Common Control-c.pdf](#)

Mandy: I am forwarding you three emails (Part 1 , 1a and 2) that we sent EPA several months ago on the aggregation issue. Once you have had an opportunity to review these materials, let me know when you want to regroup. Thank you.

**HUNTON & WILLIAMS** Colleen Doyle

Partner

[doylec@hunton.com](mailto:doylec@hunton.com)

p 213.532.2102

m 213.880.4660

[bio](#) | [vCard](#)

Hunton & Williams LLP  
550 South Hope Street  
Suite 2000  
Los Angeles, CA 90071

[hunton.com](http://hunton.com)

This communication is confidential and is intended to be privileged pursuant to applicable law. If the reader of this message is not the intended recipient, please advise by return email immediately and then delete this message and all copies and backups thereof.



HUNTON & WILLIAMS LLP  
550 SOUTH HOPE STREET, SUITE 2000  
LOS ANGELES, CALIFORNIA 90071-2627

TEL 213 • 532 • 2000  
FAX 213 • 532 • 2020

COLLEEN P. DOYLE  
DIRECT DIAL: 213-532-2102  
EMAIL: doylec@hunton.com

August 2, 2017

**CONFIDENTIAL AND  
TRADE SECRET BUSINESS  
INFORMATION ENCLOSED  
DO NOT DISTRIBUTE**

**VIA E-Mail and Overnight Delivery**

Ms. Sarah W. Dunham (Dunham.sarah@Epa.gov)  
Acting Assistant Administrator  
Office of Air and Radiation  
USEPA Headquarters  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 6201A  
Washington, D.C. 20460

Re: Lack of Common Control: Hanson Aggregates Pacific Southwest, Inc. and  
Sycamore Landfill, Inc. Operations, Santee, California

Dear Ms. Dunham,

I write on behalf of Hanson Aggregates Pacific Southwest, Inc. (“Hanson”) seeking guidance on the San Diego Air Pollution Control District’s (“District”) Title V common control determination for Hanson and Sycamore Landfill, Inc.’s (“SLI”) operations in Santee, California. SLI owns the Santee facility where it operates a Class III solid waste landfill. Through a license agreement with SLI, Hanson conducts aggregate mining at the Santee location.<sup>1</sup> While co-located, SLI and Hanson are independently owned companies with distinctly different operations and emissions. Asserting common control here defies the common sense notion of a plant, and forces a common control interpretation that is “unreasonably inconsistent with its plain meaning.” Summit Petroleum Corp. v. EPA, 690 F.3d 733, 744 (6th Cir. 2012). As outlined below, the goals for aggregating — improving air quality and preventing companies from skirting their regulatory compliance obligations — are not accomplished by combining these two separate operations.

---

<sup>1</sup> The SLI/Hanson license is memorialized in the Landfill Development Agreement (“License”) and the First Amendment to Landfill Development Agreement (“Amended License”), copies of which are enclosed.



Ms. Sarah Dunham  
Acting Assistant Administrator  
Office of Air and Radiation  
August 2, 2017  
Page 2

Landfill gas from SLI's landfill operations subjects it to Title V permitting as a major source of VOCs. Absent VOCs, no other pollutant would trigger Title V permitting at SLI's landfill. Hanson's mining operation is not a major source for any air pollutant, and does not emit VOCs from any stationary source. For the last 15 years, the District has regulated Hanson's PM 10 emissions under a permit to operate. Combined, SLI's and Hanson's PM 10 emissions are significantly below the 100 tpy PM 10 major source Title V triggering limit.<sup>2</sup>

Despite a lack of any major source emissions, whether considered alone or in conjunction with SLI, the District recently determined Hanson's operation is subject to Title V permitting. The District reasons that SLI is subject to Title V (because of triggering VOC levels), and SLI and Hanson are co-located, ergo Hanson's mining operation is subject to Title V permitting.<sup>3</sup> The District has requested Hanson submit a Title V permit application and has indicated it intends to issue Hanson a separate Title V permit.

As outlined below, Hanson maintains there is a lack of common control between SLI and Hanson. Because the District's Title V determination for Hanson is based on the facilities' co-location, absent common control, Title V permitting for Hanson's operation is inappropriate.

## **BACKGROUND**

Hanson's Santee mining operation involves rock extraction, crushing and size segregation. Consistent with its District issued permit, Hanson controls PM 10 emissions through water spray systems and baghouse filtration. Hanson's license requires it to provide the labor, equipment, materials and utilities to conduct its mining operation. License § 6.1. Accordingly, Hanson provides the mining and emission control equipment associated with its operation, and only Hanson employees are authorized to use it. The District's permit prohibits anyone other than Hanson from operating the equipment.

---

<sup>2</sup> For Title V purposes, it is not appropriate to combine potential fugitive emissions associated with Hanson's and SLI's Santee operations. See 40 CFR § 70.2 (Major Source definition; potential to emit (fugitive emissions) only included for specified sources which do not include landfilling or aggregate mining).

<sup>3</sup> The District's position is outlined in the May 2, 2017 correspondence from Paula Forbis, Senior Deputy, County of San Diego, Office of County Counsel to Stephen O'Neil, Sheppard Mullin Richter & Hampton, a copy of which is enclosed.



Ms. Sarah Dunham  
Acting Assistant Administrator  
Office of Air and Radiation  
August 2, 2017  
Page 3

SLI utilizes areas mined by Hanson for waste disposal. SLI provides and controls the equipment it uses in landfilling operations, including emission control. SLI's policies and operating procedures prohibit any party other than SLI or its affiliates from operating the landfill gas collection equipment.

### **DISCUSSION**

Title V's definition of major source has three key elements: (i) contiguous or adjacent properties; (ii) the same two digit SIC code; and (iii) common control.<sup>4</sup> 40 CFR § 70.2; Seneca Energy II, LLC, 2016 WL 7489675, at \*6 (U.S. Env'tl. Prot. Agency Dec. 9, 2016) (Order Denying Petition for Objection to Permit) ("Seneca Denial"). It is the absence of common control that precludes Title V permitting for Hanson's operation.

Aggregation needs to be "sufficiently predictable to give plausibly regulated entities 'explicit notice as to whether (and on what statutory authority) the EPA construes the term [stationary source. . . .]" Summit Petroleum 690 F.3d at 747 (citing Alabama Power Co. v. Costle, 633 F.3d 323, 397 (D.C. Cir. 1979)). Recognizing the constraints imposed by Alabama Power, the need to "approximate a common sense notion of 'plant[,] was key to EPA's major source definition. 45 FR 52676, 52695 (Aug. 7, 1980). EPA explicitly wanted to "avoid aggregating pollutant-emitting activities . . . that are ordinarily considered separate." Id.; see also 56 FR 21712, 21724 (EPA's approach to defining major source under Title V "avoids the possibility that dissimilar sources . . . will be considered as the same "source" because of common ownership.")

Combining completely separate landfill and aggregate mining operations defies any common sense notion of a plant. Instead, it improperly aggregates "pollutant-emitting activities . . . that are ordinarily considered separate." 45 FR at 52695. The District cannot override EPA's fundamental rationale for Title V aggregation simply by referencing various provisions of the parties' license agreement.

---

<sup>4</sup> While SLI and Hanson have different primary SIC codes, at this time, Hanson is not addressing the District's support facility determination. Accordingly, the SIC code prong is not discussed further.



Ms. Sarah Dunham  
Acting Assistant Administrator  
Office of Air and Radiation  
August 2, 2017  
Page 4

Except for location, SLI and Hanson do not share operations. Co-location alone, however, is not sufficient to determine common control. At most, it creates “a logical starting point” to analyze the case specific facts. Seneca Denial at 7, 17. As EPA has said repeatedly, common control determinations are made on case-by-case basis, taking into account the specific facts of the case. See e.g., Id. at 7, 14. The circumstances here confirm there is no common control.

There is no overlap in the companies’ workforces, security forces, corporate officers or board members. Likewise, the two companies do not share administrative functions. They have separate payrolls, employee benefits, health plans, retirement funds and insurance coverage. Each company has independent responsibility to comply with applicable environmental laws and obtain the appropriate permits. License §§ 7, 9.3. The companies have separate business and hazardous materials permits and stormwater pollution prevention plans.

As the License Agreement makes clear, the volume of extractable material does not equate to the volume of saleable aggregate. Rather, 40% of the material to be extracted is anticipated to be saleable aggregate, with the remaining 60% classified as “fine material.” Amended License, Amended Recital B. Hanson’s license does not give it ownership interest in the material to be extracted. Rather, title to aggregate transfers upon extraction. Amended License § 5(b). Hanson never has title to the fine material. Rather, Hanson returns the fine material to SLI, who uses it as daily cover in its landfill operations. Contrary to the District’s suggestion, return of earthen material to its rightful owner, for reuse at the facility at which it is located, does not amount to a sharing of intermediaries, products or byproducts. Hanson’s sale of roughly 90% of its mined aggregate to third parties further highlights the separate control of the operations. See e.g., R. Miller Aug. 25, 1999 letter to W. Baumann at 3 (there is no common control between food processor and the co-located power plant when the power plant’s generators only provide 10% of their total output to the food processor).

Aggregating for Title V purposes was intended when “the aggregated activities emit enough pollutants to trigger the applicable emissions thresholds provided in the Act.” 56 FR at 21724. “The purpose of aggregation therefore is simple: ensure actual major sources of pollution are regulated as such to ensure full and adequate protection of air quality, public health and welfare.” Kerr-Mcgee Gathering LLC, 2010 WL 7206738, at \*8 (U.S. Env’tl. Prot. Agency Nov. 3, 2010) (Petition to Object to Issuance of a State Title V Operating Permit). Here, aggregating SLI and Hanson neither triggers applicable emissions thresholds nor serves

# HUNTON & WILLIAMS

Ms. Sarah Dunham  
Acting Assistant Administrator  
Office of Air and Radiation  
August 2, 2017  
Page 5

the purpose underlying aggregation. The combined operations do not exceed the 100 tpy PM 10 Title V triggering amount. Likewise, aggregating does not change VOC emissions. SLI is a major source for VOCs regardless of Hanson's operation (which do not involve VOC emissions). Moreover, existing air quality permits for both operations "ensure full and adequate protection of air quality, public health and welfare." *Id.* The fact that Hanson's operation is co-located with SLI's is not a sufficient justification to sweep Hanson into Title V permitting.

Importantly, no environmental benefit is gained from requiring Hanson's Santee operation to comply with Title V permitting. EPA adopted the "all-compassing" aggregating approach to protect air quality and "[a] definitional structure that aggregates pollutant-emitting activities into one 'source' would serve that purpose . . . ." 45 FR at 52694. EPA also wanted to prevent companies from attempting to shield themselves from major source compliance obligations. See e.g., Oglethorpe Power Co. Wansley Combined Cycle Energy Facility, 2005 WL 6585013 (U.S. Env'tl. Prot. Agency Nov. 14, 2005) (Amended Order Denying Petition for Objection to Permit in Response to Remand) ("The purpose of the "common control" test in defining a major stationary source for permitting purposes is to ensure that sources do not evade major source status (and its more stringent requirements) by artificially sub-dividing sources."). Neither concern is applicable here. The major source concern at the Santee location is VOCs. VOC emissions are directly addressed by SLI's Title V permit. While not sufficient to trigger a major source determination, PM 10 emissions are addressed through SLI's Title V permit and Hanson's District issued permit to operate.

Rather than streamline permitting, imposing Title V permitting on Hanson's operation complicates it. The District and Hanson will expend considerable time, effort and resources on a Title V permit (both in application processing and ongoing recordkeeping and monitoring).

\* \* \* \* \*

For the reasons outlined above, Hanson appreciates EPA's guidance on the appropriateness of the District's common control determination given the unique facts present here.

HUNTON &  
WILLIAMS

Ms. Sarah Dunham  
Acting Assistant Administrator  
Office of Air and Radiation  
August 2, 2017  
Page 6

Thank you in advance for your time and assistance.

Sincerely,



Colleen Doyle

Enclosures (License Agreements; District May 2017 letter)

cc: Mr. Ryan Jackson (Jackson.ryan@Epa.gov)  
Ms. Amanda Gunasekara (Gunasekara.mandy@Epa.gov)  
Paula Forbis, Esq. (Paula.Forbis@sdcounty.ca.gov)  
Mr. Jim Swaney  
Mr. Doug Erwin  
Ana Damonte, Esq.  
Mr. Ian Firth  
Mr. Greg Knapp