IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, *et al.*,	)	
Plaintiffs,	)	
	)	**Judge: Robertson, J.**
v.	)	
MICHAEL JOHANNS, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,	)	**Case No: 1:00CV02502**
Defendant.	)	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF CLAIMS BASED ON THE ADMINISTRATIVE PROCEDURE ACT

Plaintiffs have stated cognizable claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, for the U.S. Department of Agriculture's (1) failure to investigate women farmers' complaints of gender discrimination in its farm loan and disaster benefit programs for farmers, and (2) discriminatory denial of disaster benefits to women farmers as a result of their gender. As a result, Plaintiffs should be allowed to pursue these claims.

None of the points raised by the U.S. Department of Agriculture ("USDA" or "Government") in its Opposition disturb the law of this Circuit, which recognizes that claims may be brought under the APA where, as here, there is no other remedy available to Plaintiffs. Nor is the Government able to refute the ineluctable conclusion that USDA's complete failure to conduct investigations of Plaintiffs' individual discrimination complaints – in some instances, failing to investigate complaints lodged more than *twenty years* ago – is tantamount to final agency action. The Government is similarly unable to disprove that its own clear mandates to conduct discrimination complaint investigations and to conduct its non-credit disaster benefit

programs in a non-discriminatory manner provide more than adequate basis for judicial review of USDA's conduct. Finally, USDA's argument that Plaintiffs lack standing to assert APA claims is without merit.[1] Plaintiffs' initial complaint, filed six years ago, as well as its third amended complaint, contained such claims and members of Plaintiffs' putative class with non-credit disaster benefit claims stand ready to litigate their claims, after amendment of the complaint if necessary, to make clear the identity of such plaintiffs.

As a result, Plaintiffs should be allowed to pursue their APA claims against USDA for discriminatory denial of non-credit benefits and the agency's failure to investigate the denial of credit and non-credit disaster benefits.

I. Plaintiffs' Claims Are Reviewable Under The APA

USDA argues that Plaintiffs cannot use the APA to challenge USDA's failure to investigate gender discrimination claims because Plaintiffs have an adequate remedy at law in the form of ECOA and its extended statute of limitations period. Opposition at 1-2, 11. USDA further contends that the APA is not available to Plaintiffs because no judicially enforceable agency regulations are in place that would permit the Court to step into the shoes of USDA and second guess the agency in conducting its own affairs. Opposition at 13-16. Both of these arguments are without merit.[2]

[1] The Government's argument that Plaintiffs lack standing to bring their claims because the alleged complaints were lodged nearly a decade ago, Opposition at 13, is disingenuous where the very purpose of Congress' extension of the statute of limitations for these claims was to extend the life of the claims so that finally justice might be levied upon USDA for its long-standing denial of its obligations.

[2] The Government takes issue, and feigns surprise, that Plaintiffs are pursuing their discrimination claims under discriminatory treatment and discriminatory impact theories. Opposition at 16 n.2. This should come as no surprise, as Plaintiffs have consistently argued in their papers and before this Court that they intend to pursue relief under both theories. *See, e.g.,* Class Certification Hearing *Love v. Veneman*, March 20, 2002 at 14-16; Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Certification of Class, *Love v. Glickman*, February 20, 2001 at 34.

A. ECOA Does Not Provide An Adequate Remedy For USDA's Failure To Investigate Discrimination Complaints.

In *Love v. Johanns*, 439 F.3d 723, 732 (D.C. Cir. 2006), the D.C. Circuit held that ECOA could not be used to address Plaintiffs' claims that USDA had failed to investigate their discrimination complaints.[3] But at least one judge of the D.C. Circuit panel in *Garcia v. Johanns* expressly disagreed with USDA's assertion that the APA cannot be used to redress those claims. *See* Transcript of Oral Argument, *Garcia v. Johanns*, Appeal No. 04-5448, 17-19 (D.C. Cir. Feb. 6, 2006) (Edwards, J.) ("The District Court is wrong, [the APA claim for failure to investigate] is an enforceable claim. If the agency has prescriptions, you are supposed to follow them and a party who is the beneficiary of those prescriptions can seek them."). The D.C. Circuit's rejection of USDA's argument is apt. In the absence of both ECOA and the APA as available causes of action, Plaintiffs would be without a remedy for the harms suffered. In its Opposition, USDA's failure to address this issue is significant.

Moreover, USDA's efforts to demonstrate that the D.C. Circuit's rulings in *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750-51 (D.C. Cir. 1990) [hereinafter *WEAL*] and *Council of and for the Blind of Del. County Valley, Inc. v. Regan*, 709 F.2d 1521, 1531-33 (D.C. Cir. 1983) [hereinafter *Council*] mandate dismissal of Plaintiffs' APA claims here are unavailing. USDA argues that the teaching of *WEAL* and *Council* is that no APA claim will lie if the plaintiff has any alternative, adequate remedy. Opposition at 12. The D.C. Circuit, however, views the rulings in *WEAL* and *Council* quite differently, as addressing the availability of an APA claim where a private cause of action against a third party exists in lieu of an action against a governmental agency.

[3] In this Court's prior opinion dismissing the APA claim for the USDA's failure to investigate, this Court gave as a reason that ECOA provided an adequate, alternative remedy, *Love v. Veneman*, No. 00-2502, at 6 (D.D.C. Dec. 13, 2001), but the Court of Appeals' conclusion that ECOA does not provide a remedy to the USDA's failure to investigate undermines this rationale. *Love v. Johanns*, 439 F.3d 723, 732-33 (D.C. Cir. 2006)

In *El Rio Santa Cruz Neighborhood Health Ctr., Inc.* v. *U.S. Dep't of Health & Human Servs.*, the D.C. Circuit summarized the *WEAL* and *Council* line of cases as those in which "APA review is unavailable [because] there is a private cause of action *against a third party* otherwise subject to agency regulation." 396 F.3d 1265, 1270-71 (D.C. Cir. 2005) (emphasis added). Indeed, all the cases cited by the D.C. Circuit in *El Rio Santa Cruz* make exactly this point, which is very different from the circumstances at bar. *Id.* (*citing Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 2537 (2005) (holding that "the availability of a private cause of action directly against universities that discriminate in violation of Title IX constitutes an adequate remedy that bars appellants' case"); *Godwin v. Sec'y of Hous. & Urban Dev.*, 356 F.3d 310, 312 (D.C. Cir. 2004) (holding that the private action against landlord authorized by section of the Fair Housing Act constituted an adequate remedy for tenant who alleged she was evicted in retaliation for filing housing discrimination grievance against landlord, precluded judicial review under the APA); *Wash. Legal Found. v. Alexander*, 984 F.2d 483, 485 (D.C. Cir. 1993) (holding that because there is an implied right of action under Title VI against the individual colleges and law schools to redress any discrimination they have allegedly suffered, judicial review is precluded under the APA); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) (holding that where Plaintiffs have implied rights of action against federally-funded institutions to redress discrimination proscribed by Titles VI and IX and express rights of action against federally-funded discriminators, judicial review under the APA is precluded); *Coker v. Sullivan*, 902 F.2d 84, 89-90 (D.C. Cir. 1990) (holding that the private right of action against failing to comply with provisions of state emergency assistance plans under Federal law, precluded judicial review under the APA); *Council of and for the Blind of Del. County Valley, Inc. v. Regan*, 709 F.2d

1521, 1531 (D.C. Cir. 1983) (holding that where the Revenue Sharing Act provided for a private cause of action for discrimination against state and local governments receiving federal funds, judicial review under the APA is precluded)). *See also McKenna v. Weinberger*, 729 F.2d 783,791 (D.C. Cir. 1984) (holding that Title VII, which provided only a remedy for discrimination against the agency itself, did not preclude APA review of the agency's failure to follow its own regulations.).[4]

Moreover, USDA's reading of *WEAL* and *Council* ultimately supports Plaintiff's maintenance of APA claims here. If *WEAL* and *Council* are read to permit APA claims only when there is no other adequate remedy at law, APA claims should indeed be allowed here because other than the APA, Plaintiffs have no remedy to redress the harms caused by USDA's failure to investigate their discrimination complaints.

B. The Extension Of The Statute Of Limitations Does Not Provide An Adequate Remedy Precluding APA Review

The Government contends that Congress' extension of the statute of limitations for ECOA provides an adequate remedy of law such that APA is not an available remedy. Opposition at 1-2, 11. Moreover, the extension was only a limited solution to reinstate the claims of people who had experienced discrimination by USDA from 1981 to 1996. *See* 7 U.S.C. § 2279 [note § 741(e)]. But it did not change the fact that ECOA does not provide any relief for USDA's failure to investigate, nor did it ensure that USDA will investigate complaints in the future. Plaintiffs herein seek injunctive relief not only to rectify the harms of

[4] Additionally, the Government invokes *Bowen v. Mass.*, 487 U.S. 879 (1988), to support its position that, if allowed to proceed, Plaintiffs' failure to investigate claims would provide duplicative remedies. Opposition at 12. Yet there is no duplication of remedies here. As in *McKenna v. Weinberger*, 729 F.2d 783,791 (D.C. Cir. 1984), there are two separate, distinct claims – one for the agency's discrimination in administering its credit and non-credit benefit programs, and another for the agency's failure to follow its regulations mandating that it conduct an investigation of individuals' discrimination complaints. It is immaterial that the complaints would not have been made without the underlying acts of discrimination, acts for which there may be relief under ECOA (in the case of credit discrimination only). The agency's failure to investigate is not also remedied by ECOA, so an APA claim cannot possibly be duplicative of other remedies.

discrimination in USDA's disaster benefit programs, but also injunctive relief directly aimed at redressing and correcting the USDA's complete failure, even to this day, to conduct discrimination complaint investigations of Plaintiffs' claims.

Furthermore, there is nothing in the legislative history of the statute extending the limitations period that precludes other claims besides ECOA claims. The legislative history makes clear that the purpose of the statutory provision was to restore a remedy for farmers who had experienced discrimination in USDA's administration of certain credit and non-credit disaster benefit programs but were denied relief based on a technicality – that the statute of limitations had run on their claims while USDA failed to resolve their complaints of discrimination. DAILY DIGEST – SENATE July 16, 1998, at S8307-08. As Senator Robb observed,

> The Congressional Budget Office believes that the Government legitimately owes …relief to farmers who were discriminated against by our Government officials…. This is an effort to say to those claimants that we are not going to let you have your claim fail on the basis of not having complied with that early 2-year statute of limitations…. Your claim will be decided now on its merits.

Id.

C. USDA Regulations Provide Judicially Manageable Standards By Which To Measure USDA's Exercise Of Its Discretion To Investigate Discrimination Complaints

Section 15.52 of 7 C.F.R. provides the judicially manageable standard by which to measure USDA's exercise of its discretion to investigate discrimination complaints – did it investigate or not. *Id.* The Government attempts to divert attention from USDA's wholesale abdication of its responsibility to investigate discrimination complaints by saying that USDA did not possess detailed non-discretionary guidelines on how to conduct its investigations, and thus the APA would not reach USDA's failure to investigate. Opposition at 14-16. This argument

must also fail. The Plaintiffs' failure-to-investigate claims do not challenge the details of USDA's investigative *process*. Rather, Plaintiffs' claims are based on the USDA's abandonment of its responsibility to conduct any investigation at all.

As the Government must concede, there have been regulations in place since 1966 requiring the USDA to investigate and resolve discrimination complaints.[5] From 1981 to 1989, USDA was required to carry out investigations in accordance with the same regulations used to handle non-discrimination based complaints and appeals. 7 C.F.R. § 15.52 (1981-89). Furthermore, from 1981 to 1985, section 15.52(d) provided that "[t]he investigative function with respect to [discrimination complaints] shall be discharged by the Office of the Inspector General…." 7 C.F.R. § 15.52 (1981-85). In 1985, section 15.52(d) changed slightly to transfer the investigative responsibility to the Assistant Secretary for Administration. 50 Fed. Reg. 25,687 (June 21, 1985) (to be codified at 7 C.F.R. § 15.52(d)).

The Government admits that the regulations in existence from 1989 to 1999 required it to investigate discrimination complaints, as section 15.52 demands that the Office of Advocacy and Enterprise "make determinations as to the merits of complaints … and as to corrective actions required to resolve the complaint." Opposition at 15 *citing* 7 C.F.R § 15.52 (1990). The regulations and departmental rules provide a clear, emphatic, non-discretionary mandate for USDA to investigate the discrimination complaints it receives relating to the credit and non-credit benefit programs it administers.[6] USDA failed to follow this mandate.

[5] The regulations also required that "any person who complains of discrimination shall be advised of his right to file a complaint" and "each agency of the Department dealing with the public shall post in a conspicuous place in its office notice of the right to file a complaint under this subpart." 7 C.F.R. § 15.52 (1967-1999).

[6] In 1999 USDA deleted Subpart B and replaced it with 7 C.F.R. § 15d, which provides for investigation of complaints by the USDA Director of the Office of Civil Rights. 7 C.F.R. § 15d.4 (2000). This regulation was supplemented with USDA Departmental Rule DR-4330-3 (1999), which mandates detailed steps for the handling of civil rights complaints.

The Government contends that this Circuit's ruling in *Slyper v. Attorney General*, 827 F.2d 821 (D.C. Cir. 1987), supports its position that section 15.52 did not provide judicially manageable standards for a court to apply. Opposition at 15-16. The Government misses the point that Plaintiffs' claims are not about *how* USDA conducted the investigation, but about whether USDA conducted an investigation *at all*, as required by 7 C.F.R. § 15.52. Unlike in this case, the defendant in *Slyper*, the United States Information Agency Director, actually made a decision about the plaintiffs' claims. *Slyper v. Attorney Gen.*, 827 F.2d 821, 822 (D.C. Cir. 1987). The statute in that case required the agency director to review a request for a waiver of a visa requirement and transmit a recommendation to the Attorney General. *Id.* In that case, the agency reviewed the request and transmitted the recommendation that the plaintiff's request be denied and gave a reason for the denial. *Id.* The *Slyper* plaintiffs, however, argued that the failure to make a favorable recommendation was arbitrary, unreasonable, and an abuse of discretion. *Id.* The plaintiffs did not argue that the agency director had completely failed his duty to review the request and issue a recommendation, but rather that the agency failed in *how* it arrived at its negative recommendation decision after completing its review. *Id.* Plaintiffs' failure to investigate claims here are clearly distinguishable from the circumstances in *Slyper*. Plaintiffs are not challenging *how* USDA investigated discrimination complaints, but rather the fact that USDA never conducted the investigations *at all*.

Therefore, in this case, Plaintiffs are simply asking for USDA to adhere to its clear mandate to conduct complaint investigations. The agency's regulations provide sufficient judicially manageable standards by which the court may review whether the agency adhered to that investigation mandate.

II. Plaintiffs' Non-Credit Benefit Claims Are Reviewable Under The APA

In response to Plaintiffs' opening brief, the Government challenges Plaintiffs' ability to assert APA claims for the discriminatory denial of non-credit disaster benefit applications based on lack of standing and lack of final agency action. USDA's arguments here also fail.

A. Standing Does Not Bar Plaintiffs' Non-Credit Disaster Benefit Claims

The Government's most repeated challenge to Plaintiffs' non-credit disaster benefit claim is that Plaintiffs have failed to identify a non-credit disaster benefit claimant. *See* Opposition at 2 and 17. But the USDA has been on notice since the filing of the original complaint six years ago that Plaintiffs are asserting claims pertaining to their non-credit disaster benefits. *See* Plaintiffs' Opening Brief, at 16 n.9.

If the Court allows Plaintiffs' APA claims to proceed, Plaintiffs would clarify their non-credit disaster benefits claim by seeking leave to amend their Complaint to, among other things, include a plaintiff who was discriminatorily denied disaster benefits. For example, Debbie Jones is a woman farmer who applied for, but was discriminatorily denied, disaster benefits in the early 1980s following a drought in her Jefferson County, Arkansas farming community. Ms. Jones suffered near complete ruin of the crops on her 70-acre farm, including soybeans, cotton, and rice, for which she sought disaster benefits from USDA, but was denied without good reason because of her gender.

B. Plaintiffs Were Not Required To Exhaust The NAD Appeal Process For Their Disaster Benefit Discrimination Claims

In its Opposition, the Government attempts to rejuvenate an argument that it lost once before in this Court. The Government argues that Plaintiffs' discrimination claims relating to non-credit disaster benefits first must be submitted to the USDA's National Appeal Division ("NAD"), only upon the conclusion of which would Plaintiffs receive a final agency

determination. Opposition at 18. In putting forth this argument, however, the Government simply ignores the Court's prior determination that NAD has *no jurisdiction* over allegations of discrimination in farm credit and non-credit benefit programs. *See Love v. Veneman*, No. 00-2502, at 6 (D.D.C. Dec. 13, 2001). *See also* 7 C.F.R. § 11.1. As this Court has noted, "[t]he language of Part 11 expressly excludes 'persons whose claim(s) arise under …[d]iscrimination complaints prosecutable under the nondiscrimination regulations at 7 CFR parts 15, 15a, 15b, [15d],[7] 15e, and 15f.'" *Love v. Veneman*, No. 00-2502, at 6 (D.D.C. Dec. 13, 2001). Therefore, Plaintiffs' failure to avail themselves of the NAD process is not at all surprising and, more importantly, not a bar to pursuing a claim under the APA.

[7] At the time that 7 C.F.R. § 11.1 was issued, *see* 64 Fed. Reg. 33,367 (June 20, 1999), the provisions were located in Part 15, Subpart B. The provisions are now located in 7 C.F.R. Part 15d. 64 Fed. Reg. 66,709 (Nov. 30, 1999).

III. CONCLUSION

For the foregoing reasons, and those stated in their opening brief, Plaintiffs respectfully request that the Court allow Plaintiffs to maintain their APA claims for the discriminatory denial of noncredit benefits and the unlawful and discriminatory failure to investigate discrimination complaints by women for the denial of credit and non-credit benefits.

Dated: September 8, 2006

Respectfully submitted,

/s/

Marc L. Fleischaker # 004333
Barbara S. Wahl # 297978
Kristine J. Dunne # 471348
Jennifer Fischer
ARENT FOX PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000
Fax (202) 857-6395

Roderic V.O. Boggs
Susan E. Huhta # 453478
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, N.W., Suite 400
Washington, D.C. 20036
(202) 319-1000
Fax (202) 319-1010

Alexander John Pires, Jr. #185009
4401 Q Street, N.W.
Washington, D.C. 20007
(202)338-0382

Phillip L. Fraas # 211219
818 Connecticut Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 223-1499
Fax (202) 223-1699