SUPREME COURT OF NEW JERSEY

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	Docket No.: 089182 Civil Action On Certification from the Judgment of the Superior Court of New Jersey, Appellate Division, in Docket No. A-000511-22 Sat Below: Hon. Mary Gibbons Whipple, P.J.A.D. Hon. Jessica R. Mayer, J.A.D. Hon. Catherine I. Enright, J.A.D.

SUPPLEMENTAL BRIEF OF RESPONDENT/INTERVENOR 760 NEW BRUNSWICK URBAN RENEWAL LIMITED LIABILITY COMPANY

RIKER DANZIG LLP
Attorneys for Respondent/Intervenor 760 New Brunswick Urban Renewal Limited Liability Company
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(973) 538-0800
ssenior@riker.com
mkettler@riker.com

Of Counsel:
Steven T. Senior (Bar No. 036151994)

On the Brief:
Michael S. Kettler (Bar No. 033562012)

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PRELIMINARY STATEMENT

Appellant Clarios, LLC ("Clarios") closed its New Brunswick battery factory in 2007. Ordinarily, under the Industrial Site Recovery Act ("ISRA"), N.J.S.A. 13:1K-6 et seq., Clarios at that time would have been required to investigate and remediate environmental contamination at its industrial establishment. But because a prior owner of the facility had become subject to ISRA before 2007, the New Jersey Department of Environmental Protection ("DEP" or the "Department") issued to Clarios an ISRA remediation in progress waiver ("RIP Waiver"). The RIP Waiver relieved Clarios at that time of its responsibility to perform work under ISRA that would have been duplicative of the prior owner's then-ongoing efforts. However, the RIP Waiver was contingent on the continued performance of the prior remediation case. DEP thus rescinded the RIP Waiver after that prior remediation case fell out of compliance, and denied Clarios' request for an adjudicatory hearing to contest that rescission.

Due process entitles the recipient of a government benefit to a hearing when that benefit is revoked only if the recipient has a legitimate claim of entitlement under state law to retain the benefit. RIP Waiver recipients lack this property interest because the actions of a third-party—the person conducting the first remediation case—can remove the RIP Waiver recipient's entitlement to

the benefit. Clarios merely had a unilateral expectation that the prior remediation would remain in compliance and that it could retain the RIP Waiver. The Appellate Division correctly held that Clarios lacked a protected property interest in the RIP Waiver and affirmed DEP's denial of Clarios' hearing request. Further, there was no material factual dispute requiring DEP to hold an adjudicatory hearing. There is no dispute that the first remediation case was not in progress, which presents an alternative ground for affirming DEP's denial of the hearing request. Therefore, Respondent/Intervenor 760 New Brunswick Urban Renewal Limited Liability Company ("Urban Renewal") respectfully requests that the judgment of the Appellate Division be affirmed.

ARGUMENT

I. CLARIOS DID NOT HAVE A LEGITIMATE CLAIM OF ENTITLEMENT TO RETAIN ITS RIP WAIVER PERPETUALLY EVEN IF THE REMEDIATION A THIRD-PARTY WAS CONDUCTING CEASED TO BE IN PROGRESS.

A. Under the Roth framework, New Jersey law establishing and implementing RIP Waivers determines whether a property interest exists.

Urban Renewal agrees with Clarios that the analytical framework of Board of Regents v. Roth, 408 U.S. 564 (1972), as applied by New Jersey courts, governs here. Nicoletta v. N.J. Dist. Water Supply Comm'n, 77 N.J. 145, 154-55 (1978) (citing Roth); Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J.

Super. 169, 184-86 (App. Div. 2023) (citing Roth and Nicoletta), certif. denied, 256 N.J. 436 (2024).

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577 (emphases added).[1]

The issue here, then, is whether ISRA, DEP's regulations implementing ISRA, DEP's 2007 determination approving Clarios' RIP Waiver application, and background common law principles governing New Jersey administrative agencies gave Clarios a legitimate claim of entitlement to keep its RIP Waiver when the underlying remediation was out of compliance. J.E. *ex rel.* G.E. v. State, 131 N.J. 552, 564 (1993) ("[W]e examine the statutes, regulations, and

[1] While article I, paragraph 1 of the New Jersey Constitution provides a state-level source of procedural due process protections, our courts have looked to federal law regarding procedural due process under the U.S. Constitution to determine the scope of the protected property interest. Thomas Makuch, LLC, 476 N.J. Super. at 185-86; New Brunswick Sav. Bank v. Markouski, 123 N.J. 402, 410-11, 414 (1991).

case law concerning the [claimed benefit] to determine the scope of [the party's] interest."). Urban Renewal submits that they did not.

B. DEP may rescind a RIP Waiver when the first remediation no longer is in compliance.

We look first to the statute to determine the extent of a RIP Waiver recipient's property interest. The statute provides for the issuance of a RIP Waiver when, among other things, "the industrial establishment is already in the process of a remediation," the applicant certifies "that there has been no discharge of any hazardous substance or hazardous waste at the industrial establishment during the applicant's period of operation or ownership," and the applicant certifies that "a remediation funding source for the cost of the remediation" has been established. N.J.S.A. 13:1K-11.5. The statute is silent, however, about what action DEP may take when circumstances change and the industrial establishment ceases to be "in the process of a remediation" at some point after a RIP Waiver is issued.

Under this circumstance, DEP has inherent authority to rescind a RIP Waiver. "In the absence of a legislative restriction, administrative agencies generally have the inherent power to reopen or to modify and rehear prior decisions." In re Application of Trantino, 89 N.J. 347, 364 (1982). The power to reconsider should "be exercised reasonably and with due diligence." In re

Cadgene Family P'ship, 286 N.J. Super. 270, 277 (App. Div. 1995) (affirming DEP rescission of a different type of ISRA approval).

The applicable regulations also make clear that Clarios lacks a legitimate claim of entitlement to the continued validity of its RIP Waiver. The Appellate Division correctly observed that DEP regulations reserve the Department's ability to require a RIP Waiver recipient to comply with ISRA at a later date. Pa11-Pa12. The regulation states,

> The issuance of an authorization letter pursuant to (a) above [including a 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, this chapter and any other applicable law.

N.J.A.C. 7:26B-1.8(b).[2] DEP's March 12, 2007 letter to Clarios approving the RIP Waiver also contained an explicit reservation of DEP's ability to enforce ISRA against Clarios in the future, consistent with this regulation. "By issuing this Letter of Authorization, [the] Department continues to reserve all rights to pursue appropriate enforcement actions allowable under the law for violations of ISRA as associated with this transaction." 1a; see also Pa12-Pa13 (the court

[2] The regulations in effect when DEP approved Clarios' RIP Waiver in 2007 contained the same language. See 29 N.J.R. 4913(a), 4939 (Nov. 17, 1997) (adopting former N.J.A.C. 7:26B-1.8(d), whose language now is found in N.J.A.C. 7:26B-1.8(b)).

below observed that DEP "explicitly noted that limitations inherent in this waiver and the reasonable scope of Clarios's right to rely on it").

Based on the foregoing underlying law, DEP correctly concluded, "If the previous case falls out of compliance with the remediation schedule, the Department may rescind the waiver and require the applicant to complete the remediation pursuant to N.J.A.C. 7:26B-3.3(a)." 4a. This reasonable interpretation and application of ISRA and DEP's own regulations is entitled to deference. TAC Assocs. v. N.J. Dep't of Envtl. Prot., 202 N.J. 533, 541-42 (2010); In re Election Law Enforcement Comm'n Advisory Opinion No. 01-2008, 201 N.J. 254, 262 (2010).

Clarios incorrectly argues that both DEP and the court below misinterpreted N.J.A.C. 7:26B-1.8(b). Clarios argues that "this provision can only be read to limit the effect of the waiver to its actual holder," that is, the regulation reserves DEP's rights to require any parties that may be responsible for the remediation except the recipient of a RIP Waiver to comply with ISRA or other applicable environmental laws in the future. Cb8.[3] Clarios' interpretation is contrary to the regulation's plain language. The regulation provides that the receipt of a RIP Waiver, among other similar DEP determinations, "may not relieve **the** owner or operator … of the obligations to

[3] Clarios' Supplemental Brief dated August 15, 2024, is cited herein as "Cb."

remediate the industrial establishment pursuant to ISRA…." N.J.A.C. 7:26B-1.8(b) (emphasis added). This reference to "the" singular "owner or operator" of an industrial establishment must refer to the singular party that received one of the determinations listed in N.J.A.C. 7:26B-1.8(a)—a RIP Waiver, a regulated underground storage tank waiver, a de minimis quantity exemption, or submission of a remediation certification—not to an undefined number of other potentially responsible parties who did not apply to DEP for these determinations.[4]

[4] Even if DEP correctly interpreted its regulation, Clarios argues that the regulation should be ignored because "an agency cannot use a regulation or putative 'claw-back' clauses to curtail the due process protections enshrined by the Constitution," citing to Justice Powell's concurrence in Arnett v. Kennedy, 416 U.S. 134, 167 (1974). Cb8. Clarios misreads Arnett. Justice Powell's Arnett concurrence contended that statutes and regulations could determine "the nature of [the party's] property interest" but could not determine "the extent of the procedural protections to which he may lay claim." Arnett, 416 U.S. at 166 (Powell, J., concurring); accord Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 541 (1985) (adopting the reasoning of Justice Powell's Arnett concurrence). Thus, following the approach of Justice Powell in Arnett and the majority in Loudermill, courts may look to state law, including state administrative regulations, to determine whether a property interest exists, but state regulations may not determine what procedures the Constitution requires after the state's regulations create a legitimate claim of entitlement to a benefit. See, e.g., Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 811 (3d Cir. 1991). Here, and consistent with Loudermill, the court below looked to DEP's regulations to determine whether Clarios had a property interest in the RIP Waiver, and it did not reach the issue of what procedures would be required because it held that Clarios had no property interest. Pa14.

Further, and as noted above, courts defer to an agency's interpretation of its own regulation "unless the interpretation is plainly unreasonable." In re Election Law Enforcement Comm'n Advisory Opinion No. 01-2008, 201 N.J. at 262. Here, DEP's interpretation of ISRA and its regulations is plainly reasonable. The statute authorizes DEP to issue RIP Waivers when certain conditions are met, but it is silent as to the future consequence when any of those conditions are no longer satisfied. See N.J.S.A. 13:1K-11.5. As demonstrated by this case—where the ISRA cleanup process began in 2006 and remains unfinished to this day—remediation projects under ISRA often take years or even decades to complete. DEP and the court below correctly reached the common-sense conclusion that "an RIP waiver is contingent on remediation being in progress; if remediation falls out of compliance, the RIP waiver applicant no longer qualifies for the suspension…." Pa4 (emphases in original). Adopting Clarios' contrary view would mean that no one would be responsible under ISRA for remediating a contaminated site where, for example, the party responsible for the first ISRA trigger that justified a RIP Waiver went bankrupt and dissolved before it could complete the lengthy remediation. The Legislature plainly did not intend to thwart the purpose of ISRA—remediating former industrial sites—when it provided for RIP Waivers.

C. The recipient of a RIP Waiver does not have a legitimate claim of entitlement to retain it when the first remediation no longer is in progress.

Under the governing state law cited above that determines whether a property interest exists in a state-conferred benefit, DEP can revoke a RIP Waiver where the third-party who is responsible for the first remediation case fails to perform. There is no legitimate claim of entitlement to keep a RIP Waiver under these circumstances.

A party does not have a legitimate claim of entitlement to a benefit conferred by the government, and thus does not have a Constitutionally-protected property interest in retaining that benefit, where the government can revoke the benefit based on the conduct of a third-party over whom the party asserting the due process claim has no control. For example, the U.S. Supreme Court held that Medicaid recipients who resided in a nursing home whose eligibility to receive payments from the Medicaid program had been terminated did not have a property right entitling them to a hearing before the nursing home's eligibility was terminated. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773 (1980). The relevant statutes and regulations gave individual Medicaid recipients the right to obtain care from any qualified facility of their choice, prohibited a certified nursing facility from discharging Medicaid recipients for arbitrary reasons, and provided a hearing right before an individual's Medicaid

benefits could terminated. Id. at 779-80. Even though this underlying legal framework gave Medicaid recipients a property right to choose among a range of qualified providers without government interference, it "clearly [did] not confer a right on a [Medicaid] recipient … to continue to receive benefits for care in a home that [had] been decertified." Id. at 785. Thus, the Medicaid recipients had no right to a hearing before the federal government decertified the nursing home as a result of the nursing home's failure to meet the minimum Medicaid program standards, notwithstanding the hardships the residents might suffer from having to move and find a new, qualified nursing home. Id. at 787-89; accord Grove City Coll. v. Bell, 687 F.2d 684, 704 (3d Cir. 1982) (students at private college who received federal government tuition assistance were not entitled to a hearing before the government terminated the college's right to receive payments under tuition assistance program as a result of the college's refusal to comply with Title IX); Kelly Care, Ltd. v. O'Rourke, 930 F.2d 170, 174-76 (2d Cir. 1991) (Medicaid provider did not have property right to continue to receive Medicaid reimbursement from Westchester County agency that had terminated its contract, even though provider remained a "qualified provider" under New York State regulations, which also required that a hearing be granted before New York State could terminate its status as a qualified provider); Sisay v. Smith, 310 Fed. Appx. 832, 838-43 (6th Cir. 2009) (cab drivers possessing

Cleveland cab licenses did not have a property right in being permitted to pick up passengers from Cleveland Airport where local law gave airport management discretion to approve cab companies operating at airport and airport management awarded exclusive contracts to other cab companies).

Here, the recipient of a RIP Waiver lacks a legitimate claim of entitlement and a Constitutionally-protected property interest for the same reasons. DEP can revoke the RIP Waiver when the party conducting the first ISRA remediation does not comply with the law. See supra Section I.B. Clarios is in the same position as the nursing home residents in O'Bannon: Clarios may lose a government benefit and consequently suffer losses when a third-party (Delphi and DeNovo) fails to comply with the law, but it does not have a property right to retain that benefit.

Clarios argues that it had a legitimate claim of entitlement because ISRA does not give DEP discretion to deny an application for a RIP Waiver if the statutory prerequisites are met. Cb4-8. Clarios misconstrues the issue presented here. The issue is not whether Clarios had a legitimate claim of entitlement to obtain the RIP Waiver in 2007, but rather whether Clarios had a legitimate claim of entitlement to keep the RIP Waiver in 2022. Further, pre-deprivation procedural protections of the kind Clarios sought here would not have been available before Clarios received the RIP Waiver. Graham v. N.J. Real Estate

Comm'n, 217 N.J. Super. 130, 136 (App. Div. 1987) ("[A] protected right in a … license comes into existence only after a license has been obtained. An applicant for a license has merely an expectation of obtaining a property interest."); see also Lyng v. Payne, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause….").[5] The procedural due process analysis of Roth and its progeny looks to the extent of a party's expectation of retaining a benefit after it has been granted, not its initial entitlement to the benefit.

Clarios attempts to overcome this hurdle by pointing out that "[n]othing in either the statute or the regulations limits the duration of a RIP waiver." Cb6.

[5] Although Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3d Cir. 2000), a case on which Clarios relies, analyzes the extent of a party's property right in receiving a land use approval when it applied in the first instance, that case concerned a claim based on substantive due process, a distinct concept from procedural due process. Id. at 120; see also Hill v. Borough of Kutztown, 455 F.3d 225, 234 n.12 (3d Cir. 2006) (substantive due process protects rights deemed fundamental under the U.S. Constitution). Woodwind Estates is part of a narrow line of Third Circuit cases in which the government's "arbitrary, irrational, or tainted with improper motive" denial of a permit "required for some intended use of land owned by the plaintiffs … implicated the kind of property interest protected by substantive due process," i.e., a fundamental right. Woodwind Estates, Ltd., 205 F.3d at 123-24. A RIP Waiver is not like the fundamental right in Woodwind Estates; Clarios has never asserted that it has a fundamental right in the RIP Waiver; and the desire to be free from ISRA enforcement is nothing like a property owner's right to develop land it owns free from arbitrary government action.

This is irrelevant. As demonstrated above, DEP reasonably determined that it can rescind a RIP Waiver whenever the first ISRA case is not in compliance. There is no legitimate claim of entitlement to retain a benefit that the State may revoke at any time because of a third-party's actions, even if the benefit otherwise would exist perpetually.

D. There was no mutually explicit understanding between Clarios and DEP that could have created a property interest.

A property interest in retaining a benefit may be created in some circumstances by "mutually explicit understandings" between the government and the recipient of a benefit, even where sources of positive law (e.g., statutes and regulations) do not create a property interest. Thomas Makuch, LLC, 476 N.J. Super. at 185 (citing Perry v. Sindermann, 408 U.S. 593, 601 (1972)). However, "the [U.S.] Supreme Court has set a high bar for how 'explicit' an understanding must be in order to support a property interest." McKinney v. Univ. of Pittsburgh, 915 F.3d 956, 960 (3d Cir. 2019). Even a party's "reasonable expectation" of retaining the benefit is insufficient; unless "the government and the [party] … both clearly expect that the [party] has some entitlement to the benefit," the party merely has a "unilateral expectation" that does not give rise to a protected property interest. Tundo v. Cty. of Passaic, 923 F.3d 283, 287 (3d Cir. 2019) (emphasis in original).

Clarios lacked even a reasonable expectation of retaining the RIP Waiver, and its unilateral expectation that the RIP Waiver would not be rescinded did not create a property interest. DEP's approval of the RIP Waiver stated that DEP could in the future take enforcement action against Clarios for ISRA liability arising from Clarios' cessation of operations. 1a. DEP's regulations in place since before Clarios' RIP Waiver was issued provide that issuance of a RIP Waiver would not preclude future enforcement of ISRA against the recipient. N.J.A.C. 7:26B-1.8(b); 29 N.J.R. 4913(a), 4939 (Nov. 17, 1997).

Clarios points to no statement or informal policy of DEP that could have created a "mutually explicit understanding" granting a property right in the RIP Waiver. Instead, it points to DEP's "silence towards Clarios in the ensuing years" after the RIP Waiver was issued. Cb8-10. Silence is not enough. As far as DEP was concerned, the remediation was proceeding without incident for over a decade until the first instance of non-compliance in 2019. DEP had no reason to speak up during that time, and the Department's silence cannot be interpreted as acquiescence in the creation of a property interest in contradiction of its prior, explicit disclaimers. Nor did the passage of time between the initial non-compliance in 2019 and DEP's rescission of the RIP Waiver in 2022 create a property interest where none existed before. It is illogical to suggest that DEP might not have been required to grant Clarios an adjudicatory hearing if it

rescinded the RIP Waiver in 2019, but that such a hearing was required when it rescinded the waiver in 2022 after the underlying case had slipped further into non-compliance.

Clarios incorrectly relies on New Jersey Department of Environmental Protection v. Atlantic States Cast Iron Pipe Co., 241 N.J. Super. 591 (App. Div. 1990), to support its inference of a property interest from DEP's silence. In Atlantic States, DEP had issued a continuous series of "temporary" 90-day operating certificates for several years that the court treated as a de facto operating permit for air emissions; it was not disputed that a hearing would be required if DEP were to revoke an operating permit. Id. at 602-03. Here, on the other hand, DEP issued a single RIP Waiver to Clarios. And, as demonstrated above, Clarios did not have a legitimate claim of entitlement to retain the RIP Waiver where it would become invalid when a third-party outside of its control failed to complete the remediation. See, e.g., O'Bannon, 447 U.S. at 779-85. In Atlantic States, in contrast, the air permit could be revoked only because of the failure of the permittee itself to comply with its conditions, not because of the actions of a third-party.

Clarios' reliance on the Appellate Division's unreported decision in Morgan Stanley also is misplaced. See Cb12-13 (citing Morgan Stanley Servs. Co., Inc. v. N.J. Dep't of Envtl. Prot., Docket No. A-5703-08, 2011 N.J. Super.

Unpub. LEXIS 182 (App. Div. Jan. 26, 2011)). The Appellate Division did not order DEP to conduct an adjudicatory hearing in Morgan Stanley. The due process questions presented in this case were not discussed at all in Morgan Stanley, and the court apparently assumed that the same procedure DEP used here to rescind Clarios' RIP Waiver—sending a letter informing the party that the Department's prior determination was rescinded—was constitutionally sufficient. See Morgan Stanley, 2011 N.J. Super. Unpub. LEXIS 182, at *11-12 (discussing DEP's rescission letter without raising procedural due process concerns). Rather, the Appellate Division in Morgan Stanley held that DEP's rescission of the No Further Action letter failed to set forth sufficient findings of fact to support the agency's determination. Id. at *14-20. Here, on the other hand, DEP found sufficient facts in its letter rescinding the RIP Waiver. That is, DEP found that the remediation was

> out of compliance for failure to submit the remedial investigation report by the regulatory timeframe of March 1, 2019, failure to complete the remedial action by the regulatory timeframe of February 28, 2022, pursuant to N.J.A.C. 7:26C-3.2(a), and failure to establish and maintain a remediation funding source pursuant to ISRA …, in accordance with N.J.A.C. 7:26C-5.2(a)(1).

3a. These facts were a sufficient basis for DEP to rescind the RIP Waiver, as prerequisites for obtaining a RIP Waiver no longer were satisfied. See N.J.S.A. 13:1K-11.5. Clarios' unilateral expectation that a property interest had been

created by DEP's understandable silence before the remediation fell out of compliance did not establish a mutually explicit understanding with DEP.

II. THE APPELLATE DIVISION'S JUDGMENT SHOULD BE AFFIRMED BECAUSE CLARIOS DID NOT RAISE A MATERIAL FACTUAL DISPUTE REQUIRING DEP TO GRANT AN ADJUDICATORY HEARING.

The analysis of a procedural due process claim has two steps: "courts first assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient." State v. Robinson, 229 N.J. 44, 75 (2017) (citation omitted). The court below discussed the first step only because it held that "[n]o property interest exists here." Pa14.

Even assuming arguendo that the Court were to find at the first step that a property interest exists in the RIP Waiver, the second step of the due process analysis does not require that DEP grant Clarios an adjudicatory hearing. Therefore, the judgment of the Appellate Division and DEP's denial of Clarios' hearing request should be affirmed.[6] See, e.g., State v. Anderson, 248 N.J. 53,

[6] Clarios implies throughout its Supplemental Brief that the Court should reverse the decision below if it finds that DEP should have provided some additional informal process to Clarios short of an adjudicatory hearing before rescinding the RIP Waiver. See, e.g., Cb1 (arguing that DEP "deprived Clarios of procedural due process when it rescinded [the RIP Waiver] without any form of notice or hearing opportunity to Clarios"); Cb4 (DEP "should have given Clarios reasonable notice and an opportunity to be heard before it rescinded the RIP Waiver…."). This implication is incorrect. Clarios appealed only from DEP's

60 (2021) (affirming the judgment though the Court's "reasoning differs from that of the Appellate Division").

The parties briefed extensively in the Appellate Division the issue of what process was due to Clarios.[7] It is well-settled that an adjudicatory hearing is not required if there are no disputed material facts that would need to be decided in a trial-type hearing. E.g., J.D. *ex rel.* D.D.H. v. N.J. Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000); Bally Mfg. Corp. v. N.J. Casino Control Comm'n, 85 N.J. 325, 334 (1981); Codd v. Velger, 429 U.S. 624, 627 (1977).

Clarios' hearing request did not raise a material factual dispute. The sole disputed fact Clarios raised—whether DeNovo had the ability to fund the remediation funding source—was immaterial. 12a. As demonstrated above, DEP has the authority to rescind a RIP Waiver when the first ISRA case is out of

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September 6, 2022 denial of its adjudicatory hearing request. 35a; 39a. That decision should be affirmed if Clarios was not entitled to an adjudicatory hearing at the time Clarios requested the hearing (i.e., after DEP rescinded the RIP Waiver); the extent of the notice and opportunity to be heard that Clarios received before the RIP Waiver was rescinded is irrelevant. Notably, Clarios did not appeal DEP's April 22, 2022 determination rescinding the RIP Waiver, so any errors allegedly arising from that determination are not properly before the Court. 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) ("only the judgment or orders designated in the notice of appeal … are subject to the appeal process and review").

[7] See Letter Brief of DEP at 11-16 (Feb. 24, 2023); Brief and Appendix of Urban Renewal at 17-27 (Mar. 1, 2023); Clarios' Reply Brief 7-8 (March 15, 2023).

compliance and the remediation is no longer in progress. Clarios did not dispute that the first ISRA case was out of compliance. Whether DeNovo had the ability to comply with ISRA was irrelevant, as long as DeNovo in fact had not complied. DEP's choice whether to enforce ISRA against DeNovo, against Clarios, or against both of them is a matter for the Department's unreviewable enforcement discretion. See Superior Air Prods. Co. v. NL Indus., Inc., 216 N.J. Super. 46, 51 (App. Div. 1987) (DEP's "duty to take action under … the Spill Act [a similar environmental remediation statute to ISRA] is discretionary").

Because there were no material disputed facts requiring an adjudicatory hearing, the Court should affirm the Appellate Division's judgment upholding DEP's denial of the hearing request.

CONCLUSION

For the foregoing reasons, Urban Renewal respectfully requests that the Court affirm the judgment of the Appellate Division.

Respectfully submitted,

RIKER DANZIG LLP

Attorneys for Respondent/Intervenor
760 New Brunswick Urban Renewal
Limited Liability Company

By: *s/ Steven T. Senior*
Steven T. Senior

Date: September 16, 2024