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By Jason Fowler*

I. INTRODUCTION

Webster's dictionary defines "final" as "leaving no further chance for action, discussion, or change; deciding; conclusive: a final decree." However, what constitutes final agency action is not as simple to determine as Webster would like us to believe. On the extreme ends of the final agency action paradigm, where an agency has given its "final decree," or where it has yet to act at all, Webster's definition of final would be an appropriate tool in determining final agency action; it would yield the appropriate results. On the other hand, anywhere between those two extremes, the definition given by Webster merely seems to beg the question: when does an agency's action demonstrate that there is no further chance for action, discussion, or change? Nor does Webster's definition give us guidance as to what kind of considerations should be taken into account when attempting to determine the finality of an agency's action. Should courts merely look to the agency itself, or should courts also look at the effect that the agency's action will have on a particular party? Due to the vagueness of the term "final," many courts have struggled to determine what constitutes final agency action.

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1. WEBSTER'S NEW WORLD DICTIONARY 523 (2d College ed. 1972).
action for those actions that fall between the two extremes. In particular, in *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, (Reliable) the D.C. Circuit was forced to decide whether the actions taken by the Consumer Product Safety Commission (CPSC) constituted final agency action within the meaning of the Administrative Procedure Act (APA), thus justifying judicial review of the case. In so doing, the D.C. Circuit attempted to further clarify what constitutes final agency action for those cases that fall within the two extremes.

This note explores the D.C. Circuit's ruling in Reliable. Part II details the historical background and procedural history of the case. Part III analyzes the majority opinion given by Circuit Judge Harry T. Edwards. Part IV considers the judicial and administrative implications of the Reliable decision. Part V considers decisions from other Circuits that address the interpretation of final agency action. Part VI concludes the discussion of the Reliable decision and the requirement of final agency review.

II. HISTORICAL BACKGROUND

A. Statutory History

In an effort to promote efficiency of administrative and judicial

2. See Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n, 173 F. Supp. 2d 41, 43-44 (D.D.C. 2001); Arch Mineral Corp. v. Babbitt, 104 F.3d 660, 665-68 (4th Cir. 1997) (holding that a preliminary decision by the Office of Surface Mining Reclamation and Enforcement (OSM), linking a corporation to another company that owed OSM delinquent fees, was final action); Dietary Supplemental Coalition, Inc. v. Sullivan, 978 F.2d 560, 562-63 (9th Cir. 1992) (holding that the FDA’s classification of a dietary supplement as a food additive through regulatory letters was not final agency action); and Nat’l Parks Conservation Ass’n. v. Norton, 324 F.3d 1229, 1236-37 (11th Cir. 2003) (holding that the NPS had not taken final agency action when it had yet to evict private individuals from occupying structures in a public park because it had yet to officially decide whether they would be allowed to stay).

3. 324 F.3d 726 (D.C. Cir. 2003).

4. See infra Part II and accompanying notes.

5. See infra Part III and accompanying notes.

6. See infra Part IV and accompanying notes.

7. See infra Part V and accompanying notes.

8. See infra Part VI and accompanying notes.
resources, the Administrative Procedure Act (APA)\(^9\) was created and Congress included within it Section 704.\(^{10}\) Section 704 provides that:

Agency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the *final agency action*. Except as otherwise expressly required by statute, agency action otherwise *final* is *final* for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.\(^{11}\)

Following the APA, "federal courts lack jurisdiction over administrative action where '(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.'"\(^{12}\)

Additionally, under Section 704 of the APA, in order for a federal court to exercise judicial review of an agency's activities, there must be a final agency action; that party must have exhausted the


\(^{10}\) See Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986) (stating that the reason the APA precludes interlocutory challenges to tentative administrative rulings is because if it did not, the judicial system would "improperly intrude[ ] into the agency's decision-making process" while needlessly squandering judicial resources, "since the challenging party still enjoys an opportunity to convince the agency to change its mind"); see also DRG Funding Corp. v. Secretary of Hous. & Urban Dev., 76 F.3d 1212, 1214 (D.C. Cir. 1996) (stating that the reason for final agency action is:

It allows the agency an opportunity to apply its expertise and correct its mistakes, it avoids disrupting the agency's process, and it relieves the courts from having to engage in "piecemeal review which is at the least inefficient and upon completion of the agency process might prove to have been unnecessary. (citations omitted)).

\(^{11}\) 5 U.S.C. § 704 (italics added by author).

\(^{12}\) Nat'l Parks, 324 F.3d at 1236-37 (citing 5 U.S.C. § 701(a) (2004)).
procedures provided by the agency, and there must be no other remedies at law.  

Under the judicial review provisions of the APA (such as Section 704), subject to specific statutory exclusions, the term “agency” includes every governmental authority of the United States, even if it is not subject to review by another agency. A government entity is included within the APA definition of “agency” if it has sufficient authority to act with the power of the government behind it. However, due to concerns over separation of powers, this does not include the President of the United States. But, it does include virtually all executive agencies.

Not only does Section 704 of the APA only apply to “agencies,” it also only applies to those activities that are classified as “agency action.” “Agency action,” according to Section 551 of the APA, includes an entire - or any part thereof - agency rule, order, license, sanction, grant or denial of relief, or failure to act. Although an agency’s activity may be classified as “agency action,” a court will not intervene for a party that is subject to that action unless the agency’s action is final.

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15. 5 U.S.C. § 701(b)(1).
17. Franklin v. Massachusetts, 505 U.S. 788, 798 (1992) (addressing final agency action and holding that the President of the United States does not fall within the statutory definition of “agency,” to justify judicial review over his actions).
18. See 5 U.S.C. § 704. There must be “agency action” before there is even a possibility that a judicial court can review any of the activities of the administrative agency in question.
19. U.S.C. § 551(13) (2004). See also Ciba-Geigy, 801 F.2d at 435 (stating that the “term ‘agency action’ encompasses an agency’s interpretation of law. (citation omitted). It is therefore the finality of that interpretative position which is relevant for purposes of determining the ripeness of the statutory question.”).
20. 5 U.S.C. § 704; see DRG Funding Corp. v. Sec’y of Hous. & Urban Dev., 76 F.3d 1212, 1214 (D.C. Cir. 1996) (holding that: “The requirement of a final agency action has been considered jurisdictional,” therefore, if “the agency action is not final, the court . . . cannot reach the merits of the dispute.” (referring to agency controversies brought before a federal court pursuant to a particular statute that prescribes judicial review) (citations omitted)).
According to the APA, "final agency action" is defined as a "final disposition." However, what constitutes a "final disposition" has not been defined by the APA, and has instead been left largely to the discretion of the courts to interpret. Although there is a strong presumption in favor of judicial review of federal administrative actions, this presumption only applies after there has been final agency action. Therefore, what constitutes "final agency action" must be determined by the courts on a case by case basis before an agency's actions can be subject to judicial review.

B. Precedential History

The determination as to whether or not an agency's action is sufficiently final to justify review by a federal court falls within the court's ripeness analysis of the case. Courts attempting to determine questions of ripeness begin the analysis with a "presumption of reviewability." This presumption should be particularly evident when the person affected by the agency action was forced to choose "between disadvantageous compliance or...

22. Abbott Labs. v. Gardner, 387 U.S. 136, 140-41 (1967) (stating that: "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation," and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." (citations omitted), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977)).
23. Id. at 140 (stating that "[T]he Administrative Procedure Act provides specifically not only for review of '(a)gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court.'").
24. Ripeness is defined as: "1. The circumstance existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made. 2. The requirement that this circumstance must exist before a court will decide a controversy." BLACK'S LAW DICTIONARY 1328 (7th ed. 1999).
25. Gen. Elec. Co. v. E.P.A., 290 F.3d 377, 380 (D.C. Cir. 2002) (following Abbott Labs. and stating that: "To determine whether a controversy is ripe for judicial review the court must evaluate 'the fitness of the issues for judicial decision . . . ,'" and that fitness is determined by deciding whether the agency’s action is sufficiently final. (citations omitted)).
risking imposition of serious penalties."\(^{27}\) In *Abbott Laboratories v. Gardner*,\(^ {28}\) the Supreme Court developed a test to determine when a case is ripe for judicial review.\(^ {29}\) In determining whether or not a case is ripe for judicial review, a federal court must assess "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."\(^ {30}\) The two considerations "function as independent but related variables."\(^ {31}\) However, when a court is dealing with tentative, or intermediate agency decisions, "claims of hardship 'will rarely overcome the finality and fitness problems inherent in attempts to review [those] decisions.'"\(^ {32}\)

Within the D.C. Circuit, the first part of the *Abbott* test is evaluated through the consideration of three factors:\(^ {33}\) "[1] whether the issue is purely legal, [(2)] whether consideration of the issue would benefit from a more concrete setting, and [(3)] whether the agency's action is sufficiently final.'"\(^ {34}\) In determining the finality requirement, the Supreme Court, in *Bennett v. Spear*,\(^ {36}\) established

\(^{27}\) *Id.*

\(^{28}\) *Abbott Labs.*, 387 U.S. at 140-41.

\(^{29}\) See *id.* at 148-49.

\(^{30}\) *Id.* at 149.

\(^{31}\) See *Ciba-Geigy*, 801 F.2d at 434 (stating that: Fitness and hardship function as independent but related variables, the former as a measure of the interests of the court and agency in postponing review and the latter as a measure of the challenging party's countervailing interest in securing immediate judicial review. The judiciary's ultimate determination of ripeness in a specific setting depends on a pragmatic balancing of those two variables and the underlying interests which they represent).

\(^{32}\) *DRG Funding*, 76 F.3d at 1215 (quoting Pub. Citizen Health Research Group v. Comm'r, 740 F.2d 21, 31 (D.C. Cir. 1984) (holding that the corporation's claim of hardship is not sufficient to overcome the finality and fitness problems because the agency's action does not effect the day-to-day business of the corporation, nor has the corporation been forced to choose between "disadvantageous compliance and risking serious penalties." (citations omitted)).

\(^{33}\) The first part of the *Abbott* test is the determination as to the fitness of the issues for judicial review. *Abbott Labs.*, 387 U.S. at 149.

\(^{34}\) *Gen. Elec.*, 290 F.3d at 380.

\(^{35}\) *Id.* (citations omitted).

\(^{36}\) 520 U.S. 154 (1997) (involving ranch operators and irrigation districts who filed suit alleging that a position set forth in a Federal Fish and Wildlife Service
two conditions that must be met in order to have "final agency action." The Court held:

As a general matter, two conditions must be satisfied for agency action to be ‘final’: First, the action must mark the 'consummation' of the agency’s decision-making process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which legal consequences will flow.

In Bennett, the Supreme Court had to determine whether or not a position set forth in a Federal Fish and Wildlife Service Biological Opinion (Biological Opinion or Opinion) constituted “final agency action” within the meaning of Section 704 of the APA. In holding the agency action final, the Court developed the above two conditions and distinguished the case in front of the Court from two previous decisions that held that the administrative action in question was not final. The two cases the Bennett Court distinguished its decision from were Franklin v. Massachusetts and Dalton v. Specter.

The Bennett Court distinguished its decision from the Franklin and Dalton decisions because, “[u]nlike the reports in Franklin and

Biological Opinion concerning the proposed use of reservoir water to protect lost river and various species of fish violated the Endangered Species Act).

37. See id. at 177-78.
38. Id. (citations omitted).
39. Id. at 177-79.
40. Id. at 178.
41. 505 U.S. 788, 798 (1992) (holding that the Secretary of Commerce’s presentation to the President of a report tabulating the results of a decennial census did not constitute “final agency action” within the meaning of Section 704 of the APA because the report carried “no direct consequences,” and it appeared to be “more like a tentative recommendation than a final and binding determination.”).
42. 511 U.S. 462 (1994) (holding that submissions to the President by the Secretary of Defense regarding recommended base closures were not sufficient to constitute final agency action within the meaning of the APA because they were not binding on the President; the President could either accept or reject the recommendations).
Dalton, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue [in Bennett] ha[d] direct and appreciable legal consequences." Since the position set forth in the Biological Opinion had direct legal consequences on ranch operators and irrigation districts, the Bennett Court held that the position given in the Opinion was sufficiently final and therefore constituted final agency action within the meaning of Section 704 of the APA.

Following the Bennett test and other case precedent on the subject of finality, essentially the "core question [in the finality determination] is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Therefore, an agency's action that "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," cannot be considered final agency action. The D.C. Circuit decided Reliable under the above statutory rules and case precedent.

C. Case History

In Reliable, the question before the court was whether the commencement of an investigation by CPSC into the performance reliability of Reliable's automatic sprinkler heads constituted "final agency action" within the meaning of Section 704 of the APA.

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43 Bennett, 520 U.S. at 178.
44 Id. at 178-79.
45 See Whitman v. American Trucking Assoc., 531 U.S. 457, 478 (2001) (holding that the EPA's rules revising national ambient air quality standards were final agency action). "Only if the 'agency' has rendered its last word on the matter in question is its action . . . reviewable." Additionally, following Bennett the Court stated that the "action under review [must] 'mark the consummation of the agency's decision-making process.'" Id. (citations omitted).
46 Franklin, 505 U.S. at 797; see also Whitman, 531 U.S. at 479 (stating that the finality determination is made by looking at the agency's actions, and not the words of its decision. "Though the agency has not dressed its decision with conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final.").
47 Rochester Tel. Corp. v. United States, 307 U.S. 125, 130 (1939); see also Am. Airlines, Inc. v. Herman, 176 F.3d 283, 288 (5th Cir. 1999).
48 Reliable, 324 F.3d at 728-29.
The appellant, Reliable, from 1973 to 1983, manufactured the “Model A Flush” sprinkler head, which was incorporated into automatic fire sprinkler systems throughout the United States.\(^49\) These fire systems were then placed in various commercial buildings.\(^50\)

Pursuant to authority granted under the Consumer Product Safety Act, 15 U.S.C. § 2051 et seq.,\(^51\) CPSC began investigating the “Model A Flush” sprinkler head in 1999 in order to determine whether or not it presented a substantial product hazard.\(^52\) CPSC claimed that it had gathered evidence sufficient to support a preliminary determination that the “Model A Flush” sprinkler heads presented a substantial product hazard as defined by the Consumer Product Safety Act.\(^53\) Although CPSC had not yet made its preliminary determination, in a letter dated September 11, 2000, it informed Reliable that the “Model A Flush” sprinkler heads “present a substantial product hazard, as defined by . . . 15 U.S.C. §

\(^{49}\text{Id. at 730.}^{50}\text{Id.}^{51}\text{The Consumer Product Safety Act, 15 U.S.C. § 2051, gives CPSC the authority to conduct investigations into the safety of consumer products that fall within the scope of the Act. 15 U.S.C. § 2054(b) (2004).}^{52}\text{Reliable, 324 F.3d at 730. One of the major responsibilities of CPSC is to determine if “a product distributed in commerce presents a substantial product hazard and [if] notification is required in order to adequately protect the public from such substantial product hazard.” 15 U.S.C. § 2064(c) (2004). If CPSC does make a determination that a product presents a substantial product hazard, it can order the manufacturer, retailer, or distributor of the product to bring the product into compliance with safety standards; replace, repair, or refund the price of the product; or give public notice of the defect. Id. However, CPSC can only issue a compliance order after the affected parties have been given an opportunity for a hearing pursuant to the APA. Id.}^{53}\text{Reliable, 324 F.3d at 730 (quoting Letter from Jimmie L. Williams, Jr., Counsel for Office of Compliance, CPSC, to Paul D. Derounian, Counsel for Reliable (Sept. 11, 2000)); see also 15 U.S.C. § 2064(a). According to Section 2064(a), “substantial product hazard” is defined as: (1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. 15 U.S.C § 2064.}
In that same letter, CPSC, before it would make its preliminary determination, requested that Reliable "take 'voluntary corrective action' pursuant to 16 C.F.R. § 1115.20(a)." However, at the time of trial, no voluntary corrective action plan had been initiated by Reliable, nor had CPSC made a formal decision that the "Model A Flush" sprinkler heads presented a "substantial product hazard." In fact, CPSC had not even begun the administrative proceedings that are required to make the formal determination. Instead, Reliable filed a complaint on January 9, 2001, seeking declaratory relief. Specifically, Reliable sought a declaration that its "Model A Flush" sprinkler heads were not "consumer products" within the meaning of the Consumer Product Safety Act, and therefore that Reliable is not subject to the jurisdiction of CPSC.

54. Id.
55. Reliable, 324 F.3d at 730; see also Letter from Jimmie L. Williams, Jr., Counsel for Office of Compliance, CPSC, to Paul D. Deronian, Counsel for Reliable (Sept. 11, 2000). According to 16 C.F.R. § 1115.20, CPSC, before beginning the required administrative proceedings, can "attempt to protect the public from substantial product hazards by seeking voluntary remedies," with one of those remedies being "corrective action plans." 16 C.F.R. § 1115.20 (2004). With "corrective action plans" the company itself, is given the opportunity to set forth the remedial action it will voluntarily undertake to prevent the product in question from being a substantial product hazard. Id. The plan the company develops should set forth how it plans to notify the public of the hazard, and if it will repair, replace, or refund the price of the product. Id. at § 1115.20(a). Since the corrective action is voluntary, the request by CPSC "has no legal binding effect." Id. Therefore, if the request by CPSC is not followed, then it can file an official administrative complaint that initiates formal administrative proceedings. 15 U.S.C. § 1025.
56. Reliable, 324 F.3d at 730.
57. Id. Following 15 U.S.C. Section 2064(c), (d), and (f), CPSC can only make a formal determination after the interested parties have been given an opportunity for a formal hearing pursuant to the APA in 5 U.S.C. § 554 (2004).
58. Reliable, 324 F.3d at 730.
59. The Consumer Product Safety Act defines "consumer products" as:
[A]ny article, or component part thereof, produced or distributed
(i) for sale to a consumer for use in or around a permanent or
temporary household or residence, a school, in recreation, or
otherwise, or (ii) for the personal use, consumption or enjoyment
of a consumer in or around a permanent or temporary household
or residence, a school, in recreation, or otherwise.
60. Reliable, 324 F.3d at 730.
On July 27, 2001, CPSC filed a motion to dismiss, arguing that the court lacked jurisdiction over Reliable’s claim because there had not been final agency action within the meaning of Section 704 of the APA. On November 28, 2001, the United States District Court in the District of Columbia rendered its opinion as to the merits of the case. United States District Judge Ellen Segal Huvelle, relying on *FTC v. Standard Oil*, held that CPSC’s “investigatory steps d[id] not rise to the level of ‘final agency action’ within the meaning of Section 704 of the APA.” The district court noted that Reliable may suffer a burden from CPSC’s investigation, but it is not a legal burden that arises from final agency action. So holding, District Judge Huvelle, granted CPSC’s motion to dismiss on grounds of lack of jurisdiction and ordered that Reliable’s complaint be dismissed with prejudice.

Following the decision in the district court, Reliable appealed to the United States Court of Appeals in the District of Columbia. At the time of appeal Reliable still had not initiated a voluntary corrective action plan, CPSC had not made a formal determination as to whether or not the “Model A Flush” sprinkler heads present a substantial product hazard, nor had CPSC filed an administrative complaint, or initiated formal administrative proceedings. In fact, at the time of appeal, CPSC had not made a formal determination that

62. *Id.* at 41.
63. *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980) (holding that the agency’s issuance of an administrative complaint that gave reason to believe that the plaintiff was violating the law was not final agency action).
64. *Reliable*, 173 F. Supp. 2d at 52.
65. *Id.* at 44-45. Following *FTC v. Standard Oil Co.*, the Court stated: [T]hat the FTC’s decision [[*FTC v. Standard Oil*]] had no “legal or practical effect, except to impose on Social the burden of responding to the charges made against it,” and while the burden might be substantial, it was different “in kind and legal effect” from the burdens imposed by conduct traditionally considered final agency action. *Id.* at 44 (citations omitted).
66. *Id.*
67. *Reliable*, 324 F.3d at 726.
68. *Id.* at 730.
it had jurisdiction over Reliable’s “Model A Flush” sprinkler heads.69 The United States Court of Appeal for the District of Columbia decided its case, Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission, based on the above factual information and background.

III. ANALYSIS OF OPINION

A. Reliable’s Contention that the District Court’s Dismissal of Case Was Improper

Circuit Judge, Harry T. Edwards, delivered the unanimous opinion for the Court of Appeals in the District of Columbia.70 He began his analysis by first addressing the district court’s dismissal of the controversy pursuant to Federal Rules of Civil Procedure 12(b)(1).71 Reliable raised the issue of improper dismissal, claiming that, in cases where judicial review is sought under the APA instead of a statute that prescribes judicial review, the requirement of final agency action is not jurisdictional under Califano v. Sanders.72 Since final agency action is not jurisdictional under Supreme Court precedent, Reliable argued that dismissal under Federal Rules of Evidence 12(b)(1) was not proper.73 Judge Edwards did not believe

69. Id. Although CPSC had not brought administrative proceedings against Reliable, CPSC had brought administrative proceedings pursuant to 15 U.S.C. § 2064 against several other manufacturers of similar sprinkler heads treating them as consumer products. See CPSC Admin. Compl. ¶ 1, JA 59; CPSC Admin. Compl. ¶ 1, JA 166 (cited in Reliable, 324 F.3d at 730).

70. Reliable, 324 F.3d at 728-29. Circuit Judge Edwards was joined by Chief Judge Ginsburg, and Circuit Judge Garland in the decision and opinion. Id.

71. Federal Rules of Civil Procedure states:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . .


73. Id.
that Reliable’s claim of improper dismissal would significantly alter the outcome of the case to justify reversal of the District Court’s decision. 74 Judge Edwards explained that “if there was no final agency action here, there is no doubt that appellant would lack a cause of action under the APA. Therefore, even though there was no basis for dismissal under Rule 12(b)(1), we may properly affirm the District Court’s judgment pursuant to Rule 12(b)(6).” 75 Judge Edwards assumed that there was not final agency action on the part of CPSC, thus holding that since there was no final agency action, the District Court’s dismissal could be affirmed on the basis of Rule 12(b)(6). 76

Although under the APA the issue of final agency action is not jurisdictional per Califano v. Sanders, and therefore, not the proper subject for a Rule 12(b)(1) dismissal, Judge Edwards, in his ruling, and additional case precedent make it evident that “final agency action” is essentially jurisdictional. 77 It is essentially jurisdictional because a federal court can not decide a case involving an administrative agency’s decision (absent a statute that states otherwise) without there being final agency action. 78 Since final agency action is needed in order for a federal court to decide the controversy in question, it would seem logical that final agency action is essentially jurisdictional. Either way, whether the dismissal

74. Id. (stating, in regard to the claim of improper dismissal, that: “We need not dwell on this issue, for it raises a question of no significance in this case”).

75. Reliable. 324 F.3d at 731. Federal Rules of Civil Procedure 12(b)(6) states in part: “[T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .” Fed. R. Civ. P. 12(b)(6).

76. Id. The district court’s decision could be affirmed on the basis of Rule 12(b)(6) because, according to the APA, final agency action is needed before a federal court can grant a party its claim for relief against an administrative agency. 5 U.S.C. § 704. Therefore, without final agency action, Reliable has failed to state a claim upon which relief can be granted.

77. See EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997) (holding that a court may properly dismiss a party’s claim pursuant to Federal Rules of Civil Procedure 12(b)(6) if there has not been final agency action); see also DRG Funding Corp. v. Sec’y of Hous. & Urban Dev., 76 F.3d 1212, 1214 (D.C. Cir. 1996) (holding that: “The requirement of a final agency action has been considered jurisdictional,” therefore, “the agency action is not final [and] the court... cannot reach the merits of the dispute” (citations omitted)).

takes place due to lack of jurisdiction under Rule 12(b)(1), or for failure to state a claim under Rule 12(b)(6), the question the court needs to ask is the same: Is there final agency action within the meaning of Section 704 of the APA? If the answer is no, the case can properly be dismissed. However, according to the D.C. Circuit’s ruling in Reliable, and following the Supreme Court’s ruling in Califano, the proper method of dismissal would be Rule 12(b)(6).  

B. Reliable’s Contention that CPSC’s Conduct Constitutes as Final Agency Action

Following Judge Edward’s analysis of Reliable’s claim of improper dismissal, Judge Edwards focused on the question of finality. Citing the APA, he explained that the authority of the district court “to review the conduct of an administrative agency is limited to cases challenging ‘final agency action.’” Following the Supreme Court and D.C. Circuit precedent, Judge Edwards then gave the general rules as to what constitutes “final agency action.”

Within the D.C. Circuit, agency action is considered final if the action is “definitive,” and it has a “direct and immediate . . . effect on the day-to-day business’ of the party challenging the agency action.” The agency action is considered final if it “imposes an obligation” or to the extent that it “denies a right, or fixes some legal relationship.” According to the court, in order for an agency’s action to be final, the conduct of the agency must demonstrate that the agency considers the action final and that the action in question yields some sort of consequence to the party challenging the action.

79. See Reliable, 324 F.3d at 731; see also Califano v. Sanders, 430 U.S. 99, 107 (1977).
80. Reliable, 324 F.3d at 731 (stating: “Having disposed of the threshold issue, we turn now to the question of finality”).
81. Id. (citing 5 U.S.C. § 704).
82. Id.
83. Id. (citing FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 243 (1980)).
84. Id. (citing Role Models Am., Inc. v. White, 317 F.3d 327, 331-32 (D.C. Cir. 2003)). The court further explains that “[f]inal agency action ‘mark[s] the consummation of the agency’s decisionmaking process’ and is ‘one by which rights or obligations have been determined, or from which legal consequences will flow.’”
85. Id. (quoting Bennett v. Spear, 520 U.S. 154 (1997)).
With the general rules regarding final agency action laid out, the court begins its analysis as to whether or not CPSC's actions toward Reliable were sufficient to be considered final agency action within the meaning of Section 704 of the APA.\textsuperscript{86} Specifically, the court must determine if CPSC's preliminary assumption that Reliable's "Model A Flush" sprinkler heads are "consumer products" under the Consumer Product Safety Act is "final agency action."\textsuperscript{87} Reliable argued that CPSC's preliminary assumption that it had statutory authority to regulate its sprinkler heads was sufficiently final to be considered final agency action and warranted judicial review.\textsuperscript{88} Although CPSC's conduct only resulted in pre-enforcement action, Reliable contended that because that pre-enforcement action assumes that CPSC has statutory authority to regulate it, then the assumption of statutory authority was sufficiently final to be reviewed by the court.\textsuperscript{89}

The court, however, "reject[ed] [Reliable's] line of reasoning."\textsuperscript{90} Because CPSC did not make any formal determinations, impose any obligations on Reliable, or create a legal relationship with Reliable, the court did not see its actions as final.\textsuperscript{91} The court pointed out that CPSC had only asked Reliable to voluntarily comply with its request for corrective action.\textsuperscript{92} According to the court, the voluntary request did not have the legal consequences or burdens that satisfy final agency action under Section 704 of the APA.\textsuperscript{93} In analogizing to
FTC v. Standard Oil Co., the court noted that the filing of an administrative complaint does not even constitute final agency action. The court recognized that CPSC’s investigation into Reliable’s sprinkler heads does have consequences, but it noted that “[t]hese consequences attach to any parties who are the subjects of Government investigations and that believe the relevant law does not apply to them.”

Even more significant to the court than the lack of obligations or legal consequences being imposed was that CPSC had “not yet taken the steps required under the statutory and regulatory scheme for its actions to have any legal consequence.” Since CPSC is required to hold formal, on-the-record hearings before it can make legally binding determinations, its conduct prior to those hearings does not have any legal effect and therefore cannot be considered final agency action. Additionally, the court emphasized that because there are formal adjudication requirements that CPSC must follow, Reliable is protected. The court stated that Reliable is protected by these procedures because:

choice Reliable faces between voluntary compliance with the agency’s request for corrective action and the prospect of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement.

Id. at 732.

94. Id. (citing 449 U.S. 232, 243 (1980) (finding that filing an administrative complaint was not final agency action within the meaning of Section 704 of the APA).

95. Id. The court stated that a party may defend on the grounds that the Government lacks jurisdiction, but the party may not challenge that jurisdiction before the Government has taken action to enforce the law. Id.

96. Id.

97. Id. The formal adjudication procedures are: (1) If, after an initial investigation, CPSC determines that a product presents a “substantial product hazard,” it may file an administrative complaint. See 16 C.F.R. § 1025.11. (2) If a complaint is filed, a full adjudicatory hearing before an administrative law judge, with the right of appeal, must be granted. See 15 U.S.C. § 2064(f); 16 C.F.R. § 1115.21(a); & 16 C.F.R. § 1025. (3) If CPSC prevails at the hearing, it can order the product’s manufacturer to take corrective action. See 15 U.S.C. § 2064(d). Compliance with CPSC’s order at this stage is mandatory, and non-compliance could subject the violator to an enforcement action. See 15 U.S.C. §§ 2068(a)(5), 2069, 2070, 2071(a), (b).
In the event that the agency should decide to pursue enforcement action against Reliable, the agency must, in the course of the formal adjudication, afford Reliable the opportunity to convince the agency that the term "consumer product" does not include Reliable's sprinkler heads and that the agency therefore lacks jurisdiction to regulate them.98

Following this line of reasoning, the court maintained that CPSC's actions toward Reliable could not be considered final agency action within the meaning of Section 704 of the APA.99 According to the court, Reliable's interest in not being forced to defend itself in an unauthorized proceeding "is far less weighty than the court's interest in conserving its judicial resources and discouraging the flouting of administrative procedures."100 In regard to tentative or preliminary enforcement actions taken by an administrative agency, the court stated that its interest in postponing review is greater.101 Judicial review should be postponed when an agency's decision is tentative because it would improperly intrude into the agency's procedures.102 Additionally, the court stated that if it were allowed to perform judicial review at preliminary stages in an agency's decisionmaking process, it would "squander judicial resources" because the party still has an opportunity, through formal administrative procedures, to get the agency to change its mind.103 Therefore, in order to conserve judicial and administrative resources, and to allow CPSC to complete its decisionmaking process, the court held that "[s]o long as Reliable retains the opportunity to convince the agency that it lacks jurisdiction over Reliable's sprinkler heads,"

98. Reliable, 324 F.3d at 742. The court went on to further emphasize that CPSC had yet to even file an administrative complaint against Reliable. Id.
99. Id.
100. Id. (quoting Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 742 (D.C. Cir. 1987)).
101. Id.
102. Id. (quoting Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Judicial review at that stage improperly intrudes into the agency's decisionmaking process").
103. Id. (quoting Ciba-Geigy, 801 F.2d at 436).
it would not intervene.  

Reliable, however, argued that CPSC’s determination as to its jurisdiction over its sprinkler heads was not tentative, or preliminary. Reliable contended that CPSC had made up its mind and that it no longer had an opportunity to convince CPSC that it lacked jurisdiction over Reliable’s “Model A Flush” sprinkler heads. Because CPSC had previously brought administrative proceedings against manufactures of similar sprinkler heads, and treated those sprinkler heads as “consumer products,” Reliable argued that CPSC had already decided that it had jurisdiction over Reliable’s sprinkler heads. Since CPSC already decided that it had jurisdiction in other cases, according to Reliable, its conduct regarding jurisdiction over Reliable’s sprinkler heads sufficiently demonstrated final agency action within the meaning of Section 704 of the APA. The court, however, did not agree that CPSC’s determination in previous cases rendered its decision as to jurisdiction in this case final. The court stated that in those previous cases, as well as in the present case in front of CPSC, the agency “never considered the issue raised by Reliable....” CPSC had yet to officially decide through its formal adjudication procedures whether or not it had jurisdiction over the type of automatic sprinkler heads in question. Even if it had made a jurisdictional determination as to other manufactures of sprinkler heads, the court stated that “it does not follow... that the agency will

104. Id. at 733.
105. Id.
106. Id.
107. Id.
108. Id. Reliable contended that the previous automatic sprinkler head cases, where CPSC’s conduct demonstrated that it had jurisdiction, were a series of agency pronouncements and, following Ciba-Geigy, a “series of agency pronouncements” can demonstrate final agency action. Id. at 734 (quoting Ciba-Geigy, 801 F.2d at 436 n.7).
109. Reliable, 324 F.3d at 733.
110. Id. The court noted that in the other sprinkler cases cited by Reliable as demonstrating that CPSC had determined that it had jurisdiction over Reliable’s sprinkler heads, in “all but one of those cases, only administrative complaints were issued. . . . And in the one case in which an ALJ actually rendered an opinion... [CPSC] never passed on the issue because the case was settled. Id.
111. Id.
use its resources to proceed against Reliable." Furthermore, the court stated that Reliable is protected by the formal adjudication procedures that CPSC is required to follow when it makes a determination. Since Reliable is entitled to a hearing in front of CPSC, it is guaranteed the opportunity to plead its case as to CPSC's lack of jurisdiction over its sprinkler heads. Therefore, the Court held that CPSC's informal, preliminary determinations of regulatory jurisdiction over other manufacturers of similar sprinkler heads did not make its conduct with Reliable final agency action within the meaning of Section 704 of the APA.

Reliable attempted to bolster its argument that CPSC's conduct sufficiently demonstrated final agency action by trying to draw analogies between its case and the D.C. Circuit precedent that addressed the issue of finality. Reliable relied on three cases where pre-enforcement agency action was considered sufficiently final to allow judicial review of the agency's decision. Reliable argued that the court should treat its case like *Ciba-Geigy Corp. v. EPA*, *Athlone Industries, Inc. v. CPSC*, or *Atlantic Richfield Co. v. U.S. Department of Energy*; and find that CPSC's pre-enforcement actions were sufficiently final to justify the court's review. However, the court did not agree that the cases cited by

112. *Id.* The court noted that just because CPSC had brought administrative proceedings against other manufacturers of similar sprinkler heads, administrative proceedings would be necessarily be brought against Reliable. *Id.*

113. *Id.* The court stated:

If the agency does decide to pursue a complaint, Reliable will be afforded a hearing in which it will have ample opportunity to convince the agency against the assertion of regulatory jurisdiction and create a record for judicial review should that later be deemed necessary. And a hearing before the Commission will not be an idle gesture, because the agency has made it clear that the interpretation of "consumer product" with respect to sprinkler heads remains to be determined.

114. *Id.*

115. *Id.* at 733-35.

116. *Id.* at 733.

117. 801 F.2d 430 (D.C. Cir. 1986).

118. 707 F.2d 1485 (D.C. Cir 1983).

119. 769 F.2d 771 (D.C. Cir. 1985).

120. 324 F.3d at 733.
Reliable as precedent were directly analogous to its present situation. The court then proceeded to take each of the cases cited by Reliable as precedent and distinguish them from the facts before the Court.

1. *Ciba-Geigy Corp. v. EPA*¹²³

*Ciba-Geigy*, the court noted, involved the Environmental Protection Agency (EPA) mandating that labeling changes be made for a registered pesticide by a specified deadline.¹²⁴ The EPA imposed the labeling changes on manufacturers without providing notice or the hearing procedures required by the statute that gave it jurisdiction.¹²⁵ In *Ciba-Geigy*, the EPA sent a letter to the manufacturer of the pesticide which ordered a labeling change of the pesticide and requested “immediate compliance.”¹²⁶ Since the letter required immediate compliance, the court in that case held that the letter “unequivocally” stated the EPA’s position that *Ciba-Geigy* was not entitled to a cancellation hearing.¹²⁷ The unequivocal nature of the letter, coupled with the fact that it gave no indication that the agency’s decision was subject to further review, suggested to the court that the EPA’s action was final.¹²⁸

The *Reliable* Court emphasized that in *Ciba-Geigy*, the EPA’s

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¹²¹ Id. The court stated: “Reliable argues that we should interpret *Standard Oil* narrowly here, and find that the agency’s actions in this case are also sufficiently final to warrant judicial review. We reject this invitation, because the cases cited by Reliable do not support review here.” *Id.*

¹²² Id. at 733-35.

¹²³ 801 F.2d 430 (D.C. Cir. 1986).

¹²⁴ *Reliable*, 324 F.3d at 733-34 (citing *Ciba-Geigy*, 801 F.2d at 436-37).

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Ciba-Geigy*, 801 F.2d at 436-37).

¹²⁷ *Id.* at 733.

¹²⁸ *Id.* at 733-34; *see also Ciba-Geigy*, 801 F.2d at 436-38 (stating: Once the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review.... We conclude, as this court has repeatedly held before, that “an agency’s interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review”).
position was unambiguous and did not provide for further agency consideration.\(^{129}\) In comparison, however, CPSC had yet to make an "unequivocal statement of the agency's position on the meaning of 'consumer product' or on the agency's jurisdiction over Reliable's sprinklers."\(^{130}\) The court noted that CPSC had merely requested voluntary corrective action; it did not mandate that Reliable comply with its request as the EPA did in Ciba-Geigy.\(^{131}\) Furthermore, should CPSC ever initiate administrative proceedings against Reliable, the court noted that Reliable is entitled to formal administrative hearings to try to persuade CPSC that it does not have jurisdiction.\(^{132}\) After looking closely at the Ciba-Geigy decision and comparing it to the facts in front of the Court, it held that CPSC's conduct toward Reliable was too dissimilar from the actions taken by the EPA against Ciba-Geigy to sufficiently satisfy the Ciba-Geigy precedent.\(^{133}\)

2. **Athlone Industries, Inc. v. CPSC**\(^{134}\)

Next, the court addressed the case of **Athlone Industries, Inc. v. CPSC.**\(^{135}\) In **Athlone**, CPSC assessed the plaintiff civil penalties for a statutory violation through an administrative proceeding.\(^{136}\) The plaintiff, believing that CPSC lacked the statutory authority to assess the civil penalty against it, sued to enjoin CPSC from enforcing the penalty.\(^{137}\) The **Athlone** court held that judicial review of CPSC's

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129. **Reliable**, 324 F.3d at 733-34.
130. *Id.* at 734.
131. *Id.; see also Ciba-Geigy*, 801 F.2d at 437 (holding that the "EPA's steadfast failure to initiate a cancellation proceeding, coupled with the representations of its counsel that EPA construes its statute not to require such a hearing before imposing labeling changes, only serves to confirm the finality of the agency's pre-litigation position.").
132. **Reliable**, 324 F.3d at 734; *see also Ciba-Geigy*, 801 F.2d at 436-37 (where "the agency denied the plaintiff any opportunity to be heard," and instead mandated that they comply with its requested labeling change).
133. **Reliable**, 324 F.3d at 733-34.
134. 707 F.2d 1485, 1486 (D.C. Cir. 1983).
135. **Reliable**, 324 F.3d at 734; *see also Athlone*, 707 F.2d at 1486.
136. *Id.*
137. *Id.; see also Athlone*, 707 F.2d at 1486-87.
actions was appropriate.\textsuperscript{138} Since the court was reviewing the agency’s statutory authority, it held that Athlone did not have to exhaust all administrative remedies before obtaining judicial review.\textsuperscript{139} The court emphasized that judicial review of statutory authority is allowed because of the “purely legal nature of the issue.”\textsuperscript{140} In determining statutory authority, the court stated that it does not need to develop the facts behind the case, nor is there the need for the court to rely on the expertise of the agency.\textsuperscript{141} Additionally, the court noted the futility for Athlone in resorting to further administrative proceedings because it was “highly unlikely that the commission would change its position if the case were remanded to it.”\textsuperscript{142} Therefore, because the issue of statutory authority raised in Athlone was purely legal, and any further administrative proceedings would more then likely be futile, the Athlone court held that CPSC’s actions were sufficiently final to justify judicial review.\textsuperscript{143}

In the present case, the Court noted that the issue raised by Reliable was more of a factual question versus the legal issue that was addressed in Athlone.\textsuperscript{144} According to the Court, “whether the statutory term ‘consumer product’ includes Reliable’s sprinkler heads is not a purely legal one since the application of the statutory term to the sprinkler heads would clearly involve the resolution of factual issues and the creation of a record.”\textsuperscript{145} Since the determination is factual in nature, the Court inferred that unlike the Athlone case, agency expertise would be helpful in determining whether or not Reliable’s “Model A Flush” sprinkler heads fall within CPSC’s statutory definition of “consumer product.”\textsuperscript{146} Consequently, the

\textsuperscript{138} Id.; see also Athlone, 707 F.2d at 1489.
\textsuperscript{139} Id.; see also Athlone, 707 F.2d at 1489.
\textsuperscript{140} Athlone, 707 F.2d at 1489 (quoted in Reliable, 324 F.3d at 734).
\textsuperscript{141} Reliable, 324 F.3d at 734 (citing Athlone, 707 F.2d at 1489).
\textsuperscript{142} Athlone, 707 F.2d at 1489 (quoted in Reliable, 324 F.3d at 734).
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. In order to determine whether or not the sprinkler heads fall within the definition of “consumer products,” the court would have to develop a factual record to determine where and how the sprinklers are used, and who the intended consumers are, and compare those facts to the statutory definition and other cases where the product in question was held to be a “consumer product.” Id.
\textsuperscript{146} Id.
court held that the facts before it in Reliable were not sufficiently similar to the facts in Athlone to allow the court to follow it as judicial precedent.\textsuperscript{147}

Reliable argued that its facts were similar to those in Athlone because in both cases further administrative proceedings would be futile.\textsuperscript{148} Reliable contended that, as CPSC had done in Athlone, it had made up its mind regarding jurisdiction and it was not going to change, even if Reliable was given the opportunity to try to change it.\textsuperscript{149} However, the court did not see CPSC’s formal administrative adjudication proceedings as yielding a “pre-ordained” answer to Reliable’s question regarding jurisdiction.\textsuperscript{150} Quoting the district court’s decision, the court held that “Reliable ‘may be able to persuade an administrative law judge that the manner in which its sprinklers are produced and marketed, and the locations in which [they] are installed demonstrate that they are not ‘consumer products.’”\textsuperscript{151} Since the court believed that Reliable would have the opportunity to convince CPSC that it lacked jurisdiction over Reliable’s sprinkler heads, the court held that the case was not similar to Athlone.\textsuperscript{152}

3. \textit{Atlantic Richfield Co. v. U.S. Department of Energy}\textsuperscript{153}

Lastly, the court addressed the case of \textit{Atlantic Richfield Co. v. U.S. Department of Energy}.\textsuperscript{154} In Atlantic, the U.S. Department of Energy, through its administrative proceedings, requested discovery of confidential information in the plaintiff’s possession.\textsuperscript{155} The

\begin{itemize}
\item 147. \textit{Id.}
\item 148. \textit{Id.}
\item 149. \textit{Id.} The court noted that Reliable “claims that it is highly unlikely that the agency will change its position and that resort to the agency’s adjudicatory proceeding would be futile.” \textit{Id.}
\item 150. \textit{Id.} According to the court, “nothing in the record indicates that the outcome of a hearing, where Reliable will have the opportunity to present its arguments to the agency, is preordained.” \textit{Id.}
\item 152. \textit{Id.}
\item 153. 769 F.2d 771.
\item 154. \textit{Reliable}, 324 F.3d at 734–35.
\item 155. \textit{Id.} at 735 (citing Atlantic, 769 F.2d at 783).
\end{itemize}
plaintiff, not desiring to turn over the confidential information, brought suit in federal court, questioning the statutory authority of the agency to order the type of discovery at issue in the case. Following Athlone, the court held that the question regarding the statutory authority of the agency was a legal issue that did not require agency expertise. Additionally, the Atlantic court noted that any attempt by the plaintiff to resort to the administrative adjudication procedures of the agency would have been futile because the agency operated under the premise that it had the authority to act in the questioned adjudicatory capacity. Due to the futility of following the administrative procedures and the strictly legal aspects of the issue, combined with the legal consequences that the plaintiff could have suffered for not complying with the agency’s discovery orders, the court held that the agency’s actions were final and ready for judicial review. As Judge Edwards and the court did not find Reliable’s argument of sufficient factual similarity to Athlone to have merit, neither did it find any similarity between its facts and the facts in Atlantic. Specifically, the court held that the consequences of failing to comply with the agency’s request were significantly different in the two situations. In Atlantic, failure to comply could have resulted in direct and immediate legal consequences, however, if Reliable failed to comply with the “voluntary corrective action” request, the court noted that it would not suffer any immediate legal

156. Id.
157. Id. at 734-35. The question of statutory authority was considered strictly legal because it had to do with the authority of the Department of Energy to adjudicate remedial orders itself and impose discovery sanctions in those proceedings. Atlantic, 769 F.2d at 782. The case did not require factual development of the issues, merely a straight interpretation of the statute. Id.
158. Reliable, 324 F.3d at 735 (citing Atlantic, 769 F.2d at 782).
159. Id. (quoting Atlantic, 769 F.2d at 783-84) (stating that Atlantic was “faced with the dilemma of having to [choose] between complying with allegedly ultra vires discovery orders – and thus revealing materials that otherwise would remain confidential – and flouting the orders and facing the consequences should the Department ultimately be found to have the power to issue the order.”).
160. Id.
161. Id. The court stated that the issue faced by Reliable “is not analogous to the plaintiff’s dilemma in Atlantic.” Id.
In fact, according to the court, if Reliable failed to comply with the request by CPSC, there is only the "possibility" that it would have to defend itself at an administrative hearing.\footnote{Id.} As the court points out, there is still the possibility that CPSC may not pursue the matter at all, or that it could find, after further review, that it does not have statutory jurisdiction over Reliable's "Model A Flush" sprinkler heads."\footnote{Id. at 734.} Therefore, because the issue in Atlantic was legal in nature, and the consequences of failing to comply with the agency's orders were significantly greater than those faced by Reliable,\footnote{Id. at 733.} the court held that the two cases were not sufficiently similar to justify following Atlantic as precedent.\footnote{Id. at 735.}

Following its analysis of the facts in Reliable and the case precedent cited by Reliable, the court held that CPSC's preliminary determination that Reliable's "Model A Flush" sprinkler heads were "consumer products," and thus subject to the court's jurisdiction, was not "final agency action" within the meaning of Section 704 of the APA.\footnote{See id. at 732-33.} Essentially, the court held that informal agency decisions that have no legally binding effect are not considered "final agency action" under the APA.\footnote{See id. at 731 (stating that "[T]he District Court's authority to review the conduct of an administrative agency is limited to cases challenging 'final agency action.'"); see also 5 U.S.C. § 704 (2004).} Since these agency decisions are not considered "final agency action," they are not subject to judicial review.\footnote{Id. at 735.} Utilizing the rule that it just established, the court affirmed the judgment of the district court and dismissed the action pursuant to Federal Rules of Civil Procedure Section 12(b)(6).\footnote{Id. at 735.}
IV. IMPACT

The aftermath of the D.C. Circuit's ruling in Reliable will not likely be exceptionally far reaching. In the end, the decision given by the court in Reliable does not appear to extend or change previous D.C. Circuit or Supreme Court precedent on the interpretation of the requirement of final agency review. What the decision may do is clarify the finality holdings in earlier D.C. Circuit opinions where preliminary agency action was held to constitute final agency action within the meaning of Section 704 of the APA.

A. Judicial Impact

At the time the author wrote this note, several cases addressing the issue of "final agency action" had been decided subsequent to the decision in Reliable. In several of the cases, the court discussed the decision in Reliable as precedent. The D.C. Circuit decided one of those cases, and the District Court for the District of Columbia recently decided two additional cases. The three District of Columbia decisions are: Croplife America v. EPA; Collagenex

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171. See Croplife Am. v. EPA, 329 F.3d 876, 882 (D.C. Cir. 2003) (declining to extend the ruling in Reliable to the case before it).
172. See Bennett, 520 U.S. at 178 (holding that in order for agency action to be considered sufficiently final, "it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"); see also Ciba-Geigy, 801 F.2d at 436 (D.C. Cir. 1986) (stating that in determining whether or not there has been final agency review, the court should look at "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." (quoting FTC v. Standard Oil Co., 449 U.S. 232, 243 (1980))).
173. See, e.g., Ciba-Geigy, 801 F.2d 430; Athlone, 707 F.2d 1485; Atlantic, 769 F.2d 771; see also, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000) (holding that an EPA guidance document that reflected a settled agency position and had legal consequences for those subject to its regulation, was final agency action for the purpose of judicial review).
Pharmaceuticals, Inc. v. Thompson; and F.L. v. Thompson.\textsuperscript{175}

1. Croplife America v. Environmental Protection Agency\textsuperscript{176}

In Croplife, the petitioners brought suit in federal court to challenge a December 14, 2001 directive issued by the EPA\textsuperscript{177} announcing a moratorium on the use of third-party human test data in its decision making process over pesticide registration.\textsuperscript{178} Prior to the December 14, 2001 directive, the EPA in October 2001 had "made [it] clear that it would consider data from third-party human studies on a case-by-case basis."\textsuperscript{179} The petitioners argued that the December 14\textsuperscript{th} directive was unlawful because it was a binding regulation that was not issued by the EPA through the formal procedures required by federal statute.\textsuperscript{180} Additionally, the petitioners argued that since the directive was a binding regulation that will adversely affect them, it is the proper subject for judicial

\textsuperscript{175} See Croplife, 329 F.3d 876; Collagenex, 2003 WL 21697344; Thompson, 293 F. Supp. 2d 86.
\textsuperscript{176} 329 F.3d 876 (D.C. Cir. 2003).
\textsuperscript{178} Croplife, 329 F.3d at 880. Human test data was important because, under FIFRA, in order for the EPA to grant registration to a pesticide, it must determine whether that pesticide would produce an "unreasonable risk to man," or whether that pesticide would result in a "human dietary risk." 7 U.S.C § 136(bb). "In determining whether pesticide tolerances are safe, [the] EPA may consider the validity of the available data from studies, anticipated and actual residue levels of the pesticide in or on foods, the percent of food actually treated with the pesticide, and international standards." Croplife, 329 F.3d at 879 (citing 21 U.S.C. §§ 346a(b)(2)(D)-(F), (b)(4) (2000)).
\textsuperscript{179} Id. at 879. This October announcement came after the EPA, since the late 1990's, had been reevaluating its practice of relying on data from third-party human studies in previous decades. Id. at 876. During this reevaluation period, the EPA would consider third-party human studies on a case-by-case basis, and only if the tests met the highest ethical standards. Id. at 877. The October 2001, announcement merely clarified the case-by-case procedure that the EPA had been using since the late 1990's. Id. at 876.
\textsuperscript{180} Id. at 878. Petitioners complain that the December 14, 2001, directive was in fact binding, and "was issued without the notice of proposed rulemaking and period for public comment mandated by the Federal Food, Drug and Cosmetic Act." Id. (citations omitted).
review.\textsuperscript{181} The EPA on the other hand, contended that the December 14, 2001, directive was not a binding regulation.\textsuperscript{182} Specifically, the EPA argued that “the matter in dispute is not subject to judicial review, that petitioners lack standing, and that the challenge is not ripe for judicial review.”\textsuperscript{183}

The court in Croplife first addressed the issue of whether or not the December 14, 2001, directive was a “binding regulation.”\textsuperscript{184} Due to the “clear and unequivocal language” of the directive, the court held that it was a binding regulation “directly aimed at and enforceable against petitioners.”\textsuperscript{185} In its holding, the court stated that “[t]his clear and unequivocal language, which reflects an obvious change in established agency practice, creates a binding norm that is finally determinative of the issues or rights to which it is addressed.”\textsuperscript{186} The EPA attempted to convince the court that the directive was not binding because it specifically stated that the EPA would consider third-party human test data if legally required to do so.\textsuperscript{187} According to the EPA, the legally required language refers to Administrative Law Judges as being “authorized to rule on particular third-party human studies after [the] EPA completes its review of a pesticide without the agency considering [the] data.”\textsuperscript{188} Therefore, according to the EPA, the directive was not binding because the third-party test data will still be reviewed by the EPA in its decision making process if mandated to do so by an ALJ.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id. at 881.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id. The court noted that the “principle issue in [the] case [was] whether the EPA directive that is included in the December 14 Press Release constitutes a binding regulation.” Id.
\item \textsuperscript{185} Id. The letter states that “the Agency will not consider or rely on any [third-party] human studies in its regulatory decision making.” Id.
\item \textsuperscript{186} Id. (internal quotations omitted) (citations omitted).
\item \textsuperscript{187} Id. According to the court the EPA letter stated that it would consider third-party human data if it was “legally required to consider or rely on such human study.” Id.
\item \textsuperscript{188} Id. at 882.
\item \textsuperscript{189} Id. In regard to the EPA’s argument, the court noted that “the reality of agency operations makes it clear that ALJs cannot independently rule on the legality of third-party human studies, because they may not ignore the Administrator’s unequivocal statement prohibiting the agency from considering
\end{itemize}
In an attempt to strengthen its argument that the directive was non-binding because it was subject to review by an ALJ, the EPA pointed to Reliable\textsuperscript{190} as supporting precedent.\textsuperscript{191} However, Circuit Judge Edwards\textsuperscript{192} held that Reliable is not similar to the case at hand.\textsuperscript{193} So holding, the court pointed out that in Reliable, the court did not find final agency action on the part of CPSC because “[no] legal consequences flow[ed] from the agency’s conduct . . . for there ha[d] been no order compelling Reliable to do anything.”\textsuperscript{194} Additionally, the court pointed out that in Reliable, according to CPSC’s statutory requirements, Reliable would have the chance to present arguments to an ALJ in formal adjudicatory proceedings.\textsuperscript{195} Conversely, the court noted that, in the present case, the EPA’s December 14, 2001, directive has legal consequences that cannot be raised in formal administrative proceedings.\textsuperscript{196} Specifically, the court stated that the directive issued by the EPA has “legal consequences that are binding on both petitioners and the agency, and petitioners will be afforded no additional opportunity to make the arguments to the agency that they now present in this petition.”\textsuperscript{197} Consequently, since the EPA directive had legal consequences, and the petitioners would be unable to raise the issues presented at an administrative hearing, the court held that the case is “inapposite” to Reliable and that the issues presented are sufficiently final to justify judicial review.\textsuperscript{198}

\textsuperscript{190} Reliable, 324 F.3d 726 (D.C. Cir. 2003).
\textsuperscript{191} Croplife, 329 F.3d at 882.
\textsuperscript{192} Circuit Judge Edwards is the same judge that drafted the Reliable opinion. See Reliable, 324 F.3d at 728-29.
\textsuperscript{193} Croplife, 329 F.3d at 882.
\textsuperscript{194} Id. (internal quotations omitted) (quoting Reliable, 324 F.3d at 732).
\textsuperscript{195} Id. (citing Reliable, 324 F.3d at 729).
\textsuperscript{196} Id. The petitioner’s arguments cannot properly be raised in administrative proceedings because they concern questions of law and policy. See, e.g., Ass’n of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (stating that “[a]lthough an ALJ may dispute the validity of agency policy, the agency may impose its policy through the administrative appeals process”).
\textsuperscript{197} Croplife, 329 F.3d at 882.
\textsuperscript{198} Id.
Within months of deciding *Reliable*, Judge Edwards, in *Croplife*, returned to the question of finality and further clarified his decision in *Reliable*. This case, in its brief analysis of *Reliable*, demonstrates the important aspects of *Reliable*. According to the court, *Reliable* stands for the proposition that there is final agency action when legal consequences flow from the agency’s conduct, and the petitioner would be unable to, or it would be futile to, raise those legal issues in an administrative proceeding in front of an ALJ. The court’s holding in *Croplife* does not expand or diminish the importance of the D.C. Circuit ruling in *Reliable*. In fact, the court’s ruling in *Croplife* seems to fall within its ruling in both *Ciba-Geigy Corp. v. EPA* and *Athlone Industries, Inc. v. CPSC*, which were distinguished in *Reliable* from the court’s decision. Therefore, the *Croplife* decision adds clarity to the *Reliable* decision by further focusing in on the importance of the agency’s adjudicatory process in the court’s finality analysis.

2. *Collagenex Pharmaceuticals, Inc. v. Thompson*

In *Collagenex*, the district court for the District of Columbia had to determine whether or not the response made by the Food and Drug Administration (FDA), in response to Collagenex’s request that it not approve any generic drugs modeled after its drug Periostat,

199. *Croplife* was decided on June 3, 2003, only a month and a half after the court rendered its decision in *Reliable*. See *Croplife*, 329 F.3d at 876; *Reliable*, 324 F.3d at 726.

200. See *Croplife*, 329 F.3d at 882.

201. *Id.*


204. See infra Part III and accompanying notes. In both cases, final agency action was found due to the unequivocal nature of the agency’s conduct and the lack of the opportunity for the petitioners to have their issues heard in a formal administrative hearing.

205. See *Croplife*, 329 F.3d at 882.


207. The FDA is given the statutory authority to investigate the efficacy and safety of new drugs and determine if they should be placed on the market. *Collagenex*, 2003 WL 21697344, at * 1.
constituted final agency action. Collagenex manufactures a drug called Periostat that is used to treat adult periodontitis. The FDA originally approved Periostat as an "antibiotic drug" within the meaning of the Food, Drug and Cosmetic Act. Collagenex objected to the FDA defining Periostat as an "antibiotic drug" so it appealed to the FDA to reclassify the drug. While Collagenex was appealing to the FDA to reclassify its drug, it pulled Periostat off the market and requested that the FDA not approve any ANDA applications prior to the situation being resolved. Since the FDA was on the verge of approving generic equivalents to Periostat, Collagenex sued in federal court for review of its actions and the issue of an injunction.

In determining if the case was proper for judicial review, the court addressed the finality of the agency's determination. The FDA argued that Collagenex was not harmed by the agency's action because it had not approved any generic equivalents to Periostat yet. Since it had not made final approval of the ANDA applications, the FDA contended it had not completed final agency action, and therefore its actions in regard to ANDA applications for Periostat generics were not the proper subject of judicial review. Citing Reliable, the court agreed with the FDA that the ANDA

208. Id.
209. Id. at * 3.
210. Id. Because Periostat was approved as an "antibiotic drug" it was not eligible for exclusive market protection or patent protection that is available to non-antibiotic drugs. Id.
211. Id.
212. A manufacturer files an ANDA application in order to get the approval by the FDA to market a generic copy of a drug. In order to get approval: "[The] ANDA applicant must certify (1) that no patent has been filed with the FDA; or (2) that the patent has expired; or (3) that the patent has not expired, but will expire on a particular date; or (4) that the patent is either invalid or the generic drug will not infringe it. (internal quotations and citations omitted). Collagenex, 2003 WL 21697344, at * 2.
213. Id.
214. Id. at * 1.
215. Id. at * 4.
216. Id.
217. Id. (citing Pfizer Inc. v. Shalala, 182 F.3d 975, 978 (1999) (holding that FDA's acceptance of ANDA applications is not final agency action)).
218. 324 F.3d 726 (D.C. Cir. 2003).
applications were not a proper subject of judicial review.\textsuperscript{219} The court held that since the FDA had not issued responses to the requested applications, there had not been final agency action, and the issue was not ripe for judicial review.\textsuperscript{220}

The \textit{Collagenex} decision cites \textit{Reliable} as precedent, but it does not expressly aid in the understanding of the circuit court decision.\textsuperscript{221} However, it does go along with the main rule articulated in \textit{Reliable} and further emphasized in the \textit{Croplife}\textsuperscript{222} decision.\textsuperscript{223} Although not articulated by the judge in \textit{Collagenex}, the court followed the core rule from \textit{Reliable} when it did not find final agency action.\textsuperscript{224} In \textit{Reliable}, the court stated that there was not final agency action when the challenging party had not suffered a legal consequence from the agency’s action and the challenging party still had an opportunity for a formal hearing on the matter through the agency’s adjudication procedures.\textsuperscript{225} Just as in \textit{Reliable}, the petitioner in \textit{Collagenex} had not suffered any harm from the FDA’s actions regarding ANDA applications, nor had the FDA’s review process been fully completed.\textsuperscript{226} Although not articulated by the district court, the \textit{Collagenex} decision appears to be a textbook application of the finality rule laid out by the D.C. Circuit in \textit{Reliable}.

3. \textit{F.L. v. Thompson}\textsuperscript{227}

In \textit{F.L. v. Thompson}, the court was asked to decide whether there was final agency action when the Office of Refugee Resettlement (ORR) declined to decide if a consent request should be granted and instead transferred the request to the Department of Homeland

\begin{itemize}
\item \textsuperscript{219} \textit{Collagenex}, 2003 WL 21697344, at * 4.
\item \textsuperscript{220} Id. The court did issue an injunction to prevent the FDA from approving any ANDA applications before it resolved its dispute with Collagenex. \textit{Id.} at * 11.
\item \textsuperscript{221} See \textit{id.} at * 4.
\item \textsuperscript{222} Croplife Am. v. E.P.A., 329 F.3d 876 (D.C. Cir. 2003).
\item \textsuperscript{223} See \textit{Collagenex}, 2003 WL 21697344, at * 4; see also \textit{Reliable}, 324 F.3d at 733; \textit{Croplife}, 329 F.3d at 882.
\item \textsuperscript{224} See \textit{Collagenex}, 2003 WL 21697344, at * 4; see also \textit{Reliable}, 324 F.3d at 733.
\item \textsuperscript{225} See \textit{Reliable}, 324 F.3d at 733.
\item \textsuperscript{226} \textit{Collagenex}, 2003 WL 21697344, at * 4.
\item \textsuperscript{227} 293 F. Supp. 2d 86 (D.D.C. 2003).
\end{itemize}
Security (DHS). The plaintiff, a minor in United States custody, sought consent from ORR to allow the state courts in Michigan to exercise jurisdiction over him. When ORR transferred the request to DHS, the plaintiff sued in federal court claiming that it was ORR’s responsibility under the Homeland Security Act and that by ORR transferring the request to DHS, he suffered harm. ORR, on the other hand, claimed that the plaintiff’s cause of action was not ripe for review by a federal court. According to ORR, the case was not ripe for review because the agency had yet to fulfill the final agency action requirement of Section 704 of the APA.

The court, quoting the Reliable decision as precedent, held that ORR had made its final determination and that the case was ripe for judicial review. In doing so, the court held that the plaintiff had suffered an injury and that, based on the unequivocal language of ORR’s letter declining to decide the issue, it was clear that the decision had been made and final agency action had taken place. Furthermore, the court inferred that because the question at issue was legal in nature, it was proper for the court to decide.

The decision given by the court in F.L. v. Thompson clearly falls within the rule laid out by the court in Reliable. As required by the Reliable rule, the plaintiff in F.L. v. Thompson suffered a legal consequence, and additional appeals to the adjudicatory process

228. Id. at 88.
229. The plaintiff is a seventeen year-old from Tanzania. Id. He came to the United States on a Boy Scout trip in 2001 where he left his group, was picked up by the FBI, and placed in INS custody. Id. He has been with a foster family in Michigan since 2001. Id. at 89.
230. Id. The plaintiff wanted the state of Michigan to have jurisdiction before his eighteenth birthday so that after he turned 18, he would be able to apply for a SIJ visa, which would protect him from deportation from the United States. Id.
231. Id.
232. Id. at 90.
233. Id.
234. Id. at 93.
235. Id. at 89. The court found the plaintiff had suffered harm in the fact that “[h]e has a legally protected interest in obtaining a decision from the properly authorized governmental agency as to whether the federal government will grant its consent to a state court’s exercise of jurisdiction over him.” Id. at 92.
236. Id. The question was legal in nature because it required a determination as to what agency has the statutory authority to issue the consent decree. Id.
would have been futile because the issue was legal in nature.\textsuperscript{237} Since the core aspects of the rule from \textit{Reliable} were met, the court properly concluded that ORR had committed final agency action when it unequivocally declined to decide the plaintiff’s request for consent.\textsuperscript{238}

The judicial impact of the D.C. Circuit’s ruling in \textit{Reliable} will have, and has already had, an impact on cases decided within the D.C. Circuit.\textsuperscript{239} However, since the case is more of a clarification of the rule given by the Supreme Court in \textit{Bennett v. Spear},\textsuperscript{240} the impact that it will have on other circuits’ finality determinations is less clear.

\section*{B. Administrative Impact}

The impact that the \textit{Reliable} decision will have on administrative bodies will not be extremely significant. However, that is not to say that the case will not have ramifications on how administrative agencies operate. Since \textit{Reliable} clarifies the Supreme Court’s ruling in \textit{Bennett v. Spear}, administrative agencies would be foolish not to heed the guidance that it gives. By analyzing the ruling in \textit{Reliable}, an administrative agency should be able to pin-point when its conduct constitutes “final agency action” and when its conduct will not.\textsuperscript{241} If the agency can pin-point what actions constitute final agency action subjecting it to potential judicial review, the agency can attempt to avoid those procedures to try and avoid judicial

\begin{itemize}
  \item \textsuperscript{237} \textit{Id.} at 93; see also \textit{Reliable}, 324 F.3d at 734.
  \item \textsuperscript{238} \textit{Thompson}, 293 F. Supp. 2d at 93.
  \item \textsuperscript{239} \textit{See Croplife}, 329 F.3d 876; \textit{Collagenex}, 2003 WL 21697344; F.L. v. Thompson, 293 F. Supp. 2d 86.
  \item \textsuperscript{240} \textit{Bennett}, 520 U.S. at 177-78 (stating:

As a general matter, two conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decision making process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’ (citations omitted)).

\item \textsuperscript{241} \textit{See generally}, \textit{Reliable}, 324 F.3d at 734.
\end{itemize}
under Reliable, there are two key questions that an administrative agency needs to ask to determine if it may be subject to judicial review for its actions. Those two questions are: (1) are there questions as to the agency's statutory authority to perform the actions in question, and (2) are there formal adjudicatory means by which a party challenging the agency's actions can appeal to the agency and reasonably expect a fair result. If the answer is yes to question number one and/or no to question number two, the agency will more than likely find its actions subject to judicial review. Since the decision in Reliable could aid an agency in determining when its actions may be subject to judicial review, potentially conserving resources, administrative agencies will probably evaluate the D.C. Circuit's opinion in Reliable and adjust procedures in conformity therewith.

V. DECISIONS FROM OTHER FEDERAL CIRCUITS

Since the two seminal cases on finality are Supreme Court cases, all of the circuit courts follow essentially the same rules. What differs from circuit to circuit is the clarity of those rules as established by precedent in the particular circuit. The following is a brief analysis of other circuits' case precedent regarding final agency review.

242. Following Reliable, if an issue raised by a challenging party is factual in nature, meaning that it does not involve the statutory authority of the agency to regulate, and the administrative agency does not make an unequivocal determination on the issue, there will not be "final agency action" as long as the party has formal administrative proceedings through which to appeal the decision. Reliable, 324 F.3d at 732-33.

243. If there are questions as to the agency's statutory authority, the issue raised will likely be legal and not the proper subject for administrative review. See, e.g., Athlone, 707 F.2d at 1489.

244. If a party is unable to reasonably appeal the agency's decision through a formal administrative adjudicatory procedure, a court is probably going to hold that the agency's action is final. See Reliable, 324 F.3d at 734.


A. The Second Circuit

According to the Second Circuit, the "finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury."\(^{247}\) In *Top Choice Distributors, Inc. v. United States Postal Service*,\(^{248}\) the Second Circuit held that the Postal Service’s filing of an administrative complaint was not final agency action, and therefore the Postal Service’s action was not subject to judicial review.\(^{249}\) In making its decision, the Second Circuit relied on the Supreme Court’s precedent in *Bennett v. Spear* and *FTC v. Standard Oil Co.*\(^{250}\) The court primarily focused on the fact that the Postal Service had not completed its decision making process and that the plaintiff had yet to suffer any direct consequences.\(^{251}\) Additionally, unlike the D.C. Circuit in *Reliable*, the Second Circuit in *Top Choice* distinguished between the requirement of finality (a requirement of the APA) and that of exhaustion of remedies (a judge-made creation).\(^{252}\) Following the Supreme Court in *Darby v. Cisneros*, the Second Circuit held that although the two requirements would yield the same results, where the agency has not finished its decision-making process the appropriate reason for dismissal is due to the requirement of finality.\(^{253}\)

B. The Fourth Circuit

Under Fourth Circuit precedent, an agency’s action is deemed

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\(^{248}\) 138 F.3d 463 (2d Cir. 1998).

\(^{249}\) Id. at 467.

\(^{250}\) Id. at 466.

\(^{251}\) Id. at 467. The court stated that "[t]he Postal Service has done nothing here other than file an administrative complaint. Its decision is not final until the time to appeal the ALJ decision runs or the Judicial Officer resolves the appeal. Thus there has been no definitive agency decision." *Id.*

\(^{252}\) Id. at 466. "$[E]xhaustion . . . refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision . . . ." *Id.* (quoting *Darby*, 509 U.S. at 144).

\(^{253}\) *Id.*
Final for purposes of Section 704 of the APA "where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." In Arch Mineral Corp. v. Babbitt, the Office of Surface Mining Reclamation and Enforcement (OSM) linked the plaintiff's corporation to a company that owed delinquent fees and penalties to OSM. Once linked, OSM sought payment from the plaintiff. Protesting to being linked with the other company, the plaintiff filed suit in federal court. OSM argued to the court that the case was not ripe for judicial review because its enforcement actions against the plaintiff were not final. OSM contended that it had not yet made an official decision to link the plaintiff to the company in question. Although OSM did not make a formal determination, the court, after looking at the unequivocal language in the letters, found that OSM had made its decision to link the plaintiff. OSM argued that it should have been given more time to attempt to make a formal determination and address the issues raised by the plaintiff. However, the court stated that "[w]hile it is generally true that judicial review awaits the issuance of a formal administrative order enforceable against a person or class of persons, such action is not an absolute prerequisite to judicial review." The court then went on to embrace the reasoning of the First Circuit when it held that OSM's actions were sufficiently final because they constituted an adoption of a position that the agency is going to take toward the plaintiff in the particular regulated industry. Additionally, unlike the D.C. Circuit in

255. 104 F.3d 660 (4th Cir. 1997).
256. Id. at 662.
257. Id.
258. Id.
259. Id. at 665-66. “OSM focuses its argument on convincing this Court that the agency’s enforcement action against Arch was not final . . . .” Id.
260. Id. at 666.
261. Id. (“For all practical purposes, however the decision has been made.”).
262. Id.
263. Id. at 667 (internal quotation marks and citations omitted).
264. Id. at 667-68 (quoting Northeast Airlines, Inc. v. CAB, 345 F.2d 662, 664 (1st Cir. 1965) (holding that the Civil Aeronautics Board took final agency action
Reliable, the Fourth Circuit kept a clear distinction between the two prongs in the Abbott test. In Reliable, the court almost blended the two prongs of the test when it emphasized that a court should consider the "day-to-day" consequences of the challenging party in its finality determination. On the other hand, the Fourth Circuit does not really focus on consequences until it addresses the second prong of the Abbott test, keeping it a legitimate two prong test.

C. The Seventh Circuit

Within the Seventh Circuit, an agency's action of issuing an administrative complaint is not a final, judicially reviewable action. Additionally, the Seventh Circuit has imposed the finality requirement as a bar to interlocutory challenges that raise preclusion in order to cut off agency proceedings. In R.R. Donnelley & Sons Co. v. FTC, the plaintiff sought federal court review of an FTC interlocutory determination not to apply collateral estoppel in resolving the plaintiff's issues that he claimed had already been decided by a district court. The court concluded that it could not review the agency's decision as to collateral estoppel because the merits of the administrative proceeding had not been determined, and the FTC had not made a final ruling. The plaintiff argued that FTC administrative procedures were flawed and that any attempt to exhaust the procedure would be too costly. The Seventh Circuit, however, was not sympathetic to the plaintiff when it stated that "[i]f the cost, delay, and aggravation of litigation made an order final, the distinction between interlocutory and final decisions would collapse,

when it published its interpretation of the Federal Aviation Act as applied to the facts alleged by the plaintiff in the case)).

265. In Abbott Laboratories v. Gardner, the Supreme Court developed a test to determine when a case was ripe for judicial review. In determining whether or not a case is ripe for judicial review, a federal court must assess "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs., 387 U.S. at 140-41.

266. Reliable, 324 F.3d at 730.

267. See Buntrock v. SEC, 347 F.3d 995 (7th Cir. 2003).

268. See R.R. Donnelley & Sons Co. v. FTC, 931 F.2d 430, 432-33 (7th Cir. 1991).

269. Id. at 431.

270. Id.
and courts of appeals would be deluged.”

D. The Ninth Circuit

In determining final agency action, the Ninth Circuit looks at whether the agency action is legal in nature and “whether the agency action represents the final administrative work.” Following this rule, the Ninth Circuit has held that a federal court should not review anything less than the final administrative determination in regard to technical and scientific information. In Dietary Supplemental Coalition, Inc. v. Sullivan, the FDA’s classification of a dietary supplement as a food additive through regulatory letters was not considered final agency action within the meaning of Section 704 of the APA. Since the determination as to the particular classification of food additives was not purely legal, and the court would benefit from the particular expertise of the administrative agency, the court held that the issue was not the proper subject of judicial review.

In regard to final agency action, the Ninth Circuit takes a very similar view to that of the D.C. Circuit as expressed in Reliable. The Ninth Circuit’s focus on the legal nature of the issue and the required expertise falls in line with the Reliable decision. The main difference between the two circuits is that the D.C. Circuit, under the Reliable decision, considers whether or not there are adequate formal administrative adjudicatory proceedings that are still yet to be followed in the finality analysis. In comparison, the Ninth Circuit, like several other circuits, does not consider the administrative proceedings of the agency until its exhaustion analysis.

271. Id.
273. Id. at 563.
274. Id. at 564.
275. Id. (stating “the decision to classify a product as a ‘food additive’ is a fact-based determination and judicial review prior to final agency action would ‘deny the [FDA] the full opportunity to apply its expertise and to correct errors or modify positions in the course of a proceeding.’”) (citations omitted).
276. See id. at 563-64.
277. Reliable, 324 F.3d at 733
278. See Dietary, 978 F.2d at 564.
VI. CONCLUSION

The D.C. Circuit’s ruling in Reliable may not have significant, far reaching implications in regard to its social implications, but it will affect administrative agencies. The decision could affect procedures that administrative agencies implement in order to protect against potential, yet needless litigation. Through Reliable, administrative agencies, as well as those challenging administrative action, are given a clearer picture as to what constitutes final agency action. Although the definition given by the D.C. Circuit in Reliable is significantly better than that given by Webster’s Dictionary, it still has yet to fully define, with complete clarity, that which may be indefinable - final agency action.