

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROSEMARY LOVE, *et al.*,

Plaintiffs,

v.

CHARLES F. CONNER, ACTING SECRETARY,
UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendant.

Case No. _____
(Civ. No. 00-2502 (JR))

**PLAINTIFFS' PETITION FOR PERMISSION TO TAKE AN
INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

Pursuant to 28 U.S.C. § 1292(b), Plaintiffs request permission to appeal the District Court's November 30, 2007 Order ("Order") dismissing Plaintiffs' claims asserted under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*¹ In that Order, the District Court held that Plaintiffs' claims that the United States Department of Agriculture ("USDA") failed to investigate civil rights complaints by women farmers who participated or attempted to participate in USDA farm loan programs and their claims that USDA discriminatorily denied non-credit benefits to women farmers were not cognizable claims under the APA. For the reasons set forth below, the Order meets the criteria for interlocutory appeal pursuant to § 1292(b), and as a result, the Court should grant Plaintiffs' request for interlocutory appeal on the following issues:

1. Did Plaintiffs state a cause of action under the APA for USDA's failure to investigate women farmers' complaints of discrimination regarding its credit and non-credit benefit programs?

¹ The Order and Memorandum Decision Dismissing the Plaintiffs' Claim for Failure to Investigate Claims of Discrimination by the United States Department of Agriculture, entered on November 30, 2007, is attached as Addendum 1.

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2. Did Plaintiffs state a cause of action under the APA for USDA's discriminatory denial of non-credit benefits to women farmers?

As demonstrated below, these issues are the subject of substantial difference of opinion by the district courts within this Circuit, involve a controlling question of law, and are of material importance to the advancement of this litigation. Furthermore, the District Court certified the Order, demonstrating that it believes this Court should undertake interlocutory review of the issues.²

**BACKGROUND REGARDING PLAINTIFFS' REQUEST FOR
INTERLOCUTORY REVIEW OF THE APA CLAIMS**

Plaintiffs' action is brought on behalf of a putative class of women farmers who allege that USDA has unlawfully discriminated against them because of their gender in connection with their efforts to obtain farm loans, loan servicing or non-credit benefits, and that USDA unlawfully and discriminatorily failed to process and investigate women farmers' discrimination complaints, in violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, and/or the APA. In 1998, Congress enacted legislation that retroactively extended the limitations period for certain discrimination-related claims against USDA dating from 1981 to October 21, 2000. *See* Agriculture Rural Development, Food and Drug Administrative and Related Agencies Appropriations Act, 1999 Pub. L. No. 105-277 (codified at 7 U.S.C. § 2297 Note). Plaintiffs timely filed their class action complaint in this case, asserting claims against USDA under the APA and ECOA.

At an early stage of the case, the District Court dismissed Plaintiffs' APA claims. *See* Order of December 13, 2001. Later, after filing their Third Amended Complaint, Plaintiffs sought class certification of two subclasses for claims brought pursuant to ECOA. On

² The Order, dated January 16, 2008, is attached as Addendum 2.

September 29, 2004, the District Court issued an order denying Plaintiffs' motion for class certification, and staying the proceedings pending further action of the District Court.

Thereafter, Plaintiffs sought to appeal the District Court's order denying class certification, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, and its order denying the APA claims, pursuant to 28 U.S.C. § 1292(b). The District Court certified for interlocutory review its December 13, 2001 Order dismissing Plaintiffs' APA claims and denying the motion for class certification of the ECOA claims. This Court granted Plaintiffs' request for interlocutory appeal of the APA claim under § 1292(b), and of the ECOA class certification under Rule 23(f), which were consolidated for appeal. The Court ultimately affirmed the District Court's decision on class certification and remanded Plaintiffs' APA claims for "further proceedings" because "the record is little developed on that argument, and the parties' briefs have given short-shrift" to that issue. *Love v. Johanns*, 439 F.3d 723, 733 (D.C. Cir. 2006).

On remand, the parties submitted briefs on the APA claims. The District Court dismissed Plaintiffs' APA claims pursuant to its Order. On December 14, 2007, Plaintiffs sought permission pursuant to 28 U.S.C. §1292(b) for interlocutory review of the District Court's denial of Plaintiffs' APA claims, which USDA opposed. Following oral argument on the issue, the District Court ordered that the APA claims be certified for interlocutory appeal. The District Court held that the claims "involve 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[]." Order dated January 16, 2008, at 1.³

³ The District Court also directed that Plaintiffs' interlocutory appeal be accompanied by a motion for expedited appeal. Accordingly, should this Court grant Plaintiffs' request for interlocutory appeal, they intend to file a motion for expedited treatment, in accord with the District Court's directive.

LEGAL ARGUMENT

I. The District Court's Certification Should Be Given Great Weight.

Once a district court has certified an order for interlocutory review, the court of appeals “may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.” 28 U.S.C. § 1292(b) (2007). Under 28 U.S.C. § 1292(b), a district court can certify an order for interlocutory review if it determines that the order involves a controlling question of law, substantial contrary authority or other grounds for a difference of opinion exist, or an immediate appeal would materially advance the disposition of the litigation. *Id. See United States v. Philip Morris USA, Inc.*, No. 99-2496 (GK), 2004 WL 1514215, at *1 (D.D.C. June 25, 2004); *Virtual Def. & Dev. Int'l, Inc. v. Republic of Mold.*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (citing *Trout v. Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989)).

Interlocutory appeal should be granted if one or more of the elements of § 1292(b) are satisfied. *In re City of Memphis*, 293 F.3d 345, 350-351 (6th Cir. 2002); *Control Data Corp. v. Int'l Bus. Machs. Corp.*, 421 F.2d 323, 325 (8th Cir. 1970) *citing* 6 Moore Federal Practice § 54.06 (Supp. 1969); *In re Heddendorf*, 263 F.2d 887, 889 (1st Cir. 1959). It is well established that great weight and deference should be given to the opinion of a district court when it grants certification. *In re Coordinated Pre-Trial Proceedings in Petroleum Prods. Antitrust Litig.*, 761 F.2d 710, 712 (Temp. Emer. Ct. App. 1985); *Lerner v. Atl. Richfield Co.*, 690 F.2d 203, 209 (Temp. Emer. Ct. App. 1982) *citing* 9 Moore's Federal Practice 110.22(3), (4); 16 Wright & Miller, Federal Practice and Procedure, § 3951 at 369-370 n.4.

Here, the District Court expressly held that all three bases for interlocutory review under § 1292(b) are met. The District Court's certification of the Order was grounded on the District

Court's familiarity with the circumstances at bar. This Court should accord due weight to its reasoning.

I. The APA Issues Present Controlling Issues of Law.

A question constitutes a "controlling issue 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 *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (a question is controlling if "interlocutory reversal might save time for the district court and time and expense for the litigants")). *See also In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 WL 673936, at *2 (D.D.C. Jan. 27, 2000). Here, the certified issues – whether Plaintiffs have alleged causes of action under the APA arising from USDA's failure to investigate discrimination complaints and from USDA's discriminatory denial of non-credit benefits – are controlling issues of law.

The Order presents controlling questions for three reasons. First, how this Court resolves these questions will determine whether or not the Plaintiffs have a cognizable claim for USDA's failure to investigate their discrimination complaints. Second, the APA provides the only relief for Plaintiffs with non-credit farm benefit claims and this Court's resolution of this question will determine if these Plaintiffs can proceed with their claims. Third, recognition of a cause of action under the APA could determine whether the Plaintiffs can maintain a class action, in light of the District Court's having found no other cognizable basis for commonality. Courts have repeatedly treated class certification issues as controlling questions of law that are appropriate for interlocutory review. *See, e.g., Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 447-48 (5th Cir.), *cert. denied*, 464 U.S. 828 (1983) (dismissal of class discrimination claims were reviewable under § 1292(b)). *See also* C. Wright & A. Miller, 16 Federal Practice & Procedure

§ 3931 (2d ed. 2007). The District Court has observed that the presence of a cognizable APA claim would provide a basis for class certification. *See Garcia v. Conner*, Transcript of Scheduling Conference (D.D.C. June 28, 2006) (Robertson, J.) (“If there’s an APA claim, there’s an APA claim, and it may follow almost automatically that there’s class certification.”).

Inability to pursue the case as a class action will likely be a death knell to the putative class members’ claims because it is unlikely that many of the putative class members will be able to maintain their claims individually. *Cf. In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (holding that a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims is grounds for granting interlocutory review of class certification decisions under Rule 23(f)).

II. A Substantial Ground for Differences of Opinion Exists.

The existence of contrary, inconsistent or unclear authority constitutes a “difference of opinion,” warranting interlocutory review under 28 U.S.C. § 1292(b). *See APCC Servs. Inc. v. Spring Commc’ns Co. L.P.*, 297 F. Supp. 2d 90, 97-98 (D.D.C. 2003), *rev’d on other grounds*, 418 F.3d 1238 (D.C. Cir. 2005), *cert. granted and judgment vacated*, 127 S. Ct. 2094 (2007). Interlocutory review is appropriate even in the absence of a difference of opinion where “the case law is confused.” *See Johnson v. Wash. Metro. Area Transit Auth.*, 790 F. Supp. 1174, 1180 (D.D.C. 1991) (certifying interlocutory review on district court’s decision issued on remand). In this Circuit, there is still unclear and inconsistent authority as to whether causes of action for the failure to investigate discrimination complaints may be maintained under the APA.

A. APA Claim for Failure to Investigate

There are significant differences of opinion as to whether Plaintiffs may assert a cause of action under the APA for the USDA's failure to investigate their discrimination complaints. Plaintiffs here and in *Garcia* have maintained that this claim is allowable. Their assertions are supported by USDA's own regulations. *See* 7 CFR 15d. The District Court noted that "[t]he government may even have implicitly conceded that the regulations did impose a duty to investigate." Order at 5. Despite USDA's acknowledged duty to investigate complaints of discrimination, the District Court based its dismissal of Plaintiffs' failure-to-investigate claim on finding an "adequate alternative remedy" in 7 U.S.C. § 2279 Note, Congress' legislation extending the statute of limitations for ECOA-based claims against USDA and providing an optional agency review process of certain "renewed complaints." *Id.* at 6. In doing so, the District Court disregarded evidence showing that there was no real "adequate" alternative remedy in effect for Plaintiffs, nor a remedy *in court*, as required by § 704 of the APA.

Plaintiffs' APA claim for USDA's failure to investigate cannot be redressed by 7 U.S.C. § 2279 Note. As a threshold matter, this Court has already found that ECOA does not pertain to a failure to investigate. *Love*, 439 F.3d at 732. Moreover, additional time to pursue an ECOA claim is not an adequate remedy for USDA's failure to adhere to its duty to investigate discrimination complaints. An ECOA claim addresses a different harm and provides different remedies than a claim under the APA for failure to investigate. An APA claim arises when an agency fails to adhere to its own procedures. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985); *Holden v. Finch*, 446 F.2d 1311, 1315-17 (D.C. Cir. 1971); *McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C. Cir. 1984).

Pursuant to USDA regulations, a complainant can utilize a relatively speedy, inexpensive mechanism to complain about discriminatory treatment, and USDA is required to investigate, and presumably reach a conclusion. *See, e.g.,* 7 CFR 15d (2007); 7 CFR 15.52 (1989). The complaint is to be reviewed by a USDA employee familiar with USDA's system, procedures, practices and personnel. If the investigator concludes that the complaint is meritorious, USDA's own guidelines provide that a settlement can be negotiated with the complainant whereby the agency can agree to, among other things, cancellation of debt, changes at the agency, an award of a loan or other benefit, a compliance review of the discriminating division within the agency, a directive correcting discriminatory conduct, and disciplinary action against employees who are found to have discriminated. *See* Procedures for Processing Discrimination Complaints and Conducting Civil Rights Compliance Reviews in USDA Conducted programs and Activities, at Chap. 4, § 9. In contrast, an ECOA claim, which arises when, among other things, a lender discriminates in the granting of loans, is prosecuted in court pursuant to the usual discovery and trial processes governed by the rules of procedure and evidence. Damages are awardable and some injunctive relief is possible.

The APA safeguards the integrity of the USDA complaint system, providing a cause of action if the agency fails to adhere to its own regulations. *See Lopez v. Fed. Aviation Admin.*, 317 F.2d 242, 247 (D.C. Cir. 2003) (holding that a court's duty to enforce an agency's regulations is especially necessary where the regulations provide the only safeguard individuals have against unlimited agency discretion). An ECOA claim addresses a different harm - - a lender's discrimination in its lending practices. 15 U.S.C. § 1691(a). Moreover, even if an ECOA claim could reach a claim for USDA's failure to investigate (and it cannot), allowing a Plaintiff two additional years to file an expensive, time consuming ECOA lawsuit that many

women farmers cannot afford and do not have the sophistication to commence and pursue, is not an alternative remedy for an APA claim, which seeks to have the agency adhere to its own obligations to conduct investigations and grant appropriate agency-focused relief. A lawsuit is not a substitute for USDA's internal complaint process.

In contrast to the District Court's Order disallowing Plaintiffs' APA claim, two other district courts in this Circuit have held that the failure to investigate claims of discrimination under comparable circumstances was an appropriate basis for an APA claim. See *Pigford v. Glickman*, 185 F.R.D. 82, 86 & n.1, 94 (D.D.C. 1999) (Friedman, J.); *Keepseagle v. Veneman*, No. Civ. A. 9903119EG51712, 2001 WL 34676944 at *1, *15 (D.D.C. Dec. 12, 2001).⁴ In granting class certification, both the *Pigford* and *Keepseagle* courts apparently recognized causes of action under the APA.

There is a solid legal basis for the rulings in *Pigford* and *Keepseagle*. The Supreme Court's opinion in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), supports the recognition of an APA claim for failure to investigate complaints. In *Bowen*, the Supreme Court determined that the "no alternative remedy" language of the APA, 5 U.S.C. § 704, was intended to preclude additional judicial remedies only in instances where Congress has already enacted statutes providing for adequate judicial review of agency action. 487 U.S. at 903. The prohibition on alternative remedies was intended only to avoid duplication and "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Id.* See also *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) ("Congress intended by that provision

⁴ The district court's ruling in *Keepseagle* was left undisturbed after interlocutory review by this Court. *In re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002) (finding nothing manifestly erroneous with the district court's certification of the *Keepseagle* class based on USDA's failure to process complaints establishing the commonality and typicality required under Rule 23(a)).

simply to avoid duplicating previously established special statutory procedures for review of agency actions.”); *accord Esch v. Yeutter*, 876 F.2d 976, 982 (D.C. Cir. 1989).

Similarly, this Court has recognized the validity of an APA claim where an agency has failed to adhere to its own regulations or guidelines. For example, in *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), this Court recognized a cause of action under the APA arising from the Defense Intelligence Agency’s failure to follow its own regulations relating to the termination of an employee, that was separate from the Plaintiff’s discrimination claim. *See also Mass. Fair Share*, 758 F.2d at 711-12 (APA cause of action arising from agencies’ failure to follow federal register announcement and guideline manual); and *Holden v Finch*, 446 F.2d at 1315-17 (judicial review of termination of probationary employee of Department of Health, Education and Welfare where termination allegedly violated agency regulations).

Here, the District Court’s finding that no valid APA claim could be stated because 7 U.S.C. § 2279 Note provided an “adequate remedy” in a court is inconsistent with the holdings of *Bowen*, *Darby*, *Esch*, and the holdings of this Court, which allow for APA claims when no adequate cause of action in court is available. This Court’s resolution of the conflicting holdings on the issue of whether an APA claim exists would allow for consistent decisions to be made in all of the farmer discrimination cases and would guide other litigants who will file APA claims in this Circuit. The presence of conflicting rulings within this Circuit provides an appropriate basis for this Court to grant interlocutory appeal. *APCC Servs.*, 297 F. Supp. 2d at 97.

B. APA Claim for Discriminatory Denial of Non-Credit Benefits

A substantial conflict of law also exists with regard to Plaintiffs’ APA claim arising out of USDA’s discriminatory denial of farm non-credit benefits. The District Court based its denial of Plaintiffs’ APA claim arising out of USDA’s discriminatory denial of non-credit farm benefits

on Plaintiffs' failure to file an amended complaint. The failure to file an amended complaint when the proceedings were stayed and the case was on remand for the limited purpose of briefing the substantive APA issues, should not form the basis for the District Court's determination on the substantive issue of whether an APA claim may be asserted. Plaintiffs made it clear throughout the post-remand briefing that they were prepared to amend their complaint in the event that the Court lifted the stay and allowed them to move forward with their APA claims. The District Court's denial of an APA claim based on a refusal to allow amendment of the pleadings to add a new Plaintiff is contrary to the liberal pleading permitted under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 15(a).

III. Certification Would Materially Advance the Disposition of the Litigation.

Interlocutory review will materially advance litigation where “[a]n immediate appeal would conserve judicial resources and spare the parties from possibly needless expense...” *APCC Servs.*, 297 F. Supp. 2d at 100. An immediate appeal in this case would substantially further the disposition of this litigation by resolving the key questions of whether Plaintiffs may maintain their APA claims, whether they can do so in a single proceeding along with their ECOA claims, and whether they may pursue their claims as a class action.

Interlocutory review of Plaintiffs' APA claims would be a more efficient use of judicial and litigants' resources. An appellate determination of the viability of Plaintiffs' APA claims at this juncture will enable Plaintiffs, and putative class members, to determine whether they can proceed with both ECOA and APA claims in a single proceeding. Otherwise, if the Order is ultimately reversed but Plaintiffs have already proceeded to trial on their individual ECOA claims, they would be faced with a second trial on their APA claims. Interlocutory appeal of the APA claims at this juncture would insure that if Plaintiffs are found to have cognizable APA

claims, they can be tried in a single proceeding at the same time as the ECOA claims. This would conserve both Plaintiffs' and the courts' resources, and obviate the possibility of expensive and time-consuming duplicative proceedings. *See Philip Morris*, 2004 WL 1514215, at *3 (citing *APCC Servs.*, 297 F. Supp. 2d at 100).

Moreover, if this Court affirms the Order, interlocutory appeal at this time would still advance the litigation. If the Order is affirmed, the individual ECOA cases that proceed thereafter, perhaps transferred to other jurisdictions for further proceedings, will do so without APA claims. After their respective trials, the appeals of those individual ECOA cases could proceed without burdening appellate courts all over the country with the review of the Order and without risking different rulings from different appellate courts.

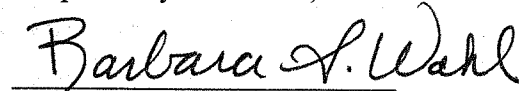
In addition, interlocutory review of the APA claim will also likely determine whether the District Court would permit the Plaintiffs to proceed as a class. The District Court has previously indicated that the presence of a cognizable APA claim could form the basis to certify a class. *See* Transcript of Scheduling Conf. in *Garcia*, June 28, 2006, at 18 ("So why don't we just talk about the APA claim and not the class certification claim, and if the APA claim survives, then [Government counsel] might even agree with you that there's a class."). Present determination of whether the case should proceed as a class or with individual Plaintiffs prosecuting their own claims would allow the parties and the District Court to determine the posture for the case to go forward towards final resolution. Whether this Court affirms or reverses, its interlocutory ruling on the APA issue will obviate uncertainty as to how the Plaintiffs should proceed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court permit Plaintiffs to conduct an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) of the District Court's November 30, 2007 Order dismissing Plaintiffs' APA claims.

Date: January 31, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2008, I served a true and correct copy of Plaintiffs' Petition For Permission To Take An Interlocutory Appeal Pursuant To 28 U.S.C. § 1292(b) upon all parties, representatives and attorneys in this cause of action, by serving same via first class, postage prepaid on:

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Addendum 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, et al., :
 :
 Plaintiffs, :
 :
 v. : Civil Action No. 00-2502 (JR)
 :
 CHARLES F. CONNOR, Acting :
 Secretary, U.S. Department of :
 Agriculture, :
 :
 Defendant. :

ORDER

For the reasons set forth in the accompanying memorandum, plaintiffs' claims under the Administrative Procedure Act are **DISMISSED**.

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, et al.,	:
	:
Plaintiffs,	:
	:
v.	: Civil Action No. 00-2502 (JR)
	:
CHARLES F. CONNOR, Acting	:
Secretary, U.S. Department of	:
Agriculture,	:
	:
Defendant.	:

MEMORANDUM

This case is here on remand from the Court of Appeals for "further development" of the merits of the plaintiffs' claims under the APA. Love v. Johanns, 439 F.3d 723, 732-33 (D.C. Cir. 2006); Garcia v. Johanns, 444 F.3d 625, 636-637 (D.C. Cir. 2006) (companion case). The facts have been stated elsewhere and will be summarized only briefly here.

Plaintiffs are women farmers who allege discrimination by USDA in the administration of its farm benefit programs, and who further complain that USDA utterly failed to process or investigate their discrimination complaints when they filed them with the agency many years ago. There 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. See generally USDA Civil Rights Action Team Report: Civil Rights at the U.S. Dept. of

Agriculture, [80, Exhibit 3]; 144 Cong. Rec. S11,433 (Sen. Robb). When Congress learned of this state of affairs, it extended for two years the period of limitations for any cause of action that a plaintiff might bring to redress claims she had filed with USDA in an "eligible complaint." See Pub. L. No. 105-277, 112 Stat. 2681-30, Title VII, Sec. 741 (codified at 7 U.S.C. § 2279 Note) (hereafter "\$ 741"). Eligible complaints were defined as complaints filed with USDA between 1981 and 1996 that complained of violations of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 et seq., or of discrimination in the administration of a commodity assistance or disaster relief program. See § 741(e). Plaintiffs filed this action days before that extended period ran out. They seek relief both for USDA's alleged discrimination and for USDA's failure to investigate.

In earlier proceedings, I denied a motion to certify a plaintiff class alleging discrimination in violation of ECOA but found that some individual plaintiffs may have viable ECOA claims. I also dismissed plaintiffs' attempt to bring their failure to investigate claim under ECOA. The Court of Appeals affirmed these rulings. Love, 439 F.3d at 728-732 (D.C. Cir. 2006). What remains on this remand is the question whether plaintiffs' failure to investigate claim can be brought under the APA, and whether certain ancillary claims of discrimination in

the administration of non-credit benefits can proceed under the APA as well.

Analysis

A. The Regulatory Regime

The regulations that bear upon this case have changed over time. In 1981, departmental regulations stated that persons could file discrimination complaints, that they would be handled "in accordance with the procedures established . . . for the handling of complaints or appeals . . . which are not based on discrimination," and that the "investigative function . . . shall be discharged by the Office of the Inspector General in the manner determined by the Inspector General." See 31 Fed. Reg. 8175. In 1985, this regulation was amended to replace the Office of the Inspector General with the Assistant Secretary for Administration, but the provision that the investigative function would be discharged "in the manner determined by the Assistant Secretary" was unchanged. See 50 Fed. Reg. 25687.

In 1989, the provision that discrimination complaints would be processed in the same manner as other complaints disappeared.¹ Also, the regulation was amended to read: "The Director, Office of Advocacy and Enterprise, will make determinations as to the merits of complaints under this subpart

¹ Apparently to no effect. No procedures for complaints "not based on discrimination" have been identified by either party.

and as to corrective actions required to resolve the complaints." See 54 Fed. Reg. 31163 (emphasis added). The commentary that accompanied publication of the final rule noted that this change was intended to "authorize" the Office of Advocacy and Enterprise to investigate and make determinations on complaints, and to clarify delegations of authority. Id.

In 1999, after Congress passed § 741 and after the expiration of the period Congress had established for "eligible complaints," the regulations were amended again. References to the Office of Advocacy and Enterprise were replaced with references to the Office of Civil Rights, and a provision that the "complain[ant] will be notified of the final determination on his or her complaint" was added. See 64 Fed. Reg. 66709; 7 C.F.R. § 15d.4. Also in 1999, the Department promulgated an internal "departmental regulation" specifying, apparently for the first time, the manner in which investigations would be conducted. See Nondiscrimination in USDA-Conducted Programs and Activities, DR-4330-3 [*Garcia Dkt.* 150, Exhibit 15].

The evolution of these regulations sheds at least some light on the question whether they imposed a duty to investigate discrimination claims at the time that plaintiffs filed their eligible complaints, or instead only "authorized" such investigations and described the manner in which they would be carried out. Although I find that to be an interesting

question,² the parties evidently do not. The government may even have implicitly conceded that the regulations did impose a duty to investigate - focusing its argument instead on the assertion that its exercise of that duty is unreviewable for lack of manageable standards. See Webster v. Doe, 486 U.S. 592 (1988); Heckler v. Cheney, 470 U.S. 821 (1985); Slyper v. Attorney General, 827 F.2d 821 (D.C. Cir. 1987).

In any event, both questions - 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.

B. Adequate Alternative Remedy

The APA provides for judicial review only where plaintiffs have "no other adequate remedy in a court." 5 U.S.C. § 704. The definitive interpretation of this section comes from Bowen v. Massachusetts, 487 U.S. 879 (1988), where the Supreme Court cited Attorney General Clark's manual on the APA for the proposition that § 704 "does not provide additional judicial remedies in situations where the Congress has provided special

² I doubt that regulatory language describing which office "will" investigate complaints necessarily creates a judicially enforceable entitlement to an investigation, much less an entitlement to the "effective system for investigating and timely responding to complaints" that plaintiffs ask me to forge and oversee by injunction. [78] at 29.

and adequate review procedures." Id. at 903. In this case, it is clear that Congress has expressly addressed the exact injury of which plaintiffs complain, and provided a "special" and "adequate" remedy for their wrong.

The remedy that Congress fashioned to deal with years of neglect and malfeasance by the Department of Agriculture was "special" because it was an express response to the injuries of these very plaintiffs. The "special" intent of Congress appears on the face of the Congressional Record, see 144 Cong. Rec. S11,433 (Sen. Robb), and is made self-evident by the definition of "eligible complaint" and the limitation of the extension remedy to those persons who actually filed complaints that had been neglected.

The special remedy Congress provided is also plainly "adequate." Not only did it extend all applicable periods of limitation for those prejudiced by agency inaction, but it also allowed any eligible complainant to "seek a determination on the merits of the eligible complaint by the Department of Agriculture" - in other words, to take up her complaint again with the agency. § 741(b). The legislation required the agency to process such renewed complaints within 180 days if possible, required the agency to award appropriate relief, and required the agency to afford a hearing on the record before making a determination. § 741(b)(1)-(3). Congress also provided for de

novo review of any such determination in federal court.

§ 741(c). In short, Congress's remedy allowed any member of the group plaintiffs seek to represent to renew her complaint with the agency and to get her long-delayed investigation conducted before going to court to vindicate her underlying claim of discrimination if the agency's determination was not entirely to her liking. Congress did not require exhaustion of this newly-enacted procedure, however, and no plaintiff states that she resorted to it before joining this action.

Even in the absence of the "special and adequate" procedures Congress enacted to remedy plaintiffs' particular injuries, circuit precedent precludes an APA suit against an agency charged with overseeing and policing discrimination where a direct cause of action for discrimination exists. The issue has been brought again and again to the D.C. Circuit, and it has repeatedly reaffirmed its en banc decision in Council of and for the Blind v. Regan, 709 F.2d 1521 (1983).

Council of and for the Blind denied APA review of the alleged failure of federal officers to terminate the federal funding of discriminating entities because direct suits for discrimination against state and local governments were an adequate remedy. The court was troubled by a hypothetical world in which every instance of agency recalcitrance would require a court to enter an injunction or contempt order. See Council of

and for the Blind, 709 F.2d at 1532. It rejected the suggestion of amicus that it oversee "an investigation of the specific and ongoing practices of [the agency]," noting that such a role would be "more properly conducted by a Congressional subcommittee as part of its oversight function." Id. at 1533.

Two considered opinions of then-Judge Ruth Bader Ginsburg endorsed and elaborated upon the reasoning of Council of and for the Blind. In Coker v. Sullivan, 902 F.2d 84 (D.C. Cir. 1990), Judge Ginsburg noted the circuit's

previously expressed hesitation to position this court as supreme supervisor of federal agency enforcement, a role more effectively performed by the Executive under congressional scrutiny. See Council of and for the Blind, 709 F.2d at 1532. As we explained in that case, the APA specifically provides that, if other remedies are adequate, federal courts will not oversee the overseer.

Id. at 89. The basis for this rule is not only the language of the APA, but a concern about traversing unnecessarily into territory beyond the institutional competence of the courts - especially where traditional suits at law are available to remedy the core injury at issue.

In Coker, eligible families had sued to compel the Department of Health and Human Services to monitor states' compliance with the requirements of the Emergency Assistance (EA) program. The court concluded that direct suits for assistance grants were an adequate remedy foreclosing oversight relief

against the federal government under the APA. The court noted that "the critical injury plaintiffs allege is the denial of EA to eligible families," Coker, 902 F.2d at 90 n.5, and reiterated that, under Council of and for the Blind, the APA bars "suits where a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action." Id. (internal quotation omitted). The application of that holding to this case, where "the critical injury plaintiffs allege" is only a different kind of government benefit, is plain.

In Women's Equity Action League (WEAL) v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990), Judge Ginsburg reiterated her Coker position. WEAL finally terminated twenty years of litigation in which the district court had come to serve "as nationwide overseer or pacer of procedures government agencies use to enforce civil rights prescriptions." Id. at 744. The court held that direct suits for discrimination against educational institutions constituted an adequate remedy precluding APA review of the enforcement and oversight work of the Department of Education. The court made clear that although the alternative of "[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief," they were still "an adequate, even if imperfect, remedy." Id. at 751. See also Washington Legal Foundation v. Alexander, 984 F.2d 483

(D.C. Cir. 1993) (direct action under Title VI was adequate remedy precluding review under the APA even if the remedies under Title VI and the APA would be markedly different); Nat'l Wrestling Coaches Assoc. v. Dept. of Ed., 366 F.3d 930 (D.C. Cir. 2004) (direct action under Title IX was adequate remedy precluding review under the APA).

The rule that emerges from this unbroken line of circuit decisions is that, where a victim of discrimination can sue directly to remedy her injury, no action will lie under the APA for failure to adequately investigate, monitor, or police that discrimination.

Plaintiffs' attempt to distinguish that rule, and the Council of and for the Blind line of cases, is unpersuasive. It relies chiefly on McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984). The 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 - for example, it failed to give notice two weeks in advance of termination. The court allowed her APA claim and her discrimination claim to go forward simultaneously, id. at 791, but it did not even cite to Council of and for the Blind, and it noted that McKenna's "claim of arbitrary treatment [was] entirely independent of her discrimination claim." McKenna, 729 F.2d at 791. The independence of the two claims distinguishes McKenna, and not the

Council of and for the Blind line of cases, from the case at bar, for whatever can be said of plaintiffs' APA claim here, it is certainly not "entirely independent" of their underlying claims of discrimination.

Plaintiffs also rely heavily on the fact that Council of and for the Blind and WEAL concerned discrimination by third parties rather than the government. Yet this fact is legally irrelevant. As the cases make clear, what matters is whether the injury can be remedied in a non-APA suit, not the identity of the target in that potential alternative action. See, e.g., Washington Legal Foundation v. Alexander, 984 F.2d at 486; Coker v. Sullivan, 902 F.2d at 90 n.5.

C. Non-Credit Benefits

A small remaining issue between the parties is the viability of claims under the APA for discrimination in the administration of non-credit benefits. Such claims cannot be brought under ECOA because they are not related to credit transactions, and defendant has not argued that these alleged acts of discrimination can be remedied under another federal law. Section 704 of the APA thus does not appear to be implicated. The Council of and for the Blind cases are also inapplicable because this APA action complains directly of discrimination, not of failure to investigate or police discrimination. Yet even if an APA action could be maintained for these non-credit instances

of discrimination, there appears to be no mention in the third amended complaint of a plaintiff who actually suffered such discrimination. See [78]. There is also no proper motion pending to amend the complaint to demonstrate that any named plaintiff has standing to litigate such a claim. There is thus no reason to allow this additional APA cause of action to be maintained at this time.

* * * * *

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

Addendum 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 00-2445 (JR)
	:	
ANN V. VENEMAN, Secretary,	:	
United States Department of	:	
Agriculture,	:	
	:	
Defendant.	:	
<hr/>		
ROSEMARY LOVE, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 00-2502 (JR)
	:	
ANN V. VENEMAN, Secretary,	:	
United States Department of	:	
Agriculture,	:	
	:	
Defendant.	:	

ORDER

The motions of plaintiffs in these two cases (00-2445 Garcia [#165]; 00-2502 Love [#99]) to certify for interlocutory appeal the nearly identical orders of this court dated November 30, 2007 (00-2445 Garcia [#159]; 00-2502 Love [#94]) are **granted**. The Court finds that such orders involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order(s) may materially advance the ultimate termination of the litigation(s). All District Court proceedings in these two cases are **stayed** while plaintiffs' appeals are pending. Previously

entered orders staying the operation of the statute of limitations (00-2445 Garcia [#163]; 00-2502 Love [#96]) remain in effect. It is **SO ORDERED**.

JAMES ROBERTSON
United States District Judge

Addendum 3

CERTIFICATE OF PARTIES

I HEREBY CERTIFY that the following individuals are Plaintiffs in the Third Amended Complaint in the District Court action:

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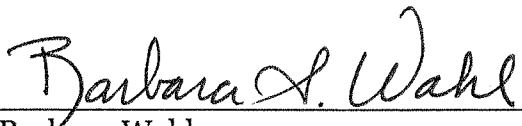
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The defendant in this action is Charles F. Conner in his capacity as Acting Secretary of the United States Department of Agriculture.

No amici have sought to intervene in this petition for appeal as of this date. Nor have any amici intervened in any of the district court proceedings in this case to date.



Barbara Wahl