

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 00-2445 (JR)
)	
MICHAEL JOHANNNS, Secretary,)	
United States Department of Agriculture,)	
)	
Defendant)	
)	

PLAINTIFFS' BRIEF IN SUPPORT OF CLAIMS THAT DEFENDANT'S UNLAWFUL FAILURE TO INVESTIGATE PLAINTIFFS' DISCRIMINATION COMPLAINTS AND THE DISCRIMINATORY DENIAL OF BENEFITS ARE REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT

INTRODUCTION

Pursuant to this Court's June 28, 2006 Order on remand from the United States Court of Appeals for the District of Columbia Circuit, Plaintiffs respectfully submit this brief in support of their claims that the failure to investigate Plaintiffs' civil rights complaints and the discriminatory denial of disaster benefits on the part of the United States Department of Agriculture ("USDA") are unlawful and reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA").

STATEMENT OF FACTS

Plaintiffs seek, at long last, to remedy decades of unlawful discrimination against Hispanic and other minority farmers in the administration of USDA farm credit and non-credit benefit programs. Plaintiffs challenge discrimination that is both admitted¹ and well-

¹ See, e.g., the statement of Hon. Dan Glickman, Secretary, USDA, from excerpts of the transcript of hearings before the Subcommittee on Department Operations, Nutrition, and Foreign Agriculture Re: Treatment of Minority and

documented.² USDA has admitted that the “systemic exclusion of minority farmers remains the standard operating procedure”³ and “[g]ood people . . . [have] lost their family land . . . because of the color of their skin.”⁴ For years, USDA has denied Hispanic farmers equal access to its farm credit and non-credit benefit programs. At the same time, USDA has encouraged Hispanic and other minority farmers who believe that they are denied equal access to these programs to file discrimination complaints.

While publicly encouraging farmers to file discrimination complaints, USDA, in the early 1980s, secretly dismantled its civil rights investigatory apparatus. Thereafter, for nearly twenty years, when Hispanic farmers filed discrimination complaints with USDA, the agency, unbeknownst to the farmers and contrary to its own regulations, simply did not bother to process and investigate such complaints. The predictable result of USDA’s willful refusal to investigate minority farmers’ duly filed discrimination complaints was to “exacerbate[] and prolong[] . . . discrimination in the administration of USDA programs.”⁵ *Keepseagle v. Veneman*, No. Civ.A. 9903119EGS1712, 2001 WL 34676944, at *9 (D.D.C. Dec. 12, 2001).

Limited Resource Producers by the U.S.D.A., Tr. at 94 (1997) (Exh. 1); Declaration of Dallas R. Smith, former Deputy Under Secretary, Farm and Foreign Agricultural Service, USDA (Exh. 2); Declaration of Rosalind Gray, former Director of the USDA Office of Civil Rights from July 1998 to January 2001, at ¶ 28 (“Gray Decl.”) (Exh. 3).

² See, e.g., Excerpts of the Civil Rights Action Team, USDA, Civil Rights at the United States Department of Agriculture (1997) (“CRAT Report”) (Exh. 4); Excerpts of “The Minority Farmer: A Disappearing American Resource; Has The Farmers Home Administration Been The Primary Catalyst?” Thirty-First Report of the Committee on Government Operations (1990) (Exh. 5); Excerpt of USDA Investigator’s Standard Operating Procedure Manual (Exh. 6); Excerpt of Discrimination In Agricultural Lending by Stephen Carpenter (Exh. 7); Excerpts of Complaints/Concerns Regarding USDA Discrimination (Exh. 8).

³ Gray Decl. at ¶ 28 (Exh. 3).

⁴ Exh. 1. (Tr. at 94.)

⁵ An example of the way in which USDA’s handling of civil rights complaints exacerbated and prolonged discrimination against Hispanic and other minority farmers was the policy announced by the USDA Office of General Counsel (“OGC”), which provided legal sufficiency review for USDA’s Office of Civil Rights (“OCR”), that “no matter how blatant the discriminatory conduct might be, there can be no discrimination unless the applicant is ‘eligible.’” Gray Decl. at ¶ 20 (Exh. 3). Consequently, “[t]o avoid finding a would-be applicant ‘eligible,’ county officials often simply refused to give minority farmers a loan application thereby making it impossible for minority farmers to establish ‘eligibility’ under the OGC’s policy.” *Id.* This practice became part of the systemic pattern of

In 1998, Congress finally learned that USDA had dismantled its civil rights investigatory apparatus, prompting it to waive the applicable statutes of limitations for claims arising between 1981 and 1996 involving USDA. Senator Robb, the principal sponsor of the provision, explained the need for the waiver:

[T]he investigative unit at USDA's Office of Civil Rights was abolished in 1983. Farmers whose complaints were pending at the time were led to believe their complaints were still being investigated, when they were not. Farmers who filed complaints [there]after . . . were also led to believe that their complaints would be . . . investigated, despite the fact that the USDA had no resources with which to conduct such investigations. . . . [N]one of these complaints were ever considered – but none of the farmers were told that was the case.

144 Cong. Rec. S11, 433 (daily ed. Oct. 5, 1998) (Exh. 9); *see also* Declaration of Lloyd E. Wright at ¶ 7, dated June 30, 2004 (“Wright Decl.”) (Exh. 10).⁶

Even when the OCR ostensibly began to process complaints in the late 1990s, it became clear that the process remained fatally flawed and the results mirrored those when USDA entirely ignored such complaints. Former OCR Director Wright described his efforts in the late 1990s to address the backlog of complaints as follows:

[o]f . . . 350 processed complaints, there were initially only two potential findings of discrimination. Originally, I started to sign some of the decisions because superficially the reports appeared to support the “no finding of discrimination” decisions. However, after thoroughly examin[ing] the reports, I began to notice a pattern.

The team reviewers based their “no finding of discrimination” decisions largely on the accused agency's initial preliminary inquiry. *The problem was that 99 percent of the time, the agency accused of discrimination investigated itself and invariably found no discrimination had occurred. These preliminary reports were self-serving. Based on my instructions, the team reviewers should have found that the files were incomplete since the only review of the complaint came from the accused agency.* The file should have also contained an independent investigation by OCR. Because the files did not contain independent investigation reports prepared by OCR, I refused to sign the no finding decisions.

discrimination perpetrated against Hispanic farmers and continues to this day. *See* Third Amended Complaint at ¶ 103(a) (“Complaint”).

⁶ Mr. Wright was the USDA OCR Director from March 1997 through May 1998.

Wright Decl. at ¶¶ 6-7 (Exh. 10) (emphasis added). The files contained no such independent reports because USDA had dismantled its civil rights investigatory capability. *Id.* at ¶ 7.

Moreover, as Rosalind Gray, Mr. Wright's successor as USDA OCR Director, testified,

[b]ased upon my first-hand knowledge, *I can attest that many complaints were destroyed or not accepted at all.* After FSA complaint processing was transferred to the OCR, the FSA was initially responsible for preparing a preliminary investigatory report. . . . In preparing the preliminary report, FSA would send its non-civil rights investigators to interview *and often intimidate the complainant.*

Gray Decl. at ¶ 20 (Exh. 3) (emphasis added).

Reflecting on her tenure as OCR Director, Ms. Gray testified that:

Civil rights procedures were developed and published, but were not and are not followed. OCR dismissed hundreds of cases because they were not filed within 180 days of the "occurrence of the alleged discrimination." Yet *many complainants did not receive a letter of acknowledgment after filing their complaint for more than a year and it frequently required another year for the complaint to be investigated and still another year before a proposed finding in the case was rendered. Consequently, there have been countless farmers who have lost their land or died waiting for USDA to process their complaints.*

Id. at ¶ 31 (emphasis added).

Former OCR Directors Wright and Gray were not alone in their bleak assessment of USDA's handling of discrimination complaints even after the dismantling of its civil rights investigatory capability had come to light and lawsuits were filed. In two internal reports, USDA admitted its continued failure to account for and to investigate discrimination complaints. CRAT Report at 22-25 (Exh. 4); Office of Inspector General, U.S. Department of Agriculture Evaluation Report for the Secretary on Civil Rights-Phase I Report No. 50801-2-Hq (1) (1997) at 6, 9 ("OIG Report") (Exh. 11). Indeed, the CRAT Report concluded that "[t]he process for resolving program complaints has failed." CRAT Report at 31 (Exh. 4). In March 2000, USDA's Office of Inspector General issued a supplemental report finding that USDA had not made any significant changes in processing discrimination complaints. Office of Inspector General Audit Reports Office of Civil Rights Status of Implementation of Recommendations

Made in Prior Evaluations of Programs Complaints, Audit Report 60801-4-Hq. at 1 (March 2000) (Exh. 12).

PROCEDURAL HISTORY

On October 13, 2000, Plaintiffs filed a complaint with this Court alleging, *inter alia*, violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* (“ECOA”), and the APA. The Complaint seeks, as this Court has acknowledged, “broad and carefully tailored injunctive relief”⁷ and (1) a declaration that the USDA’s practices and procedures are unlawful;⁸ and (2) a court order mandating that the USDA investigate Hispanic farmers’ discrimination complaints and provide Plaintiffs aggrieved by USDA’s practice of refusing to investigate such complaints expedited and impartial review of their complaints.⁹ Indeed, at their core, Plaintiffs’ APA claims address USDA’s wholesale abdication of its duty to follow its regulations and to process and investigate the discrimination complaints of minority farmers of limited means who were and are victims of discrimination in farm credit and non-credit benefit programs administered by the USDA.¹⁰

In its December 13, 2001 Memorandum Order in *Love v. Veneman*, C.A. No. 1:00 CV 2502 (“*Love* 12/13/01 Order”) and its March 20, 2002 Memorandum Order in this case (“*Garcia* 3/20/02 Order”), the Court held that USDA’s failure to investigate farmers’ civil rights complaints could not constitute a cause of action under the APA because (1) the failure to investigate did not constitute final agency action, (2) even assuming *arguendo* that it did, circuit precedent requires the rejection of APA review of the failure-to-investigate claims because

⁷ *Garcia v. Veneman*, 224 F.R.D. 8, 16 (D.D.C. 2004).

⁸ Complaint at 56.

⁹ *Id.* at 57-58.

¹⁰ USDA continues to refuse to investigate or complete the investigations of complaints filed by Hispanic farmers. Putative plaintiffs who filed complaints twenty years ago and some who have filed complaints during the pendency of this lawsuit have yet to have their complaints investigated. *See, e.g.*, Complaint at ¶¶ 23, 33, and 38; Supplemental Declaration of Lupe Garcia, Jr., at ¶¶ 9-14 (“*Garcia* Supp. Decl.”) (Exh. 13); Supplemental Declaration of Maria de Lourdes Gonzalez at ¶¶ 4-8 (“*Gonzalez* Supp. Decl.”) (Exh. 14).

Congress has provided an adequate alternative remedy. *Love* 12/13/01 Order at 13 (citing e.g., *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750-51 (D.C. Cir. 1990) (“*WEAL*”); *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1531-33 (D.C. Cir. 1983) (*en banc*) (“*Council of and for the Blind*”). The Court concluded that “[h]ere the [ECOA] provides such a remedy.” *Love* 12/13/01 Order at 14. In addition, the Court noted that Congress took steps “to preserve that remedy by extending the statute of limitations . . . precisely because of USDA’s failure to investigate.” *Id.*

In this case, the Court essentially applied its *Love* ruling to the *Garcia* facts. The only significant difference between the two holdings is the conclusion here that, unlike the situation in *Love*, *Garcia* plaintiff Gloria Morales has standing to assert a discrimination claim regarding the administration of USDA’s disaster benefit programs which the Court expressly found did not involve credit transactions subject to the ECOA.¹¹ *Garcia* 3/20/02 Order at 4.

Plaintiffs appealed the dismissal of their APA claims and the denial of their motion for class certification of the ECOA claims. Subsequently, the D.C. Circuit remanded the APA claim for “further development in the district court.” *Garcia v. Johanns*, 444 F.3d 625, 637 (D.C. Cir. 2006) (decision affirming denial of class certification of ECOA claims and remanding for briefing on APA claims). The D.C. Circuit reached a similar conclusion in *Love*. See *Love v. Johanns*, 439 F.3d 723, 733 (D.C. Cir. 2006).

¹¹ The *Love* plaintiffs have proposed amending their complaint to add one or more plaintiffs who have been discriminatorily denied access to USDA’s non-credit farm benefit programs.

ARGUMENT

I. USDA’S FAILURES TO INVESTIGATE PLAINTIFFS’ CIVIL RIGHTS COMPLAINTS AND THE DISCRIMINATORY DENIAL OF DISASTER BENEFITS ARE REVIEWABLE UNDER THE APA.

In pertinent parts, the APA provides that a “final agency action for which there is no other adequate remedy in a court” is “subject to judicial review,”¹² and its provisions apply to all such actions “except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”¹³ The APA further provides that “[t]he reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”¹⁴ In initially dismissing Plaintiffs’ APA claims, the Court focused exclusively upon the provisions of §704. *See Love* 12/13/01 Order at 13-14; *Garcia* 3/20/02 Order at 3-4. As Plaintiffs now show, their APA claims are reviewable by this Court because: (1) USDA’s unlawful failure to investigate discrimination complaints in contravention of its own regulations and the discriminatory denial of non-credit disaster benefits are final agency actions; (2) neither ECOA nor any statute other than the APA provides for judicial review of either USDA’s refusal to follow its own regulations by failing to investigate discrimination complaints filed by Hispanic and other minority farmers or its discriminatory denial of non-credit benefits to such farmers; and (3) USDA’s handling of Plaintiffs’ discrimination complaints has not been committed to agency discretion as a matter of law. 5 U.S.C. §§ 701(a), 704.

¹² 5 U.S.C. § 704.

¹³ 5 U.S.C. § 701(a)(1)-(2).

¹⁴ 5 U.S.C. § 706.

A. The USDA's Failure To Investigate Discrimination Complaints Constitutes Final Agency Action Reviewable Under The APA.

The Court's authority to review "final agency action" under APA § 704 is not limited to those instances where an agency has actually taken a discernable action. *Sierra Club v. Thomas*, 828 F.2d 783, 787 (D.C. Cir. 1987) (citing *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)) ("*Sierra Club*"). In *Sierra Club*, the D.C. Circuit identified "three forms" of "agency inaction" that constitute "final action" for the purpose of APA review: (1) "[e]ffectively final action not acknowledged," (2) "[r]ecaltrance in the face of duty," and (3) "[u]nreasonable delay of final action." 828 F.2d at 793-94.

1. USDA's systematic refusal to investigate discrimination complaints constitutes unacknowledged final action.

As the D.C. Circuit has made clear,

agency inaction may represent effectively final agency action that the agency has not frankly acknowledged: "when administrative inaction has precisely the same impact on the rights of the 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." In such a situation, "the court can undertake review as though the agency had denied the requested relief and can order an agency to either act or provide a reasoned explanation for its failure to act."

Sierra Club, 828 F.2d at 793 (quoting *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970) (footnote omitted); and *Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984)); accord *Kingman Park Civic Ass'n v. EPA*, 84 F. Supp. 2d 1, 4-6 (D.D.C. 1999). In *Hardin*, the USDA secretary was authorized, pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), to refuse or cancel the registration of any pesticide which failed to comply with FIFRA's labeling requirement or which could not be rendered safe by any labeling. 428 F.2d at 1095. A number of environmental groups appealed the secretary's refusal to comply with their request for an order suspending the registration of DDT. *Id.* The secretary moved to dismiss the appeal for lack of jurisdiction, asserting, *inter alia*, that "there [was] no final order ripe for review, [and] that any final order would nevertheless be unreviewable because it involve[d] questions committed by law to agency discretion" *Id.*

at 1096. Concerning the finality of USDA's action, the D.C. Circuit concluded that, under the circumstances of the case, USDA's "inaction [wa]s tantamount to an order denying suspension" of the pesticide. *Id.* at 1099.

In the early 1980s, USDA secretly dismantled its civil rights investigation and enforcement apparatus while simultaneously encouraging Plaintiffs and other aggrieved minority farmers to file discrimination complaints with it concerning their treatment. As the Garcia and Gonzalez supplemental declarations make clear, from at least the early 1980s to the present, USDA has refused to investigate civil rights complaints filed by Hispanic farmers. Mr. Garcia complained of discrimination "over a span of twenty years" without any of those complaints being investigated. Garcia Supp. Decl. at ¶ 11. (Exh. 13). Although USDA's regulations require the OCR to "acknowledge . . . in writing" the filing of a discrimination complaint "within 5 calendar days of receipt" and to "complete all complaint investigations within 180 days after determining USDA jurisdiction,"¹⁵ when Mr. Garcia filed his most recent complaint on February 1, 2006, it took "[a]pproximately six months . . . [and] over a dozen phone calls [by counsel] to the OCR inquiring of the status of [the] complaint" to receive a letter stating that the "complaint was 'being reviewed to determine whether it should be accepted in [OCR's] administrative . . . process.'" Garcia Supp. Decl. at ¶ 12; *see also* Gonzalez Supp. Decl. at ¶¶ 4-8 (Exh. 14).

In another instance, in or about August 2000, USDA sent Antonio Califas and a five-person team to Las Cruces, New Mexico, ostensibly to investigate civil rights complaints. Garcia Supp. Decl. at ¶ 6. Over the next several months, Mr. Califas made several trips to Las Cruces and interviewed Hispanic farmers identified by Mr. Garcia. During one of his trips, "Mr. Califas told [Mr. Garcia] that he had discovered evidence of discrimination against Hispanic farmers and ranchers that was worse than the discrimination he had seen with respect to black farmers in local county offices in the deep South." *Id.* at ¶ 8. However, "[d]uring his last visit to Las Cruces, Mr.

¹⁵ USDA Departmental Regulation, Nondiscrimination in USDA-Conducted Programs and Activities, DR-4330-3, at 12-13 (Mar. 3, 1999) (Exh. 15).

Califas told [Mr. Garcia] that he had been ordered not to conduct any further interviews of Hispanic farmers and ranchers.” *Id.* at ¶ 9. As Mr. Garcia affirms,

[s]ince this abrupt termination of Mr. Califas’ investigation, we have not received any further information regarding the status of our discrimination complaints, or whether the investigation will ever be continued. These discrimination complaints remain outstanding to this day.

Id. at ¶ 10. Moreover, “since that time the USDA has refused to release any information on Mr. Califas’ aborted investigation despite repeated requests by Congressman Reyes.” *Id.*

As a result of USDA’s dismantling its civil rights enforcement capability and continued failure to conduct investigations mandated by its regulations, the Court is confronted by a wholesale refusal to act, not just sporadic or individual decisions by USDA to decline to exercise its enforcement authority to eliminate discrimination. *Cf. Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Such conduct clearly “has precisely the same impact on the rights of” Hispanic farmers who filed discrimination complaints “as [an explicit] denial of” such complaints and as such constitutes “final agency action that [USDA] has not frankly acknowledged . . .” *Sierra Club*, 828 F.2d at 793 (citations omitted).

2. USDA’s refusal to conduct civil rights investigation constitutes recalcitrance in the face of a duty that is reviewable under the APA.

It is well settled that “agency inaction may represent ‘agency recalcitrance . . . in the face of a clear statutory duty . . . of such magnitude that it amounts to an abdication of statutory responsibility.’” *Id.* (quoting *Public Citizen Health Research Group*, 740 F.2d at 32); *see also Heckler*, 470 U.S. at 833 n.4. While the D.C. Circuit referred to a “statutory duty” to act in *Sierra Club* and the Supreme Court referred to “statutory responsibilities” in *Heckler*, the Supreme Court has made clear that agency action required by law or statute “includes, of course, agency regulations . . .” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004). Here, USDA has a constitutional, statutory and a self-imposed regulatory duty to insure that it does not discriminate against farmers on the basis of, *inter alia*, race and ethnicity in the administration of

its farm credit and non-credit farm benefit programs. *See, e.g.*, Complaint at ¶ 61; 15 U.S.C. § 1691 and 7 C.F.R. § 15d. Moreover, USDA has promulgated regulations (1) proscribing such discrimination and encouraging farmers who are victimized thereby to file complaints with USDA (7 C.F.R. § 15d) and (2) prescribing procedures for the processing and investigation of such discrimination complaints. USDA Departmental Regulation No. 4330-3 (Exh. 15).

It is a basic tenet of law that an agency must comply with its own regulations. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“[W]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the . . . procedures are possibly more rigorous than otherwise would be required”); *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (an agency must follow its own regulations); *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 552 (D.D.C. 2005). It is equally well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted policies that limit that discretion. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987).

Here USDA promulgated regulations that require it to investigate discrimination complaints filed by farmers seeking to participate in USDA-administered credit and non-credit farm benefit programs. *See* 7 C.F.R. § 15(d). USDA also affirmatively encouraged Hispanic and other minority farmers to file such complaints if they believed that they had been victims of discrimination when they attempted to participate in such programs. *Id.*; *see also* USDA Program Discrimination Complaint Process and Factfinding Inquiries, Notice A0-1174.¹⁶ In refusing to investigate discrimination complaints and dismantling its investigatory apparatus to preclude such investigations, USDA clearly evidenced recalcitrance in the face of its constitutional, statutory and self-imposed regulatory duty to prevent discrimination in the administration of its farm credit and non-credit farm benefit programs that amounts to nothing

¹⁶ Exh. 16.

less than a total abdication of that duty. *Heckler*, 470 U.S. at 833 n.4. Under settled authority, such conduct constitutes final agency action under the APA. *Sierra Club*, 828 F.2d at 793.¹⁷

B. The USDA's Disaster Benefits Denial Was A Final Agency Action.

The analysis with respect to Plaintiffs' disaster benefit claims is equally straightforward. It is indisputable that USDA refused discriminatorily to provide disaster and other non-credit benefits to Plaintiffs. Furthermore, there can be no doubt that the USDA's denial of such benefits to Hispanic farmers constituted final agency action under the APA because it "mark[ed] the consummation of the agency's decisionmaking process . . . [and was an action] . . . by which rights or obligations have been determined" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). After the USDA's decision, Plaintiffs had no rights to disaster benefits. Indeed, as the foregoing section makes clear, when Plaintiffs complained that they had been denied non-credit benefits for discriminatory reasons as USDA encouraged them to do, USDA refused and continues to refuse to process those complaints.

Any suggestion that Plaintiffs' non-credit farm benefit claims are not final because Plaintiffs allegedly did not exhaust their administrative appeals with the National Appeal

¹⁷ Even assuming, *arguendo*, that USDA were to contend, contrary to fact, that it no longer refuses to investigate and process discrimination complaints, the delays in investigating and processing such complaints documented in this case (*see, e.g.*, Garcia Supp. Decl. at ¶¶ 9-14; Gonzalez Supp. Decl. at ¶¶ 4-8; Complaint at ¶¶ 23, 33, and 38) would more than satisfy the "[u]nreasonable delay' of final action" standard. *Sierra Club*, 828 F.2d at 794; *see, e.g., Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (after observing that the plaintiff's petition had been pending for twenty years, the court observed that "[i]f these circumstances do not constitute agency action unreasonably delayed . . . it is difficult to imagine circumstances that would") (citation omitted); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) ("While the APA does not set clear temporal boundaries defining 'unreasonable delay,' a five year delay smacks of unreasonableness on it[s] face"); *In re Bluewater Network and Ocean Advocates*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) ("Mandamus . . . is an extraordinary remedy, reserved only for extraordinary circumstances. This is just such a circumstance. We are faced with a clear statutory mandate, a deadline nine-years ignored, and an agency that has admitted its continuing recalcitrance"); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (the court observed that in the absence of a time frame specified by statute, the agency was to operate under a "rule of reason" before concluding that the rule "assumes that [the issue] will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade"); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1033-35 (D.C. Cir. 1983) (eight-year delay unreasonable); *Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (ten-year delay unreasonable).

Division (“NAD”) is simply incorrect. USDA’s regulations make clear that NAD has no jurisdiction over allegations of discrimination in either farm credit or non-credit benefit programs. 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,] 15e, and 15f.’” *Love* 12/13/01 Order at 6; *see also Garcia* 3/20/02 Order at 4 (“A final agency action denying a disaster benefit is . . . reviewable under the [APA], 5 U.S.C. §§ 702, 704”).

C. Plaintiffs Have No Other Adequate Remedy For USDA’s Wholesale Refusal To Investigate Discrimination Complaints And The Discriminatory Denial Of Benefits.

In initially rejecting Plaintiffs’ failure-to-investigate claims, this Court held that, even assuming *arguendo* that USDA’s actions constituted final actions under the APA, “[c]ircuit precedent require[d] the rejection of APA claims for agency failure to investigate allegations of discrimination where Congress has provided an adequate alternative remedy,” concluding that “[h]ere the [ECOA] provides such a remedy.” *Love* 12/13/01 Order at 13-14. While the Court correctly quoted the APA as providing judicial review of only those agency actions “‘for which there is no other adequate remedy in a court,’”¹⁸ we respectfully submit that it erred in applying that language. The core of our argument is that the Supreme Court placed a very specific interpretation on the “other adequate remedy” language in its definitive construction of § 704 in *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Moreover, even under the broader reading given that language by this Court, Plaintiffs do not have an adequate alternative remedy for their claims that (1) USDA failed to follow its own regulations in refusing to investigate their discrimination complaints and (2) USDA discriminated against them in denying them equal access to its non-credit benefit programs.

¹⁸ *Id.* at 13 (quoting 5 U.S.C. § 704).

More particularly, the Supreme Court has made clear that, despite its apparent breadth, the “other adequate remedy in court” language contained in § 704 is merely intended to preclude additional judicial remedies in circumstances where Congress has already enacted special administrative review provisions. *Bowen*, 487 U.S. at 903 (while its “primary thrust . . . was to codify the exhaustion requirement, [§ 704] as enacted also makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action”). In *Bowen*, the Court considered and authoritatively construed §§ 702 and 704, (*id.* at 891-904), and left no doubt as to the meaning of § 704:

As Attorney General Clark put it the . . . year [following its enactment], § 704 “does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.” *At the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency’s action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts. When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.*

Id. at 903 (quoting Attorney General’s Manual on the Administrative Procedure Act 101 (1947) (emphasis added) (footnotes omitted). Moreover, as the Court made crystal clear, “[t]he exception that was intended to avoid such duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.” *Id.*

In addressing the government’s argument that § 704 bars review of the agency action in the district court because monetary relief against the United States is available under the Tucker Act, the Court stated that the argument should be rejected because “the remedy available to the State in the Claims Court is plainly not the kind of ‘special and adequate review procedure’ that will oust a district court of its normal jurisdiction under the APA.” *Id.* at 904. Significantly, after noting that § 704 “was . . . designed to ensure that courts . . . did not duplicate or preempt ‘special and adequate review procedures’ in other legislation,” the D.C. Circuit expressly

acknowledged the *Bowen* Court's construction of § 704 stating that "[g]iven the limited purposes for Section 704's enactment, the Court said *it is to be read narrowly.*" *Esch v. Yeutter*, 876 F.2d 976, 982 (D.C. Cir. 1989) (emphasis added). Furthermore, as the Supreme Court has made clear, "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*," *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990), and the Court jealously guards that prerogative.

Relied upon by the Court in dismissing Plaintiffs' APA claims for the failure to investigate discrimination complaints, *Council of and for the Blind* and *WEAL* are clearly distinguishable from the instant case. In both of those cases, the D.C. Circuit confronted claims of discrimination by recipients of federal funding, as distinguished from the federal agency itself, where plaintiffs were attempting to use the APA to mount a broad challenge to the oversight of the federal agencies charged with monitoring the provision of such federal funds. The issue before the court in those cases was whether under such circumstances Congress intended to create a cause of action against the federal agencies in addition to the cause of action that was impliedly found to exist with respect to the discriminating federal fund recipients. The court rejected the proposed federal court supervision of executive enforcement in the absence of a showing of approbation of such relief by Congress. In both cases, the court concluded that the statutory scheme at issue provided private rights of action against the individual fund recipients rather than a single federal court overseeing the entire federal funding regime. *Council of and for the Blind*, 709 F.2d at 1523-25, 1531-33; *WEAL*, 906 F.2d at 750-51. Although the court did say that the private rights of action offered adequate remedies and that the APA claim could therefore not be entertained, it did so in the very specific context of actions seeking to impose broad-based challenges to federal oversight of funding to third parties engaged in unlawful discrimination in circumstances where Congress had made crystal clear its intention to limit remedies for discrimination by the fund recipients to private rights of action against the fund recipients rather than the government. Here, USDA is both the perpetrator of the discrimination and the violator of its own regulations.

Even under a broader reading of § 704 than the authoritative interpretation placed upon it by the Supreme Court in *Bowen*, Plaintiffs have no other adequate remedy for USDA's refusal to follow its regulations by failing to investigate their discrimination claims and its refusal to grant them equal access to its non-credit farm benefit programs. Indeed, this Court has already ruled that the USDA's failure to investigate discrimination complaints is not covered by ECOA because it is not a "credit transaction." *Love* 12/13/01 Order at 12-13. 3/20/02 Order at 4. The D.C. Circuit affirmed that holding. *Garcia*, 444 F.3d at 636-37. Therefore, ECOA does not provide a cause of action for the failure-to-investigate claims.

Wholly consistent with that conclusion is the fact that the D.C. Circuit has expressly held that a plaintiff may bring a discrimination claim and an APA claim concurrently because the claims have independent bases. *McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C. Cir. 1984). There, the court held that an APA claim "is not one of discrimination . . . [but instead] charges that *the agency, whether its motive was legal or illegal, failed to conform to its own regulations.*" *Id.* (emphasis added). In *McKenna*, the court also held that the district court had erred in ruling that a Title VII claim precludes a companion claim under the APA. *Id.*; *Lynch v. Bennett*, 665 F. Supp. 62, 64-65 (D.D.C. 1987) (an employee may bring an APA claim together with the discrimination claim); *accord Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 3 n.2 (D.D.C. 1998).¹⁹

As for Plaintiffs' non-credit farm benefit claims, it is clear that they are based upon final agency actions under the APA. *See supra* at 12-13. Furthermore, this Court has already held that under ECOA, farm benefit program decisions are not credit transactions. *Garcia*, 3/20/02 Order at 4. Therefore, ECOA cannot possibly constitute an alternative remedy for Plaintiffs' non-credit farm benefit claims, hence Plaintiffs' sole resort for pursuing a review of the USDA's

¹⁹ While these cases involved Title VII, rather than ECOA, courts regularly use precedents from Title VII in ruling on ECOA claims. *See, e.g., Garcia*, 224 F.R.D. at 11.

discriminatory denial of such benefits is via the APA. *Id.* Thus, Plaintiffs' failure-to-investigate and non-credit farm benefit claims satisfy all of the requirements of § 704.

D. Plaintiffs' Claims Are Not Barred As An Action Committed To Agency Discretion By Law.

Under § 701(a) of the APA, agency actions are judicially reviewable "except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2). The Supreme Court has repeatedly emphasized that § 701 establishes a strong presumption of reviewability, and the exceptions of 5 U.S.C. § 701 (a)(1) & (2) should therefore be construed narrowly. *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 567 & n.7 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) ("*Overton Park*"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

1. APA review is not precluded by statute.

As the Supreme Court has made clear, in order to conclude that a statute precludes judicial review, a court must find "clear and convincing evidence" of a congressional intent to negate review. *Dunlop*, 421 U.S. at 567; *Overton Park*, 401 U.S. at 410. Moreover, a court should not refuse to review agency action if there is substantial doubt that Congress intended to preclude review. *See Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984). As the D.C. Circuit put it,

[p]reclusion of judicial review is not lightly to be inferred . . . , it requires a showing of clear evidence of legislative intent. That evidence cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms.

Hardin, 428 F.2d at 1098 (footnote omitted).

Furthermore, while the structure of a statutory scheme may indicate a congressional intent to preclude judicial review (*see, e.g., Block*, 467 U.S. at 346-47; *Morris v. Gressette*, 432 U.S. 491, 504 (1977)), it is by no means conclusive. *See, e.g., Dunlop*, 421 U.S. at 567; *Am. Fed'n of Gov't Employees Local 1219 v. Donovan*, 683 F.2d 511, 516-18 & n. 16 (D.C. Cir. 1982). Indeed, even in circumstances in which "the face of the statute" manifests the congressional

intent “to vest maximum discretion in the [agency],” it does not mean that the agency’s actions are not subject to review ““if a colorable claim were made of constitutional, statutory, or regulatory violation . . . on the part of [the agency]. . . .”” *Slyper v. Attorney Gen.*, 827 F.2d 821, 823-24 (D.C. Cir. 1987). Here, there are colorable claims on all three bases and no justification for concluding that Congress has affirmatively barred review of Plaintiffs’ APA claims.

2. Plaintiffs’ APA claims are not committed to agency discretion.

Under § 701(a)(2), a court must also consider whether the standard provided by the statute commits the decisionmaking to agency judgment absolutely. However, the § 702(a)(2) exception is, as previously noted, “narrow.” *Overton Park*, 410 U.S. at 410; *Adams v. Richardson*, 480 F.2d 1159, 1161 (D.C. Cir. 1973) (*en banc*). In order for the “committed to agency discretion” exception to bar judicial review, a court must find that “there is ‘no law to apply.’” *Overton Park*, 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong. 1st Sess. 26 (1945)). Significantly, the D.C. Circuit has held that “[j]udicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes” *Padula*, 822 F.2d at 100.

Here, there are detailed regulations mandating not only that USDA investigate such complaints, but the procedures USDA must follow in conducting such investigations. From at least 1981 through 1988, USDA’s regulations provided that:

Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by the regulations of this subpart may . . . file a written complaint based on the ground of such discrimination. No particular form of complaint shall be required. . . . *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.*

[A]ny complaint filed hereunder, to the extent that it involves a determination, decision or action under a program or activity covered by this subpart, shall be handled in accordance with the procedures established by law or regulation of the Department or any of its agencies for the handling of complaints or appeals

under such program or activity which are not based on grounds of discrimination prohibited by this subpart.

The investigative function with respect to complaints authorized by paragraph (a) of this section shall be discharged by the Assistant Secretary for Administration in the manner determined by the Assistant Secretary.

7 C.F.R. §§ 15.52(a)-(b) and (d) (1988) (emphasis added).

In 1989, the USDA revised its regulations to provide that:

(b) All complaints under [Subpart B] must be filed with the Office of Advocacy and Enterprise, which *will investigate* the complaints. The Director . . . *will make determinations as to the merits* of complaints under this subpart *and as to corrective actions required* to resolve the complaints.²⁰

In 1999, the USDA deleted Subpart B and replaced it with 7 C.F.R. § 15d, which provided that:

(b) All complaints under this part should be filed with the Director of the Office of Civil Rights . . . who *will investigate the complaints*. The Director . . . *will make final determinations as to the merits of complaints* under this part *and as to the corrective actions required* to resolve [program] complaints. The complainant *will be notified of the final determination on his or her complaint*.²¹

Through its repeated use of the term “will” in the regulations,²² USDA has signaled its strong and clear commitment to investigating civil rights complaints (like those submitted by Plaintiffs), making final determinations on same, and apprising complainants of its final determinations with respect to their complaints.

Having made that commitment in its regulations, the USDA was, under well-settled authority, bound (1) to investigate Plaintiffs’ discrimination complaints, (2) make final determinations regarding their merits, and (3) advise Plaintiffs of those discriminations. *See Service v. Dulles*, 354 U.S. at 372 (“regulations validly prescribed by a government administrator

²⁰ Complaints Alleging Discrimination in Direct USDA Programs and Activities; and Related Delegations, 54 Fed. Reg. 31163, at 31164 (July 27, 1989) (emphasis added).

²¹ Nondiscrimination in USDA Conducted Programs and Activities, 64 Fed. Reg. 66709, at 66710 (Nov. 10, 1999) (emphasis added).

²² Black’s Law Dictionary defines “will” as “[a]n auxiliary verb commonly having the mandatory sense of ‘shall’ or ‘must’” and further states that it “is a word of certainty . . .” BLACK’S LAW DICTIONARY 1598 (6th Ed. 1990).

are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature”).²³ Furthermore, even agencies that enjoy broad discretion must adhere to their voluntarily adopted policies. *See, e.g., Padula*, 822 F.2d at 100. Thus, for example, the Supreme Court held that an agency’s failure to exercise its discretion in a manner consistent with its own valid regulations was unlawful. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *accord Leavitt*, 355 F. Supp. 2d at 552 (holding that because agency’s regulation made a discretionary duty mandatory, the agency’s failure to take action was unlawful and reviewable); *Fund for Animals*, 294 F. Supp. 2d at 114 (“[D]eference ‘does not require courts to turn a blind eye when government officials fail to discharge their duties’”) (citation omitted). 7 C.F.R. Part 15d requires USDA to investigate and render final determinations on Plaintiffs’ civil rights complaints. Beyond the specificity of 7 C.F.R. Part 15d, USDA also has promulgated DR-4330-3, which states USDA’s investigatory objectives and describes discrete steps in the handling of civil rights complaints.²⁴ Thus, the Court clearly has a standard by which to review the USDA’s inaction as required by the APA.²⁵

²³ *Morton v. Ruiz*, 415 U.S. at 235 (Agency charged, in part, with failing to comply with its own regulations); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (“[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administration action”); *Leavitt*, 355 F. Supp. 2d at 552 (“The [federal agency] can impose upon itself ‘more rigorous substantive and procedural standards’ than required by statute and if it does so, it must abide by those stricter requirements”).

²⁴ *The Wilderness Soc’y v. Norton*, No. 03-64, 2005 U.S. Dist. LEXIS 18734 (D.D.C. Jan. 10, 2005) (court held that the agency’s policies created mandatory duties and supported judicial review of action under the APA), *appeal dismissed* 434 F.3d 584 (D.C. Cir. 2006).

²⁵ This conclusion is wholly consistent with the observations of one of the panel members during oral argument before the D.C. Circuit:

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’s an enforceable

Heckler, 470 U.S. 821, is not to the contrary. In *Heckler*, the Court confronted a challenge by death row inmates seeking to compel the Food and Drug Administration (“FDA”) to determine whether the drugs used for capital punishment violated the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301 *et seq.* After the FDA Commissioner declined the inmates’ request to undertake the process of approving the drugs as “safe and effective” for human execution, the inmates filed suit under the APA. *See* 470 U.S. at 823-24. The Court concluded that

an agency’s decision not to take enforcement action *should be presumed* immune from judicial review under § 701(a)(2). . . . [W]e emphasize that the decision is only *presumptively unreviewable*; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.

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.”

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, at 17-19 (D.C. Cir. Feb. 6, 2006) (Edwards, J.) (Exh.17).

Id. at 832-33 (emphasis added) (citation omitted). Significantly, the Supreme Court has made clear that agency action required by law or statute “includes, of course, agency regulations” *Norton*, 542 U.S. at 65.

In addition, the Court observed that:

We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has “consciously and expressly adopted a general policy” that is so extreme as to amount to an abdication of its statutory responsibilities. Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not “committed to agency discretion.”

Heckler, 470 U.S. at 833 n.4 (citation omitted).

In his concurring opinion, Justice Brennan explained the limits of the holding, noting that the Court held “that *individual decisions* of the [FDA] not to take enforcement action in response to citizen requests are *presumptively* not reviewable under the [APA].” *Id.* at 838 (emphasis added). As Justice Brennan noted, “despite this general presumption, Congress did not set agencies free to disregard” either “legislative direction” or their own regulations. *Id.* at 839. As Justice Brennan put it,

[t]hus the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where . . . an agency engages in a *pattern of nonenforcement of clear statutory language . . . ; [or] an agency has refused to enforce a regulation lawfully promulgated and still in effect.*

Id. (emphasis added).

Here, the Court is not confronted with sporadic or individual decisions to decline to investigate or take enforcement action with respect to discrimination complaints, but USDA’s wholesale abdication of its constitutional, statutory and self-imposed responsibility (through duly promulgated regulations) to prevent discrimination in the administration of its farm credit and non-credit farm benefit programs. This is precisely the sort of wholesale agency nonenforcement conduct that the *Heckler* Court made clear would not be presumptively unreviewable. *Id.* at 833

n.4, 838-39. Moreover, under well-settled authority, USDA's failure to follow its own regulations in refusing to investigate Plaintiffs' discrimination complaints is actionable under the APA. *McKenna*, 729 F.2d at 791; *Lynch*, 665 F. Supp. at 64-65; *Nicholas*, 18 F. Supp. 2d at 3 n.2.

CONCLUSION

For the foregoing reasons, this Court should find that Plaintiffs can maintain their APA claims against the USDA for the unlawful and discriminatory failure to investigate discrimination complaints and for discriminatory denial of non-credit benefits.

Respectfully submitted,



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