

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00CV02445
)	
MICHAEL JOHANNNS, Secretary of)	Judge: James Robertson
Agriculture,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S OPPOSITION TO PLAINTIFFS’ REQUEST
FOR ADMINISTRATIVE PROCEDURE ACT REVIEW**

INTRODUCTION

This case was remanded for a single and narrow purpose -- to further explore whether plaintiffs’ claim that USDA failed to investigate their civil rights complaints is reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”). Garcia v. Johanns, 444 F.3d 625, 637 (D.C. Cir. 2006). On appeal, plaintiffs apparently decided not to press this issue or present a full-fledged argument on it. See id. However, the matter was thoroughly developed before this Court,¹ which properly determined that “the allegation of failure to investigate plaintiffs’ civil rights complaints fails to state a claim upon which relief can be granted under the APA.” Love v. Veneman, No. 00-2502 (D.D.C. Dec. 13, 2001), Memorandum at 13; Garcia v. Veneman, No. 00-2445, 2002 WL 33004124, at *1 (D.D.C. March 20, 2002). Plaintiffs have provided no basis for altering that conclusion, nor has the Court of Appeals ever suggested it was

¹ See, e.g., Dec. 22, 2000 Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss and to Strike Class Action Allegations at 30-42.

incorrect.

As this Court found, APA review of plaintiffs' claim that USDA failed to investigate their administrative complaints of credit discrimination is precluded because the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq. ("ECOA"), provides an adequate remedy for plaintiffs' underlying claims of discrimination. Love v. Veneman, No. 00-2502 (D.D.C. Dec. 13, 2001), Memorandum at 14. Furthermore, there are no standards under applicable law for the processing of civil rights complaints, a matter which is left entirely to USDA's discretion and is therefore unreviewable under the APA. Finally, plaintiffs lack standing to seek equitable relief under the APA to enjoin future injury where the alleged failure to investigate occurred years ago, is not alleged to be an ongoing problem, and is unlikely ever to recur with respect to these plaintiffs. For these reasons, as explained further below, plaintiffs' request for APA review of their failure-to-investigate claim should be denied.

BACKGROUND

A. The USDA Process for Handling Civil Rights Complaints

USDA has long-standing, internal management guidelines proscribing discrimination based on "race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or because all or part of an individual's income is derived from any public assistance program," in the administration of any of its direct programs and activities. See 7 C.F.R. Part 15d. USDA's Farm Service Agency ("FSA") also has its own, corresponding non-discrimination policy. See 7 C.F.R. § 1901.202(b). Since their promulgation in 1966, these internal guidelines have included an administrative mechanism under which persons who believe they have been the victims of discrimination in any USDA program could file a written

complaint with USDA. 7 C.F.R. § 15.52 (31 Fed. Reg. 2645 (2/11/66), amended 31 Fed. Reg. 8175 (6/10/66)).

Under 7 C.F.R. Part 15d, participants in FSA programs who believe that they have been discriminated against may file, within 180 days of the alleged discrimination, a written complaint with USDA's Office of Civil Rights ("OCR").² 7 C.F.R. § 15d.4. OCR may then investigate the complaint and determine what corrective actions, if any, are required to resolve it. See 7 C.F.R. § 15d.4. The predecessor regulations to Part 15d make similar provisions for the filing of discrimination complaints with USDA and their investigation. See, e.g., 7 C.F.R. § 15.52 (1966-99). As stated upon adoption of its most recent version, Part 15d is an internal mechanism for USDA to police itself and correct any prohibited discriminatory conduct, see 64 Fed. Reg. 66709 (November 30, 1999). Prior versions of Part 15d also described it as an "internal agency management" rule. See, e.g., 54 Fed. Reg. 31,163 (July 27, 1989); 50 Fed. Reg. 25,687 (June 21, 1985).

B. Equal Credit Opportunity Act

In 1974, Congress enacted ECOA to prevent discrimination in the field of consumer credit. ECOA makes it "unlawful for a creditor to discriminate against any applicant with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age[.]" 15 U.S.C. § 1691(a). Section 1691e creates a private right of action against creditors who violate ECOA's anti-discrimination provisions. Under subsection (a), "[a]ny creditor who fails to comply with any requirement imposed under [ECOA] shall be liable

² Formerly, the handling of complaints rested with the Office of Advocacy and Enterprise, as denominated in earlier versions of the regulation, and then, the Office of Civil Rights Enforcement.

to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.” 15 U.S.C. § 1691e(a).

Originally, no private district court action could be brought later than two years after the occurrence of the alleged ECOA violation. See 15 U.S.C. § 1691e(f). However, on October 21, 1998, Congress amended ECOA’s limitations provision, so as not to bar a civil action seeking relief with respect to discrimination alleged in an “eligible complaint” against USDA, if the action was commenced not later than two years after the enactment of the amendment. See Omnibus Consolidated and Emergency Supplemental Appropriation Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2279 note) (hereinafter “section 741”). Congress passed section 741 “specifically because the USDA ‘failed to make timely and adequate response to discrimination complaints and the statute of limitations has expired through no fault of the complainant.’” Love v. Veneman, No. 00-2502 (D.D.C. Dec. 13, 2001), Memorandum at 8 n.7 (quoting H.R. Rep. No. 105-593 at 2 (1998)).

An “eligible complaint” is defined as:

a non-employment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending on December 31, 1996 —

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. § 1691 et seq.) in administering — (A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or (B) a housing program established under title V of the Housing Act of 1949; or

(2) in the administration of a commodity program or a disaster assistance program.

7 U.S.C. § 2279 note. Thus, ECOA actions pursuant to section 741 may be filed if before July 1, 1997, the complainant had “filed with the Department of Agriculture” a “nonemployment related

complaint” alleging discrimination under ECOA that occurred between January 1, 1981, and December 31, 1996.

ARGUMENT

I. Plaintiffs’ Denial-of-Disaster-Benefits Claims Is Not Properly Before the Court

As an initial matter, plaintiffs’ claim that defendant discriminatorily denied them disaster benefits is not properly before the Court at this time. Plaintiffs have alleged two types of APA claims, the failure-to-investigate claim and the denial-of-disaster-benefits claim. The Court of Appeals expressly limited its remand to “the APA failure-to-investigate claim.” Garcia, 444 F.3d at 637. Moreover, in its June 28, 2006 Order, this Court directed plaintiffs to file a brief “addressing the Administrative Procedure Act issues remanded by the United States Court of Appeals”. Therefore, there is no basis for the Court to consider the denial-of-disaster-benefits claim on remand, nor is there any reason for it to revisit the issue. Despite plaintiffs’ suggestion to the contrary,³ the only claim subject to “further development” which can be properly considered by the Court at this time is plaintiffs’ APA failure-to-investigate claim. Id.

Moreover, the Court has already ruled that plaintiffs’ denial-of-disaster-benefits claim is viable, see Garcia, 2002 WL 33004124, at *1 (“A final agency action denying a disaster benefit is . . . reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704.”), and noted that one individual, Gloria Moralez, has raised such a claim.⁴ Id. Because Ms. Moralez is the

³ Plaintiffs’ Brief in Support of Claims that Defendant’s Unlawful Failure to Investigate Plaintiffs’ Discrimination Complaints and the Discriminatory Denial of Benefits Are Reviewable Under the Administrative Procedure Act (“Pl. Brief”) at 6.

⁴ Plaintiffs have admitted that their non-credit claims comprise only about 1% of their total claims. Feb. 5, 2001 Plaintiffs’ Opposition to Defendant’s Motion to Dismiss and to Strike Class Action Allegations at 17.

only named plaintiff to raise a disaster benefit claim, see Third Amended Class Action Complaint, and because class certification has been denied, Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006), her allegation exists as an individual claim which should be litigated when the Court addresses the merits of all the individual plaintiffs' claims. Since this Court already has held that Ms. Morales's denial-of-disaster-benefits claim is reviewable under the APA, plaintiffs' arguments concerning that claim should not have been included in their brief and should be disregarded.⁵

II. The APA's Waiver of Sovereign Immunity Does Not Apply to Plaintiffs' Failure-to-Investigate Claim

The APA, 5 U.S.C. §§ 701-06, waives the government's immunity from certain suits challenging administrative agency action and seeking relief other than money damages. 5 U.S.C. § 702. It provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" 5 U.S.C. § 706(2)(A). On this basis, plaintiffs argue that their failure-to-investigate claim is reviewable under the APA. As we now explain, the APA's waiver of sovereign immunity does not apply to that claim.

A. The APA's Waiver of Sovereign Immunity Does Not Apply Because "Other Adequate Remedies" Are Available

Section 704 of the APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; see Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate

⁵ Even if the disaster benefits claim were properly before the Court, it would not be eligible for APA review because the APA's waiver of sovereign immunity does not apply to it for the same reasons it does not apply to the failure-to-investigate claim, as described below.

existing procedures for review of agency action"). Plaintiffs have an adequate, alternative judicial remedy for defendant's claimed failure to investigate their civil rights complaints. Thus, the APA's waiver of sovereign immunity does not extend that claim.

Nothing in plaintiffs' most recent submission can mask the fact that this suit is focused on alleged discrimination in USDA credit programs. As noted earlier, only one plaintiff raises a claim that she was denied disaster benefits. The remainder of the complaint is devoted to claims regarding alleged discrimination toward Hispanic farmers in USDA's lending practices. Thus, to the extent plaintiffs complain about USDA's failure to investigate administrative complaints of discrimination they allegedly filed under 7 C.F.R. § 15.52, those complaints all arose out of precisely the same credit transactions on which plaintiffs' ECOA claims are based. See Third Amended Complaint ("Complaint") ¶¶ 5, 8, 24, 27, 33. Moreover, aside from a requested declaration that defendant's actions are generally unlawful, Complaint, Prayer for Relief ¶ 1, none of the relief requested in the complaint pertains at all to the alleged failure to investigate. See Prayer for Relief. Rather, plaintiffs seek injunctive or other relief relating exclusively to the provision of farm loans or non-credit benefits. Id. ¶¶ 2-7.

Congress expressly preserved the remedy provided by ECOA for defendant's alleged failure-to-investigate claims when, by enacting section 741, it extended ECOA's statute of limitations with respect to the underlying claims of credit discrimination on which plaintiffs' failure-to-investigate claims are based. In fact, Congress extended the statute of limitations "precisely because of USDA's failures to investigate." Love v. Veneman, No. 00-2502 (D.D.C. Dec. 13, 2001), Memorandum at 14; see also H.R. Rep. No. 105-593 at 2. Given that Congress has provided an adequate remedy under ECOA, plaintiffs simply cannot maintain their APA

claims. National Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 945-48 (D.C. Cir. 2004) (holding that section 704 precluded APA review of Education's Title IX enforcement policy based on adequate legal remedies available to plaintiffs); Washington Legal Found. v. Alexander, 984 F.2d 483, 486 (D.C. Cir. 1993) (ruling that because plaintiffs had an implied right of action under Title VI against federally-funded educational institution, section 704 precluded APA review); Women's Equity Action League v. Cavazos, 906 F.2d 742, 750-51 (D.C. Cir. 1990) (same); Council of and for the Blind, 709 F.2d at 1531-33 (finding APA review precluded where statutory remedy against state and local governments was adequate).

Plaintiffs' attempt to distinguish this line of cases is unavailing. Pl. Brief at 15. The lynchpin of these holdings was the existence of an adequate remedy at law for the plaintiffs, regardless of whether that remedy lay against private parties rather than a federal agency. On this basis, the courts held that review was unavailable under the APA, 5 U.S.C. § 704. Women's Equity Action League, 906 F.2d at 751; Alexander, 984 F.2d at 486; see also Coker v. Sullivan, 902 F.2d 84, 90 n.5 (D.C. Cir. 1990) (holding that APA bars suit where a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action).

Plaintiffs misconstrue Bowen v. Massachusetts, 487 U.S. 879 (1988), as standing for the proposition that the APA does not preclude additional judicial remedies as long as they are different from the remedies previously established by Congress. Pl. Brief at 14. That is not what the Court held. The issue in Bowen was whether a federal district court action was barred under the APA, 5 U.S.C. § 704, where the government alleged that the Claims Court was the exclusive forum for judicial review of the type of agency action in question. 487 U.S. at 992-83. The

Court ruled that “the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court.” Id. at 901. Its holding is therefore perfectly consistent with the view that where Congress has provided for “adequate review procedures” to remedy particular injuries, see id. at 904 n.39, as it has here for plaintiffs under ECOA, review under the APA would duplicate existing procedures and is therefore not available, see id. at 903.⁶

Nor do plaintiffs have a right to maintain an action under the APA even if they believe they could obtain a more effective remedy under that statute than under ECOA. See Council of and for the Blind, 709 F.2d at 1532 (observing that the other available remedy was adequate even if less effective than the APA remedy). This principle reflects Congress's intent that the APA not create an additional remedy for particular agency action for which Congress has established a specific review process. Bowen v. Massachusetts, 487 U.S. at 903; Women's Equity Action League, 906 F.2d at 750-51 (holding that APA review is precluded where another statutory remedy exists for the specific form of discrimination alleged) (citing Council of and for the Blind, 709 F.2d at 1531-33). The principle adheres notwithstanding the fact that plaintiffs may not prevail on their ECOA claims. Pl. Brief at 16. See Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (noting that in FDIC v. Meyer, 510 U.S. 471 (1994), the Court “found sufficient” a remedy against the individual officer “which respondent did not timely pursue”); see

⁶ Plaintiffs’ reliance on McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984), for the argument that their ECOA claims do not preclude a companion claim under the APA, Pl. Brief at 16, is also wrong. The plaintiff’s APA claim in McKenna was not one of discrimination, and since Title VII is the exclusive remedy only for employment discrimination claims, the Court held that the plaintiff was not precluded from bringing her APA claim independently. Here, by contrast, plaintiffs’ purported APA claim involves an allegedly discriminatory failure to investigate precisely the same claims of discriminatory conduct on which their ECOA claims are based. Their APA claim is therefore based on the same cause of action as the ECOA claim and is inextricably linked to it. Thus, the proper remedy is under ECOA.

also Mitchell v. United States, 930 F.2d 893, 897 (Fed. Cir. 1991) (holding that available remedy in Claims Court was adequate even though the plaintiff's claim in that court may have been time-barred); McGregor v. Greer, 748 F. Supp. 881, 884 (D.D.C. 1990) (holding that Civil Service Reform Act provided an adequate remedy for employee to challenge discharge even though the Act specifically exempted her, as a Schedule C excepted service employee, from its remedial provisions). Finally, to hold that Section 704 permits review of plaintiffs' administrative complaints of credit discrimination would cause exactly the sort of problem that provision was intended to address, viz., defendant could be found liable under the APA for not investigating a claim of credit discrimination that was found to be meritless under ECOA after trial. Cf. Bowen, 487 U.S. at 903 ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."). Therefore, the APA does not apply to provide a waiver of sovereign immunity for plaintiffs' failure-to-investigate claims.

B. The Challenged Actions Are Excepted from the APA Waiver Provision Because They Are Committed to Agency Discretion by Law

The APA's waiver of sovereign immunity would be unavailable to plaintiffs even without regard to section 704 because the processing of civil rights complaints has been left entirely to the agency's discretion. The APA does not permit judicial review of "agency action [that] is committed to agency discretion by law," id. § 701(a)(2). In Heckler v. Chaney, 470 U.S. 821 (1985), the Supreme Court held that, although agency action is subject to a presumption of reviewability,

review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute . . . can be taken to have "committed" the decision-making to the agency's judgment absolutely.

Id. at 830; accord Lincoln v. Vigil, 508 U.S. 182, 191 (1993).

Similarly, where a regulation directs an agency to act but provides no meaningful standard by which to assess the manner in which the agency takes the action called for, the regulation provides no basis for review under the APA. See Perales v. Casillas, 903 F.2d 1043, 1047 (5th Cir. 1990); Slyper v. Attorney General, 827 F.2d 821, 824 (D.C. Cir. 1987), cert. denied, 485 U.S. 941 (1988). Thus, judicial review is not available where there are no “judicially manageable standards” by which to measure an agency’s exercise of its discretion, for in that situation “it is impossible to evaluate agency action for ‘abuse of discretion.’” Heckler, 470 U.S. at 830; accord Vigil, 508 U.S. at 191.

Plaintiffs point to no statute, see Pl. Brief at 18-23, for there is none, that sets forth the standards by which the Court could measure USDA’s processing of civil rights complaints. See Love v. Veneman, No. 00-2502 (D.D.C. Dec. 13, 2001), Memorandum at 5 (“There are no administrative review procedures in ECOA itself, 15 U.S.C. §§ 1691 et seq.”). In fact, no statute even requires USDA to create a mechanism to administratively review complaints alleging civil rights violations in FSA’s or its predecessors’ programs, much less sets forth any standards by which the Court could determine whether defendant has abused its discretion. Cf. 42 U.S.C. § 2000e-16(b) (Title VII); 29 U.S.C. §§ 791(a), 794(a), 794a (Rehabilitation Act); 28 U.S.C. § 2672 (Federal Torts Claim Act).

Nor do USDA’s regulations provide any standards for processing civil rights complaints such that judicial review is possible. From 1981-89, 7 C.F.R. § 15.52 (the predecessor to 7 C.F.R. Part 15d) required USDA to handle complaints of discrimination “in accordance with the procedures established by law or regulation of the Department or any of its agencies for the

handling of complaints or appeals under such program or activity which are not based on grounds of discrimination[.]” In the event a complaint of discrimination was filed involving an agency lacking a complaint or appeal procedure established by law or regulation, the complaint could be filed with the Secretary. *Id.* Until 1989 the regulations stated that the investigative function would be discharged “in the manner determined by [USDA].” 7 C.F.R. § 15.52 (1981-1989). After 1989, 7 C.F.R. § 15.52 was entirely silent about what defendant was to do in response to claims of discrimination, other than to “make determinations as to the merits of complaints under [section 15.52] and as to corrective actions required to resolve the complaint.” See also 7 C.F.R. § 15d.4 (from Nov. 30, 1999, to the present).

These are hardly “judicially manageable standards,” as plaintiffs characterize them. Pl. Brief at 18. Quite to the contrary, they do not specify the scope of any investigation of a complaint, or the time frame within which any such investigation was to be completed or any determination made. Nor did the regulation establish the criteria to be considered by USDA in determining what corrective action, if any, was required. In fact, the regulation did not even require that USDA advise a complainant of the status of the complaint or what corrective action, if any, had been taken in response to a complaint.

Section 15.52 and its successors present a situation indistinguishable from the one considered in Slyper v. Attorney General, 827 F.2d 821 (D.C. Cir. 1987). In that case, plaintiff challenged the refusal by the Director of the United States Information Agency to waive the requirement that the non-citizen plaintiffs first return to their country of origin before seeking permanent resident status. The Director had acted pursuant to 8 U.S.C. § 1182(e) and 22 C.F.R. § 514.32, the latter of which provided that “the Director will review the policy, program, and

foreign relations aspects of [a request for waiver of a visa requirement] and will transmit a recommendation to the Attorney General for decision.” Slyper, 827 F.2d at 823-24.

The D.C. Circuit concluded that judicial review of the Director’s decisions was precluded under the APA because the statute and regulation at issue “contain[] no standard or criterion upon which the Director is to base a decision to make or withhold a favorable recommendation.” Id. at 823. In contrast with 8 U.S.C. § 1182(a), which listed thirty-three distinctly delineated categories to guide the State Department’s discretion in denying visas to certain foreigners, the Court found the governing statute before it “devoid of guidance.” Also, because the regulation required only that the Director review waiver applications in light of unspecified “policy, program, and foreign relations aspects of the case,” the Court concluded that the regulation was equally devoid of meaningful direction, thus precluding judicial review. Id. at 824.

7 C.F.R. § 15.52 and its progeny have provided no greater guidance than that provided by the statute and regulations at issue in Slyper. For these reasons, the Court should conclude that the manner in which USDA handled any alleged administrative civil rights complaints is committed to agency discretion and not subject to judicial review under the APA.

III. The Court Lacks Jurisdiction to Consider Plaintiffs’ Allegations About Defendant’s Alleged Failure To resolve Their Administrative Complaints of Discrimination

Even if plaintiffs’ APA claims were not otherwise barred, this Court would lack jurisdiction to consider them because they do not do not satisfy the threshold “case or controversy” requirement imposed by Article III of the Constitution. City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). Plaintiffs must show that they have sustained or are “immediately in danger of sustaining some direct injury as a result of the challenged official

conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.” Id. at 101-02 (internal quotation marks omitted). Plaintiffs cannot do so.

Plaintiffs’ alleged administrative complaints were filed between 1984 and 2000, Complaint ¶¶ 5, 8, 24, 27, 33. Therefore, defendant’s supposed failures to investigate plaintiffs’ administrative claims of discrimination occurred years ago, and the complaint does not allege that the harm plaintiffs suffered is ongoing or likely to recur. Indeed, it appears that all but one of the plaintiffs (Mr. Chavarria, see Complaint ¶¶ 28-33) alleging a discriminatory failure to investigate have abandoned farming altogether. See, e.g., Complaint ¶ 5 (the Garcia “farms were sold at a foreclosure sale in 1999”); id. ¶ 8 (“the Jimenezes are on the verge of losing their farm to foreclosure”); id. ¶ 24 (Ms. Morales “ultimately lost her 80-acre farm”); id. ¶ 27 (the Garzas “abandon[ed] their farm operation”). They are therefore unlikely to suffer harm in the future due to the alleged deficiencies in USDA’s processing of administrative complaints of discrimination with respect to farm loan practices. Lyons, 461 U.S. at 102 (“[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”) (internal quotation marks omitted). Moreover, the complaint fails to allege any continuing, systematic failure on the part of USDA to investigate civil rights complaints such as would be necessary to establish an actual controversy. See id. at 105-06.⁷

Accordingly, plaintiffs have not made the necessary showing of particularized harm that is a prerequisite to obtaining the declaratory and injunctive relief that they seek (see Complaint,

⁷ In any event, plaintiffs have abandoned the administrative process by bringing their underlying discrimination claims to this Court for adjudication.

Prayer for Relief) and that is available under the APA, see 5 U.S.C. § 702, regarding future administrative complaints of national origin discrimination. See Lyons, 461 U.S. at 1670 (“The speculative nature of Lyons’ claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.”). To the extent plaintiffs have suffered injury for the alleged past failure to investigate their civil rights complaints, Congress has specifically provided them with a remedy under ECOA. See, e.g., Lyons, 461 U.S. at 112-13 (noting that while injunctive relief would be withheld where there was no prospect of future injury, the petitioner had a statutory remedy for damages).

CONCLUSION

For the foregoing reasons, plaintiffs’ request for APA review should be denied.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

/s/ Lisa A. Olson

MICHAEL SITCOV
LISA A. OLSON
RUPA BHATTACHARYYA
ELIZABETH GOITEIN
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Mass. Ave., N.W., Room 7300
Washington, D.C. 20530
Telephone: (202) 514-5633
Telefacsimile: (202) 616-8470
E-mail: lisa.olson@usdoj.gov
Counsel for Defendant

Dated: Sept. 27, 2006