
Supreme Court of New Jersey

Docket No. 089182

IN RE APPEAL OF THE NEW	:	CIVIL ACTION
JERSEY DEPARTMENT OF	:	
ENVIRONMENTAL	:	ON PETITION FOR
PROTECTION'S SEPTEMBER 6,	:	CERTIFICATION FROM
2022, DENIAL OF REQUEST FOR	:	THE FINAL JUDGMENT
ADJUDICATORY HEARING	:	OF THE SUPERIOR COURT
UNDER N.J.A.C. 7:26C-9.10,	:	OF NEW JERSEY,
DATED MAY 12, 2022,	:	APPELLATE DIVISION
CONCERNING THE	:	
DEPARTMENT'S APRIL 20, 2022	:	Docket No. A-000511-22
NOTICE OF REMEDIATION IN	:	
PROGRESS WAIVER	:	Sat Below:
RESCISSION	:	
	:	HON. MARY GIBBONS WHIPPLE,
	:	P.J.A.D
	:	HON. JESSICA R. MAYER J.A.D
	:	HON. CATHERINE I. ENRIGHT
	:	J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX

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PRELIMINARY STATEMENT

New Jersey’s Industrial Site Recovery Act (“ISRA”) is a unique environmental statute at risk of destabilization in this case. N.J.S.A. 13:1K-6 *et seq.* ISRA generally requires a wide variety of industrial facilities – from mining, to yarn-spinning and sock milling, to manufacturing of everything from computers to mittens, to movie studios, to those facilities’ corporate offices – to conduct investigation and cleanup when the facilities transfer ownership or wind up operations. If not reversed, the Appellate Division’s interpretation of ISRA could disrupt how all these kinds of facilities are transferred and remediated, at enormous cost to commerce in New Jersey.

The court below erred by allowing the New Jersey Department of Environmental Protection (“NJDEP”) to seriously mishandle a statutory waiver under ISRA. NJDEP granted a “Remediation in Progress” (“RIP”) waiver to Petitioner Clarios, LLC in 2007, based partly on the preconditions that Clarios had not contaminated the property and that the property was already being cleaned up. The waiver allowed Clarios to close operations on the property shortly after Clarios acquired it, without the need for further compliance with many of ISRA’s requirements. Clarios relied on that waiver extensively in entering agreements to pay for the remediation, to transfer the property, and later in litigation involving the site after Clarios’ payments were siphoned out.

At the request of a plaintiff in that litigation, in April 2022, NJDEP rescinded the RIP waiver without warning to Clarios, and without an opportunity to supplement NJDEP's record, contest the decision, or even be heard. This was a violation of Clarios' due process rights under the U.S. and New Jersey Constitutions, and if allowed to stand, will signal across the New Jersey regulated community that all ISRA waivers are unreliable. This will threaten the redevelopment of contaminated properties throughout the State.

STATEMENT OF THE MATTER INVOLVED

Clarios' predecessor, Johnson Controls Battery Group Inc. ("JCBGI"), acquired the site at issue, an automotive battery manufacturing facility at 760 Jersey Avenue in New Brunswick, in 2006.¹ The prior owner of the facility had commenced a remediation of the property under ISRA, and had established a trust fund for the estimated remediation costs. Shortly after, in January 2007, Clarios announced its plan to cease operations at the site. These circumstances triggered ISRA for the second time at the site, so Clarios applied to NJDEP for an RIP waiver from certain ISRA requirements on January 8, 2007.

Consistent with the provisions of ISRA governing RIP waivers (N.J. Stat. Ann. ("N.J.S.A.") § 13:1K-11.5 and N.J. Admin. Code § 7:26B-5.4),

¹ Clarios, the petitioner here, is the corporate successor to JCBGI, and for simplicity this petition will use the term "Clarios" to refer to both entities; the distinction between them is not relevant here.

NJDEP approved Clarios' RIP waiver application on March 12, 2007. The approval was based on three statutorily-required certifications by Clarios: (1) that a preliminary environmental report had been completed for the site; (2) that there had been no discharge of hazardous substances during Clarios' ownership; and (3) that a remediation funding source had been established in an amount equal to the estimated costs of remediation. *See* 6a.

In August 2011, Clarios conveyed the site to DeNovo New Brunswick, LLC ("DeNovo"). 3a; 6a. In connection with the property conveyance, and in reliance on the protections of the RIP waiver, Clarios paid DeNovo more than \$2.5 million in exchange for commitments by DeNovo that it would indemnify Clarios from any costs associated with the remediation of the property. 6a. DeNovo submitted a "Remediation Certification" to NJDEP and took over a remediation funding source containing \$1,825,000. 3a. At that point, DeNovo had received ownership of the site and *more than \$4.3 million* in exchange for DeNovo's promises to NJDEP and Clarios. 6a, 9a. Despite this, DeNovo and its former subsidiary (and current site owner), 760 New Brunswick Urban Renewal Limited Liability Company ("Urban Renewal"), ultimately failed to remediate the site, and DeNovo announced its insolvency without applying any of Clarios' money to the remediation. Instead, Urban Renewal sued Clarios to

pay for the remediation again. In order to strengthen that lawsuit, Urban Renewal *privately* asked NJDEP to rescind Clarios' RIP waiver. NJDEP communicated secretly with Urban Renewal on this subject for months, and initially planned to notify Clarios before the rescission.² Finally, NJDEP agreed with Urban Renewal's request, and without any form of advance notice to Clarios, the agency rescinded Clarios' RIP waiver in a letter of April 20, 2022.

On May 12, 2022, Clarios requested an adjudicatory hearing with NJDEP to assess the bases for the rescission and to contest it. On September 6, 2022, NJDEP denied Clarios' request, on the grounds that the rescission of an RIP waiver is not specified as a trigger entitling an adjudicatory hearing under N.J. Admin. Code ("N.J.A.C.") § 7:26C-9-10(a)1-6, and that NJDEP's

² The communications included multiple emails, attachments, and telephone conversations. 15a-20a. On February 24, 2022, NJDEP informed counsel to Urban Renewal that NJDEP was "continuing to look into [the status of the remediation and the RIP waiver]... it may be a lengthy process, [and] I am hoping to have some more answers for you in the next few weeks." 18a. On March 21, 2022, NJDEP informed Urban Renewal's counsel that NJDEP was "currently working on a Notice of Intent to Revoke the RIP waiver" and that NJDEP's Bureau of Enforcement & Investigations would "have to work with multiple bureaus to draft" the Notice of Intent to Revoke. 17a-18a. NJDEP offered to keep counsel to Urban Renewal "updated throughout the process" of considering whether to rescind the RIP waiver. *Id.* at 18a. NJDEP did not include Clarios in these communications, nor did NJDEP update Clarios throughout the process of its review. 15a-19a. NJDEP did not send Clarios the Notice of Intent to Revoke the RIP waiver. 17a-18a.

rescission of Clarios' RIP waiver was not a "contested case" under the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* Clarios appealed, and on February 5, 2024, the New Jersey Superior Court Appellate Division affirmed NJDEP's rescission on the grounds that Clarios does not have a legitimate claim to entitlement in the RIP waiver, nor a property interest in the waiver's benefits.³ Clarios now brings this petition for review of the Appellate Division's decision in *In re NJDEP Denial*.

QUESTIONS PRESENTED

(1) Whether the Appellate Division erred by holding that an RIP waiver under the ISRA statute does not convey a property interest requiring due process protections under the Constitutions of the United States and the State of New Jersey.

(2) Whether the Appellate Division erred by affirming NJDEP's decision to deny Clarios' request for a hearing on the rescission of the RIP waiver, thereby granting the agency unlimited discretion to rescind all waivers under ISRA without notice or opportunity for hearing.

³ The case in the Appellate Division was captioned *In Re Appeal Of The New Jersey Department Of Environmental Protection's September 6, 2022 Denial Of Request For Adjudicatory Hearing Under N.J.A.C. 7:26c-9.10, Dated May 12, 2022, Concerning The Department's April 20, 2022 Notice Of Remediation In Progress Waiver Rescission*, App. Div. Dkt. No. A-0511-22 (Feb. 5, 2024) (here, "*In re NJDEP Denial*").

ERRORS COMPLAINED OF

(1) The Appellate Division erred by concluding that Clarios does not have a property interest in Clarios' RIP waiver, where site transfer had already occurred but where the protections of the RIP waiver were still in effect.

(2) The Appellate Division erred by not addressing or affirming Clarios' due process rights, which required notice of NJDEP's rescission of the RIP waiver and some form of hearing.

REASONS TO GRANT CERTIFICATION

This petition should be granted because it meets several of the criteria set forth in N.J. Ct. R. 2:12-4.

First, the appeal presents a question of general public importance that has not been settled by this Court but should be. Specifically, the reliability of statutory waivers under the state's broadly-applicable law governing the remediation of transferred industrial properties is of critical interest to every entity that might transfer such a property and need such a waiver, in a range of commercial activities.⁴ The state is asserting an unfettered right to yank away such waivers at any time without notice or opportunity for hearing, and New

⁴ The full list of industries regulated under ISRA is available in Appendix C of the statute's rules; *see* N.J.A.C. 7:26B; available online at https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_26b.pdf.

Jersey's regulated community deserves this Court's consideration regarding whether the state has such a power.

Second, the Appellate Division's decision in *In re NJDEP Denial* is in direct conflict with the Appellate Division's decision in *Frederick Gumm Chemical Co. v. NJDEP*.⁵ In a lengthy and thoroughly-reasoned opinion, the Appellate Division reversed NJDEP's denial of a hearing on an ISRA waiver, holding that the waiver was a property interest and could not be revoked without due process of law. *Id.* at *5 (Pa12). While *Gumm* is unpublished, it has subsequently been cited by both private entities and by NJDEP itself, and it was not expressly abrogated – or addressed at all – in *In re NJDEP Denial*. This creates conflict and ambiguity in New Jersey law that this Court should exercise its supervision to resolve.

Finally, the interests of justice require consideration and reversal. In plain terms, Clarios was sandbagged by NJDEP's surprise, unreviewable waiver rescission – made at the secret request of Clarios' litigation opponent – and this Court should not allow state agencies to treat the due process rights of the regulated community this way.

I. The Appellate Division's decision will destabilize commercial property transactions and undermine ISRA's goal of encouraging the allocation of remedial responsibility.

⁵ 2007 WL 1574304 (Sup. Ct. N.J., App. Div., June 1, 2007).

The Appellate Division's decision is a threat to the entire regulated community in New Jersey. The result renders the protections of an ISRA waiver nearly meaningless; if NJDEP is free to rescind a waiver, without any notice or opportunity for hearing or challenge, then a business in New Jersey cannot wind up or transfer property under the broadly-applicable ISRA law with confidence or reliance. Parties to complicated brownfield transactions – vital to the green purposes underlying ISRA – are left unmoored.

Property buyers and developers commonly rely on RIP waivers in multiparty brownfield redevelopment arrangements. For instance, a prior owner or other responsible party may have agreed to remediate a property under ISRA, and a later owner/developer triggers ISRA with a sale or closure of operations, knowing that the responsible party has agreed to continue the remediation. In that case, an RIP waiver allows the later owner to buy, sell, or close the property without further complications under ISRA. This structure provides an incentive for green property redevelopment.

Under *In re NJDEP Denial*, however, NJDEP can unilaterally upset that arrangement, even – as here – at the secret request of just one party, on a partial and inaccurate record that can then never be developed or corrected. This is not just unfair; it is terrible public policy. The decision means that the party relying on an RIP waiver can never present the full picture to the agency

about why the waiver should stay in place. This substantially raises the risk for New Jersey businesses involved in property redevelopment arrangements, and if responsible developers offset that risk with redundant trust funds and escrow arrangements, it accordingly will raise costs for businesses trying to engage in this type of green transaction; this is wasteful.

Moreover, companies enter complex contractual arrangements to allocate remediation responsibilities; those arrangements are at the heart of returning financially risky contaminated properties to productive use. The RIP waiver is often a key to that arrangement, as demonstrated in Clarios' case. The Appellate Division's decision will dissuade property developers from purchasing properties with any associated ISRA liability if an RIP waiver would be a necessary ingredient to allocating risks.

Finally, if NJDEP may rescind an RIP waiver without notice to the holder, it would encourage primary responsible parties to abandon their remediation responsibilities and undermine prior agreements with investors and developers.⁶

⁶The outcome also encourages NJDEP to act on an incomplete record, if its rescission of an RIP waiver is essentially immune from challenge. Here, a responsible party simply asserted that it could not continue remediating a property, and its former subsidiary secretly asked NJDEP to rescind Clarios' RIP waiver. NJDEP required no proof, admitted that it did not have a complete file, and relied for its information only on a party with an interest in the rescission. This is a recipe for a bad decision, and a framework that encourages

II. The Appellate Division’s decision below creates a division of authority within the Appellate Division itself.

The Appellate Division’s decision in *In re NJDEP Denial* is in direct conflict with that court’s decision in the 2007 *Frederick Gumm Chemical Co.* case, *supra*.

In *In re NJDEP Denial*, the Appellate Division held that an RIP waiver under ISRA is not a protected property interest giving rise to due process protections. In *Frederick Gumm*, by contrast, the same court held that a different waiver under ISRA – a “UST” waiver, for underground storage tanks – *is* a protected property interest giving rise to due process protections. 2007 WL 1574304, at *5 (“Manifestly, the rescission action taken here is a threat to petitioners’ property interests.... It is essential that petitioners be afforded a fair and full opportunity to test the existence and sufficiency of the factual bases undergirding the rescission order. DEP actions to enforce environmental standards are subject to the requirements of procedural due process.”). There is no distinction between the RIP waiver and UST waiver under ISRA that would lead to one type of waiver being protected and the other not. The decisions are simply in tension, though *In re NJDEP Denial* does not acknowledge it.⁷

bad regulatory decisions will make the green goals of ISRA more expensive for everyone.

⁷ Although *Gumm* is unpublished, this Court should not ignore the decision, which is as easily accessible to future litigants on Westlaw and Lexis as any other

III. Clarios was treated unjustly by the state of New Jersey and justice requires this Court to step in.

NJDEP denied Clarios fundamental notice and opportunity to be heard on a vital matter, and Clarios was therefore denied the opportunity to build a record that might have been adjudicated by the Appellate Division. This was unjust, and Clarios deserves to be heard now.

While the denial of notice and an opportunity to be heard is, itself, sufficient grounds for reversal, the circumstances here are particularly compelling. Clarios relied on the RIP waiver when ceasing its operations at the site and entering agreements to purchase and sell the site. Those agreements allocated responsibility for the site's remediation among numerous parties, and involved several contractual arrangements and numerous commitments to NJDEP, including the establishment of funding sources for the remediation. *See In re NJDEP Denial* at *2 (Pa4-7) (summarizing history of site's ownership and remediation). Notably, above and beyond an existing remediation trust of \$1.85 million, Clarios paid the

opinion, and which has already been repeatedly cited by litigants in briefs, including by NJDEP itself. *See, e.g., NJDEP v. Monsanto Co., et al.*, No. GLO-L-000800-22 (N.J. Super.); NJDEP brief in opposition to motion to dismiss, 2023 WL 9420346, at *25. Moreover, the Frederick Gumm decision was a reversal of NJDEP administrative action – the decision was more important than a routine affirmance – and its reasoning was explained in detail and at length. It is a notable appellate opinion that squarely contradicts the holding in *In re NJDEP Denial*; this Court should reckon with the split in authority and grant cert in order to harmonize this key aspect of New Jersey environmental law.

site's new owner, DeNovo, more than \$2.5 million to take the site, i.e., providing for a total of more than \$4.3 million for remediation. DeNovo then created and spun off Urban Renewal, and shortly after announced insolvency. The \$2.5 million is now unaccounted for, and the site remains unremediated, raising very serious questions about the motivations and interests of the party that requested that NJDEP rescind Clarios' RIP waiver. Yet it is those questions, among others, that NJDEP refused to hear, instead relying on an *ex parte* request, invisible and unchallengeable by Clarios. *See* 5a – 12a. This circumstance should offend a court's sense of due process.

COMMENTS ON THE APPELLATE DIVISION DECISION

In one of the most familiar and basic principles of American law, the U.S. and New Jersey Constitutions guarantee due process before the government deprives any person of a property interest. An approved RIP waiver is squarely within the benefits arising under state law that are constitutionally protected property interests, and a balance of Clarios' interests against the administrative burden of due process falls in Clarios' favor. Certification should be granted to address the Appellate Division's erroneous holding that an RIP waiver does not create a constitutionally protected property interest.

I. The Appellate Division erred in holding that Clarios had no property interest in the RIP waiver.

An RIP waiver conveys two benefits in which the holder has a protected property interest: the right to sell or close the establishment without further ISRA compliance, and a suspension of the obligation to comply with ISRA. The Appellate Division appeared to recognize both benefits, but erred in holding that there is no protected property interest in the suspension of ISRA's remediation obligations.

A. The Appellate Division's reasoning is internally contradictory.

The Appellate Division's decision is internally contradictory as to whether Clarios had an interest in the RIP waiver's suspension of further ISRA compliance. For this reason alone, certification of this appeal and reversal are warranted. The decision first asserts that "for as long as the [underlying remediation is ongoing, the RIP waiver recipient's ISRA obligation to remediate its industrial establishment is suspended." *In re NJDEP Denial*, at *1 (Pa4) (emphasis added). Yet the decision later asserts that after Clarios had closed operations at the site, "the RIP waiver does not suspend the need to remediate the industrial establishment." *Id.* at *4 (Pa12) (emphasis added).

B. An RIP waiver suspends the holder's obligations to comply with ISRA.

ISRA's statute and regulations state that the holder of a waiver may sell or close an industrial establishment "without" further compliance with ISRA or pursuit of the remediation. N.J.S.A. § 13:1K-11.5(a).⁸

ISRA's provision allowing RIP waivers unambiguously suspends those requirements. An owner or operator may apply to close operations or transfer ownership "without" pursuing the actions specified in N.J.S.A. § 13:1K-9(b) or (e) if the site is already in the process of remediation. N.J.S.A. § 13:1K-11.5(a). If the application for an RIP waiver is complete and accurate, NJDEP "shall" authorize the closure or transfer. Importantly, the waiver suspends the need for a remediation agreement or submittal of a remediation certification, which are the mechanisms that NJDEP requires before an owner or operator may defer its ISRA compliance to a point after the closure or transfer of the property. N.J.S.A. § 13:1K-9(e).

NJDEP's regulations governing the issuance of RIP waivers do not vary this structure. Approval of an RIP waiver authorizes the owner or operator to close or transfer the property "without the submittal of a remediation

⁸ ISRA's general requirement is that the owner or operator of an industrial establishment "shall ... remediate" the site after submitting an ISRA-triggering notice. N.J.S.A. § 13:1K-9(b). With respect to the closure of operations of an industrial establishment, the statute specifies that *after closing operations* but before transferring ownership, the owner or operator "shall ... submit" to NJDEP any of several remediation documents, or obtain approval of a remediation agreement or remediation certification. N.J.S.A. § 13:1K-9(b), (e).

certification” – which is otherwise NJDEP’s key mechanism for securing later ISRA compliance. N.J.A.C. § 7:26B–5.4(b).

The Appellate Division relied heavily but erroneously on the NJDEP’s broad reservations of rights under its regulations. NJDEP’s grant of an RIP waiver “may not relieve the owner or operator or any person responsible for conducting the remediation of the industrial establishment, of the obligations to remediate the industrial establishment pursuant to ISRA, [NJDEP’s ISRA regulations] and any other applicable law.” N.J.A.C. § 7:26B–1.8(b). This provision cannot be read in harmony with the statute’s allowance of closure or transfer “without” further ISRA compliance, and “without” the institution of a remediation agreement or certification, unless it is read as a statement that any obligations of the waiver’s holder are suspended by the waiver’s issuance.

The Appellate Division inferred or added language that is not present in the statute or the regulations, in order to reach its conclusion that Clarios had only a unilateral expectation of the suspension. The Appellate Division held that the right to close operations without key ISRA steps exists only “as long as” or “so long as” the property is already in the process of a remediation. *In re NJDEP Denial* at *1 (Pa4, 12), *4 (Pa12). Nowhere does the statute or the regulation say that, nor did NJDEP say that when it approved Clarios’ RIP waiver. 1a

Despite the suspension of ISRA compliance created by these authorities, the Appellate Division found that Clarios’ only benefit under the RIP waiver

was obtained when Clarios closed operations at the facility. *In re NJDEP Denial* at *4. This finding is contradicted by the fact that once its RIP waiver was issued, Clarios was not and never has been required to submit a remediation certification, nor enter a remediation agreement. Those are ISRA's key mechanisms for keeping a responsible party committed to a remediation where a transaction is allowed to proceed. *See* N.J.S.A. § 13:1K-9(e).

Moreover, if the only benefit to Clarios of its RIP waiver were the closure of operations without prior ISRA compliance, and that an RIP waiver did not suspend ISRA compliance, there was no need for NJDEP to rescind the RIP waiver in the first place. By rescinding the RIP waiver, NJDEP acknowledged that the waiver suspended Clarios' ISRA obligations.

C. RIP waivers create constitutionally protected property interests.

Property interests are created and defined by existing rules or state law sufficient to create claims of entitlement of those benefits. *Bd. Of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972); *see also New Brunswick Sav. Bank v. Markouski*, 123 N.J. 402, 411 (1991). Procedural due process protects interests that a person has already acquired in specific benefits stemming from state law. *Bd. of Regents*, 408 U.S. at 576-77.

New Jersey courts similarly recognize that protected property interests arise from rights with economic value that are created by state law. Certificates and permits issued by NJDEP are protected interests that may not be revoked

without a hearing. *See N.J. Dep't of Env'tl. Prot. v. Atl. States Cast Iron Pipe Co.*, 241 N.J. Super. 591, 602 (App. Div. 1990). Even a temporary operating permit is entitled to due process before it is revoked, particularly where its holder relied for years on the continued existence of the temporary permit in conducting its daily business. *Id.* at 603. In addition, occupational and operating licenses are well-recognized to be in the nature of property rights. *Id.* at 601.⁹ The Appellate Division agreed that the property interest in a license is “well recognized.” *In re NJDEP Denial* at *3 (Pa8).¹⁰

II. The Appellate Division erred by affording NJDEP unlimited discretion to grant or deny an RIP waiver.

NJDEP’s discretion to grant or rescind an RIP waiver is limited by ISRA, which thereby creates a protected property interest in the waiver.

A. Limits on NJDEP’s discretion to grant or rescind an RIP waiver demonstrate that Clarios was entitled to due process.

⁹ *See also Limongelli v. N.J. State Bd. of Dentistry*, 260 N.J. Super. 346, 354-58 (App. Div. 1992) (“We start with the proposition that an occupational license is in the nature of a property right.... Thus, deprivation of that right is subject to due process procedures.”).

¹⁰ The court stated: “[t]he benefit conferred by the RIP waiver is that the owner or operator may effect such close of operations or transfer of ownership prior to [certain steps under ISRA]. Once that closure or transfer is complete, the recipient of the RIP waiver has received the benefit of that waiver.” *In re NJDEP Denial*, at *4 (Pa11). Presumably, notice and an opportunity to be heard would be due to the waiver’s holder if NJDEP proposed to rescind the RIP waiver before the closure or transfer, though the Appellate Division did not address that issue.

Where a legitimate claim of entitlement exists, the government's ability to grant or deny it is limited. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (“[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”). When an applicant requests an RIP waiver, NJDEP “shall” grant the waiver if the conditions are met. *See* N.J.S.A. 13:1K-11.5. This is not discretionary, and illustrates the initial entitlement created by ISRA.

As discussed above, ISRA generally requires that a responsible party satisfy several requirements under ISRA before selling or ceasing operations at an “Industrial Establishment.” N.J.S.A. § 13:1K-9. However, where a qualifying remediation is already under way ISRA allows the holder of a RIP waiver to allow the closure of operations or transfer of ownership “without” further compliance with ISRA, and without entering binding remediation commitments that would otherwise be prerequisites to a closure or transfer before remediation. *See* N.J.S.A. 13:1K-11.5; N.J.A.C. § 7:26B-5.4.

ISRA does *not* state that the waiver stays in place only “so long as” the first ISRA case remains in compliance. *Cf. In re NJDEP Denial*, at *4 (Pa10). But assuming that the RIP waiver can be rescinded when the primary remediation falls out of compliance, that precondition is necessary for the rescission, a point that even the Appellate Division’s decision seems to

concede. So the waiver cannot be suspended without cause, a fact establishing the existence of a property interest. *See Thomas Makuch, LLC v. Twp. of Jackson*, 476 N.J. Super. 169, 187 (App. Div. 2023).

B. NJDEP’s determination of whether cause exists to rescind an RIP waiver requires due process before the waiver is rescinded.

NJDEP must have cause to rescind a RIP waiver, and NJDEP must follow due process in reaching a determination that the underlying remediation is out of compliance. For example, the party responsible for the primary ISRA case is entitled to an adjudicatory hearing to contest NJDEP’s decision that the case is out of compliance.¹¹ The primary remediation may not even be under ISRA – it could be under a federal statute, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 USC § 9601 *et seq.*, or the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6901 *et seq.*, and could be overseen in part by agencies other than NJDEP. *See* N.J.S.A. § 13:1K-11.5(a).

C. The record in this case illustrates the hazards of proceeding without due process to RIP waiver holders.

¹¹ *See* N.J.A.C. § 7:26C–9.3 (providing that NJDEP may issue administrative orders to a responsible party for failure to comply with applicable ISRA requirements, and requiring notice of the right to a hearing to contest the order); § 9.10 (providing for adjudicatory hearings upon administrative orders).

NJDEP rescinded Clarios' RIP waiver without prior notice to Clarios or any opportunity to be heard. NJDEP's decision rested on the grounds that the primary remediation had "fallen out of compliance," though Clarios had not been able to review the record of NJDEP's decision, nor to supply additional information to ensure the agency's record was accurate and complete. Clarios was denied a hearing before NJDEP. As a practical matter, according due process to the holders of RIP waivers like Clarios will ensure that the record before NJDEP is complete before it acts. The record in this case amply illustrates the importance of that record: NJDEP's action in rescinding Clarios' RIP waiver rested on admittedly incomplete information that was not even provided by the ISRA responsible party.

CONCLUSION

For these reasons, Clarios urges the Court to grant its petition for certification and reverse the Appellate Division's decision in this case.

Dated: March 7, 2024

Respectfully submitted,

By: /s/ Roy Prather
Roy Prather III

CERTIFICATION

I certify that this petition presents a substantial issue, is made in good faith, and is not made for the purposes of delay.

/s/ Roy Prather

Roy Prather III

Dated: March 7, 2024