IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, et al.,	
Plaintiffs,	**Case Number: 1:00CV02502**
vs.	**Judge: Robertson, J.**
ANN VENEMAN, SECRETARY UNITED STATES DEPARTMENT OF AGRICULTURE,	
Defendant.	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM WITH REGARD TO THEIR CLAIM ARISING UNDER THE ADMINISTRATIVE PROCEDURE ACT

At the April 19, 2007 oral argument, it appeared that two discrete issues are of principal importance in adjudicating whether plaintiffs' claims under the Administrative Procedure Act ("APA") should be permitted to proceed. The first issue is the intersection between two distinct areas of administrative law jurisprudence that have converged in this case - - the right of an individual to obtain judicial review of a claim for violation of regulations promulgated by an administrative agency versus the ability of an agency to evade judicial review for its handling of matters within the agency's jurisdiction. The second issue is whether the extension of the statute of limitations for plaintiffs to assert claims for discrimination by the United States Department of Agriculture ("USDA") in granting credit and non-credit benefits provided an alternative remedy that precludes a claim under the APA. For the reasons discussed at oral argument and as further

demonstrated below, under well-settled case law neither of these issues bars plaintiffs from proceeding with their APA claims.

I. PLAINTIFFS STATE A CAUSE OF ACTION UNDER THE APA FOR USDA'S FAILURE TO ADHERE TO ITS REGULATIONS

A. A Distinct Cause of Action Exists for a Claimant Who Has Been Prejudiced by an Agency's Failure to Adhere to Its Regulations.

For decades courts have recognized a cause of action for a claimant aggrieved by the failure of an administrative agency to follow its own regulations. This is a basic tenet of administrative law under the APA, and is also known as the Accardi Doctrine, following the seminal case *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This principle holds that governmental agencies are bound to follow their own rules, even if those rules are self-imposed and limit what would otherwise be entirely discretionary decision making. *Service v. Dulles*, 354 U.S. 363, 372 (1957). A claimant who has been prejudiced by an agency's failure to adhere to its own internal regulations, practices or procedures has the right to assert a claim and obtain review by a federal court. *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985); *Mazaleski v. Treusdell*, 562 F.2d 701, 718 n.38 (D.C. Cir. 1977). The agency's practices on which the claimant has a right to rely can be discerned not only from regulations the agency has promulgated, but also from other guidelines by which the agency is bound. *Fausto v. Gearan*, No. Civ. A. 93-1863, 1997 WL 540809, at *11-12 (D.D.C. Aug. 21, 1977) (manual); *Mass. Fair Share*, 758 F.2d at 11 (memorandum of agreement); *San Antonio General Maintenance v. Abnor*, 691 F. Supp. 1462, 1466-67 (D.D.C. 1987) (internal memoranda and regulations). In order to state a cause of action, a claimant must show that the agency had established regulations, practices and/or procedures, that it failed to adhere to those

standards, and that the claimant was prejudiced by that failure. *Nat'l Treasury Employees Union v. Horner*, 854 F.2d 490, 497-98 (D.C. Cir. 1988).

Given the number of federal agencies in this jurisdiction, the District of Columbia federal courts have accumulated substantial experience applying this principle. *See, e.g. Padula v. Webster*, 822 F.2d 97, 100-101 (D.C. Cir. 1987) (FBI letters and public statements articulating policy on the hiring of homosexuals did not constitute sufficient guidelines for the court to employ for judicial review); *Mass. Fair Share*, 758 F.2d at 711-12 (court found sufficient guidelines for judicial review from memorandum of understanding that contemplated joint decision making by two agencies, federal register announcement that the program was being jointly administered by both agencies, and guideline manual that called for joint decision making; *Holden v. Finch*, 446 F.2d 1311, 1315-17 (D.C. Cir. 1971) (judicial review of termination of probationary employee by Department of Health, Education and Welfare permitted where court could evaluate agency's interpretation of its regulations); *Guam Indus. Servs., Inc. v. Rumsfeld*, 441 F. Supp. 2d 21, 26-27 (D.D.C. 2006) (memorandum of agreement between the Department of Defense and the Maritime Administration indicating a policy to service ships in domestic shipyards did not provide sufficient basis for the court to exercise judicial review); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 106-09 (D.D.C. 1999) (agency's personnel manual provided sufficient guidelines for judicial review); *Evans v. Perry*, 944 F. Supp. 25, 29-32 (D.D.C. 1996) (judicial review predicated on guidelines set forth in Army regulations).

McKenna v. Weinberger, 729 F.2d. 783 (D.C. Cir. 1984), which occupied much of the parties' discourse during oral argument, is a case applying the Accardi Doctrine, although it was not identified as such. As discussed at oral argument, in *McKenna*, plaintiff Barbara McKenna

had been an employee of the Defense Intelligence Agency. *Id.* at 785. When several of her colleagues complained about her attitude and abrasive and uncooperative demeanor, Ms. McKenna attributed their comments to sexism and complained about their sexist conduct towards her. *Id.* at 786-87. An investigator was tasked with determining, among other things, the validity of Ms. McKenna's complaints of gender bias. *Id*. at 787. Ms. McKenna was subsequently terminated. *Id.* at 788. Thereafter, Ms. McKenna filed a lawsuit alleging "that her dismissal was motivated by sex discrimination, that it was in retaliation for her lawful complaints about her treatment, and that it was in violation of the agency's own procedures and therefore contrary to the requirements of the [APA]." *Id.* The district court found against Ms. McKenna on the sex discrimination and retaliation claims, which findings were affirmed by the Court of Appeals. *Id.* at 791. The district court also held that Ms. McKenna had not stated a claim under the APA for the Defense Intelligence Agency's failure to follow its own procedures with regard to her dismissal and to providing her with the requisite career counseling.[1] *Id.* The D.C. Circuit held that this decision was in error:

> Ms. McKenna's claim under the APA is *not* one of discrimination. Rather, she charges that the agency, whether its motive was legal or illegal, failed to conform to its own regulations. She does not claim that these procedural violations constitute employment discrimination. Her claim of arbitrary treatment is entirely independent of her discrimination claim. Although we hold that Ms. McKenna has a legally sufficient cause of action, we find nothing in the record to support her claim.

[1] At oral argument, the Court asked whether the Defense Intelligence Agency's regulations had required an investigation of Ms McKenna's complaints. It is unclear from the reported decision whether the agency's regulations required that complaints be investigated, although an investigation was evidently conducted. The investigation may have been mandated by agency regulations, conducted as part of unwritten but established agency practice, or simply undertaken voluntarily and *sui generes* in light of Ms. McKenna's allegations. In any event, the procedural defects mentioned by the Court of Appeals in its opinion were the agency's alleged failure to provide two weeks notice, to timely terminate, to provide adequate career counseling and to properly process Ms. McKenna's EEO complaints. The reported decision does not mention a challenge to the investigation by Ms. McKenna. The D.C. Circuit found that these alleged defects were without merit and/or unsupported by the record. In the 23 years since *McKenna* was decided, the Defense Intelligence Agency's regulations have changed and efforts to obtain the regulations that were in effect during Ms. McKenna's tenure have been unsuccessful. So as of this writing, it is still unknown whether the agency was required to conduct an investigation of Ms. McKenna's claims.

Id. at 791 (punctuation and paragraphs omitted; emphasis in the original). *Accord*, *Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 3 n.2 (D.D.C. 1998) (citing *McKenna* for the proposition that the APA would afford plaintiff an opportunity to sue agency for its failure to adhere to its own regulations).

The holding in *McKenna*, like all cases under the Accardi Doctrine, is that an agency's failure to adhere to its own regulations, regardless of whether or not it promulgated those regulations gratuitously, provides a cause of action to a claimant who has been prejudiced by the agency's failure. *See, e.g.*, *Mass. Fair Share*, 758 F.2d at 711-12.

In the instant case, plaintiffs contend that USDA failed to adhere to its regulations that required an investigation of plaintiffs' allegations of sex discrimination in the granting of USDA loans and non-credit benefits. As USDA pointed out in its brief at 4, and as counsel for USDA emphasized in her oral argument, USDA has had regulations requiring the investigation of complaints since at least 1966. *See* USDA Brief at 4. At all relevant times, those regulations have clearly mandated that USDA investigate discrimination complaints. *See* 7 C.F.R. § 15.52 (promulgated June 10, 1966) (transferred to 7 C.F.R. § 15d effective Nov. 30, 1999).

The current regulations, in effect since 1999, set forth the agency's nondiscrimination policy and mandate that the USDA's Office of Civil Rights ("OCR") "will investigate the [discrimination] complaints" that are filed with OCR. 7 C.F.R. § 15d.4(b) (promulgated in 1999). The regulations require that the Director of OCR "**will** make final determinations as to the merits of [discrimination] complaints . . . and as to the corrective actions required. …" *Id.* (emphasis added). The regulations also require that "[t]he complain[ant] will be notified of the final determination on his or her complaint." *Id.* USDA promulgated more specific

departmental regulations detailing the specific process to be followed in processing discrimination complaints in 1999 with its Regulation 4330-3 (Mar. 3, 1999).

All of USDA's regulations have required, at a minimum, that USDA ***conduct investigations*** of discrimination complaints. *See, e.g.*, 7 C.F.R. § 15.52 (1966) (requiring that the "investigative function . . . shall be discharged"); 7 C.F.R. § 2.80 (1972) (the designated office "will investigate the complaints" and "will make determinations as to the merits of complaints ... and as to corrective actions required to resolve the complaints"). Thus, throughout the time period at issue in this litigation, USDA's own regulations have established USDA's consistent, clear obligation to conduct investigations of discrimination complaints.

Plaintiffs contend that USDA failed to follow these regulations and to conduct the required investigations. Plaintiffs unrebutted allegations are reinforced by the extraordinarily well-documented observations of the Office of the Inspector General, USDA's Civil Rights Action Team, and Congress itself. *See, e.g.* USDA, Roger C. Viadero, Inspector General, Report for the Secretary on Civil Rights Issues, Eval. Report Nos. 50801-2-Hq (Phase I) (February 27, 1997) and 3-Hq (Phase II) (September 29, 1997) (discrimination complaint process lacked integrity and accountability and did not resolve complaints), relevant portions of which are annexed as Exhibit 2 to Plaintiffs' Brief in Support of Claims Based on the Administrative Procedures Act ("Plaintiffs' Brief"); USDA Civil Rights Action Team, *Civil Rights at the U.S. Department of Agriculture*, Feb. 1997, relevant portions of which are annexed as Exhibit 3 to Plaintiffs' Brief; United States GAO Report to Congressional Requestors, *Farm Programs, Efforts to Achieve Equitable Treatment of Minority Farmers*, Jan. 1997, relevant portions of which are annexed as Exhibit 4 to Plaintiffs' Brief; U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, Ten-Year Check-Up: Have Federal Agencies Responded to Civil

Rights Recommendations? Vol. III: An Evaluation of the Department of Agriculture and the Interior, The Environmental Protection Agency, and the Small Business Administration (Sept. 2003), relevant portions of which are annexed as Exhibit 5 to Plaintiffs' Brief; *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), relevant portions of which are annexed as Exhibit 6 to Plaintiffs' Brief.

Moreover, plaintiffs have clearly been prejudiced by USDA's failure to adhere to its own regulations. Because of USDA's refusal to investigate their claims and provide the needed relief, some lost their farms. *See, i.e.*, Declaration of Sheridan Sylvester, annexed here as Exhibit 1, at ¶ 7. Others left farming. *See, i.e.*, Declaration of Monica Elaine Brooks, annexed here as Exhibit 2, at ¶ 9.

Plainly, under well-settled principles of administrative law, plaintiffs state a cause of action for USDA's failure to comply with its regulations, which required it to investigate plaintiffs' claims of discrimination in the granting of credit and non-credit benefits.

B. Agency Discretion Does Not Bar This Court's Review of Plaintiffs' Claims.

USDA contends that a wholly different strand of administrative law, arising from *Heckler v. Chaney*, 470 U.S. 821 (1985), governs the outcome of plaintiffs' claims. In *Heckler*, the Supreme Court addressed when decisions of an administrative agency are committed solely to the agency's discretion and when they are not.

In *Heckler*, prison inmates brought an action to compel the Food and Drug Administration ("FDA") to take enforcement action with regard to the drugs used for legal injections to carry out the death penalty. The issue before the Court was whether there was

judicial review under the APA for the FDA director's refusal to undertake enforcement action. The Supreme Court reaffirmed that there is a presumption of judicial review and that the exception to that presumption - - where action is committed to agency discretion - - remains a narrow one. *Id*. at 838. Where the agency refuses to engage in enforcement action, *Heckler* held that there is a presumption that judicial review is not available because the agency is best equipped to handle decision making that involves many variables and the ordering of agency priorities. *Id.* The Court reflected that where an agency's enforcement power is similar to a prosecutor's exercise of discretion over whether or not to indict, judicial review is not available. *Id*. at 832. The Court reasoned that even in circumstances where there is a presumption that the decision making is committed to agency discretion and is therefore unreviewable by the courts, that presumption may be rebutted where, for example, a substantive statute provides guidelines for the agency to follow, signaling that Congress did not set the agency free to disregard legislative directives. *Id*. at 833. Moreover, the Court held that when "an agency does act to enforce, that action itself provides a focus for judicial review." *Id*. at 832. (emphasis omitted).

Heckler left open several questions regarding the scope of an agency's discretion that are relevant to the case at bar. The Court "[left] to one side the problem of whether an agency's rules might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce. …" *Id*. at 836. The Court also left open the issue of judicial reviewability where the agency has "consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id*. at n.4. (citations omitted).

In the two decades since *Heckler* was decided, the courts, and particularly the courts in this Circuit, have grappled with the precepts enunciated in *Heckler,* and have developed

jurisprudence on the issues left open. The case law has evolved so that courts have developed guidelines to recognize when there are adequate standards or exceptional circumstances warranting judicial review. Post-*Heckle*r, the exception to the general presumption of reviewability is still narrow. *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 2d 73, 89 n.12 (D.D.C. 2002); *San Antonio Gen. Maint., Inc. v. Abdnor*, 691 F. Supp. 1462, 1466 (D.D.C. 1987). Judicial review of agency action will not be cut off unless there is a persuasive reason to believe that Congress so intended. *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995).

Moreover, since *Heckler*, courts in this Circuit have consistently held that standards that a reviewing court can apply may be discerned from sources other than a statute. These sources include the agency's own regulations interpreting its mandate, *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) ("[we] can look for such standards in the statue itself, in 'regulations promulgated by an administrative agency in carrying out its statutory mandate,' or in other binding expressions of agency viewpoint.") (citations omitted), as well as personnel manuals, *Vanover*, 77 F. Supp 2d at 106-109, formal and informal policy statements, *Padula*, 822 F.2d at 100 and even agency agreements. *Mass. Fair Share*, 758 F.2d at 711-12. In addition, in this Circuit, it is now well established that judicial review is intended in circumstances when agency decision making involves a class of conduct affected by the regulation such that the agency's decision rises to the level of policy rather than a simple adjudication of an individual's case. *See, e.g. Int'l Union v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986); *Nat'l Treasury*, 854 F.2d at 496; *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973); *Shell Oil Co. v. EPA*, 950 F.2d 741, 765 (D.C. Cir. 1991); *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 171 (D.D.C. 2000).

Since *Heckler*, courts have struggled with the intersection of the Accardi Doctrine and decision making committed to agency discretion to determine when agency regulations provide standards that a court can utilize for judicial review. In the absence of explicit language to the contrary, the courts have uniformly found that agency regulations supply judicially reviewable standards that provide the court with jurisdiction, regardless of whether the matter had been committed to agency discretion. *See, e.g., Capital Area Immigrants' Rights Coalition v. U.S. Dep't of Justice*, 264 F. Supp. 2d 14, 23-24 (D.D.C. 2003); *Alcaraz v. Immigration and Naturalization Serv.*, 384 F.3d 1150, 1161 (9th Cir. 2004).

Ctr. for Auto Safety v. Dole, 828 F.2d 799 (D.C. Cir. 1987), is a good illustration of these principles at work. In *Center for Auto Safety*, plaintiffs petitioned the National Highway Transportation Safety Administration ("NHTSA") to reopen an enforcement investigation of Ford Motor Company for safety defects in Ford automobiles. *Id*. at 800. The district court found that NHTSA's decision not to do so was not reviewable under *Heckler*. *Id*. at 801. The D.C. Circuit reversed, holding that NHTSA's own regulations provided the court with "judicially manageable standards" to apply. *Id*. at 802. Finding that the petitioners had stated a cause of action, the Court noted:

> NHTSA's own regulation containing the "reasonable possibility" review standard is the legal equivalent of a statutory standard for [*Heckler*] purposes. It is binding law governing the agency's decisions in this realm and, as long as it is on the books, it must be followed.

Id. at 803. The court went on to observe that although NHTSA may have enjoyed broad decision making discretion under the applicable statute, NHTSA's promulgation of regulations curtailed its exercise of that discretion:

> [A]ppellants are seeking review, not on the basis of the statue alone, but on the basis of a legal standard contained in the agency's own regulations implementing the statute. Even when a statute grants an agency broad discretion in making a

> decision and itself provides no basis for review of that decision, it is well-settled that judicial review still exists to require the agency to follow procedural or substantive standards contained in its own regulations, which curtail the discretion conferred by statute.

Id. at 805 (citing *Service v. Dulles*, 354 U.S. 363 (1957) and *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987)).

Here, USDA's refusal to investigate plaintiffs' discrimination complaints is not shielded from judicial review. Even assuming that USDA's failure to investigate plaintiffs' complaints can be categorized as an exercise of agency enforcement authority,[2] the presumption of nonreviewability is rebutted by the circumstances at bar. It is undisputed that agency regulations have been in place for decades requiring USDA to investigate discrimination complaints. *See* USDA Brief at 4. Since at least 1999, USDA has had very specific operating procedures in place for investigating complaints, providing a standard of review that this Court can apply. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, (D.C. Cir. 1997).[3] Congress itself has expressly spoken on its desire for the courts to exercise review over USDA's investigation. As Senator Robb observed:

> …the conference language allows farmers to file suit in federal court if their claims for relief are denied by USDA.… This is obviously a protection that would have given aggrieved farmers a degree of legal protection that is imminently justified.

DAILY DIGEST – SENATE October 5, 1998, at S11434.

Moreover, USDA's failure to competently investigate plaintiffs' complaints is an abdication of its mandated role. USDA's consistent ignoring of its constituents' complaints for

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[2] *Heckler* also left open the question of what constitutes enforcement action. Whether USDA's failure to investigate should be deemed a non-enforcement action depends on the characterization of the use and purpose of the investigation. *See, e.g. Block v. SEC*, 50 F.3d 1078, 1082 (D.C. Cir. 1994)(determination of whether directors should be categorized as "interested persons" was enforcement action "[w]here the only purpose of an investigatory hearing would be to lay the foundation for a potential enforcement action"). Here, where USDA's investigation of discrimination complaints rarely resulted in any action providing relief or consequences, it is arguable that the investigation process was not an enforcement action. Under that characterization, *Heckler* would not be applicable.

[3] Where relief sought is in the nature of relief going forward, the governing law is that in effect at the time of the decision. *Legal Assistance*, 104 F.3d at 1352, (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)).

decades enunciated a policy that goes beyond the cases of specific individuals and constitutes the kind of agency policy that courts routinely review. *See, e.g., Nat'l Treasury,* 854 F.2d at 497. USDA's actions in promulgating regulations and in allegedly investigating an imperceptible number of individual complaints, in the words of *Heckler*, provide a focal point for the courts to review. *Heckler*, 470 U.S. at 832. In sum, *Heckler* provides no impediment to judicial review in this case.

USDA has nonetheless argued that under *Heckler* its decision whether or not to investigate plaintiffs' claims of discrimination is solely within its discretion and is not reviewable by this Court. At oral argument, USDA's counsel argued that USDA's determination to cut back on the investigations of complaints is a classic exercise of the agency's allocation of scarce resources and that the Court should not interfere with that process. This argument is untenable. The gist of USDA's argument is that essentially *all* of its decisions are a reflection of its allocation of resources because all of its decision making inherently prioritizes goals and determines whether to provide personnel and funds to some areas and not to others. But as a matter of law, not all agency decisions are *unreviewable* allocations of agency resources. *Heckler* does not provide "a blanket exception to APA review in any matter involving the allocation of agency resources…" *Capital Area Immigrants' Rights Coalition,* 264 F. Supp. 2d at 24.

In sum, in this case, the application of well-established D.C. Circuit case law requires the Court to recognize that plaintiffs have stated a cause of action under the APA for USDA's failure to adhere to its own regulations in investigating complaints of discrimination lodged by plaintiffs. USDA having promulgated regulations to ensure fair review of complaints, it cannot

now claim that its broad discretion precludes judicial review of its failure to comply with those regulations.

II. THE EXTENSION OF THE STATUTE OF LIMITATIONS DOES NOT PROVIDE AN ALTERNATIVE REMEDY TO THE APA

At oral argument, counsel for USDA argued that a claim under the APA will not lie because plaintiffs had already received a remedy for their uninvestigated complaints in the form of an extension of the statute of limitations for their separate discrimination claims. USDA's argument fails to recognize the law in this Circuit -- that there is a separate cause of action that arises from an agency's failure to adhere to its own regulations -- and in this case that failure is not addressed by an extension of the statute of limitations to assert a discrimination claim. The APA claim redresses a separate claim, involving different facts and remedies than plaintiffs' claim arising under the Equal Credit Opportunity Act. Accordingly, plaintiffs' claim under the APA was not redressed by an extension of the statute of limitations to assert a federal lawsuit.[4]

Pursuant to USDA regulations, a complainant can utilize a relatively speedy, inexpensive mechanism to complain about discriminatory treatment, and USDA is <u>required</u> to investigate, and presumably reach a conclusion. The complaint is supposed to be reviewed by a USDA employee familiar with USDA's system, procedures, practices and personnel. If the investigator concludes that the complaint is meritorious, USDA's own guidelines provide that a settlement can be negotiated with the complainant whereby the agency can agree to, among other things, cancellation of debt, changes at the agency, an award of a loan or other benefit, a compliance review of discriminating entities and a directive correcting their conduct, and disciplinary action against employees who are found to have discriminated. *See* Procedures for Processing

[4] Nor did subsection b of the statute, 7 U.S.C. § 2279 [note § 741], reiterating an internal USDA investigation process already in existence at USDA pursuant to its own regulations, provide an alternative where, as here, USDA continued to fail to conduct investigations of discrimination complaints, regardless of whether they were mandated by statute or regulation.

Discrimination Complaints and Conducting Civil Rights Compliance Reviews in USDA Conducted programs and Activities, at Chap. 4, § 9, annexed in relevant part here as Exhibit 3. The speedy and inexpensive resolution available through the USDA investigation process, and the potential remedies for discrimination complaints are not available through litigation before a federal court.

The APA safeguards the integrity of the USDA complaint system, providing a wholly separate cause of action if the agency fails to adhere to its own regulations. Litigation before a court is no substitute for adherence to the USDA complaint process. It is not an alternative remedy for USDA's failure to comply with its complaint regulations to allow a plaintiff two additional years to file an expensive, time consuming discrimination lawsuit that many women farmers cannot afford and do not have the sophistication to commence and pursue. A federal lawsuit is not a substitute for USDA's internal complaint process.

CONCLUSION

For the reasons emphasized here, as well as in plaintiffs' prior memoranda and at oral argument, plaintiffs' should be permitted to proceed with their APA claim.

Respectfully submitted,

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