

5/31/2012
This item relates to:

Item # 3
*Received from
Lehigh*

**LEHIGH'S INFORMATION SUBMITTED FOR THE RECORD
CONCERNING THE FEASIBILITY OF ALTERNATIVE 1**

May 31, 2012

This information supplements Lehigh's testimony during the May 24, 2012 Planning Commission hearing.

During the May 24, 2012 hearing, the suggestion was made during public comments that the Planning Commission should condition its approval to require Lehigh to excavate the EMSA, and haul EMSA material (6.5 million tons) to the Quarry Pit for disposal rather than reclaiming the EMSA in place. The proposal essentially describes Alternative 1 in the EIR.

Lehigh wishes to make it clear for the record that Alternative 1 raises questions of feasibility, in light of Lehigh's established vested rights and the County's authority to approve a reclamation plan amendment.

One of the important functions of an EIR is to present the decision-making body – here, the Planning Commission – with a reasonable range of *potentially* feasible alternatives which can be accomplished in a reasonable period of time, taking into account economic, environmental, social and technological factors. (Pub. Resources Code, § 21061.1; Code of Regulations, tit. 14, § 15126.6, subd. (a).)

The responsibility of the decision-making body, in turn, is to consider whether the alternatives in the EIR are *actually* feasible, in light of economic, legal, social, technological, or other considerations. (Pub. Resources Code, § 21081, subd. (a)(3).) California's Sixth Appellate District, which includes Santa Clara County, recently described the decision-making process this way:

[W]hile the certification of the EIR is a determination that the EIR adequately discusses *potentially feasible* alternatives, CEQA explicitly permits the legislative body to make a post-certification determination that these potentially feasible alternatives are *not actually feasible*, so long as the legislative body makes the requisite findings citing specific reasons for its infeasibility determination. There is no inconsistency between the City's certification of an EIR that discusses potentially feasible alternatives and the City's determination that those alternatives are not actually feasible.

(*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1007 [orig. italics]; see also *Flanders Foundation v. City of Carmel-By-The-Sea* (2012) 202 Cal.App.4th 603, 618 [the decision-making body, not EIR, makes the ultimate determination of feasibility]; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 489 [an EIR discusses only "potentially" feasible alternatives].)

In this case, although the EIR identified Alternative 1 as potentially feasible, there is substantial evidence in the record that Alternative 1 is actually infeasible, based on specific legal and other considerations.

The Surface Mining and Reclamation Act (“SMARA”) defines the production and disposal of overburden, the activity that occurs at the EMSA, as part of Lehigh’s surface mining operation. (Pub. Resources Code, § 2735.) If the County were to require Lehigh to put its overburden in a new and different location, it would amount to directing the conduct of Lehigh’s surface mining operation. Such a directive would violate Lehigh’s vested rights to determine the conduct of mining, as established by the Board of Supervisors’ Resolution 2011-85. It also would mean an unprecedented action of forcing Lehigh to engage in mining operations that Lehigh does not wish to conduct. Such a condition also is fundamentally inconsistent with the scope of the project, which is the approval of a reclamation plan amendment, not the approval of continued mining operations. For these reasons, Lehigh cannot support Alternative 1, and submits that Alternative 1 is actually infeasible.

In addition to these concerns, we observe that the EIR identifies the project as the Environmentally Superior Alternative, and accurately states that Alternative 1 would increase the number and severity of adverse impacts in terms of criteria pollutants, toxic air contaminants, greenhouse gases, noise, water quality and hydrology, because Alternative 1 involves the excavation and transportation of millions of tons of overburden using diesel-powered equipment in closer proximity to Cupertino homes.

We raise the issues to make sure that the record is clear on this point.

* * *