



FINAL AGENCY ACTION AFTER *HAWKES*

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INTRODUCTION

On May 31, 2016, the Supreme Court decided *United States Army Corps of Engineers v. Hawkes Co.*,¹ holding that Jurisdictional Determinations (JDs) made by the Corps are final agency actions subject to judicial review under the Administrative Procedure Act (APA).² Following the Court's decision in *Sackett v. EPA* in 2012,³ also involving a dispute as to whether certain lands were wetlands subject to Clean Water Act jurisdiction,⁴ this outcome was not surprising.⁵ However, the Court's opinion and the accompanying concurring opinions still leave much open to question regarding how the term "final agency action" in the APA is to be interpreted. This article will discuss first what the Court has decided and what it has

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¹ 136 S. Ct. 1807 (2016).

² 5 U.S.C. § 704 (2012).

³ 132 S. Ct. 1367 (2012).

⁴ 33 U.S.C. §§ 1344, 1362 (2012); 33 C.F.R. § 328.3 (a) (2014); 40 C.F.R. §122.2 (2014).

⁵ See William Funk, *Make My Day! Dirty Harry and Final Agency Action*, 46 ENV. L. 313 (2016).

suggested, and then it will discuss the questions left open and suggest how they might be answered.

In both *Sackett* and *Hawkes*, the plaintiffs were landowners with land they wished to develop in some fashion, but which federal agencies – the Environmental Protection Agency (EPA) in *Sackett* and the Corps in *Hawkes* – claimed were “navigable waters” under the Clean Water Act,⁶ which may not be developed without a permit from the Corps. The plaintiffs disputed that their lands were “navigable waters” within the meaning of the Act and the agencies’ regulations⁷ and sought review in court under the APA. The agencies asserted that review was not available under the APA because the agency action—an EPA compliance order in *Sackett* and a Jurisdictional Determination (JD) in *Hawkes*—was not “final agency action” as required by Section 704 of the APA.⁸ In both cases a unanimous Supreme Court found the agency action to be “final agency action” subject to review.

I. SACKETT’S ANALYSIS

In *Sackett*, Justice Scalia, writing for a unanimous Court, said that EPA’s compliance order had “all the hallmarks of APA finality that our opinions establish.”⁹ Citing to *Bennett v. Spear*,¹⁰ an earlier Court decision interpreting final agency action that was also authored by Scalia, he said “[t]hrough the order, the EPA ‘determined’ ‘rights or obligations,’” because the order imposed on them “the legal obligation” to restore their property according to an agency-

⁶ See 33 U.S.C. § 1362(7) (2012).

⁷ See 33 CFR § 328.3(a) (2014) (Corps definition of “waters of the United States”); 40 C.F.R. §122.2 (2014) (EPA definition of “waters of the United States”).

⁸ 5 U.S.C. § 704 (2012) (“final agency action for which there is no other adequate remedy in court [is] subject to judicial review”).

⁹ *Sackett*, 132 S. Ct. at 1371.

¹⁰ 520 U.S. 154, 178 (1997).

approved plan and to provide EPA access to their property and their records related to the property.¹¹ In addition, he said “legal consequences . . . flow’ from issuance of the order” because the order exposed the Sacketts to possible double penalties in a future enforcement proceeding.¹² It also limited the ability of the Sacketts to obtain a Corps permit.¹³ Finally, the order marked the “consummation” of the agency’s decision-making process.¹⁴ Consequently, the EPA compliance order satisfied all the requirements the Court had utilized in *Bennett* to find final agency action in that case.

Justice Ginsburg concurred in the opinion and wrote separately to make clear that, while she believed the Sacketts should be able to challenge the agency’s assertion of jurisdiction over their land, the issue of whether they could challenge the terms and conditions of the compliance order was not before the Court.¹⁵ In other words, she signed onto a challenge to the agency’s jurisdiction to regulate the Sacketts but not necessarily to the type of regulation involved, if the agency did have jurisdiction.

Justice Alito also concurred in the opinion but wrote separately to express his displeasure with the nature of the Clean Water Act’s regulation of private property.¹⁶

¹¹ *Sackett*, 132 S. Ct. at 1371.

¹² *Id.* (quoting *Bennett*, 520 U.S. at 178).

¹³ *See id.* at 1372.

¹⁴ *Id.* (quoting from *Bennett* 520 U.S. at 178).

¹⁵ *Id.* at 1374-1375.

¹⁶ *Id.* at 1375.

II. HAWKES' ANALYSIS: THE ROLE OF THE ACTION'S DETERMINATION OF RIGHTS OR OBLIGATIONS OR ITS DIRECT AND APPRECIABLE LEGAL CONSEQUENCES

Hawkes also involved an assertion of an agency's jurisdiction over the plaintiff's land, but it differed from *Sackett* in that the JD by its terms neither prohibited the plaintiff from doing anything nor required it to do anything. Indeed, the plaintiff had even requested the agency to make a determination whether its land was subject to the agency's jurisdiction, although clearly the plaintiff hoped for a different outcome.¹⁷ There was no dispute that the JD was the consummation of the Corps' decision-making—the first *Bennett* condition. The issue was whether the JD determined rights or obligations or whether legal consequences would flow from it.¹⁸

The Chief Justice's opinion for the Court found that there were "direct and appreciable legal consequences" flowing from the JD.¹⁹ First, he wrote, "[c]onsider the effect of an approved JD stating that a party's property does *not* contain jurisdictional waters—a 'negative' JD, in Corps parlance."²⁰ The Chief Justice interpreted a memorandum of agreement between EPA and the Corps as foreclosing EPA and the Corps from asserting jurisdiction for five years over a property receiving a negative JD, despite the agencies' contrary interpretation.²¹ While a citizen suit could still be brought, citizens cannot obtain civil penalties for "wholly past violations," so "a negative JD both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging without a

¹⁷ United States Army Corps of Eng'rs. v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016) (emphasis in the original).

¹⁸ *Id.* at 1813 (emphasis in the original).

¹⁹ *Id.* at 1814 (quotations omitted).

²⁰ *Id.*

²¹ *Id.* at note 3; *id.* at 1817 (Ginsburg, J., concurring in part and concurring in the judgment).

permit.”²² “Each of those effects,” he said, “is a legal consequence.”²³ Therefore, if negative JDs have legal consequences, so do affirmative JDs: “[t]hey represent the denial of a safe harbor that negative JDs afford.”²⁴

While the above conclusion would have been enough to find final agency action, the Chief Justice went on to stress the “pragmatic approach [the Court has] long taken to finality.”²⁵ To demonstrate that pragmatic approach, he used an example the case of *Frozen Food Express v. United States*.²⁶

Frozen Food Express involved a provision of the Interstate Commerce Act that exempted motor carriers from a permit requirement if they carried only agricultural commodities. The Interstate Commerce Commission issued an order interpreting this provision to mean that certain agricultural commodities did not qualify under the exemption, and thus motor carriers carrying these commodities would be required to obtain a permit.²⁷ A carrier of these non-exempt commodities challenged the order, which the Court held was reviewable, saying: “The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities.”²⁸ Turning back to *Hawkes*, the Chief Justice then quoted from *Abbott Laboratories v. Gardner*’s²⁹ description of the case: “the order [by the ICC] ‘had no authority except to give notice of how the Commission interpreted’ the relevant statute, and ‘would have effect only if and when a particular action was brought

²² *Id.* at 1814.

²³ *Id.* at 1814 (quotations omitted).

²⁴ *Id.*

²⁵ *Id.* at 1815 (quotations omitted).

²⁶ 351 U.S. 40 (1956).

²⁷ *Id.* at 41.

²⁸ *Id.* at 43–44.

²⁹ 387 U.S. 136, 150 (1967).

against a particular carrier.”³⁰ Nevertheless, the Court in *Frozen Food Express* had found the order to be immediately appealable. The similarity between *Frozen Food Express* and the situation in *Hawkes* was notable. In both cases the agency’s action warned the entity that if it did not obtain the requisite permit before engaging in the desired activities, then it would be acting at the risk of significant criminal and civil penalties.

Justice Kennedy, joined by Justices Thomas and Alito, concurred in the Court’s opinion, but wrote separately to express his view that the “reach and systemic consequences of the Clean Water Act remain a cause for concern.”³¹ He suggested that a JD should be deemed binding, even in the absence of an agreement between agencies to abjure enforcement in the face of an affirmative JD, “in light of the fact that in many instances it will have a significant bearing on whether the Clean Water Act comports with due process.”³² What exactly Justice Kennedy meant by this is unclear, but he may have been suggesting that unless a person has the opportunity to obtain a definitive determination of the status of one’s land, the Act might be unconstitutionally vague by potentially criminalizing actions without adequate notice.³³ Finally, he wrote that the Act “continues to raise troubling questions regarding the Government’s power to cast doubts on the full use and enjoyment of private property throughout the Nation.”³⁴

Justice Ginsburg concurred in part and in the judgment.³⁵ She wished to indicate that her judgment that the JD was final agency

³⁰ *Hawkes Co.*, 36 S. Ct. at 1815.

³¹ *Id.* at 1816 (Kennedy, J., concurring).

³² *Id.* at 1817 (Kennedy, J., concurring).

³³ See, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) (“It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . .”).

³⁴ *Hawkes Co.*, 36 S. Ct. 1816 (Kennedy, J., concurring).

³⁵ *Id.* at 1817 (Ginsburg, J., concurring in part and concurring in the judgment).

action did not rely on the effect of the memorandum of agreement between EPA and the Corps.³⁶ She pointed out that the government had indicated in both its brief and at oral argument that the memorandum of agreement did not apply to JDs such as those involved in this case.³⁷ Nevertheless, Ginsburg noted that the JD was definitive, not tentative or informal (citing to *Abbott Laboratories*), and had “an immediate and practical impact” (citing to *Frozen Food Express*).³⁸ She disputed that *Bennett* changed the requirements for finality from the test established in *Abbott Laboratories* and *Frozen Food Express*, saying that *Bennett* “dealt with finality quickly, and did not cite those pathbreaking decisions.”³⁹ In other words, Ginsburg views the second part of the test for final agency action to be that identified in *Abbott Laboratories* and *Frozen Food Express*—requiring immediate and practical impact—rather than what was used in *Bennett*—determining rights or obligations or having direct and appreciable legal consequences.

Justice Kagan also concurred in the Court’s opinion but wrote to clarify that her agreement was contingent on the Court’s recognition that the memorandum of agreement between EPA and the Corps gave binding legal effect to the Corps’ JD.⁴⁰ She took issue with Justice Ginsburg’s concurrence, believing that the second part of the test for final agency action was governed by *Bennett*.⁴¹

III. COMPARING AND CONTRASTING HAWKES AND SACKETT

Sackett and *Hawkes* clearly establish that compliance orders and JDs under the Clean Water Act are judicially reviewable final agency

³⁶ *Id.*

³⁷ *Id.* (Ginsburg, J., concurring in part and concurring in the judgment).

³⁸ *Id.* (Ginsburg, J., concurring in part and concurring in the judgment).

³⁹ *Id.* at 1818 n. * (Ginsburg, J., concurring in part and concurring in the judgment).

⁴⁰ *Id.* at 1817 (Kagan, J., concurring).

⁴¹ *Id.* (Kagan, J., concurring).

actions. It should also be clear that compliance orders issued by EPA under like environmental statutes would also be judicially reviewable final agency actions.⁴²

Beyond enforcement of environmental statutes, the analysis in *Sackett* and *Hawkes* would seem to suggest that the Court has finally disposed of the idea that the remaining vestige of the so-called “negative order doctrine”⁴³ still exists. That doctrine precluded review of agency actions “[w]here the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the [agency].”⁴⁴ The *Frozen Food Express* case seemed to have eliminated even that vestige, but some courts of appeals have seemed to retain it.⁴⁵ After *Sackett* and *Hawkes*, however, that position appears to be no longer tenable.

Sackett and *Hawkes* were both unanimous decisions involving enforcement of wetlands protections under the Clean Water Act, an area of the law that in recent years has engendered extreme division in the Court. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,⁴⁶ the Court split 5-4 in overturning the Corps’ determination of jurisdiction over disputed wetlands, with the conservatives and liberals voting as blocs. In *Rapanos v. United States*,⁴⁷ there was no majority opinion. Justice Scalia wrote the plurality decision, joined by the Chief Justice and Justices Thomas and Alito. Justice Kennedy wrote an opinion concurring in the

⁴² See, e.g., 42 U.S.C. § 7413(a)(1)(A) (compliance orders under the Clean Air Act).

⁴³ In *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 129 (1939), the Court addressed the “negative order doctrine,” which had been viewed to preclude judicial review of certain agency actions. In *Rochester*, the Court abolished two of the three strands of that doctrine, but retained one strand.

⁴⁴ *Id.* at 129.

⁴⁵ See, e.g., *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014).

⁴⁶ 531 U.S. 159 (2001).

⁴⁷ 547 U.S. 715 (2006).

judgement.⁴⁸ Justice Stevens wrote the dissent on behalf of the liberal wing.⁴⁹ The difference between these two sets of cases is that the latter two cases (*Solid Waste Agency* and *Rapanos*) involve the substantive reach of the Clean Water Act, with conservatives seeking to limit government regulation of private property and liberals seeking to uphold such regulation. *Sackett* and *Hawkes*, while involving wetlands regulation, raised substantive questions under the Administrative Procedure Act about when courts should become involved in holding agencies accountable for their actions. This is a subject that both liberals and conservatives can often agree on: the conservatives to assure that agencies can be appropriately restricted, and the liberals to assure that agencies can be held to provide the protection required by statute.

IV. THE QUESTION LEFT OPEN BY SACKETT AND HAWKES: BENNETT AND JUSTICE GINSBURG OR KAGAN

Sackett and *Hawkes* still leave open at least one major question as to the meaning of “final agency action.” That question is the one highlighted by the warring concurrences of Justices Ginsburg and Kagan in *Hawkes*. Is it required that final agency action have legal consequences or determine rights or obligations, or is it sufficient that the action have a direct and immediate impact on the person bringing the claim? In the vast majority of cases, this is seemingly a nonissue because the agency action has a direct and immediate impact as a result of the action’s legal consequences or its determination of a person’s rights or obligations. There are cases, however, where the nature of the legal consequences may be somewhat attenuated, such as in *Hawkes*, or where as a technical matter the agency action cannot have binding legal consequences,

⁴⁸ *Id.* at 759 (Kennedy, J., concurring in the judgment).

⁴⁹ *Id.* at 787 (Stevens, J., dissenting).

such as in interpretive rules and policy statements.⁵⁰ If one follows Justice Kagan's approach that there must be binding legal effect, then interpretive rules and policy statements would not be judicially reviewable as final agency action. Moreover, were EPA and the Corps to eliminate their memorandum of agreement not to enforce against anyone receiving a negative JD, then an entity like Hawkes Company would not be able to obtain review of a positive JD. On the other hand, if one follows Justice Ginsburg's approach, then all of these items would be final agency action, as long as they had a direct and immediate impact on the entity.

A. THE GINSBURG LINE OF CASES

Both approaches have some provenance. *Abbott Laboratories* is often considered the seminal case for describing what is necessary for final agency action, and it said that the Court had interpreted the finality requirement "in a pragmatic way."⁵¹ It then referred to three earlier cases to illustrate that pragmatic approach.⁵² The first was a pre-APA case: *Columbia Broadcasting System v. United States*.⁵³ In that case the Federal Communications Commission (FCC) had adopted a rule saying that it would not license local broadcast stations that maintained certain contracts with the broadcasting networks. This rule was challenged by the networks, which faced local stations opting out of their contracts with the networks, but the rule did not require the networks to do anything or forbid them from doing anything.⁵⁴ In *Abbott Laboratories* the Court characterized the FCC rule "as a statement only of its intentions."⁵⁵ Nevertheless, the Court

⁵⁰ See, e.g., *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).

⁵¹ *Abbott Laboratories*, 387 U.S. at 149.

⁵² *Id.* at 149-151.

⁵³ 316 U.S. 407 (1942).

⁵⁴ See *Id.* at 408.

⁵⁵ *Abbott Laboratories*, 387 U.S. at 150.

in *Columbia Broadcasting* found the rule to be reviewable.⁵⁶ The second case illustrating the pragmatic approach was the *Frozen Food Express* case discussed by the Chief Justice and Justice Ginsburg in *Hawkes*.⁵⁷ The third case was *United States v. Storer Broadcasting Co.*⁵⁸ It, like *Columbia Broadcasting*, involved an FCC rule adopting a policy as to how it would treat future applications for broadcast licenses. In *Abbott Laboratories* and each of the cases it cited illustrating the pragmatic approach, the agency adopted a rule that clearly had legal effect and consequences. In the cited cases, the rule at issue prospectively bound the agency to take certain actions should the circumstances specified in the rule arise.⁵⁹ In *Abbott Laboratories*, the rule had immediate legal consequences if the regulated entities did not comply with the rule.⁶⁰ Nevertheless, in *Abbott Laboratories* the Court did not seem to rely on this fact in finding the actions reviewable as final agency actions. Rather, it concluded its discussion of the cases by saying:

We find decision in the present case following a fortiori from these precedents. The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal, or only the ruling of a subordinate official, or tentative. It was made effective upon publication, and the Assistant General Counsel for Food and

⁵⁶ *Columbia Broadcasting*, 316 U.S. at 425.

⁵⁷ *Abbott Laboratories*, 387 U.S. at 150.

⁵⁸ 351 U.S. 192 (1956) (discussed in *Abbott Laboratories*, 387 U.S. at 151).

⁵⁹ See *e.g.*, *Id.* at 193.

⁶⁰ *Abbott Laboratories*, 387 U.S. at 152.

Drugs stated in the District Court that compliance was expected.⁶¹

Later in *Abbott Laboratories* the Court focused not on the legal effect of the agency's rule but its practical effect, saying: "the impact of the [agency action] upon the petitioners [must be] sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage," such as having a "direct effect on the day-to-day business" of a person.⁶² This language, however, appears to have been offered as part of the Court's evaluation of the "hardship to the parties" of denying reviewability—part of its "ripeness" test⁶³—rather than as further explication of what is final agency action.

A 1980 case, *Harrison v. PPG Industries, Inc.*,⁶⁴ raised the issue whether a determination made by the Regional Administrator of EPA—that waste-heat boilers constructed by PPG were subject to new source performance standards under the Clean Air Act—was "any other final action" and therefore subject to direct appeal to a court of appeals.⁶⁵ As to whether this determination was final agency action, the case is almost on all fours with *Hawkes*. Here, EPA provided by regulation that, upon request of an owner, EPA would make a formal determination as to whether the owner's equipment was subject to the new source performance standards.⁶⁶ While the Court was split as to whether the determination was *any other* final action, the Court was apparently unanimous that the determination

⁶¹ *Id.* at 150 (footnote and citations omitted).

⁶² *Id.* at 152.

⁶³ In *Abbott Laboratories*, the Court established a two-part test for determining whether an agency action was "ripe" for judicial review: an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. The Court's discussion of what is final agency action under the APA was part of its analysis of these two factors.

⁶⁴ 446 U.S. 578 (1980).

⁶⁵ *Id.* at 583.

⁶⁶ *Id.*

was final agency action.⁶⁷ In reaching this conclusion, it said: “[i]t is undisputed that the Administrator's ruling represented EPA's final determination concerning the applicability of the ‘new source’ standards to PPG's power facility. Short of an enforcement action, EPA has rendered its last word on the matter.”⁶⁸ Justice Stevens, although dissenting as to whether the determination was *any other* final action, explained why he concluded that it was final agency action under the APA:

Although informal advice by agency personnel as to how the Agency is likely to react to a particular set of circumstances will not ordinarily be subject to judicial review under the *Abbott Laboratories* tests, this case would seem to be an exception. As EPA argues, the only issue to be decided is whether certain regulations apply under the facts submitted to the Agency by PPG. Second, the Regional Administrator of EPA herself signed the letter rejecting PPG's position; thus, it appears to be, as the Court suggests, the Agency's "last word" on the issue. And finally, although the parties have not informed us of the magnitude of PPG's estimated compliance costs, it appears that PPG would have to risk sizeable penalties . . . in order to challenge EPA's determination in enforcement proceedings.⁶⁹

⁶⁷ Justice Stevens dissented from the Court's conclusion that the determination was “any other final action” but explained why he agreed that it was “final agency action” under the APA, *see id.* at 603-604; Justice Blackmun concurred in the result but wrote that for the reasons stated by Justice Stevens he agreed with the Court that the determination was final agency action, *see id.* at 595; Justice Rehnquist dissented from the Court's conclusion that the determination was “any other final action” but not on the basis that it was not final agency action, *see id.* at 595-602.

⁶⁸ *Id.* at 586.

⁶⁹ *Id.* at 595 (citations omitted).

What can be seen in *Harrison* is that neither the Court nor the dissent mentioned any requirement that the action have legal consequences before it could be considered final agency action.

In 1992, the Court decided *Franklin v. Massachusetts*.⁷⁰ At issue was a challenge to the reapportionment of representatives resulting from a decennial census, and the initial question was whether the matter was reviewable as a final agency action under the APA.⁷¹ The Court found it was not.⁷² It described the appropriate test as follows:

To determine when an agency action is final, we have looked to, among other things, whether its impact “is sufficiently direct and immediate” and has a “direct effect on . . . day-to-day business.” *Abbott Laboratories v. Gardner*. An agency action is not final if it is only “the ruling of a subordinate official,” or “tentative.” *Id.* The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.⁷³

No members of the Court took issue with this framing of the question. Again, notable for its absence is any requirement for the agency action to have legal consequences, in addition to practical consequences.

Two years later in *Dalton v. Specter*,⁷⁴ quoting from *Franklin*, the Court said: “[t]he core question for determining finality [is]: ‘whether the agency has completed its decisionmaking process, and

⁷⁰ 505 U.S. 788 (1992).

⁷¹ *Id.* at 796.

⁷² *Id.* at 801.

⁷³ *Id.* at 797.

⁷⁴ 511 U.S. 462 (1994).

whether the result of that process is one that will directly affect the parties."⁷⁵

B. THE KAGAN LINE OF CASES: BENNETT

If the foregoing line of cases seems to support Justice Ginsburg's approach to final agency action, there exists another line of cases that supports Justice Kagan's approach. The principal case cited for this approach is *Bennett*. In *Bennett*, the Court posed the question of finality differently:

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 decisionmaking 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."⁷⁶

It neither cited to *Abbott Laboratories* nor indicated any awareness that it was posing the question differently. Instead, *Bennett* cited to *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*.⁷⁷ There, the issue had been whether an action was a final order under the Administrative Orders Review Act,⁷⁸ and the Court said that "the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency

⁷⁵ *Id.* at 471.

⁷⁶ *Bennett*, 520 U.S. at 177-178 (citations omitted).

⁷⁷ *Id.* at 178 (citing *Port of Boston*, 400 U.S. 62 (1970)).

⁷⁸ 28 U.S.C. § 2342.

action.”⁷⁹ *Port of Boston* in turn cited to two other cases for this test: *ICC v. Atlantic Coast Line R. Co.*⁸⁰ and *Rochester Telephone Corp. v. United States*.⁸¹ While the first of these cases stated that “orders determining a right or obligation so that legal consequences will flow therefrom are judicially reviewable,”⁸² it did not say that this was a requirement for judicial review; it merely said that such determinations were reviewable. The second of these cases, decided before the APA was enacted, actually did not say anything like what it was cited for,⁸³ and as earlier mentioned,⁸⁴ the limitation on final agency action in that case has been effectively overruled by subsequent Supreme Court decisions.⁸⁵ In short, none of the authority cited by *Bennett* for its test for finality involved suits under the APA.⁸⁶

Whatever the weakness of the provenance for *Bennett*'s test for finality, it has been the citation of choice in subsequent Supreme

⁷⁹ *Port of Boston*, 400 U.S. at 70.

⁸⁰ *Id.* at 71 (citing *Atlantic Coast Line*, 383 U.S. 576, 602 (1966)).

⁸¹ *Id.* (citing *Rochester Telephone*, 307 U.S. 125, 143 (1939)).

⁸² *Atlantic Coast Line*, 383 U.S. at 602 (quotations omitted).

⁸³ The closest thing in the opinion is: “Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, or where the Commission's order denies an exemption from the terms of the statute, the road to the courts' jurisdiction seems to be clear. There is a constitutional ‘case’ or ‘controversy’; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act in that it is one ‘to enjoin, set aside, annul’ an ‘order of said commission.’” *Id.* at 132 (citations omitted).

⁸⁴ See text, *supra* note 43.

⁸⁵ See, e.g., *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 436 (1949).

⁸⁶ *Bennett* did distinguish two APA cases, *Franklin* and *Dalton*, but not on the basis that the test used in those cases was wrong. Rather, the Court in *Bennett* had found that in those cases the agency action was “purely advisory,” 520 U.S. at 178, whereas in *Bennett* the Biological Opinion issued by the Fish and Wildlife Service was not.

Court decisions assessing finality, including in *Hawkes*.⁸⁷ Yet, *Bennett* is a strange case to be the progenitor of the requirement that a final agency action must be one by which rights or obligations have been determined or from which legal consequences will flow. It is a strange case because, although it found final agency action, the action involved did not determine any rights or obligations; and any legal consequences were significantly attenuated. Indeed, the Court seemed to be as concerned with the practical effects of the agency action as with its legal effects.

C. BENNETT'S BACKGROUND

Bennett involved a suit by ranchers against the Fish and Wildlife Service who challenged a Biological Opinion (BO) issued by the Service to the Bureau of Reclamation. The BO opined that the Bureau's method of releasing water from its dams on the Klamath River would jeopardize certain endangered fish, but the BO offered "reasonable and prudent alternatives" to the Bureau's proposed method, thereby avoiding jeopardy.⁸⁸ The ranchers, reliant on water released under the Bureau's traditional method, would have likely lost access to much of that water if the dams were operated as provided in the "reasonable and prudent alternatives."⁸⁹ One of the issues in the case was whether the BO was "final agency action," and

⁸⁷ See *Hawkes*, 136 S. Ct. at 1813; *T-Mobile South, LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 817 n. 4 (2015); *Sackett*, 132 S. Ct. at 1371; *Alaska Dept. of Environmental Conservation v. E.P.A.*, 540 U.S. 461, 483 (2004). But see *Whitman v. American Trucking Associations*, 531 U.S. 457, 478 (2001) (citing *Bennett* but omitting the second part of the *Bennett* test: "the word 'final' . . . requires that the action under review 'mark the consummation of the agency's decisionmaking process.' *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). Only if the 'EPA has rendered its last word on the matter' in question, *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980), is its action "final" and thus reviewable.").

⁸⁸ *Bennett*, 520 U.S. at 159.

⁸⁹ *Id.*

the question was whether it determined rights or obligations or whether legal consequences would flow from the BO.⁹⁰ As a technical matter, a BO does not bind the agency receiving the BO. It is simply the opinion of the Fish and Wildlife Service, which the receiving agency is legally free to reject.⁹¹ However, the Court recognized that “in reality it has a powerful coercive effect on the action agency.”⁹² Moreover, the Court said, the action agency (here, the Bureau of Reclamation) must explain why it disagrees with the BO, and the agency “runs a substantial risk if its (inexpert) reasons turn out to be wrong.”⁹³ Therefore, the Court said, a BO “alters the legal regime to which the action agency is subject.”⁹⁴ Two things are noteworthy in this conclusion. First, the legal regime that was altered did not involve the plaintiff ranchers. The effect on the ranchers was entirely a practical one. Second, the agency action’s alteration of the legal regime seemed to occur through practical effects, rather than through legal compulsion. That is, the coercive effects of the BO on the action agency occur because, as a practical matter, the opinion of the Fish and Wildlife Service is likely to be determinative as a result of its relative expertise and the severe negative consequences to the action agency if it turns out that its rejection of the opinion was wrong.

But the Court did not end its discussion there. It went on to note that when the Fish and Wildlife Service issues a BO with “reasonable and prudent alternatives” to avoid jeopardy, the Service includes an “Incidental Take Statement,” which permits the taking of a certain number of endangered species incidental to the agency’s activity, so long as the agency complies with the Incidental Take’s conditions.⁹⁵

⁹⁰ *Id.* at 161.

⁹¹ *Id.* at 169.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 169-170.

This permission to take a certain number of endangered species exempts the agency from the prohibitions of the Endangered Species Act against any “take” of an endangered species.⁹⁶ Thus, a BO does have direct legal consequences if the agency complies with its terms, even if there is no legal requirement for the agency to comply with its terms. The Court said that this distinguished *Bennett* from *Franklin* and *Dalton* because those cases involved agency opinions that were “purely advisory” and had no legal effects.⁹⁷

D. THE COURT’S POSITION AND ITS OPPORTUNITY TO DECIDE THE ISSUE

As may be seen, *Bennett*, like *Hawkes*, struggled to find some legal effect of the challenged agency action where the practical effects were patent and severe, yet both cases were able to find it. Still, we are left with the two conflicting strands of precedent: one requiring significant *practical* consequences from the challenged agency action, and one requiring *legal* consequences from the challenged agency action. In *Hawkes*, the Court could have addressed these differing approaches and settled on one while rejecting the other. Justices Ginsburg and Kagan appear to have been willing to make the cut, but the remainder of the Court was not, which may explain the mixed message we get from the Chief Justice’s opinion. This suggests that the Court is unlikely to decide this issue unless forced to do so.

The position taken recently by the D.C. Circuit regarding the non-reviewability of interpretive rules and statements of policy may force the issue. In *Ass’n of Flight Attendants-CWA v. Huerta*,⁹⁸ the court held without reservation that statements of policy and interpretive rules were not final agency actions because they failed the second

⁹⁶ 16 U.S.C. § 1536(b)(4).

⁹⁷ *Id.* at 178.

⁹⁸ 785 F.3d 710, 713 (D.C. Cir. 2015).

part of the *Bennett* test. The court quoted from the recent Supreme Court decision in *Perez v. Mortgage Bankers Ass'n*⁹⁹—a case that did not involve any question regarding final agency action—that interpretive rules and statements of policy “do not have the force and effect of law.”¹⁰⁰ From this, the D.C. Circuit in *Huerta* concluded that interpretive rules and statements of policy could not meet *Bennett*’s finality requirement—that is, an action must determine “rights or obligations” or produce “legal consequences”.¹⁰¹ In so concluding, the D.C. Circuit was acting consistently with other circuits in strictly applying the *Bennett* test,¹⁰² as opposed to how the Supreme Court applied the test in *Bennett* itself and as it has since characterized how the test should be applied: pragmatically.¹⁰³ But to allow interpretive rules and statements of policy entirely to escape judicial review, despite their often substantial coercive effects, would provide yet another incentive for agencies to avoid notice-and-comment rulemaking, even when establishing new policy. Indeed, to allow such actions to avoid review would be inconsistent with a number of decisions of both the D.C. Circuit and other circuits.¹⁰⁴ For example, in *Perez*, upon which the D.C. Circuit relied so extensively in *Huerta*, on remand, after the Supreme Court held that the agency’s action was an interpretive rule, the D.C. Circuit issued an order upholding the district court’s determination on the merits that the interpretive

⁹⁹ 135 S. Ct. 1199 (2015).

¹⁰⁰ *Id.* at 1204 (quoting from *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

¹⁰¹ *Huerta*, 785 F.3d at 713.

¹⁰² *See, e.g., Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383, 390-394 (5th Cir. 2014) (judgment vacated *sub nom.* *Kent Recycling Services, LLC v. U.S. Army Corps of Engineers*, 136 S. Ct. 2427 (2016)).

¹⁰³ *See Hawkes Co.*, 136 S. Ct. at 1815.

¹⁰⁴ *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (EPA guidance document interpreting its regulations held to be final agency action); *International Longshoremen’s and Warehousemen’s Union v. Meese*, 891 F.2d 1374 (9th Cir. 1989) (INS advisory opinion held to be final agency action).

rule was valid.¹⁰⁵ If interpretive rules are not final agency actions and therefore not subject to judicial review, the D.C. Circuit should have remanded to the district court to dismiss the action because the interpretive rule was not subject to judicial review.

CONCLUSION

Underlying the Supreme Court's reluctance to make a definitive ruling regarding the correct test for finality may be a concern with how to distinguish between informal agency interpretations and guidance provided to regulated entities, which are perceived to be important to the administrative process and would perhaps be impeded by subjecting them all to possible judicial review, and other agency pronouncements that call for judicial review. There are at least two ways to make a distinction that would protect both agencies and the regulated community.

First, in both *Sackett* and *Hawkes*, the Court was clearly influenced by the coercive nature of the agency action. Even if the agency action did not legally compel the entity to do anything, the failure of the entity to bend to the agency's will could result in significant civil and criminal penalties. In *Bennett*, the coercive nature of a BO on the action agency likewise seemed to drive the Court's willingness to find that there had been an alteration in the legal regime sufficient to conclude that legal consequences flowed from the BO.¹⁰⁶ Thus, one way of melding both the "legal consequences" and the "direct and immediate consequences" tests would be to find that agency actions that are coercive by threatening either civil or criminal penalties or withdrawal of federal funding for non-conforming actions "alter the legal regime" to which the entity is subject.

¹⁰⁵ See *Mortgage Bankers Ass'n v. Perez*, 602 Fed.Appx. 541 (D.C. Cir. 2015) (mem.).

¹⁰⁶ See *Bennett*, 520 U.S. at 169.

A different approach would be to use the requirement that even final agency action is not reviewable under the APA unless there is “no other adequate remedy in a court.”¹⁰⁷ In both *Sackett* and *Hawkes*, the government argued that there was an adequate alternative to APA review.¹⁰⁸ While its argument in those cases was unavailing, that argument has much more force where the agency action is not coercive. In *Hawkes*, for example, the Court found that waiting for enforcement proceedings was not an adequate alternative “where such proceedings carry the risk of serious criminal and civil penalties.”¹⁰⁹ Presumably, where enforcement proceedings would have no effect other than to require the person to comply with the agency’s interpretation or policy, waiting for such proceedings would often provide an adequate alternative to pre-enforcement review. For example, the Wage and Hour Administrator from time to time issues opinion letters on the Administrator’s interpretation of the wage and hours laws. An employer paying less than the amount stated in such an opinion letter might wish to seek judicial review of the letter. If the effect of the opinion letter would be to make the employer subject to civil penalties for ignoring it, then the employer would not have an adequate alternative to pre-enforcement review.¹¹⁰ If, however, the only effect was that the recipient would have to pay the amount indicated in the opinion letter, there would be no coercive effect of the letter. There is no coercive effect because if the employer disagreed with the Administrator, the employer

¹⁰⁷ 5 U.S.C. § 704.

¹⁰⁸ See *Sackett*, 132 S. Ct. at 1372; *Hawkes Co.*, 136 S. Ct. at 1815.

¹⁰⁹ *Hawkes Co.*, 136 S. Ct. at 1815 (quotations omitted).

¹¹⁰ See, e.g., *Rhea Lana, Inc. v. Department of Labor*, --- F.3d ---, 2016 WL 3125035 (D.C. Cir. 2016) (finding final agency action where the opinion letter informed the employer that failure to conform to the dictates of the letter would be viewed as a willful violation, subjecting it to civil penalties).

would have an adequate alternative to pre-enforcement review – simply waiting for an enforcement action.¹¹¹

Second, although agencies' interpretive rules or statements of policy do not "have the force and effect of law," they do bind agency employees, particularly employees involved in enforcement actions. If an agency issues an interpretive rule or statement of policy indicating that some type of action violates a statute or regulation, the enforcement personnel of that agency are not at liberty to ignore that rule or statement. Therefore, it is fair to say that in these circumstances the interpretive rule has legal consequences and has altered the legal regime to which the regulated community is subject.

There may be other ways to tweak the "legal consequences" requirement to reach agency coercive actions, but the critical issue is whether administrative law, as reflected in the APA, should countenance the federal government using extortionate methods to compel compliance with its interpretation of the law or its view as the appropriate policy. For the government to threaten dire consequences unless the person complies, and insulating that threat from judicial review by avoiding the imposition of "legal consequences" in the threat, is the legal equivalent of "your money or your life." And the government is supposed to protect you from such a threat, not impose it.

¹¹¹ See *Taylor-Callahan-Coleman Counties District Adult Probation Department v. Dole*, 948 F.2d 953 (5th Cir. 1991) (finding no final agency action where an opinion letter would have no legal effect on employer).