



TOM VAN SANT

174 IBLA 78

Decided March 14, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

TOM VAN SANT

IBLA 2007-173

Decided March 14, 2008

Appeal from a Finding of No Significant Impact/Decision Record issued by the Field Manager, Bishop, California, Field Office, Bureau of Land Management, approving an amendment to a material site easement. CACA 047712; EA CA-170-07-07.

Intervention granted; motions to dismiss denied; request for oral argument denied; decision set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Land Use Planning

Since FLPMA requires that resource management decisions conform to an approved land use plan, a BLM decision approving a proposed action that does not conform to the visual resource management standards set out in the applicable land use plan will be set aside and remanded if the nonconformance does not fall within an allowed exception to conformance to those standards.

APPEARANCES: Tom Van Sant, Santa Monica, California, *pro se*, and Amy Minter, Esq., Santa Monica, California, for appellant; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Thomas P. Hallenbeck, District 9 Director, California Department of Transportation, Bishop, California, for intervenor, California Department of Transportation.

OPINION BY ADMINISTRATIVE JUDGE GREENBERG

Tom Van Sant¹ has appealed the March 29, 2007, Finding of No Significant Impact (FONSI)/Decision Record (DR) issued by the Field Manager, Bishop, California, Field Office, Bureau of Land Management (BLM), approving an amendment to the Independence Material Site 118 (MS #118) Easement issued to the California Department of Transportation (Caltrans)² in April 2006. The approved amendment, which was based on the environmental assessment (EA) prepared for the proposed amendment (EA CA-170-07-07), extended the authorized length of use of the easement from 5 years to 10 years; increased the amount of material permitted to be extracted by 650,000 cubic yards (cy) from 550,000 to 1.2 million cy; and authorized the location of processing plants within the existing material site pit. On appeal, Van Sant objects to the FONSI/DR and underlying EA as violating both the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2) (2000), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1712(a) and 1732(a) (2000). Because BLM's approval of the amendment allowing the placement of processing plants in the pit violates FLPMA's requirement that management activities conform to applicable land use plans, we set aside BLM's decision and remand the case for further action.³

¹ Van Sant's May 8, 2007, Notice of Appeal identified himself as the only appellant; however, in his statement of reasons for appeal (SOR) dated June 7, 2007, he attempts to add Concerned Citizens of Independence as an appellant to his appeal. Since Concerned Citizens of Independence was not named as an appellant in Van Sant's Notice of Appeal and did not file its own notice of appeal within the 30-day appeal period set out in 43 C.F.R. § 4.411(a), it is not a proper appellant in this appeal.

² Caltrans has requested that it be allowed to intervene in this appeal. We grant that request.

³ Both BLM and Caltrans have moved for dismissal of Van Sant's appeal for lack of standing under 43 C.F.R. § 4.410. We find that the record supports Van Sant's standing to bring this appeal because he participated in a public meeting regarding the proposed activity and made comments regarding the action's visual aspects, which BLM cited in the EA, and because he has a legally cognizable interest that is substantially likely to be injured by the approved easement amendment. We thus deny the motions to dismiss. Van Sant has requested an opportunity for oral argument pursuant to 43 C.F.R. § 4.25. The extensive written appeal submissions provide more than sufficient analysis of the issues raised in this appeal, and we see no need for oral argument. We therefore deny Van Sant's request for oral argument. Van Sant has also moved for expedited consideration of his appeal. Since we are now deciding the appeal, the motion to expedite is moot.

Background

MS #118 is a 50-year old gravel pit on an approximately 8-acre parcel situated in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 7, T. 13 S., R. 35 E., Mount Diablo Meridian, Inyo County, California, just west of and adjacent to U.S. Highway 395 (Hwy 395) at mile post marker 75.1, 1.2 miles northwest of the town of Independence. The site was originally permitted to Caltrans in 1957 pursuant to a materials site right-of-way (No. CALA-0151584) issued under the Federal Aid Highway Act, 23 U.S.C. § 317 (2000). Caltrans removed 133,000 cy of material from between 1957 and 1991, disturbing approximately 35 acres of surface before major use ceased in 1991. Caltrans relinquished the site in 1997, with the understanding that BLM would make material within the pit available through commercial mineral material sales for highway projects. EA at 1-2; *see Larry Thompson*, 151 IBLA 208, 210 (1999).⁴ Although in July 1998 BLM approved issuance of a mineral materials sales contract authorizing removal of 550,000 cy from the pit over a 5-year period, that sale was never finalized. EA at 2; *see Larry Thompson*, 151 IBLA at 219 n.4 (referring to Inyo County's denial of approval of the reclamation plan for the mineral material sale, the approval of which had been a condition of BLM's decision).

On December 12, 2005, Caltrans requested that the Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT), assist it in securing a DOT easement from BLM for MS #118, pursuant to 23 U.S.C. § 317 (2000). On December 19, 2005, FHWA requested BLM's concurrence on the Caltrans request and issuance of a Letter of Consent specifying the conditions of the transfer. *See* "Decision Record Federal Highway Administration Letter of Consent for Independence Mineral Material Pit CACA 047712," dated Mar. 31, 2006 (2006 DR), at 1. In accordance with the July 27, 1982, Interagency Agreement between BLM and FHWA, on April 1, 2006, BLM issued a Letter of Consent allowing FHWA to issue a 5-year highway easement deed to Caltrans authorizing the use of MS #118, but limited that use to the extraction of a maximum of 550,000 cy of material over the 5-year period and restricted pit activity to the extraction and separation of materials using a steel grid (grizzly). Apr. 1, 2006, Letter of Consent at 4, 5; *see also* 2006 DR

⁴ In *Larry Thompson*, 151 IBLA at 209, 220, the Board affirmed a BLM decision approving issuance of a mineral material sales contract for MS #118.

at 2.⁵ FHWA issued Highway Easement Deed MS 118 9-INY-395 to Caltrans on February 27, 2007.

After receiving BLM's April 2006 approval for use of MS #118, Caltrans reviewed its highway improvement plans for Hwy 395 in the Independence area over the next 15 years and calculated that the anticipated three large highway widening projects would require approximately 1 million cy of material.⁶ In light of the rapidly increasing costs associated with construction material for highway improvement projects and the need to reduce the fiscal impacts of those projects, Caltrans determined that the current material site easement would better serve the projects and the public if it were amended. EA at 2. Accordingly, Caltrans requested that the easement be amended to extend the authorized length of use of the easement from 5 years to 10 years; increase the amount of material permitted to be extracted by 650,000 cy, from 550,000 to 1.2 million cy; and allow the placement of processing plants, including rock crushers and separators and concrete or asphalt batch plants, in the pit, with multiple plants permitted on the site should highway projects overlap.⁷ See EA at 3, 9.

The EA, FONSI, and DR

BLM prepared an EA to assess the impacts of the proposed easement amendment. In addressing the need for the proposed action, the EA identified the issues inducing the amendment, including the lack of available material pits near the proposed project sites; the excessive hauling costs for materials; the efficiency and

⁵ BLM based its decision to approve issuance of the letter of consent and Caltrans' use of MS #118 on the May 19, 1998, EA prepared for the commercial mineral materials sales contract that was never finalized (EA CA-170-98-28). See 2006 DR at 1. In rejecting the proposed alternative set out in the 1998 EA, which tracks the proposal now before us, and instead adopting Alternative 2, with minor changes, BLM noted the selected alternative did not allow for rock crushers and separators or for asphalt or concrete batch plants, and thus would reduce or eliminate public concerns over noise, odor, visual impacts, and dust emissions. 2006 DR at 5.

⁶ These projects consist of widening portions of Hwy 395 from 2 lanes to 4 lanes and include the 2007 Blackrock 4-lane project (requiring 170,000 cy), the 2008 Independence/Manazur 4-lane project (requiring 288,000 cy), and the 2012 Olancho/Cartago (Olancho) 4-lane project (requiring 600,000 cy). EA at 2.

⁷ The record is unclear about when Caltrans requested the easement amendment; however, Caltrans advised the public of its plans to seek easement amendment in November 2006. See EA at 26; Nov. 20, 2006, Caltrans Concerned Citizen letters, seeking public comment; Nov. 11, 2006 and Dec. 2, 2006, public notices published in the *Inyo Register*.

costs savings from performing processing activities in the pit during road construction; and the reduction of visual, noise, and air quality impacts along the highway if processing facilities were sited in the pit instead of along the highway. The EA noted that no other approved material site available to Caltrans contained sufficient material to satisfy all three proposed highway projects, and that, while two pits near Lone Pine (a Los Angeles Department of Water and Power (LADWP) site near Cottonwood Canyon and a Caltrans site near Keeler) might be able to provide materials for the Olancho project, the distance from those pits and from other pits near Bishop to the two projects near Independence would increase hauling costs and impacts to existing surface roads. The EA also explained that, without the amendment permitting processing activities in the pit, crushing and batch plant activities would have to be located within the Hwy 395 right-of-way, either on the side of the road or in the proposed median, which would create safety, visual, and noise impacts, and the need to return unusable waste material to MS #118 (in addition to transporting the raw material to the project site) would enlarge the number of required hauling trips with consequent costs and traffic. EA at 2-3.

The EA analyzed three alternatives: Alternative 1, the No Action Alternative, which would perpetuate the currently approved use under the existing 5-year easement for the removal of 550,000 cy of material; Alternative 2, the Modified Alternative, which would amend the existing easement to extend the period of use to 10 years, allow the siting of processing plants, including crushers and separators and concrete or asphalt batch plants, within the pit, and permit multiple plants on site if highway projects overlapped; and Alternative 3, Caltrans' Preferred Alternative, which, in addition to the amendments described in Alternative 2, would also increase the amount of material authorized to be extracted by 650,000 cy to 1.2 million cy. EA at 9. The EA also identified alternatives that had been considered and rejected, including using the LADWP and Caltrans sites near Lone Pine and the sites near Bishop, which had been rejected because of the increased hauling costs and impacts to existing road surfaces if these sites were used for the projects near Independence. *Id.* The EA added that there were no other approved mineral material sites with sufficient material amounts and suitable locations to support the Caltrans projects. *Id.* at 9-10.

The EA discussed the impacts associated with each alternative, including, *inter alia*, impacts on air quality, noise, visual resources, public health and safety, and socio-economics. In its discussion of the impacts of Alternative 3, which incorporated the impact analysis for Alternative 2 with some slight modifications,⁸ the EA first

⁸ The EA's discussion of the impacts of Alternative 3 adopted the impacts analysis for Alternative 2, except for the analyses of noise, visual resources, minerals, and realty and lands, which were slightly modified to reflect the increased amount of material

(continued...)

noted that all extraction and processing operations, including batch plant activities, would be required to comply with and operate under a permit issued in accordance with Great Basin Unified Air Pollution Control District (GBUAPCD) regulations. According to the EA, air emissions from the batch plants would be controlled by a bag house and water sprays and would be source tested to ensure that they were within Federal emissions standards. Additionally, best available control technology, such as maintaining moist aggregate surfaces and bag houses on the crusher, would be employed to suppress dust from extraction, processing, and hauling. EA at 19.

As to air quality impacts, the EA stated that dust would be confined to the site through the measures imposed by GBUAPCD, that visual air quality in the pit area would be affected less than 20 percent by dust or plant emissions from any phase of the operation, and that water and/or dust palliatives would be used to keep dust low. While acknowledging that extraction and processing would also cause some vehicular and batch plant emissions, as well as some suspended dust within the pit, the EA stated that because the soil disturbance from extraction, processing, and hauling would be a fresh disturbance, the major component of the ensuing dust would be large particles (greater than 10 microns) that would settle out rapidly. The EA added that during inactive periods, little if any dust would come from the site due to the large particle size of the fines, although there could be dust during an extreme wind event. The EA further indicated that the action would not result in the emission of PM₁₀. EA at 20.

In discussing noise impacts, the EA recognized that the greatest noise emissions would be concentrated within the processing area of the pit, but noted that noise emissions would be somewhat contained or reduced by the below-grade pit and resulting pit walls and would decrease over time as material was removed and the pit floor lowered. EA at 21. The removal of the additional material authorized under Alternative 3 would increase the depth of the pit, and the location of equipment and plants within the lowering pit would lessen noise impacts. *Id.* at 24. The EA estimated that the combined noise level from the material site, with the equipment placed below the current grade of the site, would be 30-40 dB at 2,000 feet, which would be considered "Faint." EA at 21; *see also id.* at 6.

In its analysis of visual resources, the EA noted that the plants to be located in the pits included crushing and separating plants (rock plants) and concrete and asphalt batch plants. The EA explained that rock plants, with their various conveyor systems and open-looking appearance, would be slightly lower in height, but occupy

⁸ (...continued)

authorized in Alternative 3. *See* EA at 24-25. Our discussion of the impacts of Alternative 3 will include the relevant portions of the impacts analysis for Alternative 2.

more ground than batch plants, which have large cylindrical towers (silos) extending above the equipment. The EA estimated that a rock plant located in the middle of the site would likely extend 10 to 12 feet above the ground surface, that a 50-foot asphalt plant hopper and conveyor would extend about 18 to 20 feet above the ground surface, and that a 70-foot hopper would extend twice as far above the ground as a 50-foot one. The EA acknowledged that regardless of the measures taken to screen the pit, the plants located in the pit would be visible from all key observation points (KOPs) in the near term.⁹ EA at 21.

The EA specifically assessed whether the visual impacts from the proposed amendment conformed to the visual resource management (VRM) standards established for the area in the Bishop Resource Management Plan (RMP). The EA explained that, according to the RMP, the site was located in a VRM Class III area. The objective of that classification is to partially retain the existing character of the landscape, which means that the level of change to the characteristic landscape of such areas may be moderate, management activities within those areas may attract attention from KOPs but should not dominate the view of the casual observer, and changes to the areas should repeat the basic elements found in the predominant natural features of the landscape. EA at 7 (discussion of existing environment). The EA found that plants and plant operations located within the pit, while visible to some extent from all KOPs, would nevertheless meet the VRM Class III standards from KOPs #1 and #4. The EA concluded, however, that, for KOPs #2 and #3, the plants would be very noticeable and therefore would not meet the VRM Class III criteria. *Id.* at 22; *see id.* at 36 (Photo KOP #2 (Plant Simulation)) and 39 (Photo KOP #3 (Plant Simulation)). The EA added that additional plants would increase the visual impacts if they were located adjacent to each other. *Id.* at 22.

The EA noted that the distance to the highway and the lowering of the pit as mining progressed would begin to lessen the appearance of the plants during periods of operation. The EA further noted that the plants would only be in the pit during the construction periods for planned 4-lane projects and would be removed once the project was completed so that the visual intrusions would be temporary. *Id.* at 22. It also found that the excavation of the greater amount of material proposed under Alternative 3 would increase the depth of the pit and improve visual impacts over those in Alternative 2 because most of the mining equipment and processing plants

⁹ The KOPs for this site are along Hwy 395 and the Fish Hatchery access road (Oak Creek): KOP #1 is located about 1/4 mile north of Independence on northbound Hwy 395; KOP #2 is located on the highway, mostly opposite the existing pit and looking southwest; KOP #3 is located on the highway on the southbound lane looking at the existing pit; and KOP #4 is on the Fish Hatchery road looking southeast toward the pit. EA at 7; *see* EA at 32 (Map #3) and 33, 35, 38, and 40 (Photos KOP #1-#4, titled "Existing").

would no longer be visible. It recognized, however, that the upper 20 feet of a plant projecting above the pit's eastern edge might still be visible from Hwy 395 directly east of the pit. *Id.* at 24-25.

The EA also identified mitigation measures to minimize visual impacts:

1. Paint areas of the plant structure dull dark olive green that are above pit grade and have large blocky, flat, or rounded surfaces.
2. Locate plants in the lowest portion of the pit.
3. Begin material excavation in areas where plants are to be located, thereby lowering the pit floor and the processing plants.
4. Utilize olive green or dark netting if possible to screen non-moveable equipment or processing plants if such are visible above the pit surface grade.
5. Separate multiple plants within the pit to avoid a clustering visual effect.

EA at 24, 25. The EA anticipated that the use of all the mitigation measures would bring the residual visual impacts within VRM Class III standards because, although the plants might still be visible, they would not dominate the landscape and the color contrasts of the upper portions of the batch plants would be moderated. *Id.*

The EA's discussion of Public Health and Safety emphasized that the use of the material site under Alternatives 2 and 3 would actually reduce the number of truck trips by eliminating the need to return unusable waste material to the pit. The EA also explained that the observable air quality impacts and unacceptable odors would be minimized by the use of current technology and the requirement that processing plants meet state standards and county-approved reclamation plan conditions imposed for dust, air quality, and odors. The EA added that placing the processing operations in the pit, and not along the highway, would reduce or eliminate visual and noise impacts that might distract travelers along the highway corridor, and that the highway upgrades using the pit materials would improve safety and the experience and enjoyment of the traveling public. EA at 23.

In discussing the socio-economic impacts of the alternatives, the EA first noted that the parts of Hwy 395 designated as a scenic highway ended approximately 1.5 miles north of the entrance to MS #118 (EA at 9 (Existing Environment)), and that the operation, therefore, would not impact that designation (*id.* at 18 (Discussion of Alternative 1)). The EA then pointed out that locating the processing plants in the pit

would result in efficient material handling, reduced material hauling, and significantly decreased highway project costs, saving 2 to 5 million dollars. *Id.* at 23.

The EA also reviewed the public involvement in the project, including the notices of comment periods and public meetings, both sent to interested members of the public¹⁰ and published in the *Inyo Register*, summarized comments received at the meetings, and provided responses to both oral and written comments. *Id.* at 26-28.

The Field Manager issued his FONSI and DR, adopting Alternative 3 analyzed in the EA, but modifying the mitigation measures identified in the EA.¹¹ He determined that adopting Alternative 3, with the described mitigation measures, would not have significant impacts on the human environment and that, therefore, preparation of an environmental impact statement (EIS) was not required. DR at 2. He further found that it was in the public interest to amend the existing Caltrans easement for MS #118 to (1) extend the use of the material site to 10 years until 2016; (2) increase the amount of material extracted by 650,000 cy to a total of 1.2 million cy; and (3) allow the placement of processing plants, including crushing and separating equipment, asphalt and concrete batch plants, and other equipment, within the pit, and permit the use of bulldozers, front-end loaders, belly dump trucks, bobtail dump trucks, maintenance trucks, water trucks, and haul trucks. *Id.* at 1-2.

In discussing the approved amendment's conformance to the Bishop RMP, the Field Manager acknowledged that the placement of tall 50- to 70-foot high batch plants in the pit would violate VRM Class III standards for 2 of the 4 KOPs. He pointed out, however, that the RMP allowed for exceptions for nonconformance in certain circumstance, including permitting a field manager to

“allow temporary projects to exceed VRM standards in Class 2-4 areas, if the project will terminate within two years of initiation.

¹⁰ Van Sant was listed as one of those interested members of the public. *See* BLM Motion to Dismiss for Lack of Standing, Response to Statement of Reasons, and Opposition to Request for Hearing (BLM Answer), Attachment (Att.) 4. Van Sant denies having received any information until the FONSI/DR issued. He agrees that he received necessary service of the final decision. Additionally, although Van Sant was not identified by name, a summary of the substance of the comments and concerns he expressed during a Jan. 9, 2007, Caltrans presentation to the Inyo County Board of Supervisors, which a BLM representative attended, was included in the Public Involvement section of the EA. *See* EA at 26.

¹¹ The Field Manager noted that, as part of his decision, a concurrent Letter of Consent would be issued to the FHWA authorizing the amendment of the existing highway easement deed held by Caltrans. DR at 1.

Rehabilitation will begin at the end of the two year period. During the temporary project, the field manager may require phased mitigation to better conform to prescribed VRM standards.”

DR at 2, *quoting* Bishop RMP Record of Decision (ROD) at 14. Rather than adopting the mitigation measures identified in the EA to reduce visual impacts to conform to the VRM Class III standards, the Field Manager chose instead to implement this exception. While acknowledging that the easement amendment authorized use of MS #118 for a total of 10 years, he stated that the pit would be used irregularly during its life, and that, although the first few highway projects would initially create visual contrasts, the deepening of the pit from excavation activity should lessen visual impacts and improve conformance to the prescribed VRM standards. *Id* at 2. Since each component of the project was expected to last less than 2 years, the Field Manager anticipated that BLM would have the opportunity to evaluate changing visual contrasts and ensure increasing conformance during the 10-year life of the project. He added that since the operations were confined to an existing pit, no new surface area would be affected and that rehabilitation at the end of the 10-year project life would comply with state Surface Mining and Reclamation Act (SMARA) requirements. *Id.*

The Field Manager addressed the two factors underlying the approved amendment’s nonconformance to VRM standards: facility height and facility color. As to facility height, he noted that the nonconformance would occur only if extremely tall processing plants were used and sited in the highest area of the pit. He pointed out that, as material was removed from the pit, the pit floor was expected to deepen up to 50 feet, and that the lowering of the pit floor would also lower the height of any plants located in the pit and increase conformance with the VRM Class III standards. He also indicated that the plants would not be present during the entire 10-year period, but only when each separate highway project was underway, and would be removed between projects.¹² He concluded that the visual contrasts would diminish through time as the pit lowered from the distinct and separate excavation phases. DR at 2-3.

As far as facility color was concerned, the Field Manager acknowledged that striking colors increase visual contrasts and that using all the mitigation measures identified in the EA would reduce visual impacts to VRM Class III standards. Nevertheless, he declined to adopt all those measures, stating that, because Caltrans could not predict the color of a contractor’s processing plant, he would initially defer imposing the painting mitigation “due to the cost of painting a large processing plant for a short duration of use. This would increase the cost of the 4-lane project to the

¹² The approved amendment did not preclude the overlap of highway projects and that, in fact, the EA explicitly acknowledged that possibility. *See, e.g.,* EA at 9.

taxpayers and cost savings is one of the intended purposes for locating the plants in the pit.” DR at 3. In conformance with the exception to compliance with the VRM standards, the Field Manager indicated that he would require painting or other appropriate mitigation if visual contrast exceeded Class III standards for greater than 2 years and that BLM would conduct a visual contrast analysis 2 years after the project commenced to determine VRM conformance and necessary actions to meet VRM standards. He added, however, that any plant facilities creating egregious and unacceptable color contrasts, as determined through a visual contrast analysis, would be required to undergo painting or other appropriate mitigation to reduce the contrast. *Id.*

The Field Manager decided, however, to modify several of the visual mitigation measures because of the “unreasonable and unnecessary costs associated with full adoption of the measures” and because “strict adherence to the EA mitigation measures [might] be technically infeasible because specifying plant locations [might] prohibit actual excavation where it is needed for future projects.” DR at 3. He explained:

The Residual Impacts section of the EA states that although the mitigation will bring the visual contrasts to within Class III standards, its implementation will increase the operational costs. These additional costs will occur from either the placement of plants in areas which conflict with more efficient and desirable locations of excavation or excavating areas which conflict with pit operations or schedules. It is unknown at this time, how a contractor will plan the material extraction and plant location within the pit for efficient operation. In order to allow for flexibility in the planning and execution of the pit operations, the mitigations have been altered so that the contractor can determine the most efficient plant locations and extraction areas within the pit. It is known that mineral material for the initial road elevation fill will be removed from the pit before batch plants are placed there, immediately lowering the pit to some degree. Therefore, when batch plants are set-up, the pit floor will already be lower than its current depth. The intent of the visual mitigations below are still retained to reduce visual contrast and improve visual conformance but the modified mitigations below provide practical flexibility for future material needs. The visual contrast of tall batch plants will still be reduced, without increasing the cost of the material operation through implementation of the modified mitigation measures.

Id. at 3-4.

The Field Manager therefore decided to implement the project with the following revised mitigation measures:

1. Implement VRM exception No. 2 in the Visual Resources section of the BLM Bishop RMP which reads, "The field manager may allow temporary projects to exceed VRM standards in Class 2-4 areas, if the project will terminate within two years of initiation. Rehabilitation will begin at the end of the two year period. During the temporary project, the field manager may require phased mitigation to better conform with prescribed VRM standards."
2. At the end of the two year period, conduct a visual contrast analysis to identify conformance or non-conformance of plant operations with the VRM Class III standard. A non-conformance determination will result in implementation of mitigations to conform to the VRM standard including painting areas of the plant structure dull dark olive green that are above pit grade and have large blocky, flat, or rounded surfaces. This will only be applied if visual contrasts do not meet Class III standards and impacts extend beyond 2 years. However, if the color of any future plant facilities create[s] unacceptable and egregious color contrasts, as determined through a visual contrast analysis, then BLM retains the authority to require painting or other appropriate mitigation to reduce the contrast to conform with the RMP.
3. Locate plants in the lowest portion of the pit if compatible with material extraction.
4. Material excavation should begin in areas where plants are to be located, thereby lowering the pit floor and the processing plants.
5. Utilize olive green or dark netting where technically or practically feasible to screen non-moveable equipment or processing plants if they are visible as per BLM's VRM criteria above the pit surface grade.
6. Strive to separate multiple plants within the pit to avoid a clustering visual effect.

DR at 5-6.

ANALYSIS

Van Sant challenges BLM's EA, FONSI, and DR as violative of both NEPA and FLPMA. Van Sant asserts that the EA is inadequate and cannot support a FONSI because (1) the visual impacts will violate the Bishop RMP;¹³ (2) the air quality impacts were not adequately addressed; (3) the significant noise impacts were not sufficiently analyzed; (4) the public safety hazards were not evaluated; (5) the serious traffic problems were not discussed; and (6) the alternatives analysis was inadequate. He also asserts that the material site easement amendment does not comply with the Bishop RMP because it fails to provide for saleable materials.¹⁴ We find that the amendment approved in the DR, as modified by the Field Manager, fails to conform with the Bishop RMP VRM Class III standards and therefore violates FLPMA's directive that management actions conform to the approved land use plan and must be set aside for that reason. We need not address Van Sant's NEPA arguments.¹⁵

As described above, the EA's analysis of the impacts to visual resources admitted that Caltrans' preferred alternative would not conform to VRM Class III standards from KOP #2 and #3 and delineated mitigation measures, which, if imposed, would ensure that the project conformed to RMP's VRM standards. Rather than adopting those measures, the Field Manager chose to modify them to such an extent that the approved amendment admittedly no longer met the VRM Class III standards and to rely on an exception to those standards to avoid conflicting with the RMP. The approved amendment, however, does not fall within the exception and the approved action therefore does not conform to the RMP and must be set aside.

¹³ Although the adequacy of the EA's visual impact analysis is a NEPA issue, the visual impacts' nonconformance to the RMP is actually a FLPMA, not a NEPA, issue.

¹⁴ Van Sant also complains that he did not receive proper notice of the proposed action and the EA. We note that BLM published notices of the availability of the EA, the requests for comments, and the scheduling of a public meeting in the *Inyo Register* on Feb. 13, Feb. 27, and Mar. 3, 2007, and posted the EA on both BLM's and Caltrans' websites, and placed copies of the EA in the Lone Pine, Independence, Big Pine, and Bishop public libraries, and that it claims that it mailed a copy of the EA directly to Van Sant. See DR at 5; EA at 26; BLM Answer, Att. 4.

¹⁵ We also need not address BLM's assertion that we may not consider certain arguments raised by Van Sant on appeal, pursuant to 43 C.F.R. § 4.410(c), because he failed to raise them in his public comments. As the visual impacts were the central feature of Van Sant's complaints, as identified in the EA, he clearly may present that argument on appeal.

[1] Section 202(a) of FLPMA, 43 U.S.C. § 1712(a) (2000), directs the Secretary of the Interior to “develop, maintain, and, when appropriate, revise land use plans,” which govern in part the use of the public lands, and section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2000) requires him to manage public lands “in accordance with” such land use plans. *See Forest Guardians*, 168 IBLA 323, 328 (2006). BLM’s implementing regulations also require all resource management authorizations and actions to conform to the approved land use plan. 43 C.F.R. § 1610.5-3(a). The regulations define “conformity or conformance” as meaning “that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.” 43 C.F.R. § 1601.0-5(b); *Great Basin Mine Watch*, 159 IBLA 324, 340 (2003).

In this case, the parties agree that the Bishop RMP places the lands affected by the material site easement amendment into VRM Class III. The Field Manager correctly notes that the RMP permits a Field Manager to “allow temporary projects to exceed [VRM] standards in class 2-4 areas, *if the project will terminate within two years of initiation*,” and specifies that “[r]ehabilitation will begin at the end of the two year period. During the temporary project, the Area Manager may require phased mitigation to better conform with prescribed VRM standards.” Bishop RMP at 14-15 (emphasis added).¹⁶ The approved material site easement amendment, however, does not authorize a temporary project terminating within 2 years; rather the amendment as approved allows the use of the pit for a series of highway improvement projects over a 10-year period, and thus does not fall within the confines of the exception. The Field Manager attempts to avoid this conclusion by pointing out that each 4-lane project will be a separate and discrete project lasting less than 2 years and that the plants and consequent visual disturbance will not exceed 2 years. This justification ignores the facts that the approved amendment authorizes use of the pit for a series of projects over a 10-year period, not just for a single, individual highway project lasting less than 2 years, and that it not only does not preclude an overlap of individual highway projects, but, to the contrary, explicitly allows simultaneous operations with multiple plants on site. *See, e.g.*, EA at 3, 9, 22. Additionally, as the project is structured, rehabilitation will not begin at the end of the 2-year period because the pit will continue to be used for additional highway work; in fact, the DR relies on the continued lowering of the pit floor as a method to reduce visual impacts over time. *See* DR at 3-4. Similarly, the Field Manager’s statement that BLM will conduct a visual inspection 2 years after activities under the amended easement commence to determine if actions are necessary to meet VRM standards conflicts with the RMP’s requirement that the project *terminate* within 2 years of initiation. Accordingly, we conclude that the Field Manager’s approval of

¹⁶ Relevant excerpts from the Bishop RMP are included in the case file.

the material site easement amendment, as modified in the DR, does not conform to the Bishop RMP and must be set aside.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Caltrans' request to intervene is granted, BLM's and Caltrans' motions to dismiss are denied, Van Sant's request for oral argument is denied, and the decision is set aside and remanded.

_____/s/_____
Sara B. Greenberg
Administrative Judge

I concur:

_____/s/_____
Lisa Hemmer
Administrative Judge