



# PACIFIC LEGAL FOUNDATION

October 16, 2015

Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
Washington, DC 20543

**VIA FEDERAL EXPRESS**

Re: *Kent Recycling Services, LLC v. U.S. Army Corps of Engineers*, No. 14-493

Dear Mr. Harris:

I write to inform the Court of a recent development that may affect the Court's disposition of the petition for rehearing in the referenced case. *Kent Recycling* raises two questions. The second reads: *Is a due process claim against an agency action subject to the finality requirement of the Administrative Procedure Act?* We noted in the Petition for Writ of Certiorari (pp. 26-28) that there is a conflict among the circuits on this question. That conflict, standing alone, warrants review by this Court.

However, that conflict has been reinforced by a recent decision in *ASSE International, Inc. v. John F. Kerry*, October 9, 2015 (9th Cir.). See attached. In *ASSE*, as in this case, the plaintiff brought a claim against a federal agency action under the APA and the Due Process Clause of the Fifth Amendment. However, contrary to the Fifth Circuit decision in *Kent Recycling*, wherein the court held a due process claim must satisfy the requirements for an APA challenge, the Ninth Circuit in *ASSE* held a due process claim may be brought independent of the APA. The relevant portion of the Ninth Circuit decision states:

We note, however, that even if we had found the State Department's action unreviewable under 5 U.S.C. § 701(a)(2) [the APA], we would still be able to review its decision insofar as ASSE had raised colorable constitutional claims, unless Congress precluded such review. "[W]here Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). Nothing in the Mutual Educational and Cultural Exchange Act of 1961 evidences such intent.

*Asse International v. Kerry*, n.12 (first bracket added; others in original).

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So it is under the Clean Water Act; Congress did not preclude judicial review of constitutional claims. Review of this issue is, therefore, warranted. Certiorari should be granted.

I would appreciate your circulating this letter to the Court.

Sincerely,

A handwritten signature in black ink that reads "M. Reed Hopper". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

M. Reed Hopper  
Counsel for Kent Recycling Services

cc: See Attached Service List

*Kent Recycling Services, LLC v. U.S. Army Corps of Engineers*  
No. 14-493

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing letter was served this 16th day of October, 2015, via Email and First-Class mail, postage pre-paid, upon the following:

Donald B. Verrilli, Jr., Solicitor General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001  
Email: SupremeCtBriefs@USDOJ.gov  
*Party name: United States Army Corps of Engineers*

M. Miller Baker  
McDermott Will & Emery LLP  
500 North Capitol Street, N.W.  
Washington, DC 20001-1531  
Email: mbaker@mwe.com  
*Party name: Senator David Vitter*

Karma B. Brown  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, N.W.  
Washington, DC 20037  
Email: kbbrown@hunton.com  
*Party name: American Farm Bureau Federation, et al.*

Anthony T. Caso  
Center for Constitutional Jurisprudence  
c/o Dale E. Fowler School of Law at Chapman University  
One University Drive  
Orange, CA 92886  
Email: caso@chapman.edu  
*Party name: Center for Constitutional Jurisprudence, et al.*

Martin S. Kaufman  
Atlantic Legal Foundation  
2039 Palmer Avenue #104  
Larchmont, NY 10538  
Email: skaufman@atlanticlegal.org  
*Party Name: Ernest M. Park and Lauren Kent Park*



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MARK MILLER