



CITIZENS ALLIANCE FOR RESPONSIBLE URBAN GAS DRILLING

179 IBLA 38

Decided April 6, 2010



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

CITIZENS ALLIANCE FOR RESPONSIBLE URBAN GAS DRILLING

IBLA 2009-309

Decided April 6, 2010

Appeal from denial of State Director review of a letter of the Royal Gorge (Colorado) Field Office, Bureau of Land Management, regarding an Application for Permit to Drill. CO-09-07.

Appeal dismissed.

1. Administrative Appeals--Administrative Procedure:
Administrative Review--Administrative Procedure: Decisions

Rejection of a request by neighboring private landowners for the Bureau of Land Management to stop processing and return to the lessee/operator a pending application for permit to drill an exploratory well on a Federal oil and gas lease, for alleged noncompliance with information requirements of Federal Onshore Oil and Gas Order No. 1, neither authorizes nor prohibits an action affecting individuals having interests in the public lands, nor adjudicates the rights of any party. Rejection of the request to return the application therefore is not a "decision of an officer of the Bureau of Land Management" appealable to this Board under 43 C.F.R. § 4.410.

APPEARANCES: Paul Zogg, Esq., Boulder, Colorado, for appellant; Tyson H. Powell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

The Citizens Alliance for Responsible Urban Gas Drilling (Alliance) appeals from an August 18, 2009, decision of the Deputy State Director, Colorado State Office, Bureau of Land Management (BLM) (SDR Decision), denying State Director review of a July 14, 2009, letter from BLM's Royal Gorge Field Office (RGFO) to counsel for the Alliance (RGFO Letter). The RGFO Letter responded to an April 3, 2009, letter from the Alliance contending that BLM had not followed certain provisions of Onshore Oil and Gas Order No. 1 issued in 1983, 48 Fed. Reg. 48916

(Oct. 21, 1983), with respect to an Application for Permit to Drill (APD) a well into a Federal oil and gas lease submitted by Dyad Petroleum Company (Dyad). In response to the Alliance's appeal and Statement of Reasons (SOR), BLM filed a motion to dismiss for lack of standing under 43 C.F.R. § 4.410(a).

The Alliance is "a Colorado non-profit corporation that represents members and individuals who stand to be adversely affected" by the proposed development of the well. SOR at 2. According to its president, it consists of "dozens of individual members" who apparently live in certain neighborhoods in the vicinity of the proposed well site. Declaration of Eileen Skahill dated October 30, 2009, attached to Alliance Response to Motion to Dismiss for Lack of Standing, at 1.

For the reasons explained below, we grant BLM's motion to dismiss the appeal.

Factual and Legal Background

A. The Rampart Federal #1-18 APD

Dyad owns a 50 percent interest in Federal oil and gas lease COC-59615, covering portions of secs. 7, 18, 19, and 30, T. 11 S., R. 67 W., Sixth Principal Meridian, El Paso County, Colorado. SOR Ex. 1996-1; Motion to Dismiss at 1. The lease is located within the Pike-San Isabel National Forest west of the town of Monument, Colorado. The lease is part of the Rampart Unit, which includes 20 Federal leases encompassing various parts of Ts. 10, 11, and 12 S., Rs. 67 and 68 W. SOR at 2 and Ex. 1996-1. Dyad is the unit operator.

Dyad submitted the APD to drill the Rampart Federal #1-18 exploratory gas well on November 1, 2002. Administrative Record (AR) File 1 Group 4.¹ The

¹ The AR consists of 3 divided file folders. Two are labeled "SDR CO-09-07 Background Files." These two folders are not numbered or otherwise distinguished. The larger of the two folders, which we designate as File 1 for convenience, has 6 groups of documents, which we designate by number in the order they appear from the front of the file. The smaller of these two folders, which we designate as File 2 for convenience, has only one group of documents clipped together. The AR also includes a third file folder labeled "SDR CO-09-07 APD Processing Time Frames, #1-18 Rampart Unit, 18-11S-67W, El Paso Cty. Citizen's Alliance for Resp. Urban Gas Drlng." We designate that folder as File 3. It contains 6 groups of documents, which we again designate by number in the order they appear from the front of the file. None of the documents in any of the file folders are tabbed, and they are not paginated by "Bates stamp" numbers. We will cite the AR documents by the number of the file folder and, if applicable, the number of the group in which a cited

(continued...)

proposed well was to be directionally drilled from a location on unleased National Forest land in SW $\frac{1}{4}$ sec. 17 to a bottomhole location on lease COC-59615 in NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 18.²

In addition to the requirements for APDs set forth in Onshore Oil and Gas Order No. 1, applicable regulations of the U.S. Forest Service (USFS), Department of Agriculture, the surface management agency, require an applicant to include as part of an APD a proposed surface use plan of operations (SUPO) for BLM to forward to USFS for analysis and approval. 36 C.F.R. § 228.106(a). No APD may be granted without such approval. *Id.* As part of its review, USFS must comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h (2006 & Supp. 1A 2009), and implementing regulations at 40 C.F.R. Parts 1500-1508. 36 C.F.R. § 228.107(a). On November 30, 2002, the USFS District Ranger for the Pike-San Isabel National Forest sent a letter to Dyad stating that additional information was needed before the APD could be considered complete. The letter also advised that due to staff shortages and the priority of forest rehabilitation following a fire that consumed 138,000 acres, an extended period of time (at least until December 2004) would be needed for USFS to complete environmental analyses under NEPA. AR File 1 Group 3.

On December 9, 2002, the RGFO sent a letter to Dyad indicating that the APD information was deficient under Onshore Oil and Gas Order No. 1 with respect to requirements for binding, the surface use plan, and the drilling plan. The letter specified what additional information was required. AR File 1 Group 2.

Dyad's authorized agent submitted further information on July 15, 2003, indicating at the same time that the APD would be re-submitted with revisions requested by USFS. AR File 1 Group 2. Dyad's authorized agent thereafter submitted a revised APD dated November 11, 2003, which included a much more detailed drilling plan, surface use plan, accompanying maps, etc. AR File 1 Group 4; transmission letter in AR File 1 Group 2. On June 4, 2004, BLM notified Dyad by letter as follows: "November 17, 2003[,] has been established as the date that Dyad furnished the BLM and FS two APD submissions that were considered technically complete." June 4, 2004, RGFO letter to Dyad, AR File 1 Group 2, at unpaginated

¹ (...continued)

document is included. The Nov. 1, 2002, transmission letter submitting the APD is in AR File 1 Group 2.

² At the same time Dyad filed the APD for the Rampart Federal #1-18 well, it filed an APD for a second exploratory well, the Mt. Herman Federal #1-19 well in SW $\frac{1}{4}$ sec. 19 of the same township. Because Dyad subsequently withdrew that APD on Aug. 13, 2008 (AR File 1 Group 2), we need not discuss it further here.

(unp.) 1. BLM further noted that “[i]f the FS needs additional information to complete the NEPA review necessary for processing of the APD Surface Use Plan of Operations . . . they will inform you directly via either mail or telephone.” *Id.*³

B. Suspension of Operations and Production

On October 15, 2003, before submitting the revised APD, Dyad submitted to BLM a request for suspension of operations and production in the interest of conservation for all the leases in the Rampart Unit, including lease COC-59615.⁴ AR File 1 Group 2. The grounds for the request were the expected delays in processing the APD for reasons including, among others, limited agency resources for biological inventories, NEPA requirements, and the priority of forest rehabilitation. Letter dated Oct. 15, 2003, AR File 1 Group 2, at unp. 1-2. Dyad maintained that the surface managing agency had initiated environmental studies that prohibited beneficial use of the leases (citing 43 C.F.R. § 3103.4-4 and *River Gas Corp.*, 149 IBLA 239, 245 (1999)). *Id.* at 2. The RGFO’s initial denial of the suspension on January 26, 2004, AR File 2, was overturned by the BLM Deputy State Director on March 11, 2004. The Deputy State Director granted a suspension of operations and production for each of the leases. Decision dated March 11, 2004, AR File 2 and AR File 3 Group 4. The lease suspensions were effective March 1, 2004, and would “remain in effect until lifted by the Royal Gorge Field Office.” Decision, BLM Colorado State Office, dated April 9, 2004, AR File 3 Group 2, at unp. 1.⁵

On June 18, 2008, in view of later developments discussed below, the RGFO sent a letter to Dyad extending the suspension of operations and production for the leases within the Rampart Unit “until the FS completes their review and a decision is made on the operator’s APDs.” June 18, 2008, letter, AR File 1 Group 2, at unp. 2.

³ The letter also attached a list of questions that the RGFO’s petroleum engineer had regarding the drilling proposals, but acknowledged that “your company may have already provided this requested information directly” to him. Jun. 4, 2004, RGFO letter at unp. 2.

⁴ See section 39 of the Mineral Leasing Act, 30 U.S.C. § 209 (2006), and 43 C.F.R. § 3103.4-4(a).

⁵ After the lease suspensions were granted, Dyad also requested and was granted a suspension of the unit terms. See RGFO letter to Dyad dated Apr. 1, 2004, AR File 1 Group 2; BLM Colorado State Office letter to Dyad dated Apr. 29, 2009, AR File 3 Group 2.

C. *Further Information Requests*

On March 9, 2005, USFS sent a letter to Dyad requesting further information for purposes of the environmental analysis. AR File 2; AR File 1 Group 3. With respect to the Rampart Federal #1-18 well, USFS asked Dyad for a list of equipment and vehicles that would be used in the drilling operation. USFS also asked Dyad to evaluate the planned drill pad size and whether it could conduct operations during the off-season months of November to mid-March. Dyad provided the requested information on June 6, 2005. AR File 1 Group 3. USFS responded on November 22, 2005, further stating that to adequately evaluate the SUPO, a detailed site-specific reclamation plan was necessary. AR File 1 Group 3.

Between January 2006 and April 2008, it appears that there were informal discussions regarding the SUPO and modifying access routes. “Dyad Rampart Federal 1-18 Lease and APD Chronology,” AR File 3 Group 5, at 2.

On April 17, 2008, the RGFO sent a letter to USFS expressing concerns about complying with Onshore Oil and Gas Order No. 1, which requires that BLM notify an applicant submitting an APD of any deficiencies in the APD within 7 days, and to return the APD to the proponent if required information is not submitted within 45 days of such a notice. AR File 1 Group 2. Specifically, section III.B.2. of the 1983 version of Onshore Oil and Gas Order No. 1 provides:

The authorized officer of BLM shall advise the lessee or operator, within 7 working days of receipt of the application, as to whether or not the application is complete. . . . The notification shall advise the lessee or operator of any defects that need correcting and of any additional information required. If the deficiencies are not corrected and/or the additional required information is not submitted within 45 days of the date of any oral or written notice (if no prior oral notice), the application shall be returned to the proponent.

48 Fed. Reg. at 48922.⁶ The letter stated that BLM and USFS had agreed that USFS would “furnish the BLM with a complete list of any additional information required to

⁶ Onshore Oil and Gas Order No. 1 was amended in 2007. 72 Fed. Reg. 10308 (Mar. 7, 2007). Although not codified in the Code of Federal Regulations, both the 1983 and 2007 versions of Onshore Oil and Gas Order No. 1 are substantive rules promulgated under the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006). See 48 Fed. Reg. 48916; 72 Fed. Reg. 10308. The 1983 version of the order was in force at the time the APD in this case was submitted and deemed complete. The 2007 order was prospective in its application, and nothing in it stated or indicated any intent that it apply to APDs submitted before its effective date.

complete the review of the Surface Use Plan and prepare the necessary environmental analysis.” April 17, 2008, letter at unp. 1. BLM would then incorporate the additional requirements into a letter to the operator and notify the operator of the requirement to furnish the information within 45 days. In the event the operator requested additional time to meet some requirements, BLM and USFS would confer and decide whether additional time would be allowed. *Id.* at unp. 1-2. On April 24, 2008, USFS responded to BLM, attaching a list of additional information required to complete review of the SUPO and prepare the NEPA analysis. AR File 1 Group 2.

Accordingly, on April 29, 2008, the RGFO sent a letter to Dyad requiring it to submit the additional information requested by USFS within 45 days. BLM, however, would consider a request for additional time. AR File 1 Group 2. Counsel for Dyad responded to both BLM and USFS on June 9, 2008. Dyad argued that the information sought was overly broad and unnecessary for approval of the SUPO and NEPA review. AR File 1 Group 2. The following day, a meeting was held in Pueblo, Colorado, to clarify the information request. The parties apparently agreed that some of the information would be provided within 30 days, and that an extension of time was needed for the remainder of what Dyad was to provide. June 11, 2008, letter from Dyad to USFS and BLM, AR File 1 Group 2. The RGFO granted the extension in a letter dated June 25, 2008. AR File 1 Group 2.

On July 10, 2008, Dyad submitted additional information regarding expected vehicle traffic, emissions, a plat of proposed production facilities, and a map of the proposed gas sales line. AR File 1 Group 2. By letter dated August 13, 2008, Dyad requested an extension of time to submit further information. AR File 1 Group 2. The RGFO granted the extension on September 2, 2008. AR File 1 Group 2. Dyad subsequently submitted further information. On May 26, 2009, USFS sent an e-mail to BLM stating that it considered Dyad’s SUPO acceptable and complete as of January 15, 2009. AR File 1 Group 2. USFS also stated that it was deferring approval action on the SUPO pending completion of the required NEPA environmental analysis.

On May 22, 2009, 4 days before the May 26 letter, USFS sent to Dyad a Memorandum of Understanding (MOU) regarding the groundwater analysis segment of the environmental analysis. AR File 1 Group 2. The letter transmitting the proposed MOU stated:

The Rampart Federal 1-18 exploratory drilling proposal has proven to be highly controversial and promises to be a hotly contested action. We fully expect a decision to authorize the well will be appealed and possibly litigated. One of the key issues we’ve identified thus far is the proximity of the proposed well to municipal water supplies. The public

has in fact mobilized itself in opposition to the well on the basis of its “threat” to their drinking water. In order to prepare a defensible environmental analysis and decision, it is critically important that the NEPA documentation includes a credible and science-based assessment of existing groundwater conditions in the area of the proposed well, as well as analysis and disclosure of potential effects of drilling operations on local groundwater resources.

May 22, 2009, letter at unp. 1. The proposed MOU provided for using a third-party contractor for the groundwater analysis.

On July 10, 2009, USFS sent a letter to the RGFO explaining that Dyad had informed USFS on June 19 that Dyad was obtaining a cost estimate from a third-party contractor for specific tasks for the groundwater analysis. However, USFS had not heard from Dyad since that time. USFS believed that Dyad had been allowed sufficient time to execute the MOU or request a meeting to discuss it, but had done neither. Therefore, USFS returned the APD to BLM (citing 36 C.F.R. § 228.107(b) and Onshore Oil and Gas Order No. 1). July 10, 2009, letter, AR File 1 Group 2, at unp. 1. Dyad responded by letter dated July 15, 2009, asking USFS to reconsider and continue processing the APD. Dyad stated that the cost estimate for the third-party work was approximately \$60,000, and the cost and the scope of work to be done far exceeded what was discussed at the June 10, 2008, meeting. July 15, 2009, letter from Dyad to USFS and BLM, AR File 1 Group 2, at unp. 1. USFS responded to Dyad on July 22, 2009, asserting that adequate NEPA analysis and further processing of the SUPO is impossible without the information requested under the MOU. USFS emphasized that returning the SUPO (with the APD) to BLM does not constitute a denial of the SUPO. USFS was willing to resume review and processing of the SUPO upon receipt of the signed MOU or an agreement on a suitable alternative. July 22, 2009, USFS letter to Dyad, AR File 1 Group 2, at unp. 2.

D. The Alliance’s Request, State Director Review, and the Instant Appeal

On April 3, 2009 (before USFS sent the proposed groundwater analysis MOU to Dyad), counsel for the Alliance sent a letter to BLM requesting that BLM “honor and comply with the mandatory terms of Onshore Order No. 1, and return the remaining application for permit to drill to Dyad as promptly as possible.” April 3, 2009, letter, AR File 3 Group 2, AR File 1 Group 2, and SOR Ex. 3, at unp. 2. The Alliance argued that the phrase “shall be returned to the proponent” in section III.B.2. of Onshore Oil and Gas Order No. 1, quoted above, “indicates that your office has no discretion to hold on to the applications for permit to drill if the requested information is not supplied” (*i.e.*, within 45 days after notice). *Id.* The Alliance maintained that even though Dyad provided “some information” in June 2008, “other portions of the very basic information sought have still not been provided.” *Id.*

BLM responded in the July 14, 2009, RGFO Letter, observing that the information sought on behalf of USFS “was in addition to that provided at the time the APD was initially deemed complete, which occurred on November 17, 2003.” RGFO Letter, AR File 3 Group 4 and SOR Ex. 2. at unpag. 1. The RGFO Letter also noted that Dyad had made changes to its proposal affecting the SUPO, which required additional USFS reviews. RGFO further said that in processing an APD, especially one involving coordination between BLM and USFS, it is common for one or both agencies to ask for additional information, even after the APD has been deemed complete. *Id.* at unpag. 2. RGFO noted that in this case, “the BLM/USFS gave Dyad several extensions to submit the requested information. Some extensions were documented in further correspondence with Dyad, and others were verbal extensions.” *Id.*

The Alliance then sought State Director review under 43 C.F.R. § 3165.3(b). That paragraph provides in relevant part:

(b) *State Director review.* Any adversely affected party that contests a notice of violation or assessment or an instruction, order, or decision of the authorized officer issued under the regulations in this part, may request an administrative review, before the State Director, either with or without oral presentation. . . . Any party who is adversely affected by the State Director’s decision may appeal that decision to the Interior Board of Land Appeals as provided in § 3165.4 of this part. [Emphasis added.]

In the August 18, 2009, SDR Decision, the Deputy State Director stated that the RGFO Letter was “a status report provided for the purpose of explaining BLM and USFS actions” and “summarizes the agencies’ recent requests for additional information from Dyad.” SDR Decision, AR File 3 Group 1, SOR Ex. 1, at 1-2. He further stated that the RGFO Letter “does not offer instruction, issue an order, or make a decision.” *Id.* at 2. After quoting 43 C.F.R. § 3165.3(b), the Deputy State Director concluded that this Board’s precedent “establishes that a decision is an announcement or prohibition of some action affecting individuals having interests in the public lands.” *Id.* (citing *Joe Trow*, 119 IBLA 388, 391 (1991)). “Here,” he held, “the RGFO letter of July 14, 2009, announces no action. It simply provides a narrative account of the RGFO activities.” *Id.* On that basis, the Deputy State Director concluded that the RGFO Letter was not subject to State Director review under 43 C.F.R. § 3165.3. *Id.*

The Alliance then appealed to this Board.

Analysis

I. *The RGFO Letter Is Not an Appealable “Decision.”*

Title 43 C.F.R. § 4.410(a) provides, with certain exceptions not relevant here, that “[a]ny party to a case who is *adversely affected by a decision* of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board.” (Emphasis added.) Thus, for a person or entity to have a right of appeal to the Board, there must first be a “decision.”

The Alliance argues that the Deputy State Director’s reliance on *Joe Trow*, 119 IBLA 388, for his determination that the RGFO Letter is not a decision is misplaced because that case addresses the regulation governing appeals to the Board (43 C.F.R. § 4.410) rather than the regulation governing review by the State Director (43 C.F.R. § 3165.3(b)). The latter provision, the Alliance argues, provides for review not only of “decisions,” but also of “notice[s] of violation,” “assessment[s],” “instruction[s],” and “order[s]” of lower-level BLM officials, which “clearly demonstrates a broader scope for state director review than that envisioned as available for appeals to the IBLA.” SOR at 8. The Alliance further argues that the RGFO Letter qualifies as a “decision” even under the interpretation of that term made in *Joe Trow*—as well as an “assessment” or “order”—because it “was, as a practical matter, the effective announcement of [the Field Manager’s] decision not to carry out the terms of Onshore Order No. 1, something he entirely lacked the discretion to do.” *Id.* The Alliance further relies on the APA’s definition of “agency action” at 5 U.S.C. § 551(13) (2006), as including an agency’s “failure to act.” *Id.* at 8-9.⁷ With respect to the SDR Decision, the Alliance argues that the SDR Decision itself “openly admits” that it is a “decision” subject to appeal to the Board under 43 C.F.R. § 4.410. *Id.* at 8.

BLM argues that the RGFO Letter is not a decision because it neither authorizes nor prohibits an action affecting individuals having interests in the public lands. Motion to Dismiss at 3-5 (citing *Geo-Energy Partners-1983 LTD*, 170 IBLA 99 (2006); *Seldovia Native Association*, 161 IBLA 279 (2004); *Nevada Outdoor Recreation Association*, 158 IBLA 201 (2003); and *Joe Trow*, 119 IBLA 388 (1991)).

[1] In *Geo-Energy Partners-1983 LTD*, BLM had not yet adjudicated pending geothermal lease assignments. It also had not decided the amount of a bond that would be required in the event that the appellant or its subsidiary became the operator of the geothermal unit. Appellant had asserted claims on appeal regarding those questions. In dismissing the appeal as to those claims, the Board held:

⁷ The SOR, at 9, mis-cites this provision as 5 U.S.C. § 551(4) (2006). Section 551(13) provides: “[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]”

The requirement that there be “a decision of an officer” before an appeal will lie is essential. *Joe Trow*, 119 IBLA 388, 392 (1991). The “decision” referred to by the regulation means a decision *either authorizing or prohibiting an action affecting individuals having interests in the public lands. Id.*, and cases cited. Generally, standing to appeal requires a BLM decision *adjudicating the rights of the parties in a given factual context. Blackwood and Nichols*, 139 IBLA 227, 229 (1997).

170 IBLA at 119 (emphasis added). Applying the same principles, the Board held in *Nevada Outdoor Recreation* that BLM’s consideration of a recommendation by the U.S. Fish and Wildlife Service to adjust the boundaries of land to be conveyed, on which BLM had not acted, was not an appealable decision. 158 IBLA at 209-10.

In *Joe Trow*, we held that a BLM letter explaining the history of the establishment of the boundaries of the Upper Missouri Wild and Scenic River was not an appealable decision. The Board explained:

The letter is a narration of management actions taken from 1975 until 1989 to establish management boundaries, sent in response to a request that such information be supplied. This letter *announces no decision and proposes none*, but instead describes the historical development of BLM’s policy concerning management of the river system boundaries. The letter *makes no determination regarding Trow’s individual rights and neither takes nor prevents action*.

119 IBLA at 391 (emphasis added).

In this case, similarly, BLM is considering the APD but has not yet acted upon it. Neither the RGFO Letter nor the SDR Decision authorizes or prohibits any action that affects individuals having interests in the public lands. Nor do either of those documents announce or propose any decision on the APD.

The only remaining question is whether either the RGFO Letter or the SDR Decision determines or adjudicates any right or obligation of the Alliance. In substantive effect, the Alliance’s April 3, 2009, letter requested that BLM reject the APD (and thereby terminate the suspension of operations and production so that the terms of the leases would continue to run). In other words, the Alliance attempts to use the Department’s administrative appeal procedures to compel BLM to reject the APD. But the Alliance does not have a legal right to supervise the APD approval

process. *If* BLM approves the APD, then the Alliance may appeal that approval and assert its theory regarding the alleged violation of the 45-day information provision.⁸

For these reasons, BLM's rejection of the Alliance's request to return the APD before BLM has acted on it, and BLM's continued consideration of the APD, is not a "decision of an officer of the [BLM]" that is appealable to this Board under 43 C.F.R. § 4.410.

Further, we reject the Alliance's theory that the RGFO Letter is subject to State Director review under 43 C.F.R. § 3165.3(b) even if it is not a "decision" ultimately appealable to the Board under 43 C.F.R. § 4.410. We do not believe that the references to "notice of violation," "assessment," "instruction," and "order" in addition to "decision" in section 3165.3(b) mean that the matters subject to review by the State Director are broader than "decision[s]" appealable to this Board under section 4.410. Each of the types of actions identified in section 3165.3(b) will "either authoriz[e] or prohibit[] an action affecting individuals having interests in the public lands" or adjudicate a party's rights in a given factual context. We see no indication that the intent of 43 C.F.R. § 3165.3(b) is to create a special category of matters that are properly the subject of State Director review under the former provision but that would not be appealable to this Board under the latter provision. We conclude that the scope of 43 C.F.R. § 3165.3(b) is not broader than that of 43 C.F.R. § 4.410.

Moreover, the inclusion of appeal rights "boilerplate" language in the SDR Decision at 2 does not imply an "admission" by the Deputy State Director that somehow binds this Board to regard the SDR Decision as an appealable "decision" within the meaning of 43 C.F.R. § 4.410. Whether the SDR Decision is an appealable decision depends on whether it authorizes or prohibits any action that affects individuals having interests in the public lands, or adjudicates or determines a party's rights or obligations. It does not depend on whether the Deputy State Director believed his decision was appealable, or on whether he included standard appeal rights language.

⁸ Though we do not reach or decide the issue here, we note that there are substantial questions regarding the Alliance's legal theory that the phrase "the application shall be returned to the proponent" in the 1983 version of Onshore Oil and Gas Order No. 1 flatly precludes BLM from granting an extension of time to provide information. The more than 26 years that have elapsed since its promulgation have yielded no precedent supporting the Alliance's interpretation. It is unlikely that the instant case is the first time BLM has granted such an extension of time, and we are not aware of any challenge to any previous extension. We also do not reach or decide the question of whether "return" of an APD under Onshore Oil and Gas Order No. 1 equates to rejection of the APD.

Finally, the Alliance's reliance on the APA definition of "agency action" as including an agency's "failure to act," 5 U.S.C. § 551(13) (2006), is misplaced. The APA governs judicial review of final agency action. 5 U.S.C. §§ 701-706 (2006). The APA does not prescribe or determine what actions or matters are subject to administrative appeals or reviews within a particular executive department. That is determined under the rules of the particular agency.

For all of these reasons, we conclude that neither the RGFO Letter nor the SDR Decision is a decision appealable to this Board under 43 C.F.R. § 4.410.⁹

⁹ Even if we were to assume, *arguendo*, that the SDR Decision was a "decision" within the meaning of 43 C.F.R. § 4.410(a), that section requires an appellant to demonstrate that it is both a "party to a case" within the meaning of paragraph (b), and "adversely affected" by the decision within the meaning of paragraph (d). Under the latter paragraph, a party is adversely affected when it has a legally cognizable interest and the appealed decision "has caused or is substantially likely to cause injury to that interest." In *Nevada Outdoor Recreation*, we said: "When an adverse impact on a party is contingent upon some future occurrence, or where the adverse impact is merely hypothetical, it is premature for this Board to decide the matter." 158 IBLA at 209-10 (citations omitted). *See also Devon Energy*, 171 IBLA 43, 48 (2007); *Geo-Energy Partners*, 170 IBLA at 119.

In its Response to BLM's motion to dismiss at 2-3 and the attached declarations of six Alliance members who live within 1.5 miles or less of the proposed well site, the Alliance argues in substance that the pendency of the APD has negatively affected residential real estate values. The implication is that if the APD were rejected (and the primary term of the lease were running), the depressive effect on market prices would disappear. But even if we were to assume, *arguendo*, that the asserted current market value of private property located in the general vicinity of a Federal oil and gas lease is a "legally cognizable interest," the alleged adverse effect on such values from the pendency of the APD is hypothetical and speculative rather than concrete and immediate. It is therefore insufficient to constitute an injury to the private property owner's interest. The Alliance members' declarations further assert that drilling would contaminate their drinking water supply and cause noise and air pollution and various other negative physical and aesthetic impacts. But no drilling has been authorized, and at present such effects are only contingent possibilities.

Thus, even if the SDR Decision were an appealable decision, the Alliance has failed to show that it has standing to appeal under 43 C.F.R. § 4.410. It is not necessary to determine whether the Alliance comes within the definition of a "party to a case" under 43 C.F.R. § 4.410(b).

Conclusion

For the reasons explained above, the SDR Decision is not a “decision of an officer of [BLM]” that is appealable to this Board under 43 C.F.R. § 4.410. Even assuming, *arguendo*, that it is an appealable decision, the Alliance has failed to show that it has standing to appeal under that regulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we grant BLM’s motion to dismiss the appeal.

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/_____
R. Bryan McDaniel
Administrative Judge