

(D.C. Cir. 1983)] cases are also inapplicable.” *Love* 11/30/07 Memorandum at 11. Such conclusions cannot be reconciled with the Court’s summary dismissal of plaintiffs’ “APA cause of action with respect to such claims” *See Garcia* 11/30/07 Order.

2. Defendant’s supposed concern that the passage of time will make locating relevant evidence more difficult (*Love* Opposition at 1) rings particularly hollow in light of USDA’s secret dismantling of its civil right investigatory apparatus¹ and its continued refusal, in violation of its own regulations, to process and investigate current discrimination complaints that have contributed to the age of the current claims.² Moreover, it was USDA’s refusal, again in violation of its own rules, to preserve documents even after the instant lawsuit was filed³ and other tactics designed not only to thwart the proper administration of its credit and non-credit

¹ As then-Secretary Glickman, the original defendant in this case, testified, “[a] good part of the reason for the backlog is the fact that in 1983, USDA Investigation Unit was dismantled.” Testimony of Secretary Dan Glickman before the Subcommittee On Department Operations, Nutrition And Foreign Agriculture and the Committee On Agriculture, Treatment Of Minority And Limited Resource Producers By The Department Of Agriculture, March 19, 1997, at 97 (Exhibit 3 to Plaintiffs’ Second Supplemental Memorandum In Support Of Their Motion For Class Certification filed July 17, 2002) (Document 60).

² *See, e.g.*, 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”) 10-11 and Exhibits 26-39 thereto (Document 152). Indeed, according to one former USDA Office of Civil Rights Equal Employment Specialist who served in that capacity from 2001-2004, he and his colleagues “were told on numerous occasions by [their] supervisors that the majority of Hispanic farmer discrimination complaints *were not to be investigated* pending certification of a class. . . .” Declaration of Jimmy W. Jones, Sr. ¶ 5 (Exhibit 39 to Plaintiffs’ 10/27/06 APA Reply Brief) (Document 152) (emphasis added).

³ During the pendency of this lawsuit, USDA continued to destroy credit files of Hispanic farmers and ranchers despite its own and other applicable regulations that required it to retain such documents. *See, e.g.*, Plaintiffs’ Second Supplemental Memorandum in Support of Their Motion for Class Certification, filed July 17, 2002, at 30-31 and Exhibit 1 thereto (Document 60); Plaintiffs’ Reply To Defendant’s Response To Plaintiffs’ Second Supplemental Memorandum In Support of Their Motion For Class Certification, filed September 5, 2002, at 14-18 (Document 68). Thus, for example, defendant conceded that Regulation B required that USDA, upon notice of an action filed pursuant to Section 706 of the [EOA], . . . shall retain the information until final disposition of the matter.” 12 C.F.R. § 202.12(b)(4) (2000). Defendant nevertheless contended that USDA was under no obligation to retain the files of the “scores of [putative class members whose] names and addresses” were contained in Second Amended Complaint. Defendant’s Response To Plaintiffs’ Second Supplemental Memorandum In Support Of Their Motion For Class Certification, filed August 28, 2002, at 16 n.12 (Document 67). Defendant reported to the Court the following year that “we have been able to identify from the 110 named farmers that are identified in the complaint that there are USDA borrower files for 37 of them. Transcript of April 29, 2003 Status Hearing at 12 (Document 91). Ultimately, defendant produced files for only 35 of the 110 plaintiffs named in the Second Amended Complaint.

programs, but to prevent any investigation of such discrimination that have contributed most to any difficulty that may exist with respect to locating documentary evidence.⁴

3. Defendant also completely ignores the fact that in 2004 this Court found that plaintiffs' APA claims satisfied all of the requirements of § 1292(b). Order dated September 27, 2004 (Document 134). The intervening events have only increased the importance of the APA claims to the viability of the lawsuit as a class action. As defendant concedes, questions affecting class certification are proper subjects for interlocutory appeal. Defendant, however, appears to fault plaintiffs for not seeking such review pursuant to Fed. R. Civ. P. 23(f). *Love* Opposition at 3. But it was defendant who insisted that the legal question of whether the APA claims state a cause of action be addressed prior to plaintiffs' moving to certify a class on that basis. As defense counsel Olson put it, "it would seem appropriate to limit the briefing to whether or not the APA failure to investigate claim is viable." Transcript of Scheduling Conference, *Garcia v. Glickman*, C.A. No. 00-2445, June 28, 2006, at 17 (Document 145). Indeed, the Court acknowledged that if on remand plaintiffs prevailed on the APA question that class certification would likely be a foregone conclusion. *Id.* at 18 ("And so why don't we just talk about the APA claim and not the class certification claim, and if the APA claim survives, then she might even agree with you that there's a class.")

4. Defendant's attempt to dismiss the substantial difference of opinion reflected in the disparate treatment of the class claims in *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), and in *Keepseagle v. Veneman*, No. 1:99-CV-3119 (EGS/AK), 2001 WL 34676944 (D.D.C. Dec. 12, 2001), on the one hand and *Love* and *Garcia* on the other is also unavailing. Clearly, a substantial difference of opinion exists regarding the subject question when two judges in this Court, confronting complaints that are virtually identical to the initial complaint in this case and

⁴ One such tactic was the policy announced by the USDA Office of General Counsel ("OGC") that "no matter how blatant the discriminatory conduct might be, there can be no discrimination unless the applicant is 'eligible.'" Declaration of Rosalind Gray, former director of the USDA Office of Civil Rights, dated April 6, 2002, ¶ 20 (Exhibit 3 to Plaintiffs 8/28/06 APA Brief) (Document 150). 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 policy." *Id.*

the *Love* case, have certified classes of African American and Native American farmers on the basis of USDA's failure to investigate their discrimination complaints, and the D.C. Circuit has held that the USDA's failure to investigate was a proper basis for a finding of commonality and typicality.⁵ See *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002). That holding by the D.C. Circuit demonstrates that there is strength in plaintiffs' argument that commonality among the putative class members exists based on the USDA's failure to investigate their discrimination complaints and that the APA claims present a controlling question of law as to which there is a substantial difference of opinion. See *APCC Servs., Inc. v. Sprint Comm. Co.*, 297 F. Supp. 2d 90, 98 (D.D.C. 2003) ("a court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute") (citation omitted) *rev'd on other grounds*, 418 F.3d 1238 (D.C. Cir. 2005), *cert. granted and judgment vacated*, 127 S. Ct. 2004 (2007). Indeed, this Court expressly observed that "[i]f plaintiffs' complaint-processing claim were still in the case, their prayer for 'specific performance with respect to their program benefits' . . . might support the provisional certification of a Rule 23(b)(2) class." *Garcia v. Veneman*, 211 F.R.D. 15, 23 n.9 (D.D.C. 2002).

5. Defendant's assertions to the contrary notwithstanding, an interlocutory appeal would materially advance the litigation. An immediate appeal would resolve the question of whether plaintiffs can assert their APA claim and do so in a class action. If the D.C. Circuit were to affirm the Court's APA ruling, it would spell the death knell of this litigation for hundreds, if not

⁵ Defendant cites no authority for the contention that such a difference of opinion is not "the sort of inconsistency necessary to trigger section 1292(b)." *Love* Opposition at 3-4. Defendant's contention is, of course, belied by the § 1292(b) certification in 2004. Defendant also ignores the fact that the failure-to-investigate issue was the basis upon which classes were certified in both *Pigford* and *Keepseagle* with respect to all claims. As for the contention that § 741 precludes review pursuant to 5 U.S.C. § 704, it is, as discussed *infra* at 5-6, contrary to the Supreme Court's authoritative definition of the "adequate remedy" provision of § 704 set forth in *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). In addition, defendant does not even attempt to dispute the sworn declaration of Rosalind Gray, the former director of the USDA Office of Civil Rights, describing the inadequacy of the supposed alternative remedy and USDA's efforts to ensure that it would not be adequate. See *Garcia* 12/14/07 Memorandum at 8 (Document 165).

thousands, of Hispanic farmers, as this Court has previously recognized.⁶ *Garcia v. Veneman*, 224 F.R.D. 8, 9 (D.D.C. 2004). An immediate appeal would also enable plaintiffs and putative class members to determine whether they can bring their ECOA and APA claims in a single proceeding, thereby avoiding the possibility of duplicative proceedings and conserving the resources of the parties and the Court. Moreover, certification of class may well enhance the prospect of a comprehensive settlement that would also conserve the resources of the parties and the Court.

6. Defendant's arguments with respect to *Bowen*, 487 U.S. 879, are simply wrong. *Garcia* Opposition at 2. Indeed, the assertion that "plaintiffs cite no authority for their reading of *Bowen* (*id.*) suggests that defendant has not carefully read plaintiffs' 12/14/07 Memorandum. See *Garcia* 12/14/07 Memorandum at 7. In addition to the language quoted in the *Garcia* 12/14/07 Memorandum at 7 explicitly identifying the "special and adequate review procedures" encompassed by § 704, the *Bowen* Court drove home the point in the very next paragraph, noting that "[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." *Bowen*, 487 U.S. at 903.

⁶ Defendant's contention that plaintiffs offer no explanation why members of the putative class will not be able to pursue their claims individually given that ECOA entitles prevailing plaintiffs to attorney's fees is belied by Plaintiffs' 12/14/07 Memorandum at 13. Wholly apart from the documented intimidation, subsistence farmers will find it virtually impossible to find lawyers or law firms with the resources to try hundreds, if not thousands, of individual cases against the taxpayer-funded USDA and the United States Department of Justice ("DOJ"). In addition, defendant once again ignores the hundreds, if not thousands, of claims based on USDA's discrimination in the administration of its non-credit farm benefit programs. ECOA attorney's fees would not apply to plaintiffs who prevailed only with respect to such non-credit claims. Moreover, even with respect to ECOA claims, the prospect of recovering attorney's fees does not guarantee that the prevailing party will receive anything even approximating actual costs. For example, in connection with a discovery dispute in this case in which defendant interposed approximately 900 individual privilege claims, plaintiffs were forced to move to compel discovery (Document 100). The Court ultimately granted plaintiffs' motion and encouraged plaintiffs to seek costs including attorney's fees. Order dated January 20, 2004 at 2 (Document 115). Despite the fact that defendant conceded that plaintiffs were entitled to "a total of \$13,320.00 in expenses" (Defendant's Opposition To Plaintiffs' Motion for Expenses, filed February 25, 2004, at 12), (Document 124) the Court awarded plaintiffs \$5,000, 38% of the amount that defendant conceded plaintiffs should recover and 13% of the \$38,271.00 cost of preparing the motion to compel. Memorandum Order dated March 11, 2004, at 4 (Document 126); see also Plaintiffs' Reply To Defendant's Opposition To Plaintiffs' Motion for Expenses at 9-11 (Document 125). Such results provide little incentive for attorneys to try hundreds, if not thousands, of individual cases against the USDA and DOJ.

The Supreme Court reiterated its authoritative gloss on § 704 in *Darby v. Cisneros*, 509 U.S. 137 (1993) (cited in the *Garcia* 12/14/07 Memorandum at 7). As the Court wrote in *Darby*,

[i]n *Bowen* . . . , we were concerned with whether relief available in the Claims Court was an “adequate remedy in a court” so as to preclude review in Federal District Court of a final agency action under the first sentence of § 10(c). We concluded that “although the primary thrust of [§ 10(c)] was to codify the exhaustion requirement,” [487 U.S. at 903] *Congress intended by that provision simply to avoid duplicating previously established special statutory procedures for review of agency actions.*

Id. at 146 (emphasis added).

Similarly, in *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989) (also cited in the *Garcia* 12/14/07 Memorandum at 7), the D.C. Circuit explained the Supreme Court’s holding in *Bowen* noting that:

Moving on to Section 704, the court found that while its purpose was mainly to codify the exhaustion requirement, it was also designed to ensure that courts acting under authority of Section 702 did not duplicate or preempt “special and adequate review procedures” in other legislation, such as the National Labor Relations Act’s provision for direct review of Board orders in the courts of appeals, the now-extinct provision for review of the Interstate Commerce Commission’s orders in three-judge district courts, or the Interstate Commerce Act’s present provision for direct review of such orders in the courts of appeals. *Given the limited purposes for Section 704’s enactment, the Court said, it is to be read narrowly.*

Id. at 982 (emphasis added; footnotes omitted). Having thus “determined [the] statute’s clear meaning, [the Supreme Court] adhere[s] to that determination under the doctrine of *stare decisis*.” *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 126, 131 (1990). Indeed, as the Supreme Court has also made clear, “we are normally and properly reluctant to overturn our decisions construing statutes” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

7. Even assuming *arguendo* that the D.C. Circuit could be properly characterized as taking a view “contrary” (*Garcia* Opposition at 2) to the foregoing express holding of the Supreme Court in *Bowen* concerning the scope of § 704 that was expressly reaffirmed by the Court in *Darby* and expressly acknowledged by the D.C. Circuit in *Esch*, that fact would not support denial of plaintiffs’ instant motion. To the contrary, the foregoing Supreme Court and the D.C. Circuit holdings clearly point to the strength of plaintiffs’ argument with respect to the narrow and limited meaning of § 704. Any “contrary” view by the D.C. Circuit to the Supreme Court’s authoritative definition of the “adequate remedy” provision of § 704 is at best highly inappropriate. See, e.g., *Maislin*, 497 U.S. at 131; *Rodriguez de Quijas*, 490 U.S. at 484 (“the Court of Appeals should . . . leav[e] to this Court the prerogative of overruling its own decisions”), and at a minimum reflects inconsistent or unclear authority sufficient to satisfy the requirements of § 1292(b). See *Johnson v. Washington Metro. Area Transit Auth.*, 773 F. Supp. 459, 460 (D.D.C. 1991).

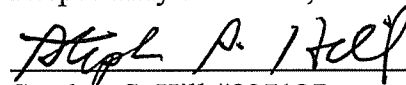
8. With respect to the D.C. Circuit’s holding in *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), plaintiffs agree that “[w]hether McKenna was properly disciplined is an entirely different question from whether the government followed the proper procedure for imposing discipline.” *Garcia* Opposition at 3. Similarly whether USDA discriminated against Hispanic farmers in the administration of its farm credit and non-credit farm benefit programs is an entirely different question from whether USDA failed to follow its own regulations when it refused to investigate Hispanic farmers’ complaints of discrimination in its administration of such programs. As the D.C. Circuit made clear, “Ms. Mc Kenna’s claim under the APA is not one of discrimination. Rather, she charges that the agency, *whether its motive was legal or illegal*, failed to conform to its own regulations.” *Mc Kenna*, 729 F.2d at 791 (emphasis in original and emphasis added). *Mc Kenna* is thus wholly consistent with the Supreme Court’s authoritative definition of the “adequate remedy” provision of § 704, the D.C. Circuit’s explicit acknowledgement of that definition in *Esch*, 876 F.2d at 982, and the well-settled principle that

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an agency must follow its own regulations.⁷ *See, e.g., Esch*, 876 F.2d at 991 & n.163;
Panhandle E. Pipe Line Co. v. FERC, 613 F.2d 1120, 1135 (D.C. Cir. 1979); *Garcia* 12/14/07
Memorandum at 11.

Accordingly, for the foregoing reasons and for the reasons set forth in the *Garcia*
12/14/07 Memorandum, plaintiffs' motion should be granted.

Respectfully submitted,



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⁷ In addition, *McKenna*, *Esch* and *Council of and for the Blind* reflect "the sort of inconsistency" that even defendant concedes "trigger[s] section 1292(b)." *Love* Opposition at 3-4; *see also* n.5 *supra*.