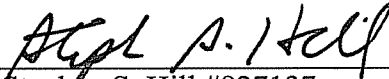


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Dated: December 14, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, *et al.*,

Plaintiffs,

v.

CHARLES F. CONNER, Acting Secretary,
UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendant.

Civil Action No. 1:00CV02445

Judge Robertson

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND
NOVEMBER 30, 2007 ORDER AND FOR CERTIFICATION
OF ORDER FOR INTERLOCUTORY REVIEW UNDER 28 U.S.C. § 1292(b)**

INTRODUCTION

Pursuant to LCvR 7, FRAP 5(a)(3) and 28 U.S.C. § 1292(b), plaintiffs have filed herewith a motion and proposed order to amend this Court's November 30, 2007 Order ("11/30/07 Order") dismissing plaintiffs' claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, to include the statement that the necessary conditions for interlocutory review under 28 U.S.C. § 1292(b) have been met and to certify, pursuant to 28 U.S.C. § 1292(b), the amended order on the question of whether the failure of the United States Department of Agriculture ("USDA") to investigate plaintiffs' discrimination complaints with respect to USDA's administration of its farm credit and non-credit farm benefit programs and USDA's discriminatory denial of non-credit benefits to Hispanic farmers and ranchers constitute causes of action under the APA. As required by LCvR 7(m), plaintiffs' counsel conferred with defendant's counsel, Lisa Olson, Esq., concerning this motion and Ms. Olson has indicated that defendant opposes the motion. Plaintiffs submit this memorandum in support of the motion.

FACTS

This action is brought on behalf of a putative class of Hispanic farmers and ranchers who allege, and the facts show, that USDA has discriminated against them and continues to discriminate against them in connection with their efforts to participate in farm credit and non-credit benefit programs operated by USDA through its former agency, the Farm Home Administration (“FmHA”), and its successor, the Farm Service Administration (“FSA”), in violation of the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. §§ 1691 *et seq.*, and the APA. In addition to discriminating against plaintiffs in the administration of its farm credit and non-credit benefit programs, USDA failed to process or investigate and still fails to investigate plaintiffs’ discrimination complaints filed with the agency.

As the Court noted in its November 30, 2007 Memorandum in *Love v. Conner*, C.A. No. 00-2502 (“11/30/07 *Love* Memorandum”) at 1, “[t]here is little dispute that USDA dismantled its civil rights investigation program between the early 1980’s and the mid-1990’s, and did so without informing farmers that their discrimination complaints would be either ignored or summarily denied.” In 1998, Congress enacted legislation that retroactively extended the limitations period for certain claims against USDA proved that the action was brought within two years of the enactment of the legislation, *i.e.*, by October 21, 2000. Congress allowed individuals who filed administrative complaints with USDA between January 1, 1981 and July 30, 1997 to sue on the basis of claims arising between January 1, 1981 and December 31, 1996. *See* Agriculture Rural Development, Food and Drug Administration and Related Agencies Appropriation Act, 1999, Pub. L. No. 185-277 § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297 note).

On October 13, 2000, eight days prior to the expiration of the extended limitations period, plaintiffs filed the initial complaint in this case. Plaintiffs initially sought class certification on the basis of their APA claims as African American farmers and Native American farmers, who, with complaints virtually identical to the initial complaint in this case, had their classes certified on the basis of USDA’s failure to investigate their discrimination complaints.

See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman J.); *Keepseagle v. Veneman*, No. 99-03119 (EGS), 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001) (Sullivan, J.). It was only after the Court rejected the APA claims as a basis for commonality in its March 20, 2002 Memorandum Order (“3/20/02 Order”) after having made clear that it would certify a class of Hispanic farmers and ranchers only if they proved more than the *Pigford* African American farmers and the *Keepseagle* Native American farmers that plaintiffs sought alternative bases, in addition to their APA claims, on which to certify a class.¹

Subsequently, in its September 10, 2004 Memorandum Order (“9/10/04 Order”) denying class certification on plaintiffs’ alternative grounds, the Court indicated that “[i]f asked to do so, I will also certify my Memorandum Order of March 20, 2002 pursuant to 28 U.S.C. § 1292(b).” *Garcia v. Veneman*, 224 F.R.D. 8, 9 (D.D.C. 2004). On September 24, 2004, plaintiffs moved for, and the Court granted, certification of the 3/20/02 Order. On appeal, the D.C. Circuit, after consolidating the Fed. R. Civ. P. 23(f) and § 1292(b) petitions, affirmed this Court’s denial of class certification on the alternative grounds urged by plaintiffs following this Court’s 3/20/02 Order which was before it pursuant to a Fed. R. Civ. P. 23(f) petition, and remanded the APA claims, which were before it pursuant to a § 1292(b) petition, for “further development.” *Garcia v. Johanns*, 444 F.3d 625, 637 (D.C. Cir. 2006). After additional briefing on remand, this Court dismissed plaintiffs’ APA claims in its 11/30/07 Order. The 11/30/07 Order, unlike the 9/10/04 Order, did not invite plaintiffs to seek

¹ As the Court explained during a January 10, 2002 scheduling conference in *Love v. Veneman*, C.A. No. 002502,

[o]f even more important concern, it seems to me, is trying to figure out what it is that holds this plaintiff class together. . . . Judges Friedman and Sullivan have held . . . [t]hat it is the failure or refusal of [USDA] to investigate and deal with . . . the plaintiff[s]’ claims that is the glue that holds those classes together. *But I have held in this case and I think it is now law in the case, that there’s no claim that arises out of that action. Because there’s no final agency action, because there is another remedy provided by law, that the [ECOA] is that remedy and if that’s not a claim, then I’m not quite sure where the commonality is in this case that would distinguish this case as Judges Friedman and Sullivan distinguished their cases from Judge Flannery’s opinion in Williams.*

Love 1/10/02 Hearing Transcript at 4-5 (emphasis added).

certification of the order or contain § 1292(b)'s required language to permit an interlocutory appeal of the order.

ARGUMENT

I. **THE QUESTION OF WHETHER PLAINTIFFS' ALLEGATIONS OF USDA'S FAILURE TO INVESTIGATE CIVIL RIGHTS COMPLAINTS WITH RESPECT TO USDA'S FARM CREDIT AND NON-CREDIT BENEFIT PROGRAMS AND USDA'S DISCRIMINATORY DENIAL OF NON-CREDIT BENEFITS TO HISPANIC FARMERS AND RANCHERS STATE CLAIMS UNDER THE APA SATISFIES ALL THE REQUIREMENTS OF § 1292(b).**

A district court may certify an issue to the Court of Appeals for interlocutory appeal under § 1292(b), which provides in relevant part that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b) (2000). Accordingly, the district court must consider (1) whether the order to be appealed involves a controlling question of law, (2) whether substantial contrary authority or other grounds for a difference of opinion exist, and (3) whether an immediate appeal would materially advance the disposition of the litigation. *See Virtual Dev. & Def. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001); *see also Trout v. Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). In 2004, this Court found and the D.C. Circuit agreed that the 3/20/02 Order satisfied § 1292(b)'s certification requirements. The D.C. Circuit subsequently remanded the APA claims for "further development." *Garcia*, 444 F.3d at 637. The question of whether plaintiffs' allegations of USDA's failure to investigate plaintiffs' discrimination complaints with respect to its administration of farm credit and non-credit benefit programs and USDA's discriminatory denial of non-credit benefits to plaintiffs state causes of action under the APA is as critical to the course of this litigation now as it was in September 2004 when the Court

initially certified the issue. Indeed, if anything, today the issue is more critical now than ever before given the D.C. Circuit's affirmance of this Court's denial of class certification on the alternative grounds urged by plaintiffs. Just as in 2004, the requested certification involves a controlling point of law and is the subject of substantial difference of opinion between this Court and prior class certification rulings with respect to virtually identical cases in this circuit.

Consequently, now that the APA claims have had the benefit of the "further development" mandated by the D.C. Circuit, that Court should be afforded the opportunity to review the order to resolve the controlling question of law that it presents as well as the difference of opinion that is reflected in the disparate holdings in *Pigford* and *Keepseagle* on the one hand and this Court's 11/30/07 Order.

A. The Requested Certification Addresses A Controlling Issue Of Law.

There can be no dispute that the subject question is a controlling issue of law. A question constitutes a "controlling question of law" if resolution of the question could determine the outcome or future course of the litigation. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002) (citing *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 U.S. Dist. LEXIS 11405, at *2 (D.D.C. Jan. 28, 2000) and *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991)), *stay denied*, No. 02-5355, 2003 U.S. Dist. LEXIS 20078 (D.C. Cir. Sept. 30, 2003).

In light of the D.C. Circuit's decision affirming this Court's denial of class certification on the alternative grounds urged by plaintiffs following this Court's 3/20/02 Order, this Court's 11/30/07 Order effectively eliminates plaintiffs' only currently viable bases on which to move forward as a class. The practical impact of the 11/30/07 Order would likely be the death knell of this litigation as it is unlikely that many putative class members would be able to pursue individual claims. Not surprisingly, then, courts have repeatedly treated class certification issues as controlling questions of law proper for certification for interlocutory appeal. See, e.g., *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 447-48 (5th Cir. 1983) (dismissal of class action aspects of discrimination suit

reviewed under § 1292(b)); *Hewitt v. Joyce Beverages of Wisconsin, Inc.*, 721 F.2d 625, 626 (7th Cir. 1983) (decertification of class reviewed); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 721 (11th Cir. 1987) (denial of class certification reviewed); *Chateau de Ville Prods. v. Tams-Witmark Music*, 586 F.2d 962, 964 (2d Cir. 1978) (certification of class reviewed); *see also* 19 James Wm. Moore, *et al.*, Moore's Federal Practice § 203.31[2] (3d ed. 1997) (issue of whether action may be properly brought as a class action appropriate for appeal as controlling question of law). Significantly, here the Court, not surprisingly in light of the holdings in *Pigford* and *Keepseagle* which were affirmed by the D.C. Circuit, all but conceded that if plaintiffs' APA claims are viable, class certification is a foregone conclusion. *See Garcia* Transcript of June 28, 2006 Scheduling Conference at 18 ("If there's an APA claim, there's an APA claim, and it may follow almost automatically that there's class certification").

B. The Question For Which Certification Is Sought Provides Substantial Grounds For Difference Of Opinion.

The question of whether plaintiffs' allegations of USDA's failure to investigate their discrimination complaints with respect to USDA's administration of its farm credit and non-credit benefit programs and USDA's discriminatory denial of non-credit benefits to plaintiffs state APA causes of action provides substantial grounds for difference of opinion. The existence of contrary, inconsistent, or unclear authority constitutes the grounds for difference of opinion required by § 1292(b). *See Johnson v. Washington Metro. Area Transit Auth.*, 773 F. Supp. 459, 460 (D.D.C. 1991) (intra-circuit split justified § 1292(b) certification); *see also Virtual Dev.*, 133 F. Supp. 2d at 22 (no § 1292(b) certification where no "disputed question of law"). At a minimum, courts have a "duty . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute." *See In re Vitamins Antitrust Litig.*, No. 99-197, 2000 U.S. Dist. LEXIS 17412, at *20-*21 (D.C. Cir. Nov. 22, 2000). Here, plaintiffs have consistently maintained, and provided authority for, the position that the USDA's failure to

investigate constitutes a violation of the APA and a basis for a finding of commonality pursuant to Rule 23. Clearly, the defendant has presented a conflicting view. This Court has now reasserted its conclusion that USDA's wholesale failure to investigate discrimination complaints in violation of its own regulations does not constitute a cognizable APA violation based upon its reading of 5 U.S.C. § 704.

The Court's analysis of § 704 is, however, inconsistent with the Supreme Court's authoritative gloss on that section set forth in *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988), and explicitly reiterated in *Darby v. Cisneros*, 509 U.S. 137, 146 (1993); *see also Esch v. Yeutter*, 876 F.2d 976, 982 (D.C. Cir. 1989) (acknowledging the *Bowen* Court's narrow construction of § 704). While the Court concluded that § 741 provided the "special and adequate review procedure's defined by *Bowen* (*Love* 11/30/07 Memorandum at 5-6), the Supreme Court explicitly identified the "special and adequate review procedures" it held were encompassed by § 704, noting that

[a]t 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 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.*

Bowen, 487 U.S. at 903 (emphasis added and footnotes omitted). Furthermore, it is well settled that once the Supreme Court has authoritatively defined a statutory provision as it has with § 704, lower courts cannot expand upon or alter that definition. Indeed, as the Supreme Court itself 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). Moreover, it is a prerogative that the Supreme Court jealously guards even in instances where it later determines that its earlier ruling was clearly

erroneous. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“the Courts of Appeal should . . . leav[e] to this Court the prerogative of overruling its own decisions”).

Even under the Court’s reading of § 704, the 11/30/07 Order provides grounds for a difference of opinion. Assuming, *arguendo*, that § 741 constituted the type of “special” procedure cited in *Bowen*, the implementation of the review process by USDA was every bit as flawed as the process it supposedly sought to correct and was, in fact, completely inadequate. Indeed, the record contains the unrebutted declaration of the then-director of the USDA Office of Civil Rights describing the inadequacy of the supposed alternative remedy cited by the Court and USDA’s efforts to ensure that it would not be adequate. *See* Exhibit 1 to Plaintiffs’ Brief In Response To Notice To Counsel, filed September 18, 2007 (“Plaintiffs’ 9/18/07 Response to Notice”) (Document 158-2) and Plaintiffs’ 9/18/07 Response to Notice at 12-15 (Document 158). To ignore completely the unrebutted evidence of the complete inadequacy of the supposed process and USDA’s efforts to thwart it is to elevate form over substance in a fashion that is clearly contrary to *Bowen*. *See Bowen*, 487 U.S. at 905 (noting the inadequacy of relief in court of claims under the Tucker Act).

Furthermore, the Court’s 11/30/07 Order largely restates the Court’s 3/20/02 Order and relies upon authority that was either briefed by the parties before the D.C. Circuit or, in any event, familiar to the D.C. Circuit, as is § 704. *See, e.g.*, Appellants’ Opening Brief in *Garcia v. Johanns*, No. 04-5448, filed in the United States Court of Appeals for the District of Columbia Circuit on August 29, 2005, at 49-53 (discussing, *e.g.*, § 704, *Bowen*; *Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990); *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983), and *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984)). Clearly, if the resolution of plaintiffs’ APA claims simply rested, as the 11/30/07 Order suggests, on an “unbroken line of circuit decisions” as familiar to the D.C. Circuit as “the *Council of and for the Blind* line of cases (11/30/07 *Love* Memorandum at 10), the D.C. Circuit would not have concluded that “unlike the straightforward statutory construction

issue the appellants' ECOA failure-to-investigate claim presents, we think this claim will benefit from further development in the district court." *Garcia*, 444 F.3d at 637.

In addition, the Court conceded that plaintiffs' non-credit benefit "claims cannot be brought under ECOA because they are not related to credit transactions," that "[s]ection 704 of the APA . . . does not appear to be implicated" and that "[t]he *Council of and for the Blind* cases are also inapplicable." *Love* 11/30/07 Memorandum at 11. Thus, it would appear from the Court's own analysis that there is no bar to certifying a class with respect to such non-credit benefit claims. The Court, however, summarily dismissed plaintiffs' non-credit benefit claims despite having previously found that *Garcia* plaintiff Gloria Morales has asserted such claims. 3/20/02 Order at 4. (Document 47) *See Garcia* 11/30/07 Order ("[t]he APA cause of action with respect to such claims is therefore **DISMISSED**"). And as plaintiffs have made clear, she is not the only plaintiff named in the Third Amended Complaint or putative class member who asserts such claims. *See, e.g.*, Exhibits 2-30 of Plaintiffs' Reply Brief In Support Of Their Claims Based On The Administrative Procedure Act, filed October 27, 2006 (Document 152).

Moreover, the Court's attempt to distinguish *McKenna*, which was decided a year after *Council of and for the Blind*, and has never been overruled,² provides further grounds for a difference of opinion with respect to plaintiffs' APA claims. Indeed, in describing *McKenna*, the Court noted that "[t]he plaintiff in *McKenna* claimed that a government agency discriminated against her by firing her *and that it also failed to follow regulations related to her firing*" and pointed out that the *McKenna* court concluded that the "'claim of arbitrary treatment [was] entirely independent of her discrimination claim.'" *Love* 11/20/07 Memorandum at 10 (quoting *McKenna*, 729 F.2d at 791 (emphasis added)). The Court then concluded that *McKenna* is distinguishable "from the case at bar" because "plaintiffs' APA claim . . . is certainly not 'entirely independent' of their claims of discrimination." *Id.* at 11. Respectfully, plaintiffs' APA

² Significantly, it has been cited with approval. *See, e.g., Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 3 n.2 (D.D.C. 1998).

claims are, if anything, more independent of the discrimination at issue here than were the APA claims in *McKenna*. Here, plaintiffs allege that USDA discriminated against them in the administration of their farm credit and non-credit benefit programs and in addition to that discrimination USDA acted arbitrarily in violation of the APA by not complying with its own regulations to investigate the discrimination in the farm credit and non-credit benefit programs, while in *McKenna*, by the Court's own analysis, the government agency discriminatorily fired plaintiff and "*failed to follow regulations relating to her firing.*" *Love* 11/30/07 Memorandum at 10 (emphasis added). Given the Court's own analysis of *McKenna*, the contrast which the Court draws between that case and the case at bar appears, at best, to be a distinction without a difference.

Furthermore, the Court noted that "[t]he government may even have implicitly conceded that the regulations did impose a duty to investigate" plaintiffs' discrimination complaints. 11/30/07 *Love* Memorandum at 5. The Court, however, concluded that "whether the regulations required an investigation and whether investigation decisions are unreviewable – are beside the point, because even if plaintiffs have an APA claim under the 1999 regulations, that claim is barred by the existence of an adequate alternative remedy at law." *Id.* That conclusion presents a basis for substantial difference of opinion in at least two respects.

First, § 704 does not bar claims where there is "an adequate alternative remedy at law." *Id.* The section instead provides that "[a]gency action made reviewable by statute and final agency action for which there is *no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). And, the *Bowen* Court gave that language a very specific and limited meaning. *Bowen*, 487 U.S. at 903 ("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"); *see also Esch*, 876 F.2d at 982 (expressly acknowledging 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*" (emphasis added)).

Second, if as plaintiffs contend and, as the Court notes, “[t]he Government may even have implicitly conceded that the regulations did impose a duty to investigate,” that obligation is hardly “beside the point.” To the contrary, 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); *Panhandle E. 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). And, as in the instant case, “[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.” *Morton*, 415 U.S. at 235 (emphasis added). Indeed, the following observation of one of the panel members during the oral argument before the D.C. Circuit is wholly consistent with this basic tenet of law and further evidence of the substantial difference of opinion with respect to plaintiffs’ APA claims:

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 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.

Transcript of Oral Argument, *Garcia v. Johanns*, Appeal No. 04-5448, at 17 (D.C. Cir. Feb. 6, 2006) (Edwards, J.) (Exh. 17 to Plaintiffs’ Brief In Support Of Claims That Defendant’s Unlawful Failure To Investigate Plaintiffs’ Discrimination Complaint And The Discriminatory Denial Of Benefits Are Reviewable Under The Administrative Procedure Act, filed August 28,

2006 (Document 150-1)). Simply put, far from being distinguishable from the instant case, *McKenna* is wholly consistent with the basic tenet that an agency must comply with its own regulations and in harmony with the Supreme Court's definitive gloss on § 704 in *Bowen*.

Finally, a substantial difference of opinion exists regarding the subject question even within this circuit. Two judges in this Court, faced with complaints that are virtually identical to the initial complaint in this case, have certified a class of African American and Native American farmers on the basis of USDA's failure to investigate their discrimination complaints. See *Pigford v. Glickman*, 182 F.R.D. 341, 348-49 (D.D.C. 1998), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000); *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, *petition denied In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002); *petition denied*, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004). Significantly, the D.C. Circuit denied the government's Rule 23(f) petition to review the *Keepseagle* certification decision, holding that the USDA's failure to investigate was a proper basis for a finding of commonality and typicality. See *In re Veneman*, 309 F.3d at 794. At the very least, the existing decisions in virtually identical cases demonstrate that there is strong support in this circuit for plaintiffs' argument that commonality between the putative class members exists based on the USDA's failure to investigate their discrimination claims and the APA claims present a controlling question of law as to which there is substantial difference of opinion.

C. Certification Under 1292(b) Would Materially Advance The Disposition Of The Litigation.

An immediate appeal would materially advance the disposition of the litigation. The practical impact of a prompt resolution of the subject issue is substantial. This is particularly true in light of the D.C. Circuit's affirmance of the Court's previous class certification rulings. Should the D.C. Circuit agree with this Court on the question presented, and find no other basis for commonality, this action would end as a class action. Such a result could well bring an end to this litigation for hundreds, if not thousands, of Hispanic farmers and ranchers.

The Hispanic farmers and ranchers who comprise the putative class represent an oppressed minority who are confronting a powerful governmental agency that has systematically stripped them of their land and, in some instances, their ability even to subsist as farmers and ranchers. They are confronting an agency which the record shows reflects animus not just at the local level but at high levels within the bureaucracy. *See* Declaration of Lou Anne Kling (Ex. 3 to Plaintiffs' Emergency Motion to Stay Proceedings, filed December 9, 2002) (Document 78). It is an agency which, according to a former Director of the Office of Civil Rights, destroys documents and intimidates those who would complain about discrimination. *See* Declaration of Rosalind Gray ¶ 20 (Ex. 7 to Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Class Certification) (Document 50). Clearly, such subsistence farmers would find it infinitely more difficult, if not impossible, to pursue individual claims, as this Court apparently recognized. *Garcia*, 224 F.R.D. at 9 & n.1.

A resolution of this issue would guide the parties as to the manner in which to proceed, for example, whether they can proceed with their ECOA and APA claims in a single proceeding. In addition, any settlement possibilities are inhibited by the existing uncertainty. Given the fact that this issue has arisen in other cases, uncertainty itself about what the appellate result might be will pose an obstacle as this and other cases progress. *See Washington Metro.*, 773 F. Supp. at 460 (clarification of law and conflicting authority would circumvent appeal and remand on issue, possibly saving additional cost and delay). Indeed, in light of this Court's 11/30/07 Order, the government has recently moved to dismiss the APA claims in *Keepseagle*. *See* Defendant's Renewed Motion For Partial Judgment On The Pleadings To Dismiss Count III Of The Amended Complaint And Supporting Points And Authorities, filed in *Keepseagle v. Conner*, C.A. No. 1:99CV3119 (EGS) (Document 449).

II. IN ORDER TO COMPLETE THE REVIEW CONTEMPLATED BY THE D.C. CIRCUIT IN ITS REMAND OF THE APA CLAIMS FOR FURTHER DEVELOPMENT, THE COURT SHOULD AMEND ITS 11/30/07 ORDER.

The record now has the benefit of the “further development” that the D.C. Circuit concluded would be beneficial and hence mandated. *Garcia*, 444 F.3d at 637. However, the Court’s 11/30/07 Order in its current form precludes the further review that was clearly contemplated by the D.C. Circuit’s remand. By its terms, § 1292(b) permits an interlocutory appeal only when the district judge “state[s] in writing in [the] order” to be appealed his “opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation” 28 U.S.C. § 1292(b). As the foregoing makes clear, those factors are as present in the Court’s 11/30/07 Order as they were in its 3/20/02 Order following the Court’s 9/10/04 Order. Indeed, given the D.C. Circuit’s intervening affirmance of the Court’s 9/10/04 Order, the factors in favor of § 1292(b) certification are, if anything, even stronger as a determination of the viability of plaintiffs’ APA claims will determine whether plaintiffs may proceed as a class or whether hundreds, if not thousands, of claims will be abandoned and USDA’s admitted discrimination left unremedied. Accordingly, in order to complete the review contemplated by the D.C. Circuit in its remand, plaintiffs request that the Court amend its 11/30/07 Order and certify the amended order for interlocutory appeal pursuant to § 1292(b).

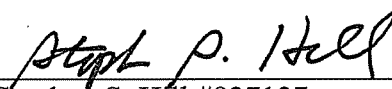
CONCLUSION

For the foregoing reasons, plaintiffs respectfully request this Court to amend its 11/30/07 Order to include the statement that the necessary conditions for interlocutory review under 28 U.S.C. § 1292(b) have been met and certify the amended order on the following question for interlocutory review under 28 U.S.C. § 1292(b): (1) Whether plaintiffs’ allegations of USDA’s failure to investigate civil rights complaints with respect to USDA’s farm credit and non-credit

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benefits programs and USDA's discriminatory denial of non-credit benefits to Hispanic farmers and ranchers state claims under the APA?

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Dated: December 14, 2007