IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

XP VEHICLES, INC. et al., Plaintiff, v. THE UNITED STATES DEPARTMENT OF ENERGY et al., Defendants.	Case No. 1:13-cv-00037 (KBJ)

MEMORANDUM IN OPPOSITION TO OFFICIAL CAPACITY DEFENDANTS' MOTION TO DISMISS COUNTS 2, 3, AND 4

SUMMARY

This is a case about two small companies that have been directly and severely damaged by Defendants' cronyism. As the result of decisions made and actions taken by Defendants in this case, politics and political pressure infected the Department of Energy's ("DOE") conduct with respect to both the Advanced Technology Vehicle Manufacturing Loan ("ATVM") and the Section 1703 Loan Guarantee programs. Ver. Compl. ¶¶ 4, 7, 54-63, 84-109, 113, 118. Through these programs, Congress authorized Defendants to hand out tens of billions of American taxpayer dollars and charged them to run honest and fair loan programs that would free the United States from dependence on foreign oil and help support American technology and manufacturing companies. *See* Energy Independence and Security Act, Pub. L. 110-140, 121 Stat. 1492 (Dec. 19, 2007) ("EISA") (declaring the purpose to be: "To move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government").

Instead, Defendants abused their power, treating taxpayer funds as a piggy bank for politically connected and powerful companies and individuals. Ver. Compl. ¶¶ 83, 85-89, 112-18. Of the 144 ATVM loan applications, Defendants have granted only five and distributed billions of taxpayer dollars to politically powerful and connected applicants. *See* Ver. Compl. ¶¶ 90-109.

On March 15, 2013, the Government Accountability Office even said that no more ATVM loans would be made, contrary to the authorizing Congressional directive. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 13-331R, STATUS OF DOE LOAN PROGRAMS 3

(2013). Among other things, this ensures that the politically-connected "winners" of ATVM loans are free from government-funded competition.

Defendants' wrongdoing has put XPV out of business and has hamstrung Limnia. Ver. Compl. ¶¶1, 9, 19, 67-74, 117, 119. Yet Defendants now argue that the Court cannot review their cronyism-infected decisions because they are not "final," that XPV cannot seek any relief because they ran it out of business, and that they are not bound by their promises because of a regulation that was not in effect at the time those promises were made. Defendants' arguments are contrary to well-established controlling authorities and their motion to dismiss should be denied.

STANDARD OF REVIEW

In reviewing whether to dismiss a complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the court will construe such complaint liberally and grant plaintiff the benefit of all inferences derivable from the alleged facts. *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005). The nonmoving party "is entitled to all reasonable inferences that can be drawn in her favor." *Artis v. Greenspan*, 158 F.3d 1301, 1306 (D.C. Cir. 1998). The court will assume the truth of the allegations made. *Flynt v. Rumsfeld*, 355 F.3d 697, 701 (D.C. Cir. 2004).

Defendants' Rule 12(b)(6) motion to dismiss must be denied so long as Plainitffs' claims are "plausible on their face," meaning that the facts pled must allow the court to draw the reasonable inference that the Defendants here are liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009); *Maljack Prods. Inc. v. Motion Picture Ass'n of Am., Inc*., 52 F.3d 373, 375 (D.C. Cir. 1995).

FACTS

Statutory and Regulatory Framework

Congress, when it created the ATVM, gave DOE very clear directions and set plain limits on DOE's discretion to award or deny ATVM loans. For example, in EISA § 136, Congress directed that not later than one year after the date of enactment and subject to the availability of appropriated funds, "[DOE] shall carry out a program to provide a total of not more than $25,000,000,000 in loans to eligible individuals and entities." EISA §136(d)(1). Congress specified application criteria, including financial viability without the receipt of additional Federal funding associated with the proposed project, a demonstration that "the qualified investment is expended efficiently and effectively" and compliance with such "other criteria as may be established and published by" DOE. *Id.* at § 136(3).[1]

Congress did not give DOE unfettered discretion to choose between or reject applicants. It did not authorize DOE to deny otherwise qualified applicants loan funds by way of a secret,

[1]DOE subsequently published regulations under 10 C.F.R. Part 611 setting three stages of review for ATVM loan applicants. First, DOE screens the applicant for eligibility. To pass this phase, the applicant must be either a manufacturer of automobiles or of qualifying components, 10 C.F.R. § 611.100(a); *see also* 42 U.S.C. § 17013(b), and financially viable, 10 C.F.R. § 611.100(c) (setting forth eight factors DOE considers in assessing the applicant's financial viability); *see also* 42 U.S.C. § 17013(d)(3)(B). Second, DOE screens the application for eligibility, assessing whether the application contains all information required by regulation, 10 C.F.R. § 611.101, and whether the proposed loan complies with other statutes and regulations. 10 C.F.R. § 611.103(a). During this second phase of review, DOE is not given authority to reject an applicant for any reason, but rather it can "reject an application, in whole or in part, *that does not meet these requirements*." *Id.* (emphasis added). Third, DOE conducts a substantive review of the application, evaluating it for the technical merit of the proposal; the technical program factors including "economic development and diversity in technology, company, risk, and geographic location," whether the proposed provisions will financially protect the Government; and priority is given to manufacturers that have been operational for the longest amount of time. 10 C.F.R. § 611.103(b); *c.f.* 42 U.S.C. § 17013(g) ("The Secretary shall, in making awards or loans to those manufacturers that have existing facilities, give priority to those facilities that are oldest or have been in existence for at least 20 years or are utilized primarily for the manufacture of ultra-efficient vehicles. Such facilities can currently be sitting idle.").

unpublished, criteria-less "merit review." Nor did Congress authorize DOE to arbitrarily cease making loans to qualified applicants. Yet, DOE has done all of these things.[2] *See* Ver. Compl. ¶ 38 ("XPV's application was 'determined to be eligible'"); *id.* ¶¶ 40-74, 120-23.

Congress also set clear limits on DOE's discretion to grant or deny Section 1703 program guarantees, defining eligible projects and setting loan and repayment terms. *See* 22 U.S.C. §§ 16511 *et seq*. DOE subsequently promulgated rules clarifying these requirements. DOE, *Loan Guarantees for Projects That Employ Innovative Technologies,* 74 Fed. Reg. 63,544 (Dec. 4, 2009). DOE has criteria for LGP applicants and promises to consider applications by using as "competitive process." 10 C.F.R. § 609.7(a).

XPV and Limnia's Travails

XPV was an advanced technology vehicle company and an ATVM Loan applicant. Ver. Compl. ¶¶ 1, 14-19. Responding to a DOE solicitation, XPV applied and offered over $100 million in collateral to secure its request for a $40 million loan to mass produce an advanced, family-friendly electric SUV-style vehicle using polymer plastics and foam pressure membranes wrapped around a lightweight alloy frame. *Id.* ¶ 14, 17. XPV expected to be able to sell a base model of this SUV for around $20,000.00. *Id.* ¶ 14.

Limnia is an advanced technology "green energy" company that has since 2002 worked with DOE's own Sandia National Laboratory on an advanced energy storage system for electric cars with DOE providing grant, technical support and validation services. *Id.* ¶ 12. Limnia

[2] In fact, the statutory language creating the program's language that "the Secretary *shall* carry out a program to provide a total of not more than $25,000,0000 in loans to eligible individuals and entities," could be read to require that DOE continue to allocate funds to the extent that eligible applicants exist. 42 U.S.C. § 17013(d)(1) (emphasis added); *FTC v. Tarriff,* 584 F.3d 1088, 1090 (D.C. Cir 2009) (The word "shall" is mandatory, a carrying with it a fixed usage meaning "something on the order of 'must' or 'will'").

applied for a Section 1703 Loan Guarantee and for $15 million in ATVM Loan funds to build its system (with Sandia as a key subcontractor). *Id.* ¶¶ 68, 77.

XPV's ATVM Loan application was deemed "substantially complete" on December 31, 2008. At all times relevant, XPV qualified for a loan under DOE's published criteria and it was deemed a "qualified applicant" by DOE staff. In fact, DOE's Excel comparison matrices in December, 2008 and March, 2009 placed XPV in the top five percent of all applicants. *See id.* ¶¶ 21-23.

XPV's understanding from DOE was that underwriting review would be consistent with normal industry standards, meaning that it would take only a matter of weeks to determine XPV's eligibility and funding. However, DOE delayed, setting aside XPV's application in favor of applications from politically-favored cronies and campaign contributors. Ver. Compl. ¶¶ 24-26. At the end of April 2009, XPV was notified that it had been assigned a technical eligibility and merit review team. *Id.* ¶ 27. About a month later, XPV was told by DOE that it had passed technical review and that "everything looked good." *Id.* ¶ 28. Shortly thereafter, XPV discovered that two applicants, both with very close ties to the government, were receiving special assistance from DOE with their applications. *Id.* ¶¶ 30, 90-109. XPV requested similar treatment, but was denied same ostensibly because its application was so good that special assistance was unnecessary. *Id.* ¶ 31. On June 15, 2009, XPV advised DOE staff that XPV had been listed among "America's Most Promising Companies" by Forbes Magazine. *Id.* ¶ 32.

On June 29, 2009, five days after DOE announced $8 billion in loans to three companies, all of which had close government ties, XPV wrote asking for a status update. Over the next seven weeks, XPV was given repeated assurances by DOE ATVM program staff that everything was on track and that XPV met every criterion for a loan. XPV's repeated offers to provide

additional technical information, and to make its business team available for interviews with DOE underwriters, were repeatedly denied over a period of months. *Id.* ¶ 25.

On August 21, 2009, XPV received a letter from Defendant Seward denying its application. Seward said that although DOE deemed XPV "eligible" for a loan under the written criteria, XPV had failed to pass a "merit review." Seward did not disclose the criteria for this "review," and they remain a secret to this day. *See id.* ¶¶ 37-38. XPV immediately contacted DOE staff asking for the merit review documents and requesting an explanation for DOE's determination in light of the fact that it had determined XPV to be eligible for a loan but refused over a period of ten months to work with XPV's engineers and business staff for even one percent of the time devoted to the politically-connected companies given loan funds. *Id.* ¶ 40.

XPV then called DOE staff and was told in a phone call some of the reasons in the loan file for its "merit review" failure. Staff said the memo in the file failed XPV because the electric SUV did not use E85 gasoline, because XPV did not plan for government fleet sales, although the business plan given to DOE did do so, and because XPV's advanced technology was too advanced, among other things. *Id.* ¶ 42-44. However, the conversation was cut short when Defendant Seward discovered that staff was speaking with XPV and immediately terminated the phone call. *Id.* ¶ 52.

XPV heard nothing from DOE thereafter. Therefore, it sent Defendant Chu a letter requesting reconsideration of the denial because the bases therefor were inaccurate. It asked him to explain why DOE staff had given XPV repeated assurances of approval, rejected offers of additional information on the project, to describe the merit review criteria. It also asked him to justify why government cronies that applied for ATVM Loan funds after XPV's application had

been submitted were reviewed first, given access to DOE staff to help draft the applications, and then awarded funds when XPV was denied. Chu did not answer. *Id.* ¶¶ 53-54.

Weeks later, Seward responded on Chu's behalf in writing but without addressing XPV's arguments or concerns. Instead, he gave new pretexts for the denial. *Id.* ¶¶ 55-61. He did not say, however, that XPV offered inadequate security for the loan, that it had failed to demonstrate a reasonable prospect of repayment, that it had failed to demonstrate its capability to build, distribute or sell the electric SUV, or that it had failed to demonstrate "financial viability without the loan" as required by law. *Id.* ¶ 64. Nevertheless, the ATVM Loan program dried up other sources of investment capital, and Defendants' wrongful conduct led XPV to collapse. *See id.* ¶ 9.

To benefit and protect the government cronies, bundlers and contributors who had a stake in companies that were seeking ATVM Loan funds, Defendants denied XPV a fair shake. *Id.* ¶¶ 32, 89-93, 99-109, 114-119. Defendants Chu and Seward used opaque "merit criteria" and process to steer taxpayer funds to government cronies. *Id.* ¶ 83.

Limnia received similar treatment. Although Limnia's product was a battery system for an electric vehicle, Seward initially denied its ATVM Loan application because its battery system was not "designed for installation in an advanced technology vehicle…." *Id.* ¶¶ 68-69. Limnia responded, advising Seward that the relevant patents stated that Limnia's product was meant for use specifically in advanced technology vehicles. Seward again denied the application because the technology was not "installed in an advanced technology vehicle." Limnia then advised him that the components in question had to be installed in an advanced technology

vehicle to operate and were designed for this purpose. Defendants never responded. *Id.* ¶¶ 70-74.[3]

Chu and Seward were responsible for the cronyism and abuse of the ATVM and LGP programs. Ver. Compl. ¶¶ 112-113, 116, 118. The Government Accountability Office found that they gave away billions without engaging "the engineering expertise needed for technical oversight" or having performance measures in place to ensure taxpayers were protected. *Id.* ¶¶ 86-87. It also found that Defendants treated applicants inconsistently, favoring some over others, ignored their own underwriting standards and failed to properly document reviews, thus reducing the "assurance that [DOE] has treated applicants fairly and equitably." *Id.* ¶ 111. In their environment, Plaintiffs and the other tens of applicants who brought only good ideas to the table, but not relationships with former politicians or big political "bundlers" or the current Senate majority leader, never had a fair or level chance.

ARGUMENT

I. XPV HAS BOTH CONSTITUTIONAL STANDING AND THE CAPACITY TO SUE, AND SO THE SECOND CLAIM FOR RELIEF SHOULD STAND.

Defendants assert that XPV lacks both constitutional standing and the capacity to sue for relief under the Administrative Procedure Act. Off. Cap. Def. Mot. to Dismiss at 13-16. However, XPV both has capacity for this lawsuit and its claims are redressable.[4] Therefore, the second claim for relief should stand.

[3]Limnia's efforts to participate in the 1703 Loan Guarantee Program were frustrated as well. *See* Ver. Compl. ¶¶ 76-82.

[4]The Individual Federal Defendants have moved to dismiss Plaintiffs *Bivens* claims on the grounds that the APA provides an equivalent and complete statutory remedy. *See* Individual Federal Defs. Mot. to Dismiss at 17-21. Apparently, the Official Capacity Federal Defendants see things differently.

Defendants argue that XPV's claims should be dismissed because it "lacks constitutional standing" to bring its claim that DOE's denial of its loan application was "impermissibly infected with political pressure" as well as arbitrary and capricious. Off. Cap. Def. Mot. to Dismiss at 13. They assert that since XPV is a dissolved California corporation, and therefore cannot conduct business as an automobile manufacturer, it is "ineligible as a matter of law" to receive an ATVM loan. In support of this, they quote California law regarding corporate dissolution:

> A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, *but not for the purpose of continuing business except so far as necessary for the winding up thereof.*

Id. at 15 (quoting Cal. Corp. Code § 2010(a) (emphasis added by DOE).

This statute does not preclude XPV's claims. While XPV may not currently meet the financial requirements for an ATVM loan, it certainly did do so in 2009. In fact, Defendants do not dispute that XPV was an Eligible Applicant at the time that it applied for the ATVM loan or that it submitted a qualified loan application at that time. *See* Ver. Compl. ¶¶ 38, 64. Had Defendants conducted a fair review of the application at that time, and judged XPV's application based against the statutory and regulatory factors, and not political considerations and cronyism, XPV would have been allowed to borrow funds. *Id.* ¶¶ 9, 19, 35, 117.

Even now, years after XPV was forced out of business, its APA claims are redressable and it has Article III standing. Federal regulations provide that an ATVM borrower can assign its interest in its loan to another eligible party if it receives "prior written approval by DOE and the Federal Financing Bank." 10 C.F.R. § 611.110(b). Consequently, XPV should be given what it was wrongfully denied in 2009, that is, an approved application, and then allowed the

opportunity to assign its loan to an eligible party pursuant to 10 C.F.R. § 611.110(b) and wrap up its affairs in accordance with California law.[5]

Under the California Corporation Code, the powers and duties of the directors and officers post-dissolution include, but are not limited to, the following acts in the name and on behalf of the corporation: to elect officers and to employ agents and attorneys to liquidate or wind up its affairs, to continue the conduct of the business insofar as necessary for the disposal or winding up thereof, to carry out and collect, compromise and settle debts and claims for or against the corporation, to sue, in the name of the corporation, for all sums due or owing to the corporation or to recover any of its property, and, in general, to make contracts and to do any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling and liquidating the affairs of the corporation. *See generally* Cal. Corp. Code §§ 2001(a)-(h). Given that DOE's unjust and illegal denial of XPV's loan application drove the company out of business and caused its dissolution, this suit to vindicate XPV's rights, and the potential assignment of the loan rights that it earned 2009, are well within the ambit of the applicable statutory scheme.

Therefore, XPV has constitutional standing and a redressable injury.[6] To hold otherwise would be contrary to the plain language of the applicable statute and allow Defendants to rely on their own bad acts as a shield against judicial review.

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[5]Defendants acknowledge that California law allows a dissolved corporation to do "any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling and liquidating the affairs of the corporation." Mot. to Dismiss at 15 (quoting *Cal. Corp. Code* § 2001(h), *citing Penasquitos, Inc. v. Superior Court*, 53 Cal. 3d 1180 (Cal. 1991)).

[6]*Accord Penasquitos*, 53 Cal. 3d at 1190 ("[A] corporation's dissolution is best understood not as its death, but merely as its retirement from active business") (citation omitted).

II. LIMNIA'S THIRD CLAIM FOR RELIEF SHOULD STAND.

Defendants' arguments for the dismissal of Limnia's third claim for relief all depend on "one fact": DOE's purported reconsideration of Limnia's ATVM loan application renders the third claim for relief "incurably premature." Off. Cap. Mot. to Dismiss at 17.

DOE, however appears to have told its lawyers one thing, but GAO something else entirely. According to GAO, DOE says that it is not actively considering *any* ATVM loan applications and that it does not expect to make any further ATVM loans in the future, contrary to EISA.

> As of January 29, 2013, DOE was not actively considering any applications for using the remaining $16.6 billion in loan authority or $4.2 billion in credit subsidy appropriations available under the Advanced Technology Vehicles Manufacturing (ATVM) loan program. DOE considered the seven ATVM loan program applications it has, requesting a total of $1.48 billion, to be inactive for reasons including insufficient equity or technology that is not ready. Most applicants and manufacturers we spoke with told us that, currently, the costs of participating outweigh the benefits. Although the ATVM loan program is accepting applications on an ongoing basis, according to DOE officials, DOE is not likely to use the remaining ATVM loan program authority given the current eligibility requirements.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 13-331R, STATUS OF DOE LOAN PROGRAMS 3 (2013), *available at* http://www.gao.gov/products/GAO-13-331R (accessed July 29, 2013).

Given this, Defendants arguments are easily disposed of. DOE's denial of Limnia's application is final and reviewable under the APA, and the third claim for relief is both ripe for judicial review and alleges an injury in fact. The third claim for relief is well-pled.

A. DOE's Denial Is Final And Reviewable.

DOE's denial of Limnia's ATVM loan application is final and reviewable, even if DOE told its lawyers the truth and but gave GAO an alternative version of reality.[7] First, DOE's

[7] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 13-331R, STATUS OF DOE LOAN PROGRAMS 3 (2013). DOE's statements to GAO were made around the time Limnia filed its

refusal to carry out its clear statutory duties and make ATVM loans to Limnia and other qualified applicants (and to do so without regard for the borrower's political connections and influence) is contrary to law and subject to APA review. 5 U.S.C. § 706; *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987). Second, Limnia's statutory right to have its loan application decided without political favoritism was violated and judicial review is therefore proper. Third, Limnia need not wait for DOE to complete its Potemkin review of its ATVM loan application, because the review is futile and all of the evidence points to the inevitable conclusion that DOE will deny it.

1. DOE's denial of Limnia's ATVM application is final.

Contrary to EISA § 136 DOE says that it is not actively considering any ATVM loan applications and will not be making any more ATVM loans, and its denial of Limnia's ATVM loan application is final and reviewable in any event. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997); *John Doe, Inc. v. Drug Enforcement Admin.*, 484 F.3d 561, 566-67 (D.C. Cir. 2007).[8] In *Doe,* the D.C. Circuit held that an agency's affirmative denial of an import permit application constituted final agency action because it (1) "was not merely tentative, but rather definitive"; and (2) "had a 'direct and immediate effect' on [the plaintiff's] business by stopping in its

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complaint in this matter. Conveniently for Defendants, Mr. Franz sent an email to Limnia roughly two months later regarding the loan application. The discrepancy in DOE's position must be resolved in Limnia's favor. *See Iqbal*, 556 U.S. at 678-679. Therefore, the third claim for relief must stand.

[8]An action is final where the agency has (1) acted definitively; and (2) "had a 'direct and immediate effect' on [the plaintiff's] business." *John Doe, Inc.*, 484 F.3d at 566-67; *Ciba-Geigy Corp. v. U.S. Envtl. Prot. Agency*, 801 F.2d 430, 436 (D.C. Cir. 1986)). The D.C. Circuit applies the finality requirement "in a 'flexible' and 'pragmatic' way … look[ing] primarily to whether the agency's position is 'definitive' and whether it has a 'direct and immediate … effect on the day-to-day business' of the parties challenging the action." *Ciba-Geigy Corp.* at 435-36 (citation omitted and alteration in original).

tracks" plans to further develop the medical drug to be imported.[9] *Id.* at 566-67. Here, too, the agency acted definitively in denying Limnia's application and refusing to actively consider new applications, causing a direct and immediate effect on Limnia's business because it could not proceed with its plan to manufacture car parts. *See* Ver. Compl. ¶¶ 19, 68-72.

In *Ciba-Geigy* the court held that an agency's interpretation of its own governing statute was final action fit for review because the interpretation unequivocally stated the agency's position and gave no indication it was subject to further consideration or modification. 801 F.2d at 435-38. Finality existed under these circumstances, in part, because there was "not the slightest danger that judicial review [would] disrupt the orderly process of administrative decisionmaking." *Id.* Here, DOE unequivocally stated its position that it denied the loan. *See* Compl. ¶¶ 69, 71. It further affirmed its position when it told GAO that it was not actively considering any applicants to the program. DOE cannot avoid this result by pointing to a letter dated after its statements to GAO in which its Acting Executive Director merely states that DOE would "evaluate the application's merit and the project's eligibility" after Limnia "submitted a substantially complete application." Mot. to Dismiss, Ex. C. DOE's decision-making has thus ceased and, as in *Ciba-Geigy*, judicial review will not disrupt DOE's decision-making process.

2. DOE's refusal to act on Limnia's application is reviewable.

DOE's drawn-out reconsideration of Limnia's ATVM application constitutes a failure to act, and it should not be allowed to evade judicial review of Limnia's claims by administrative delay and by purposeful, protracted review, without any intention of fairly considering, much

[9] *Doe* involved a statute that mandated finality as a jurisdictional requirement, but the court indicated that the finality analysis mirrored that under the APA. *Doe*, 484 F.3d 561, 555, 566 n.4 (D.C. Cir. 2007) ("We see no reason, however, that the word 'final' in § 877 should be interpreted differently than the word 'final' in the APA."); *see* Lawson, Federal Administrative Law 923-24 (5th ed. 2009)

less granting, Limnia's application. It is well-established that "agency inaction may represent effectively final agency action that the agency has not frankly acknowledged." *Sierra Club*, 828 F.2d at 793. An agency cannot "preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Id.* [10]

An agency's refusal to act also becomes final action when "exigent circumstances render it equivalent to a final denial of petitioners' request." *Public Citizen Health Research Grp v. Comm'r, Food & Drug Admin*., 740 F.2d 21, 32 (D.C. Cir. 1984) (citing *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970)).[11]

Here, DOE's refusal to act is final because its reasons for doing nothing with respect to Limnia's ATVM loan application, whether for the reasons alleged by the plaintiffs or those given by DOE to GAO, necessarily mean that inaction is the final position. The circumstances of DOE's initial denial of Limnia's application, its failure to provide any meaningful reassessment, and the agency's general conduct towards and treatment of the ATVM loan program make it obvious that the DOE has "effectively already determined that further reviews will not change

[10]For example, in *U.S. Gypsum Co. v. Muszynski*, the EPA withdrew its concurrence to the plaintiff's application for a dumping permit. The Army Corps of Engineers then denied the permit and failed to conduct any meaningful reassessment of the decision. 161 F. Supp. 2d 289, 290-292 (S.D.N.Y. 2001) (applying exclusively D.C. Circuit case law). The EPA's decision, "coupled to the [Corps'] failure to undertake any meaningful reassessment … [made it] obvious that the [Corps] ha[d] effectively already determined that further reviews [would] not change that result and that [its] inaction now represent[ed] 'effectively final agency action that the agency ha[d] not frankly acknowledged.'" *Id.* at 291-93 (*citations omitted).*

[11]For example, in *Hardin*, the D.C. Circuit held that exigent circumstances (and thus both ripeness and final action) existed where the plaintiffs asked the Secretary of Agriculture to cancel (and in the meantime suspend) registration of DDT for interstate sale and the Secretary initiated cancellation procedures, but did not suspend registration; instead it "indicated that he was considering further compliance … [but] has neither granted nor denied much of the relief requested." 428 F.2d at 1096, 1098. The Court determined that this inaction should be treated as final action because the immediate risk of further harm meant that "[n]o subsequent action [could] sharpen the controversy" from the Secretary's decision not to act to suspend registration of DDT. *Id.* at 1098. In other words, the Secretary's decision to not grant the suspension functioned like a decision to deny.

that result." *See Muszynski*, 161 F. Supp. 2d at 290-292; Ver. Compl. ¶¶ 68-74, 83-113, 130-32. DOE did not run an honest and fair program, and so the outcome of Limnia's review (and XPV's review, and the review of all the other applicants who lacked connections to former politicians, bundlers and the Executive Branch) was predetermined. Ver. Compl. ¶¶ 83-113. Therefore, just as in *Hardin* the DOE's decision regarding Limnia's case is effectively final and its full effect has already been felt by Limnia. Because the decision is already made and the effects felt, "[n]o subsequent action [could] sharpen the controversy" and the Court has all of the facts that it needs to be able to decide this case. *See Hardin*, 428 F.2d at 1098. The Complaint alleges facts showing that DOE will not change its position because its review of applications is infected with political pressure.

Subsequent events have done nothing to lessen that pressure—instead they have strengthened the conclusion that denial of Limnia's loan application represents DOE's final decision "not frankly acknowledged." *Thomas*, 828 F.2d at 793. DOE's admission that, as of January 29, 2013, when it already had received Limnia's application, it was not "actively considering any applications" for ATVM loans reinforces this result.[12] The fact that DOE officially categorized Limnia's application as "inactive" belies its contention that this Court is precluded from reviewing Limnia's claims because the DOE is still actively reviewing the

[12] DOE has not entered into an ATVM loan agreement since March of 2011. *See* GAO Report at 14. DOE offered explanations to GAO for why it was not "actively" considering any of the ATVM applications before it. DOE claimed that all but two of the applications were not "substantially complete." *Id.* at 27. The two remaining applications, though deemed "substantially complete" were not ready to proceed for other reasons which were not specified, although insufficient equity and technology readiness were suggested as examples of unreadiness. *Id.* DOE stated that it was not actively considering applications that, in its view, were not "substantially complete," meaning that DOE believed it needed further information to determine applicant eligibility. *Id.* at 23.

application.[13] DOE's review of loan applications is impermissibly infected with political pressure, systemically favors applicants with political connections, and sets aside the applications of others in favor of its cronies. *See* Compl. ¶¶ 83-119. Although the DOE refuses to frankly acknowledge it, its failure to act upon Limnia's application represents its immovable, final position, and thus constitutes final agency action.

3. DOE's abdication of its statutory duty is reviewable.

DOE has abdicated its statutory responsibility to issue loans to applicants that meet certain eligibility requirements, rendering Limnia's claim reviewable. In the D.C. Circuit, agency inaction is grounds for final-agency-action review if it constitutes "agency recalcitrance … in the face of a clear statutory duty … of such magnitude that it amounts to an abdication of statutory responsibility. Examples of such clear duties to act include provisions that require an agency to take specific action when certain preconditions have been met." *Sierra Club,* 828 F.2d at 793 (internal quotations omitted); *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593-95 (D.C. Cir. 1971). The DOE has a clear, statutory duty to act to issue loans to applicants of the ATVM program, up to the full amount of the authorized spending authority, when those applicants meet the preconditions described in 42 U.S.C. § 17013(d)(3) and in 10 C.F.R. § 611. Limnia met these and therefore ought to be granted an ATVM loan.

[13] In fact, the very email upon which Defendants rely as evidence of reconsideration is further proof that DOE was not "actively" considering Limnia's application. Mr. Franz implied in his letter that he did not consider Limnia's application to be "substantially complete," and DOE only "actively" considers applications that it believes to be substantially complete. *Id.* ("Once Limnia, Inc. submits a substantially complete application, the ATVMLP can evaluate the application's merits and the project's eligibility.").

In reality, DOE has no intention to issue any further loans, $16.6 billion in loan authority.[14] DOE's own Acting Director, as well as various DOE officials have admitted that DOE is not likely to use its remaining ATVM lending authority. GAO Report at 2, 3, 23, 30 ("according to DOE officials, DOE is not likely to use the remaining ATVM loan program authority given the current eligibility requirements") (quoting a letter from the Acting Executive Director of the DOE's Loan Programs Office to the Director of the Government Accountability Office, marked March 11, 2013, stating that "[t]he draft report acknowledges our assessment that DOE is not likely to use the remaining ATVM loan program authority given the current eligibility requirements."). DOE's refusal to make ATVM loans to Limnia and other eligible applicants, up to the amount of its loan authority, constitutes APA-reviewable "inaction" and Limnia's claim for relief should not be dismissed.[15]

4. Limnia asserts deprivation of an important statutory right and need not demonstrate finality.

[14] Speculation abounds regarding why so much of DOE's lending authority remains unused. It could be because of bad publicity. *See* GAO Report at 14; *see also* Department of Energy Loan Programs Office, Our Projects, http://lpo.energy.gov/our-projects/ (last visited July 12, 2013) (listing the five loans made under the ATVM program, along with dates). The majority of the industry players (including actual and prospective applicants, as well as other eligible auto manufacturers) interviewed by the GAO believed that the negative publicity surrounding Solyndra's default and other DOE programs affected DOE's willingness to use its loan authority. *Id.* at 28; *see also* Rachel Weiner, *Solyndra, Explained*, Washington Post: The Fix (June 1, 2012, 08:30 AM) available at http://www.washingtonpost.com/blogs/the-fix/post/solyndra--explained/2012/06/01/gJQAig2g6U_blog.html (accessed July 29, 2013). It could be because of the poor performance of Tesla and Fisker. Ver. Compl. ¶¶ 94-98, 102-109. Or, it could be because DOE recognized that making ATVM loans to potential competitors of the government cronies that it had determined to fund could pose a mortal threat to them.

[15] The DOE has also abdicated its clear statutory duty under the APA to provide Limnia with fair review that has not been shaped by political pressure. *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011) ([P]olitical pressure invalidates agency action" if that pressure "shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."). DOE has abdicated this duty by subjecting the loan process to the pressure to favor government cronies at the expense of other qualified applicants such as Limnia.

The D.C. Circuit has held that finality "may be dispensed with" if "the agency has very clearly violated an important constitutional or statutory right." *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 168-169 (D.C. Cir. 1983); *see also Marchiano v. NASD*, 134 F. Supp. 2d 90, 94-95 (D.D.C. 2001) ("… [F]inality requirement may be waived where the agency action 'has very clearly violated an important constitutional or statutory right'"). Limnia's claims are based not merely on bias in the agency process; instead, DOE has turned the ATVM program into a means of diverting Congressionally-appropriated funds away from qualified applicants and diverting them to government cronies.

DOE has thus violated Limnia's important statutory right to have its application considered fairly, without outcome-determinative political pressure. *See* Compl. ¶¶ 83-119; *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011) ("[P]olitical pressure invalidates agency action" if that pressure "shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."). The right to expect that the government will treat all actors fairly and without the extreme favoritism alleged in this case is an important statutory right encoded in the Administrative Procedure Act. *Id.*; 5 U.S.C. § 706 (affording a cause of action for agency conclusion that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right….").[16] DOE has grievously infringed on Limnia's rights and review under the APA is thus appropriate.

5. Further agency review is futile.

[16] Agencies are increasingly attacking this right in general. *See* Thomas O. McGarity, *Administrative Law As Blood Sport: Policy Erosion In A Highly Partisan Age*, 61 DUKE L.J. 1671 (2012) ("This Article suggests that in this era of deep divisions over the proper role of government in society, high-stakes rulemaking has become a "blood sport" in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies.")

Even if there were no effectively final agency action, any further review by DOE would be futile and, therefore, no final agency action should be required.

Although the D.C. Circuit has yet to adopt the notion that futility is an exception to the APA's requirement of final agency action, the Ninth Circuit has directly and unambiguously adopted the futility exception.[17] In the seminal case of *Air One Helicopters, Inc. v. Fed. Aviation Admin.*, the Ninth Circuit held that FAA letters containing the agency's position on a particular issue would be "treat[ed] … as final agency action" under the APA where "there [was] no question it would be futile . . . to attempt to persuade the FAA to change the position it clearly sets forth in the letters." 86 F.3d 880, 882 (9th Cir. 1996).

Indeed, such an exception makes perfect sense, since the requirements for final agency action and exhaustion are rooted in the same rationales. Both are concerned with not committing resources to deciding a case that may prove to be an unnecessary use of judicial resources. *See*

[17]The Fifth Circuit seems eager to adopt such an exception as well. In *DCP Farms v. Yeutter*, the Circuit Court referred to APA section 704, 957 F.2d 1183, 1188-89 (5th Cir. 1992), and found that there was an exception to what it referred to as "exhaustion" but likely intended to refer to final agency action (because it was hearing an APA section 704 issue). According to that court, the exception exists, "when the plaintiff demonstrates that 'it would be futile to comply with the administrative procedures because it is clear that the claim will be rejected,'" *id.*at 1189 (it reversing the district court on the facts by finding that the plaintiff had failed to produce sufficient evidence of futility). To our knowledge, no Circuits other than the Fifth and the Ninth have decided the issue.

The D.C. Circuit has come close to considering whether futility should be an exception to final agency action. In *Independent Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588 (D.C. Cir. 2001), the Court reviewed a District Court decision dismissing a complaint for lack of final agency action on the basis that futility was not an exception for finality. *Id.* at 593. While the Circuit Court affirmed the decision, it did so on the basis that the plaintiff had not properly challenged an agency *action*, and did not reach the issue of whether any action was *final* or whether futility could serve as a replacement for finality. *Id.* at 593-595 ("[N]ot only does [the plaintiff] not challenge final agency action, it is not at all clear what agency action [the plaintiff] purports to challenge" given that the plaintiffs did not challenge a particular agency action but rather general ""efforts" [which] are not final agency actions fit for judicial review.").

Bethlehem Steel Corp. v. Envtl. Prot. Agency, 669 F.2d 903, 908 (3d Cir. 1982) ("[F]inality and exhaustion serve the same interests …'one of the principal reasons to await the termination of agency proceedings' is the possibility that a dispute may be mooted if the party ultimately prevails before the agency…." (internal citations omitted)). A purpose of exhaustion is "protecting administrative agency authority," *Tesoro Ref. & Mktg. Co. v. FERC*, 552 F.3d 868, 875 (D.C. Cir. 2009), and a parallel purpose of the APA's final agency action provision is to prevent premature judicial review that "improperly intrudes into the agency's decisionmaking process." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (citation omitted).

The D.C. Circuit's reasons for allowing finality as an exception to exhaustion lend further support to the notion that futility should be an exception to final agency action. "Because the purposes undergirding the [exhaustion] doctrine are not furthered when 'following the administrative remedy would be futile because of the certainty of an adverse decision,'" the D.C. Circuit does not require exhaustion upon a showing of futility. *Comm. of Blind Vendors v. Dist. of Columbia*, 28 F.3d 130, 133 n.5 (D.C. Cir. 1994) (citing *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986)). Similarly, the goals of the finality requirement (awaiting termination of agency proceedings and not interfering with agency decision-making) are not furthered, and finality is thus futile, when the agency is certain to reach an adverse outcome. A futility exception to final agency action does not usurp agency decision-making authority; nor does it use judicial resources on a case that may be rendered moot by a favorable decision for the plaintiff, since it applies only when an unfavorable outcome is certain. This Court should therefore adopt a futility exception in the finality context.

This is true notwithstanding other D.C. District Court decisions that have relied on flawed reasoning in refusing to acknowledge a futility exception to finality. For example, *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n,* held that a "prudential concern regarding futility" could not overcome the APA's finality requirement, but the reasons it gave in support of that statement were themselves largely prudential--specifically a concern with disrupting the administrative and judicial review processes established by Congress, and the administrative concern that determining futility becomes "a guessing game regarding agency intent." 173 F. Supp. 2d at 52, 51. However these are issues with which courts frequently grapple in the context of the futility exception to exhaustion, and these "prudential concerns" have not disrupted the balance of that review process.[18]

[18]The claim that futility cannot create finality made in *Indep. Petrol. Ass'n of Am. v. Babbitt* (*IPAA* I), 971 F. Supp. 19 (D.D.C. 1997), is baseless. There, the court held that through the APA's finality requirement "Congress gave agencies dominion to make rulings or adjudications free from judicial interference until there is final agency action." *Id.* at 29. However, just as in the exhaustion context, judicial review does not interfere with an agency's prerogative to make decisions because the court intercedes only where the outcome of the process is inevitably adverse. *See Comm. of Blind Vendors v. Dist. of Columbia*, 28 F.3d 130, 133 n.5 (D.C. Cir. 1994). The *IAAP I* court also incorrectly believed it would be inconsistent with D.C. Circuit case law to recognize the futility exception "because doctrinally speaking, finality, though it may often coincide with issues such as exhaustion, is fundamentally distinct," and because futility could not satisfy the "finality prerequisite for jurisdiction" under the APA. 971 F. Supp. at 28-29. As the more recent and better reasoned cases have concluded, finality under the APA is not jurisdictional. *See Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) ("We think the proposition that the review provisions of the APA are not jurisdictional is now firmly established."); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n,* 324 F.3d 726, 731 (D.C. Cir. 2003) ("[Where] judicial review is sought under the APA rather than a particular statute prescribing judicial review, the requirement of final agency action is not jurisdictional…."). *IPAA I* thus misconceives D.C. Circuit law, and, as a result, draws a false distinction between finality and exhaustion, incorrectly believing the former was rigidly jurisdictional whereas the latter was not. Without that distinction, the logic of its decision falls away. Other district court cases are distinguishable or not on point. For example, *Shell Offshore v. DOI* cited only *IPAA I*'s flawed opinion to justify its holding. 997 F. Supp. 23, 33 (D.D.C. 1998)). *Alaska Legislative Council v. Babbitt* was decided on the facts of that case, where the court held that "in light of the fact that the [challenged] regulations are still subject to agency review prior to implementation, and the fact that the agency is currently

Even if DOE is still "actively" considering Limnia's application, all of the evidence points to the unavoidable conclusion that it will be denied. Therefore, it would be senseless and contrary to the more persuasive precedent to force Limnia to forego litigation until the agency reaches its inevitably unfavorable decision. *Air One Helicopters, Inc. v. Fed. Aviation Admin.*, 86 F.3d 880, 882 (9th Cir. 1996).

B. Count 3 Is Ripe for Judicial Review.

1. DOE's denial is final.

DOE argues that "that "DOE has not finalized a determination on Limnia's ATVM loan application" and that Limnia's claim is therefore "not fit for judicial review." *Id*. To the contrary, it is clear that DOE *has* made a final decision. To begin with, DOE has told GAO it will not be making any more ATVM loans. The pervasive bias and cronyism that infected the ATVM loan program denied Limnia a fair shot, and DOE's "review" is only for show. Finally, as discussed above, DOE has acted with finality with respect to Limnia's ATVM application. Limnia's claims are ripe. *Harris v. Fed. Aviation Admin.*, 353 F.3d 1006, 1011-12 (D.C. Cir. 2004) (relying on APA finality for ripeness analysis)

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forbidden by statute from implementing them," there was no final agency action and no argument for a futility exception. 15 F. Supp. 2d 19, 26 (D.D.C. 1998). Unlike in *Alaska Legislative Council*, where the government was statutorily barred from implementing its challenged rule and thereby acting to harm the plaintiffs, here DOE has already harmed Limnia by its refusal to give Limnia the fair and politically-neutral review to which it is entitled. *John Doe, Inc. v. Gonzalez* considered the question and discussed the decision in *IPAA I* not to adopt a futility exception (although *IPAA I* relied on flawed reasoning and therefor is not suitable authority); however, this case was decided on other grounds. No. 06-9666, 2006 U.S. Dist. LEXIS 44402, at *51, *54 (D.D.C. June 29, 2006) (holding that "even assuming arguendo that federal jurisdiction over Plaintiff's claims is not barred under the APA's 'finality' mandate, it is clear that this Court lacks jurisdiction over Plaintiff's action" due to a statutory provision that gave jurisdiction over the claim to the appellate court rather than the district court.), *aff'd by, petition denied by John Doe, Inc. v. DEA*, 484 F.3d 561, 566-567 (D.C. Cir. 2007) (holding that the agency's denial of the import permit application was final agency action).

2. The third claim for relief raises a purely legal question.

Defendants assert that Limnia's claim is unfit for judicial review because Limnia "does not present a purely legal claim" and that consideration of the claim would therefore benefit "from a more concrete and final setting, particularly one in which DOE has made a final determination as to Limnia's ATVM loan application." Off. Cap. Mot. to Dismiss at 20. They are mistaken.

"[F]itness of the issues for judicial decision is more likely to be found where 'the issue tendered is a purely legal one,' *Abbott Labs.*, 387 U.S. at 149, [and the D.C. Circuit has held] that the question of whether an agency decision is arbitrary and capricious is a purely legal question." *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003) (citations omitted). Specifically, in *Nevada v. Dep't of Energy*, the DC Circuit stated that a claim satisfies the "fitness" requirement "if the issue tendered is a purely legal one," and that "[w]hether an agency decision is arbitrary and capricious is a purely legal question." 457 F.3d 78, 85 (D.C. Cir. 2006) (citations omitted) (internal quotation marks omitted). Limnia's claims are that DOE acted in an arbitrary and capricious manner in rejecting its application and that DOE exceeded its statutory authority in doing so. These are both purely legal questions and fit for judicial review. 5 U.S.C. § 706; *Nevada v Dep't of Energy*, 457 F.3d at 85.

3. Limnia's claim is ripe because crystallization of DOE policies is not likely to result from further review.

One purpose of the ripeness requirement is to allow crystallization of the agency policy before it is subject to review:

> Under our case law, "the primary focus of the ripeness doctrine is to balance the petitioners' interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subject to review and

> the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting."

Shays v. FEC, 414 F.3d 76, 95 (D.C. Cir. 2005) (quoting *AT&T Corp. v. FCC*, 358 U.S. App. D.C. 369, 349 F.3d 692, 699 (D.C. Cir. 2003)). In *Shays*, the D.C. Circuit held that a claim was fit for judicial review, reasoning that any further "crystallization" of the disputed agency policies was unlikely to occur. 414 F.3d at 95. Similarly here, there is unlikely to be further crystallization of DOE policies– the denial of Limnia's application is a foregone conclusion due to the DOE's bias and political favoritism which Limnia has alleged. *See* Ver. Compl. ¶¶ 26, 68-74, 116-118, 142-146. Moreover, DOE has admitted that it is unlikely to issue further loans under the ATVM program. Therefore, DOE is not able to provide review in "a more concrete and final setting," and Limnia's claims are ripe for review.

4. DOE remand is not required.

Defendants argue that Limnia's claim is unripe because the Court cannot order DOE to issue a loan to Limnia, but must instead remand DOE's denial of the application, relying principally on *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Official Cap. Def. Mot. to Dismiss at 20. That very authority, however, acknowledges limits to the general practice of remanding flawed agency action. *Lorion* describes scenarios in which remand is appropriate, and also states that remand may not be appropriate in some rare circumstances:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, *except in rare circumstances*, is to remand to the agency for additional investigation or explanation.").

Lorion, 470 U.S. at 744 (emphasis added).

Limnia's claim does not fit into one of the remand-appropriate scenarios enumerated by the Supreme Court in *Lorian*; rather, Limnia's claim sets out an example of "rare circumstances"

where remand is inappropriate because DOE's review of Limnia's application is infected with bad faith and will inevitably result in denial.

The D.C. Circuit has stated "[w]e do not remand where there is not the slightest uncertainty as to the outcome of an [agency] proceeding." *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1489 (D.C. Cir. 1995) (citations omitted).[19] Further, this court has suggested that *Lorion's* applicability may be limited in cases of "bad faith" or "improper behavior" by an agency. For example, in *Cape Hatteras Access Pres. Alliance v. U.S. Department of Interior*, the court cited *Lorion*, for the general proposition that "[g]oing beyond the administrative record presented by the deciding agency when reviewing its action is only done in exceptional cases." 667 F. Supp. 2d 111, 114-116 (D.D.C. 2009). It went on to note that the plaintiffs did not allege "that the agency acted in bad faith," that it "engaged in improper behavior," or that it "failed to explain [its] decision," implying that "rare circumstances" meriting an exception to the remand requirement would be found in such circumstances.[20] *Id.* Given the DOE's bad faith, represented in its bias and political favoritism, there is not the slightest uncertainty as to the outcome of Limnia's loan application process before the DOE. Remand to DOE is therefore not required in this case.

[19] Similarly, this court noted a "small subset of administrative law cases" in which "remand to the agency is an unnecessary formality" because "it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the first time." *Berge v. United States*, 2013 U.S. Dist. LEXIS 78890 at 16-18 (citing *FEC v. Legi-Tech, Inc., 75 F.3d 704*, 708-709).

[20] In a related vein, the D.C. Circuit has held that "[t]he APA limits judicial review to the administrative record 'except when there has been a "strong showing of bad faith or improper behavior" or when the record is so bare that it prevents effective judicial review.'" *Theodore Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (citations omitted) (internal quotation marks omitted).

5. The case is not moot.

Defendants contend that Limnia's claims are not fit for judicial review because they "could disappear if DOE makes an ATVM loan to Limnia." Off. Cap. Def. Mot. to Dismiss at 21. Defendants rely on *Outland v. Civil Aeronautics Bd.*, 284 F.2d 224, 227-28 (D.C. Cir. 1960), for the notion that "[W]hen the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary." Off. Cap. Mot. to Dismiss at 21.[21] However, no such possibility exists here. As explained above, DOE has acknowledged that it is unlikely to issue any further ATVM loans. Further, its review of ATVM applications is so tainted by political bias that Limnia's receipt of a loan is a practical impossibility. Any claim that DOE is reconsidering Limnia's application is therefore unfounded and should not prevent this Court from holding that Limnia's claims are ripe for review.[22]

6. Past harm is not a requirement for ripeness**.**

Limnia has been directly harmed by the cronyism that infected DOE's loan programs. Ver. Compl. ¶¶ 118, 119, 142-147. Even if there were no direct harm, Limnia's claims would still be ripe because past harm is not a requirement for ripeness. The hardship sought in the ripeness analysis is prospective, rather than retrospective: It "is measured by considering 'not whether [the parties] have suffered any direct hardship, but rather whether postponement will impose an undue burden on the claimant or would benefit the court.'" *Smith v. Harvey*, 541 F. Supp. 2d 8, 13 (D.D.C. 2008) (quoting *Nat'l Ass'n of Home Builders v. U.S. Army Corps of*

[21] The Court in *Outland v. Civil Aeronautics Bd.*, 284 F.2d 224 did not specifically address mootness.

[22] Moreover, DOE suggests that "Limnia is surely not burdened by DOE's voluntary provision of relief that Limnia seeks in the complaint." Mot. to Dismiss at 20. The relief Limnia seeks is not that DOE "reconsider" the application under the same biased and politically motivated process which we have alleged. Rather, Limnia seeks remand to the DOE for *unbiased* consideration by the agency. Limnia has not received the relief it seeks and will not likely receive that relief absent an order from this Court.

Eng'rs, 440 F.3d 459, 464 (D.C. Cir. 2006)). Further, "where, as is the case here, there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review." *Nat'l Ass'n of Home Builders*, 440 F.3d at 465 (citations omitted) (internal quotation marks omitted). Postponing judicial review of Limnia's application would not help the Court since, as described herein, it would only delay the inevitable denial. Such a meaningless delay would unduly burden Limnia.

C. Limnia Has Suffered Injury In Fact.

DOE asserts that "[t]he fact that Limnia's loan application is under reconsideration also means that Limnia has not suffered an injury-in-fact necessary for Article III standing." Off. Cap. Defs.' Mot. to Dismiss at 21. This is simply not the case.[23] For the same reasons that Limnia's claim is ripe for review, namely that DOE's denial of its ATVM loan application is final and further review would be futile, it has also suffered an injury-in-fact. *See Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1150 (2013) ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.").

III. THE FOURTH CLAIM FOR RELIEF SHOULD NOT BE DISMISSED BECAUSE DOE ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT FAILED TO HONOR ITS PROMISE TO WAIVE LIMNIA'S SECTION 1703 LOAN GUARANTEE PROGRAM APPLICATION FEE

Limnia alleges that Defendants' denial of its LGP application was arbitrary and capricious, specifically in that it failed to honor an oral promise from then-Secretary Chu to

[23] DOE states that "rather than suffering an injury, Limnia received exactly what it asked for from DOE – reconsideration of its ATVM loan application." As we discussed previously, Limnia is seeking unbiased reconsideration of its application – something that is certain not to occur without intervention by the Court.

waive the application fee. Defendants' only grounds for dismissal of Limnia's claims in this regard is that any statements made by DOE or its representatives "have no legal effect because DOE is not bound by oral representations" as a result of the application of 10 C.F.R. § 609.10(b) (2009) ("DOE is not bound by oral representations made during the Pre-Application stage . . . or Application stage, or during any negotiation process."). Defendants fail to mention, however, is that the regulation upon which it relies did not become effective until December 4, 2009—nearly ten months after then-Secretary Chu promised to waive the fee and Limnia submitted its application in reliance thereon. *See* 74 Fed. Reg. 63,549 (Aug. 7, 2009) (to be codified 10 C.F.R. § 609.10).[24] Defendants' reasons for dismissal of Limnia's LGP-related claims fail therefore and Defendants' motion should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendants' motion to dismiss, grant judgment in its favor, and order all other relief deemed just and proper.

July 29, 2013

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[24] The language regarding oral representations did not even appear in the Federal Register as a Notice of Proposed Rulemaking until August 7, 2009, roughly six months after Limnia submitted its application. 74 Fed. Reg. 63,549 (Aug. 7, 2009).

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