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' BRIEF IN SUPPORT OF CLAIMS BASED ON THE ADMINISTRATIVE PROCEDURES ACT

Plaintiffs, by and through the undersigned counsel, hereby submit this brief in support of their claims based on the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*.

I. HISTORY OF PLAINTIFFS' APA CLAIMS

Plaintiffs' First Amended Complaint filed on December 27, 2000 contained a claim for violation by the United States Department of Agriculture (the "USDA") of the APA, 5 U.S.C. §§ 701 *et seq*. *See* First Amended Complaint at ¶¶ 131-135.[1] Plaintiffs' APA claims against USDA were based on the unlawful and discriminatory denial of credit and other benefits and USDA's failure to properly process Plaintiffs' discrimination complaints. *See id.* ¶ 132. By order dated December 13, 2001, this Court dismissed Plaintiffs' APA claims on multiple grounds, including: (1) the only named plaintiff who alleged unlawful denial of disaster benefits, Margaret Odom, was successful in her administrative appeal; and (2) the Equal Credit Opportunity Act

[1] Plaintiffs' initial Complaint dated October 19, 2000 also contained this APA claim. *See* Complaint at ¶¶ 131-135. Plaintiffs' most recent amendment of their complaint also included a claim under the APA in order to preserve the issue of Plaintiffs' APA claims for appeal. *See* Third Amended Complaint at ¶¶ 79-80.

("ECOA"), 15 U.S.C. §§ 1691 *et seq*., provides an adequate remedy for Plaintiffs' APA-based claims. *See* Dec. 13, 2001 Order at 13-14. Plaintiffs appealed the Court's dismissal of their APA claims, along with the Court's denial of Plaintiffs' motion for class certification of the ECOA claims. After full briefing of the issues and oral argument before a three-judge panel, the D.C. Circuit issued its decision remanding the APA claim "for further proceedings in the District Court." *Love v. Johanns*, 439 F.3d 723, 733 (D.C. Cir. Mar. 3, 2006) (decision affirming denial of class certification of ECOA claims and remanding for briefing on APA claims).[2] The D.C. Circuit reached a similar result in the Hispanic farmers' discrimination lawsuit, *Garcia v. Johanns,* in which oral argument was held before the appellate court on the same day and before the same panel as was the *Love* case. *See* 444 F.3d 625, 637 (D.C. Cir. Mar. 31, 2006).

Plaintiffs now submit this brief in support of their APA claims against USDA for its discriminatory denial of non-credit benefits and its unlawful and discriminatory failure to investigate discrimination complaints of women farmers.[3]

[2] In its decision in *Love*, the D.C. Circuit anticipated that "[t]he regulatory scheme of which [USDA's regulations] is a part may become the stuff of APA litigation upon remand …." 439 F.3d at 732 (citation omitted). The D.C. Circuit's encouragement of District Court proceedings involving the APA also occurred in the D.C. Circuit's review of the District Court's opinion in *Keepseagle v. Johanns*, No. Civ. A. 9903119EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001). In that case, the D.C. Circuit affirmed class certification of the APA claim based on USDA's failure to investigate civil rights complaints of Native Americans, and refused to review the merits of the plaintiffs' APA claims. *In Re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002).

[3] Consistent with the Court's directive in *Garcia*, as for issues relating to Fed. R. Civ. P. 23, Plaintiffs will request an opportunity to seek review of the merits of Rule 23 class certification of their APA claim at a later date, presuming the Court approves the viability of Plaintiffs' APA claims.

II. ARGUMENT

The APA provides a presumption of judicial review for private individuals adversely affected by federal agency action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review") (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). In order to state a claim under the APA for judicial review of a federal agency's action or failure to take action, a plaintiff must establish that (1) there has been final agency action, (2) the action has not been committed to agency discretion as a matter of law, and (3) there is no other adequate remedy available from a court. 5 U.S.C. §§ 701(a), 704. *See Abbott Labs.*, 387 U.S. at 140.

Here Plaintiffs assert APA claims against USDA on two grounds:

(1) USDA's discriminatory denial of disaster and other non-credit benefits to women farmers based on gender; and

(2) USDA's unlawful and discriminatory failure to investigate women farmers' discrimination complaints.[4]

See First Amended Complaint at ¶ 132. As demonstrated below, Plaintiffs' APA claims are viable because (1) neither USDA's failure to investigate nor its denial of non-credit benefits is covered by ECOA or any other statute that provides for review by a court; (2) APA claims of this sort have not been committed solely to the jurisdiction of USDA; and (3) USDA's discriminatory denial of non-credit benefits to women farmers and its unlawful and/or discriminatory failure to investigate women farmers' discrimination complaints are final, non-discretionary agency actions for which the APA provides judicial review.

[4] The failure to investigate claim is common to all previously delineated subclasses, *see* Plaintiffs' Motion for Class Certification dated Jan. 16, 2004, and also pertains to women farmers whose complaints of discriminatory denials of disaster and other non-credit benefits were not investigated.

A. USDA's Failure To Investigate Discrimination Complaints Is Reviewable Under The APA.

The failure to investigate discrimination complaints is reviewable under the APA because all of the requirements for bringing an APA claim are met: (1) ECOA does not provide an adequate alternative remedy to Plaintiffs' APA claims; (2) the claims are not barred as an action committed to agency discretion by law; and (3) the failure to act is tantamount to final agency action.

1. ECOA Does Not Provide An Adequate Alternative Remedy To Plaintiffs' APA Claims.

ECOA fails to provide an adequate alternative remedy to Plaintiffs' APA failure to investigate claims because ECOA provides relief only from gender discrimination in "any aspect of a *credit transaction*." *See* 15 U.S.C. § 1691(a), (d)(6) (emphasis added). *See also* 12 C.F.R. § 202.2 (promulgated March 18, 2003) (containing definitions of credit, credit transaction and adverse action). This Court has already found that the failure to investigate is not covered under ECOA because it is not a "credit transaction." *See* Order dated Dec. 13, 2001 at 12-13. The Circuit Court of Appeals affirmed this holding. *Love*, 439 F.3d at 732 ("even a liberal interpretation of 'credit transaction' does not encompass failure to investigate a discrimination complaint") (citation omitted). Thus, ECOA does not provide a viable cause of action for Plaintiffs' failure to investigate claims.[5]

This Court having already found that ECOA cannot be used by Plaintiffs to state a cause of action for USDA's failure to investigate discrimination complaints, it should recognize that

[5] There is no other statute that might even hypothetically be a vehicle for Plaintiffs to state a cause of action for USDA's failure to investigate their discrimination complaints in connection with their applications for USDA credit and/or non-credit benefits.

the APA can be used to redress such claims.[6] This very issue arose during oral argument before the Court of Appeals panel in the *Garcia* case, wherein a member of the panel recognized that an action under ECOA for discrimination in credit transactions would not provide relief for the agency's separate failure to investigate such discrimination, which investigation was mandated by the agency's own rules:

> Mr. Scarborough: "There are agency regulations that allow for people to make discrimination complaints."
>
> The Court: "And get investigation."
>
> Mr. Scarborough: "Well, Your Honor, yes, at some point."
>
> The Court: "And those are enforceable…I mean there are plenty of APA cases. The District Court is wrong…. The case law on that is clear, the District Court is wrong, it 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.
>
> Mr. Scarborough: Well, then let me try to respond to that, because there are no prescriptions that they have identified that require the agency to do a particular thing by a particular time that are judicially enforceable…"
>
> The Court: "How about that they are required to do something?"
> Mr. Scarborough: "Again, there is nothing that says that they are required to do something…" The Court: "There is no requirement to investigate?"
>
> Mr. Scarborough: "There is a process that is set out to—"
>
> The Court: "Yes, an investigation process."

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[6] In its Order dated December 13, 2001, at 13-14, this Court held that if ECOA could be utilized to challenge the Plaintiffs' failure to investigate claims, no cause of action would be cognizable under the APA. This Court also concluded that ECOA could not be used to state a valid claim for USDA's failure to investigate Plaintiffs' discrimination complaints. The Court's rejection of both ECOA and the APA as mechanisms for asserting rights left Plaintiffs without a remedy, in contravention of longstanding American jurisprudence. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) (in case involving review of executive action, the Court reasoned that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."). *See also Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"). It is this Court's dismissal of Plaintiffs' APA claims for failure to investigate that the Court of Appeals has remanded for reconsideration by this Court, in the specific context of rejection of Plaintiffs' ECOA claims.

> Mr. Scarborough: "That's a separate question from whether there is a judicially enforceable obligation in Court. And the District Court – and that's sort of a threshold point. The District Court's ruling is adequacy of a remedy at law under 704 of the APA. Congress looked at this very problem, the alleged failure to investigate, over a long period of time, sort of a systemic breakdown in the investigatory process, and said, 'your remedy here is not something, you know, an independent cause of action there, it's I'm going to extend the ECOA limitations."
>
> The Court: "That doesn't mean that an agency can't create something else that becomes a remedy for parties."

Transcript of Oral Argument, *Garcia v. Johanns*, Appeal No. 04-5448, 17-19 (D.C. Cir. Feb. 6, 2006) (Edwards, J.) (Ex. 1). Indeed, as the Court of Appeals noted, USDA has created a remedy in the form of its regulations mandating the investigation of discrimination complaints. That remedy is judicially enforceable by application of the APA.

Supporting the D.C. Circuit's comments during the *Garcia* oral argument is well-established D.C. Circuit precedent. In *McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C. Cir. 1984), the D.C. Circuit held that a plaintiff may bring both a discrimination claim and an APA claim that is based upon the agency's failure to comply with its own regulations because the two claims have independent bases. *Id.* In *McKenna*, Title VII provided the remedy for an employment discrimination claim where the plaintiff asserted that the agency fired her after she made an administrative complaint of sex discrimination. *Id*. The D.C. Circuit found that the APA provided a separate cause of action against the agency for its failure to conform to its own regulations in effecting the dismissal. *Id*. *Accord Lynch v. Bennett*, 665 F. Supp. 62, 64-65 (D.D.C. 1987). Here, as in *McKenna*, ECOA creates a remedy for a discrimination claim against USDA in its credit transactions, while the APA provides the remedy for the failure of USDA to investigate discrimination complaints as its regulations demand. The failure to investigate claim is independent of any credit discrimination claim potentially existing under ECOA and, as in *McKenna*, presents a claim separately allowable under the APA. Moreover, as

the D.C. Circuit has found, Plaintiffs' claims that USDA failed to investigate discrimination complaints relating to its non-credit benefits programs are outside the scope of ECOA. Thus they are judicially reviewable under the APA.

The cases that this Court relied upon in determining that ECOA provides an adequate alternative remedy are inapposite to the facts of this case and the holding in *McKenna*. *See Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750-51 (D.C. Cir. 1990); *Council of & for the Blind v. Regan*, 709 F.2d 1521, 1531-33 (D.C. Cir. 1983) (en banc).[7] In both *WEAL* and *Council of the Blind*, agencies provided federal funds to private recipients who subsequently discriminated against the plaintiffs in connection with those funds. *WEAL*, 906 F.2d at 750-51; *Council of the Blind*, 709 F.2d at 1531-33. The alleged discrimination was conceivably a violation of both a federal anti-discrimination statute and agency regulations governing oversight of private fund recipients. *WEAL*, 906 F.2d at 750-51; *Council of the Blind*, 709 F.2d at 1531-33. The D.C. Circuit found in both cases that because Congress understood that the agencies may not always be able to sufficiently monitor the conduct of their funding recipients – as opposed to the conduct of the agencies themselves – Congress provided a separate private cause of action for discrimination against the fund recipients who allegedly perpetrated the discrimination. *WEAL*, 906 F.2d at 750-51; *Council of the Blind*, 709 F.2d at 1531-33. As such, the private rights of action offered the plaintiffs adequate remedies to correct the discrimination, and thus an APA claim against the agency was not available. *WEAL*, 906 F.2d at 750-51; *Council of the Blind*, 709 F.2d at 1531-33.

In contrast to *WEAL* and *Council for the Blind*, ECOA provides for an action directly against the government agency itself, USDA, for discrimination in its own credit decisions. This

[7] Additionally, as this Court has acknowledged, these cases "might be distinguished on the ground that they involved private causes of action against third parties." Order dated Dec. 13, 2001 at 13-14.

is more akin to the agency's decisionmaking in *McKenna*. Furthermore, unlike the statute in *WEAL* and *Council for the Blind*, there is no evidence of Congressional intent that ECOA should be used as an alternative remedy against the agency for failing to process discrimination complaints. This is consistent with *Bowen v. Mass.*, 487 U.S. 879 (1988), in which the Supreme Court determined that the "no alternative remedy" language of the APA, 5 U.S.C. § 704, was intended to preclude additional judicial remedies only in instances where Congress has already enacted statutes providing for adequate judicial review of agency action. 487 U.S. at 903 (prohibition on alternative remedies which "was intended to avoid [] duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action").

Therefore, as with the plaintiff in *McKenna*, Plaintiffs are entitled to pursue separate claims under the APA for USDA's failure to investigate their discrimination complaints, in addition to their APA claims for the denial of non-credit benefits. *See* discussion *infra* at 16. ECOA and the waiver of its applicable statute of limitations does not bar a separate claim against USDA for a failure to adhere to its regulations, in this case a failure to investigate Plaintiffs' discrimination complaints.

2. USDA's Failure To Investigate The Discrimination Complaints Is A Final Agency Action Subject To Judicial Review Under The APA.

USDA's failure to investigate discrimination complaints is reviewable under the APA as a final agency action. An agency may not simply avoid review of its actions by failing to act. *See Sierra Club v. Thomas*, 828 F.2d 783, 793-95 (D.C. Cir. 1987); *Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). The APA provides judicial review where a person has suffered legal wrong due to an agency's failure to act and instructs the reviewing court in those instances to compel "agency action unlawfully or unreasonably delayed." 5 U.S.C. § 706. If an

agency could simply avoid review by not acting, it would defeat the purpose of relevant regulations. The D.C. Circuit agrees and has recognized at least three circumstances where judicial review under the APA may occur despite the lack of an official agency action: (1) an effectively final action not acknowledged by the agency; (2) recalcitrance in the face of a clear statutory duty; and (3) unreasonable delay of final action. *Sierra Club*, 828 F.2d at 793-95. All three are present here.

a. USDA's Failure To Investigate Represents Effective Final Agency Action And Is Therefore Reviewable Under The APA.

The D.C. Circuit has held that agency inaction constitutes effective "final agency action that the agency has not frankly acknowledged." *Sierra Club*, 828 F.2d at 793. Where an agency's inaction has "the same impact on the rights of parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Id.* (quoting *Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970)). For example, in *EDF v. Hardin*, the Secretary of the Department of Agriculture had the power to suspend a hazardous chemical's registration in order to protect the public from an imminent hazard. 428 F.2d at 1099. The Secretary, however, failed to act on a request for interim suspension of the registration of the chemical, DDT. *Id.* In finding that the APA provided a cause of action for private individuals against USDA, the D.C. Circuit held that the agency's inaction was the equivalent of an order denying suspension of the chemical because there was potential for irreparable injury on a massive scale, and the failure to act denied petitioners the right to seek emergency relief. *Id.*

In this case, USDA has a statutory duty to ensure that it does not discriminate against women farmers in administering its credit and benefit programs. 15 U.S.C. § 1691. USDA has promulgated regulations prohibiting discrimination in all of its programs and activities and

regulations requiring the investigation of discrimination complaints. 7 C.F.R. §§ 15d.1 *et seq.* (effective Nov. 30, 1999) (setting forth the agency's "nondiscrimination policy" covering all of its programs and activities); 7 C.F.R. §§ 15.51 *et seq.* (promulgated Aug. 7, 1978) (prohibiting discrimination with regard to any program or activity of the agency). USDA's Director of the Office of Civil Rights is tasked with conducting agency investigations of discrimination complaints relating to agency programs. *See* 7 C.F.R. § 15d (2006). USDA's Departmental Regulations mandate that the Office of Civil Rights acknowledge in writing receipt of each complaint within five calendar days and complete investigation of each complaint within 180 days after finding jurisdiction over the complaint. *See* USDA, Departmental Regulation: Nondiscrimination in USDA-Conducted Programs and Activities, DR 4330-3 (Mar. 3, 1999). As in *EDF v. Hardin*, *supra*, the failure to investigate Plaintiffs' complaints has the same impact as if USDA had made a formal decision refusing to investigate each woman farmer's discrimination complaint: the women farmers were denied the right to an investigation of their discrimination complaints, and thus the discriminatory practices of USDA's Farm Service Agency went unchecked and wrongs committed against women farmers went unremedied. By failing to act, USDA denied Plaintiffs the right to have investigations of their discrimination complaints conducted and to have the appropriate corrective action identified and implemented by the agency investigators. This Court itself has noted that Congress's statutory waiver of the statute of limitations was "tantamount to a legislative finding that, at USDA, resort to administrative remedies was futile." Order dated Dec. 13, 2001 at 8 n.7. Such inaction is the *sine qua non* of an effective final action subject to judicial review under the APA. *Cf. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 65 (2004) (agency action under the APA includes the

failure to conduct a discrete act as required, as opposed to a general failure to "consider" a particular issue) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)).

b. USDA's Failure To Investigate Amounts To An Abdication Of Its Duty And Therefore Is Reviewable As A Final Agency Action Under The APA.

USDA's failure to investigate Plaintiffs' complaints as provided in its regulations also amounts to an abdication of its regulatory duty, which renders its inaction judicially reviewable as a final agency action under the APA. The D.C. Circuit has held that the APA provides judicial review for aggrieved individuals where agency inaction may amount to "agency recalcitrance … in the face of a clear statutory duty … of such magnitude that it amounts to an abdication of statutory responsibility." *Pub. Citizen Health Research Group v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)). Moreover, courts have consistently held that a court has a duty to enforce an agency's regulations even where those regulations are not mandated by the Constitution or federal law. *See Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003).

Judicial review of agency inaction is especially necessary where regulations provide the only safeguard individuals have against unlimited agency discretion. *See Lopez*, 318 F.3d at 247. For example, the D.C. Circuit held that the Federal Aviation Administration's ("FAA") procedures provided the only protection a Designated Engineer Representative ("DER") had from termination for "any reason considered appropriate by the Administrator." *Id.* at 248 (citation omitted). For that reason, the D.C. Circuit found that the federal court had jurisdiction to review whether the FAA followed its own rules before termination of a DER designation. *Id.* at 247 (where an agency's rules are "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion," it is appropriate to hold the

agency accountable to those rules) (citation omitted). Similarly, in *Mazaleski v. Treusdell*, the D.C. Circuit rejected the idea that a failure to inform an employee of the grounds of termination as provided in an agency's regulations was harmless and therefore unreviewable. 562 F.2d 701, 719 (D.C. Cir. 1977). Significantly, the D.C. Circuit held that "scrupulous compliance" with the agency's regulations governing termination was "required to avoid any injustice." *Id*. (requiring the agency's compliance with the procedures "which the agency has chosen to create by its own regulations").

In this case, USDA has a statutory duty to ensure that it does not discriminate against women farmers in administering its credit programs. 15 U.S.C. § 1691. USDA regulations also prohibit discrimination in all of its programs and activities (including credit and non-credit benefit programs) and require the investigation of discrimination complaints. 7 C.F.R. §§ 15d.1 *et seq*., §§ 15.51 *et seq*. (promulgated Aug. 7, 1978). These regulations, which clearly mandate USDA's duty, are judicially enforceable. Moreover, the regulations take on special force because they protect farmers from the discriminatory discretion that may be exercised by local Farm Service Agency officials in the implementation of farm loan and benefit programs. Yet it is undisputed that for decades USDA has failed and refused to comply with its own regulations requiring investigations of discrimination complaints.[8] USDA's obligation to investigate such

[8] As recognized by the District Court in *Keepseagle v. Johanns*, USDA "systematic[ally] fail[ed] to process complaints of discrimination," as detailed in numerous reports issued by different entities over a period of many years. *See* 2001 WL 34676944, at *9. Report after report has discussed the failures of USDA to process complaints. In 1997, the Office of Inspector General ("OIG") within USDA found that the discrimination complaint process within USDA lacked integrity and accountability, lacked a tracking system, was in disorder, did not resolve discrimination complaints and had a massive backlog. USDA, Roger C. Viadero, Inspector General, Report for the Secretary on Civil Rights Issues, Eval. Report Nos. 50801-2-Hq (Phase I) (Feb. 27, 1997) and 3-Hq (Phase II) (Sept. 29, 1997), relevant portions of which are annexed hereto as Exhibit 2. USDA's own Civil Rights Action Team's report condemned the agency's lack of civil rights enforcement and accountability and isolated it as a cause of the drastic decline in the number of minority farmers. USDA Civil Rights Action Team, *Civil Rights at the U.S. Dept. of Agriculture*, Feb. 1997, relevant portions of which are annexed hereto as Exhibit 3. Specifically they found that discrimination complaints at USDA were often ignored, decisions favoring farmers were routinely not enforced, USDA often failed to respond to discrimination complaints, and USDA failed to maintain records of discrimination complaints and a significant backlog of complaints existed. *Id.* Even after the introduction of a new Office of Civil

complaints is distinct from the agency's duty to comply with its nondiscrimination policy in its underlying programs and activities, *see* 7 C.F.R. §§ 15d.1 *et seq.*; 7 C.F.R. §§ 15.51 *et seq.*, the violation of which should be separately actionable under the APA apart from any other cause of action, such as under ECOA for discrimination in the denial of credit. USDA's wholesale abdication of its duty to investigate women farmers' discrimination complaints qualifies the agency's inaction for judicial review as a final agency action under the APA. *See Heckler v. Chaney*, 470 U.S. 821, 832-33 n.4 (1985).

3. The Failure To Investigate Discrimination Complaints Is Not Barred As An Action Committed To Agency Discretion By Law.

Although the APA provides a presumption of judicial review, Congress created a narrow exception for agency actions that are committed to agency discretion by law. 5 U.S.C. § 701. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Under this exception, even if Congress has not affirmatively barred review, courts cannot review an agency action "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler*, 470 U.S. at 830. The D.C. Circuit recognizes statutes,

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Rights within USDA, the Government Accounting Office in 2000 found the civil rights complaint processing system to be dysfunctional and in disarray. United States GAO Report to Congressional Requestors, *Farm Programs, Efforts to Achieve Equitable Treatment of Minority Farmers*, Jan. 1997, relevant portions of which are attached hereto was Exhibit 4. In 2003, the Commission on Civil Rights found that there had been little improvement in USDA's civil rights enforcement program since the Commission's previous evaluation in 1996. U.S. Commission On Civil Rights, Office Of Civil Rights Evaluation, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume III: An Evaluation of the Departments of Agriculture and the Interior, The Environmental Protection Agency, and The Small Business Administration* (Sept. 2003), relevant portions of which are attached hereto as Exhibit 5. Despite some improvement in the complaint resolution system in 2000, USDA has regressed and continues to have large backlogs of discrimination complaints. *Id. See also* Civil Rights Action Team Report, attached as Exhibit 3, at iii (statement from USDA Secretary Dan Glickman conceding that USDA is "keenly aware that we are still far from the finish line" in ending civil rights violations); *see also Review of the Operation of the Office of Civil Rights, USDA and the Role of the Office of General Counsel, USDA, in Addressing Discrimination Complaints Pertaining to Program Delivery and Employment: Hearing Before Sen. Comm. on Agric., Nutrition and Forestry*, 106th Cong. (Sept. 12, 2000) (statement of Chairman Dick Lugar), relevant pages of which are attached hereto as Exhibit 6 (stating that discrimination against women farmers and other minorities continues to persist at USDA); *id.* at *3 (statement of John Zippert, Federation of Southern Cooperatives/Land Assistance Fund), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:70527.wais.pdf (last visited on July 7, 2006) (testifying that "[d]iscrimination and disparity in service has not stopped at USDA."), relevant portions of which are attached hereto as Exhibit 7.

regulations and even formal and informal policy statements as constituting "judicially manageable standards." *See Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (citing *Citizens to Preserve Overton Park*, 401 U.S. at 410).

For example, in *CC Distribs. Inc. v. United States*, 883 F.2d 146 (D.C. Cir. 1989), the D.C. Circuit found judicially manageable standards in the regulations of the Department of Defense requiring it to use private contractors where it was more cost effective to do so, even though the statute itself did not so provide. 883 F.2d at 153 (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Similarly, in *Ctr. for Auto Safety v. Dole*, 828 F.2d 799 (D.C. Cir. 1987), the D.C. Circuit found that while the applicable statute itself did not provide "judicially manageable standards" of review, the agency's underlying regulations requiring review of citizens' petitions did provide such standards, which were subject to judicial review under the APA. 828 F.2d at 803 (APA governed denial of citizens' petitions to reopen an enforcement investigation against an automobile manufacturer for safety defects). *Id.*

Here no statute bars review of the agency action. Although there are no clear statutory guidelines for the courts to follow in reviewing the agency's failure to investigate Plaintiffs' discrimination complaints, there are, however, regulations mandating that USDA investigate complaints of gender discrimination. *See, e.g.,* 7 C.F.R. §§ 15.51 (promulgated Aug. 7, 1978), 15.52 (promulgated June 10, 1966). As in *CC Distribs., supra,* and *Ctr. for Auto Safety, supra,* USDA's regulations mandating complaint investigation provide judicially manageable standards for review. For example, from 1966 to 1999, USDA's regulation for discrimination complaints stated that "[a]ny person who complains of discrimination … shall be advised of his rights to file a complaint as herein provided. Each agency of the Department dealing with the public shall post in conspicuous places in its offices and other facilities notice of the right to file a complaint

…." 7 C.F.R. § 15.52 (1984). The regulation also requires filed complaints to be investigated by the Director of the Office of Advocacy and Enterprise, which is then to determine the merits of the complaints and decide on corrective actions required to resolve the complaints. *Id.* Thus, through these judicially manageable standards, a court can determine whether or not USDA handled the complaints of discrimination in accordance with its regulations, such as through conducting investigations of filed complaints and resolving meritorious complaints. *Id.* Accordingly, Plaintiffs' failure to investigate claims are not committed to agency discretion and are properly the subject of judicial review under the APA.

B. USDA's Discriminatory Failure to Investigate Also Constitutes a Basis for Pursuing Judicial Review Under the APA.

In addition to their APA claims for USDA's unlawful failure to investigate, Plaintiffs also assert that USDA discriminatorily failed to investigate women farmers' civil rights complaints as required by the agency's own regulations. Under both disparate treatment and disparate impact theories, USDA's discriminatory failure to investigate women farmers' complaints violates USDA's prohibition against discrimination in any program or activity of the agency, including its investigation activities. *See, e.g.,* 7 C.F.R. §§ 15d.1 *et seq.* This prohibition is augmented by the agency's regulations governing the conduct of its investigations. *See* 7 C.F.R. §§ 15.51 *et seq.*

USDA's failure to investigate women farmers' discrimination complaints is actionable under a disparate treatment theory because women farmers were treated differently than male farmers. Male farmers' non-civil rights complaints were, upon information and belief, investigated and decided by offices other than USDA's incompetent Office of Civil Rights. In contrast, the discrimination complaints of women farmers were funneled to the dysfunctional and ultimately disbanded Office of Civil Rights, which failed to investigate, determine and/or remedy

the women's complaints. Plaintiffs also proceed under a disparate impact theory because USDA's system of sending discrimination complaints to the incompetent and understaffed Office of Civil Rights, while allowing males' non-discrimination complaints to be handled differently at USDA, discriminatorily impacted women complainants who could not get fair, competent review of their civil rights complaints.

Since there is no other adequate remedy for Plaintiffs' claims that USDA discriminatorily failed to investigate women farmers' civil rights complaints, Plaintiffs should be permitted to pursue claims under the APA for USDA's abdication of responsibility to comply with its non-discrimination complaint regulation and regulations governing the mandatory investigation of discrimination complaints. *See Shannon v. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 818-20 (3rd Cir. 1970) (failure to act with respect to discrimination allegations is reviewable under the APA). *See* discussion *infra* 8-13 regarding agency inaction that is judicially reviewable under the APA.

C. The Denial Of Non-Credit Disaster Benefits Due To Discrimination Is Reviewable Under The APA.

Plaintiffs also assert a claim under the APA for USDA's discriminatory denial of disaster and other non-credit benefits. The Court has already held this to be a viable claim.[9] *See Garcia v. Veneman*, No. 00-2445, at 4 (D.D.C. Mar. 20, 2002). ECOA does not provide an adequate remedy for *non-credit benefits*. *See Love*, 439 F.3d at 732; *see also* Order dated Dec. 13, 2001 at 12-13. The non-credit benefit claims are those addressing discrimination in the denial of non-credit benefits that by definition do not qualify as "credit transactions" under ECOA. *Id.* Therefore, the APA provides the only remedy. *Id.*

[9] If successful on this remanded motion to consider the APA claims, Plaintiffs intend to seek leave to amend their complaint to address the standing issue raised by this Court in its previous dismissal of the non-credit benefits claim under the APA.

III. CONCLUSION

For the foregoing reasons, 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.

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
CONLON FRANTZ PHELAN & PIRES
1818 N Street, N.W. - Suite 700
Washington, D.C. 20036
(202) 331-7050
Fax (202) 331-9306

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

Dated: July 10, 2006