

discretion in a manner consistent with its own regulations was unlawful); *Panhandle Eastern Pipe Line Co. v. F.E.R.C.*, 613 F.2d 1120, 1135 (D.C. Cir. 1979). Here, since at least 1981, USDA has had in place regulations that require it to investigate farmers' complaints of discrimination in the administration of USDA farm credit and non-credit programs. *See* Plaintiffs' 8/28/06 Brief at 18-20. In addition, defendant encouraged farmers to file discrimination complaints and hundreds, if not thousands, of farmers filed such complaints in reliance upon USDA's regulations and encouragement.

USDA, however, completely contravened its regulations by refusing to conduct any investigations and, in fact, by dismantling its investigatory apparatus. Even now USDA still refuses to comply with its regulations. *See, e.g.*, Ex. 39 to Plaintiffs' Reply Brief In Support of Their Claims Based on The Administrative Procedure Act, filed October 27, 2006 ("Plaintiffs' 10/27/06 APA Reply Brief"). Thus, the instant case is clearly distinguishable from *Heckler v. Cheney*, 470 U.S. 821, 832-33 (1985), where the Court held that an agency's decision not to take enforcement action "is presumptively unreviewable. . . ." *See* Plaintiffs' 8/28/06 APA Brief at 21-23. The *Heckler* unreviewability presumption does not apply where "the agency has ' . . . expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory [or self-imposed] responsibilities," *Heckler*, 470 U.S. at 833 n. 4, or where a statute or a regulation "has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833.

Here, both factors are present. USDA's across-the-board refusal to investigate any discrimination complaints clearly constitutes an abdication of its constitutional, statutory and self-imposed responsibility to prevent discrimination in the administration

of its credit and non-credit benefit programs by, *inter alia*, investigating discrimination complaints. Moreover, inasmuch as USDA has promulgated specific regulations such as DR 4330-3 (Exh: 15 to Plaintiffs' 8/28/06 APA Brief) as well as a detailed manual prescribing how to conduct investigations, it "has provided guidelines . . . to follow in exercising its enforcement powers," *Heckler*, 470 U.S. at 833, and there are clearly standards that the Court can apply in determining whether USDA has complied with its self-imposed obligation to investigate discrimination complaints.¹

2. *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), is one of a line of cases that recognize the reviewability of an agency's failure to comply with its own regulations. Defendant's attempt to distinguish *McKenna* by contending that plaintiffs allege that defendant's refusal to investigate discrimination complaints because plaintiffs are Hispanic fails for at least two reasons. First, while USDA has refused and continues to refuse to conduct any investigations in conformity to its rules, plaintiffs have not and do not ascribe any motive based upon racial or ethnic animus to USDA's across-the-board refusal to investigate discrimination complaints. *See, e.g.*, Ex. 39 to Plaintiffs' 10/27/06 APA Reply Brief. Second, *McKenna* makes clear that USDA's failure to follow its regulations gives rise to an APA claim regardless of "*whether its motive was legal or illegal. . . .*" 729 F.2d at 791 (emphasis added); *see also* Plaintiffs' 10/27/06 APA Reply Brief at 6 & n.6.

¹ Departmental Manual No. 4330-001, Procedures for Processing Discrimination Complaints and Conducting Civil Rights Compliance Reviews in USDA Conducted Programs and Activities. A copy of the manual is attached for the Court's convenience as Exh. 1. The online-version of the manual does not include page numbers. (For the Court's convenience plaintiffs have number stamped the exhibit.) Part II 2 DURATION provides that

The investigation phase *must* be completed within 120 days from the date intake is completed. Since the Intake Unit *must* complete its work no later than 30 days from the date the complaint is received by CR, the Investigation Unit may have as little as 90 days to complete the final ROI ["Report of Investigation"] and, transfer the case file to the Adjudication Division or other processing point.

Exh. 1, p. 21 (emphasis added).

3. Defendant's reliance upon *Council of & for the Blind of Delaware County Valley Inc., v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983), and *Coker v. Sullivan*, 902 F.2d 84 (D.C. Cir. 1990), is also unavailing. Plaintiffs have already addressed *Council of and for the Blind* and similar cases, which hold that where a recipient of government funds engages in discriminatory conduct, the victims of such discrimination must pursue their claims against the fund recipient rather than the government when, as in those cases, the statutory schemes make it clear that Congress did not intend that the government should answer for discrimination perpetrated by a third party. See Plaintiffs' 8/28/06 APA Brief at 15; see also Plaintiffs' 10/27/06 APA Reply Brief at 5. While *Coker*, which defendant stressed at oral argument, shares with *Council of and for the Blind* a similar statutory scheme that requires that relief be had by directly suing the state,² it is also clearly distinguishable from the instant case on other bases as well.

Coker involved the Emergency Assistance ("EA") program which "is an optional component of the multicomponent aid to Families with Dependent Children ("AFDC"). 902 F.2d at 86. The *Coker* court held that "APA does not provide a right of action for plaintiffs to demand from a court an order directing HHS to monitor and enforce the Social Security Act's purported command that states comply with the provisions of state EA plans" because (1) "Congress has not limited HHS' discretion to control its enforcement of the EA component of the AFDC program" and (2) "[i]njured parties may secure state compliance with EA pledges through fair hearing procedures and, if state noncompliance indicates a pattern violative of federal law, through direct suits against the states." *Id.* at 88. Citing *Heckler v. Chaney*, 470 U.S. at 834, the court noted that

² See *Coker*, 902 F.2d at 90 (noting "the absence of any indication that Congress intended to permit suit directly against [Health and Human Services] HHS").

“[u]nless Congress has provided ‘meaningful standards defining the limits of that discretion,’ the APA does not permit courts to interfere” and concluded that neither the Social Security Act nor HHS’ regulations imposed any “meaningful . . . limitation[s] on the Department’s enforcement discretion. . . .” *Id.* at 88-89. Significantly, the court observed that “[p]laintiffs have not charged that HHS has failed to regulate state AFDC plans altogether.” *Id.* at 89. In stark contrast to the instant case, the *Coker* court noted that “[b]ecause the Act and HHS’ regulations address monitoring and enforcement of the entire AFDC program, plaintiffs cannot tenably claim that the Department has ‘adopted a general policy which is in effect an abdication of its statutory [or regulatory] duty.’” *Id.* at 89 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (*en banc*)). Here, unlike the situation in *Coker*, USDA has, in effect, completely abdicated its self-imposed regulatory responsibility to investigate discrimination complaints.

4. Finally, at oral argument, USDA described plaintiffs’ case as one at its “core” about the discriminatory denial of loans. *See* Tr. at 39. USDA’s description of plaintiffs’ case is belied by even a cursory review of the Third Amended Complaint. At the very outset of the complaint, plaintiffs assert that “USDA has maintained and continues to maintain a system of administering its farm credit *and non-credit benefit programs* that gives virtually unfettered discretion to local officials to enforce highly subjective eligibility criteria that, in turn, give vent to hostility toward minority farmers that *deprives them of an equal, fair opportunity to participate in such programs.*” Third Amended Class Action at 12-13 (emphasis added); *see also, e.g.*, Third Amended Complaint at 14-15 and ¶¶ 21, 43, 47-49, 61-63, 65-68, 70, 73, 75-77, 79, 80-83, 98-99, 102-103, 106, 107(b), (n), 108, 117. Moreover, a review of plaintiffs’ specific prayer for

relief further belies defendant's claim that the instant case is at its "core" about discriminatory loans. *See, e.g.*, Prayer for Relief ¶¶ 1, 2(a),(c), 4(a)-(b), (d)-(g), 5 and 9.

In a similar vein, defendant also mischaracterizes plaintiffs' claims by asserting that only one named plaintiff, Gloria Morales, asserts a non-credit benefit claim. As plaintiffs indicated at oral argument, at least eleven (11) named plaintiffs have submitted declarations asserting that they complained about discrimination in the administration of defendant's non-credit benefit programs.³ In addition, plaintiffs have submitted nineteen (19) other declarations of Hispanic farmers who complained about discrimination in USDA non-credit benefit programs.⁴ To date, USDA has failed to investigate any of these complaints or even to acknowledge receiving them.

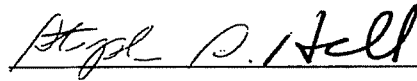
For the foregoing reasons and for the reasons set forth in Plaintiffs' 8/28/06 APA Brief⁵ and Plaintiffs' 10/27/06 APA Reply Brief, this Court should find that Plaintiffs can maintain their APA claims against the USDA for failure to investigate discrimination complaints and for discriminatory denial of non-credit benefits.

³ The eleven named plaintiffs are: Ricardo Arevalo (Plaintiffs' 10/27/06 APA Reply Brief Exh. 3), Rigoberto Banuelos (*id.* Exh. 4), Mr. and Mrs. Jose Chaidez (*id.* Exh. 5), Larry & Robert Chavarria (*id.* Exh. 6), Antonio Espindola (*id.* Exh. 9), Jaime Fuentes (*id.* Exh. 11), Dora Linares (*id.* Exh. 17), Albert Medina (*id.* Exh. 19), and Joe A. Flores (*id.* Exh. 29).

⁴ *See* Plaintiffs' 10/27/06 APA Reply Brief Exhs. 2, 7-10, 12-16, 18, and 21-30.

⁵ In reviewing Plaintiffs' 8/26/06 APA Brief, plaintiffs noticed two typographical errors. At page 18, the second sentence in the first full paragraph, "§ 702(a)(2)" should in fact be "§ 701(a)(2)" as set forth in the immediately preceding sentence. At page 19, the word "discriminations" immediately preceding "See Service ..." should in fact be "determinations."

Respectfully submitted,



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