

---

---

# 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.

---

---

## REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR CERTIFICATION

---

---

*On the Brief:*

ROY D. PRATHER III, ESQ.  
Attorney ID# 026292009

BEVERIDGE & DIAMOND, P.C.  
*Attorneys for Petitioner Clarios, LLC*  
201 N. Charles Street, Suite 2210  
Baltimore, Maryland 21201  
(410) 230-1300  
rprather@bdlaw.com

Date Submitted: May 2, 2024

---

---



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
REPLY BRIEF OF PETITIONER CLARIOS, LLC .....	1
I. In “rescinding” Clarios’ RIP waiver, NJDEP conceded that the waiver was still in place, and was still conferring a benefit when rescinded .....	2
II. NJDEP does not dispute that it rescinded the RIP waiver without notice to Clarios, at the secret request of an interested party .....	6
III. This Court should resolve the tension between <i>Frederick Gumm Chemical Co.</i> and <i>In re NJDEP</i> .....	7
IV. <i>In re NJDEP</i> is bad public policy .....	9
CONCLUSION .....	10

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases:</b>	
<i>Brady v. Dep’t of Pers.</i> , 149 N.J. 244 (1997).....	7
<i>City of Santa Clara v. Kleppe</i> , 418 F. Supp. 1243 (N.D. Cal. 1976).....	7
<i>Crema v. New Jersey Dep’t of Environmental Protection</i> , 94 N.J. 286 (1983).....	7
<i>Frederick Gumm Chemical Co.</i> , 2007 WL 1574304 (Sup. Ct. N.J., App. Div., June 1, 2007) .....	7, 8, 9
<i>J.I. v. New Jersey State Parole Bd.</i> , 228 N.J. 204 (2017).....	7
<i>Joint Anti-Fascist Comm. v. McGrath</i> , 341 U.S. (1951) .....	6
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976) .....	6
<i>S.C. v. New Jersey Dept. of Children &amp; Families</i> , 242 N.J. 201 (2020).....	6-7
<b>Statutes &amp; Other Authorities:</b>	
N.J. Ct. R. 2:12-4 .....	8
N.J.S.A. 13:1K-11.5.....	3

## REPLY BRIEF OF PETITIONER CLARIOS, LLC

Clarios, LLC files this reply to the opposition briefs of Respondent New Jersey Department of Environmental Protection (“NJDEP”) and Intervenor 760 New Brunswick Urban Renewal Limited Liability Company (“Urban Renewal”). NJDEP filed a letter brief “in lieu of a formal brief,” Opp. at 2, and instead “relies primarily on its brief filed below,” *id.* If this Court considers the briefing in the Appellate Division in addition to the briefing on the instant certification petition, Clarios asks the Court to consider all briefing below, including Clarios’ January 30, 2023 opening brief and its March 15, 2023 reply.

The Court should ignore the brief of Intervenor Urban Renewal. The issues before the Court are limited to Clarios’ rights to due process from NJDEP, as to which Clarios and NJDEP alone have an interest, not Intervenor. NJDEP’s brief does not adopt, affirm, or mention the arguments of Intervenor Urban Renewal, though NJDEP filed a month after Intervenor.

Should the Court consider Intervenor’s arguments, the Court should reject them. Intervenor is claiming an interest in Clarios’ RIP waiver sufficient to participate in this appeal, but is arguing that Clarios itself lacked an interest sufficient to participate in any process regarding its *own* RIP waiver at the agency level. If Intervenor has the right to participate in this appeal,

Clarios itself surely had the right to participate in the agency process that rescinded its own RIP waiver.

**I. In “rescinding” Clarios’ RIP waiver, NJDEP conceded that the waiver was still in place, and was still conferring a benefit when rescinded.**

NJDEP argues – and the court below held – that the agency’s rescission of Clarios’ RIP waiver was meaningless because any benefit conferred on Clarios by that waiver expired when the property was transferred. Opp. at 10 (RIP waiver “waives only the requirement to provide for remediation before... transfer of ownership”) (quoting *In re NJDEP*, at 12). This argument is simply at odds with the procedural facts of this case and the terms of ISRA.

When NJDEP finally rescinded Clarios’ RIP waiver in 2022, it did *not* do so on the straightforward grounds that the property had been transferred more than a decade earlier, in 2011. If the Appellate Division were correct that RIP waivers categorically confer no benefit after a property is transferred, it would have been a simple application of the law for NJDEP to find, in 2022, that eleven years had passed since the property transfer in 2011, and to rescind the RIP waiver on that basis. Indeed, such a rescission would have made even more sense shortly after the property transfer, instead of eleven years later. If NJDEP were correct, the most sensible process would require no “rescission”

in the first place, because an RIP waiver that naturally and automatically expires upon property transfer need not be “rescinded.”<sup>1</sup>

But NJDEP *did* “rescind” Clarios’ RIP waiver in 2022, and it did so not on the grounds that it was eleven years expired, but because the agency found – without notice to or input from Clarios – that remediation at the property had faltered. Opp. at 5. The Appellate Division itself acknowledged this, noting that NJDEP rescinded Clarios’ RIP waiver not because the property transfer had occurred eleven years earlier, but because remediation was no longer “in progress.” Specifically, the Appellate Division noted that “[i]f remediation falls out of compliance, the RIP waiver applicant no longer qualifies for the suspension under N.J.S.A. 13:1K-11.5, and the NJDEP may rescind the RIP waiver. That is what occurred here.” *In re NJDEP*, at 4 (emphasis added).

In focusing on the argument that RIP waivers do not survive property transfers – even though NJDEP clearly believed they do when it “rescinded” the Clarios RIP waiver in 2022 – neither NJDEP nor Intervenor addresses Clarios’ core point in its petition. If RIP waivers expire naturally upon the

---

<sup>1</sup> NJDEP’s position is also inconsistent with the structure of ISRA and its regulations, which relieve RIP waiver recipients from the need to commit financial resources to back up the remediation. *See* Pet. § I(B). If NJDEP’s argument were correct, the RIP waiver holder should be *especially* subject to financial assurance requirements, since it is allowed to liquidate its interest in the property before the remediation is complete.

transfer of an ISRA property, and confer no further benefit after that point, there was no need for NJDEP to “rescind” Clarios’ RIP waiver in 2022, eleven years after the property transfer.

Instead, NJDEP behaved as though the RIP waiver was still conferring a benefit on Clarios – a suspension of Clarios’ remediation obligations – more than a decade after the property was transferred. Specifically, as Intervenor points out, NJDEP specifically warned Clarios in January 2021 that the suspension of Clarios’ remediation obligations under its RIP waiver would end *if* an adequate remediation funding source were not maintained. Intervenor Opp, at 18. This message from NJDEP presupposed that the RIP waiver was still in effect a decade after the property transfer. NJDEP was also behaving as though the RIP waiver were not purely a matter of its own discretion, but instead required cause – specifically, a failure of remediation work – for rescission of the RIP waiver. The January 2021 message from NJDEP establishes this point too. *Id.* This is how RIP waivers are administered by NJDEP, it is consistent with ISRA’s statute and rules, and it creates due process rights for waiver holders like Clarios.<sup>2</sup>

---

<sup>2</sup> Intervenor argues that this January 2021 warning was a “notice” of NJDEP’s rescission of the RIP waiver, more than a year before it happened. This message was not “notice,” however, for the simple reasons that the warning was contingent on future events, and no decision on rescission had occurred yet about which Clarios could be notified.

NJDEP's Opposition asserts that Clarios has an "ongoing misunderstanding" about the RIP waiver, Opp. 9, but NJDEP is attacking straw arguments, not Clarios' actual arguments. NJDEP wrongly characterizes Clarios as assuming that Clarios was "relieved of its duty to remediate an industrial property after the property is transferred," *id.* (emphasis added); and as arguing that Clarios' remediation responsibility was "discharge[d]" by the RIP waiver, *id.* at 10 (emphasis added). This is not Clarios' argument.

To the contrary, Clarios understands that an RIP waiver only *suspends* – not "relieves" or "discharges" – its ISRA remediation obligations. NJDEP is ignoring Clarios' actual argument, which is (1) that the suspension of ISRA obligations is itself a property right, akin to a temporary license to forego remediation; and (2) that the suspension of Clarios' ISRA obligations under Clarios' RIP waiver continued, with a meaningful and relevant effect on Clarios' rights, up until NJDEP rescinded the RIP waiver in 2022.

NJDEP also asserts, without explaining, that if an RIP waiver is only effective before a property transfer – and not after – then Clarios' due process challenge "presents no genuine question of public importance for this Court to answer." *Id.* at 10. But this assertion ignores that NJDEP itself was communicating to Clarios that the RIP waiver was still effective as late as 2021, *supra*. And it simply skips over Clarios' constitutional argument, which



is that even a *suspension* of remediation obligations under an RIP waiver is akin to the type of licenses or certificates that New Jersey courts have held give rise to a “property” interest and minimal due process protections. *See* Pet. at 16-17. This central argument is functionally unopposed.

**II. NJDEP does not dispute that it rescinded the RIP waiver without notice to Clarios, at the secret request of an interested party.**

Notably, NJDEP does not dispute in its opposition brief that Clarios was denied any notice of the agency’s decision to rescind Clarios’ RIP waiver, or that Clarios was denied any form of due process. Nor do NJDEP or Urban Renewal dispute that NJDEP rescinded Clarios’ RIP waiver at the behest of Urban Renewal – a highly interested party – after repeated, months-long *ex parte* communications with Urban Renewal.

Under basic constitutional principles, Clarios was entitled to “some form of hearing.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). At the very least, Clarios should have received some form of notice before NJDEP’s final agency action rescinding Clarios’ RIP waiver, which Clarios had relied on for nearly seventeen years. *Id.* at 348 (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S., at 171-172 (1951)). *See also* *S.C. v. New Jersey*

*Dept. of Children & Families*, 242 N.J. 201, 211 (2020) (“notice and opportunity to be heard are the essentials of due process”).

While NJDEP has discretionary authority to rescind an RIP waiver, the agency is still bound by the confines of due process. “[D]ue process means that administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules.” *Crema v. New Jersey Dep’t of Environmental Protection*, 94 N.J. 286, 301(1983) (quoting *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243, 1261 (N.D. Cal. 1976)). Further, this court has held “judicial review, however, requires that we not blindly defer to an agency’s decision.” *J.I. v. New Jersey State Parole Bd.*, 228 N.J. 204, 230 (2017) (citing *Brady v. Dep’t of Pers.*, 149 N.J. 244, 256 (1997)). Therefore, this instance of a state agency ignoring the very basic requirements of procedural due process requires this court’s intervention.

### **III. This Court should resolve the tension between *Frederick Gumm Chemical Co.* and *In re NJDEP*.**

NJDEP and Intervenor Urban Renewal argue that this Court should ignore *Frederick Gumm Chemical Co.*,<sup>3</sup> because it is unpublished. Opp. at 10-12; Intervenor Opp. at 13-15. But this Court’s certification rule does not limit certification to instances of conflict between published decisions; rather,

---

<sup>3</sup> 2007 WL 1574304 (Sup. Ct. N.J., App. Div., June 1, 2007).

certification is warranted “if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court’s supervision[.]” N.J. Ct. R. 2:12-4 (emphasis added). While as a general matter, conflict between published opinions presents a classic case for certification in this Court, the phrasing of the certification rule – “any other decision” – is not so limiting, and the conflict in this case illustrates why it is not.

This Court can exercise its supervision where two thoroughly-reasoned decisions of the Appellate Division contradict each other, particularly where the earlier decision – even though unpublished – constitutes a decision on a significant question of law (whether an ISRA waiver confers a property interest) and has already been cited in the legal community, including by NJDEP itself. NJDEP does not explain why it believed *Frederick Gumm* was important enough to cite in opposing a motion to dismiss in an unrelated case but is not worthy of this Court’s attention now. *See* Pet. at 10-11 n.7.

NJDEP and Urban Renewal are also wrong in attempting to distinguish *Frederick Gumm*. In that case, the Appellate Division concluded that it was “manifest” that a UST waiver under ISRA was a “threat to petitioners’ property interests,” 2007 WL 1574304, \*5. “[A]t least” one reason was that the petitioners had a stake in the “continuing viability” of a sales transaction,

but the court did not reject the importance of other potential property interests. *Id.* In any case, this is no distinction. In *Frederick Gumm* – as here – the sales transaction closed many years before the UST waiver was rescinded. *Id.*, \*3. Contrary to Urban Renewal’s suggestion, the court did not articulate any concern about a voiding of the stock sale; the court’s reference to “continuing viability” of a transaction was not so cabined. There are many ways that a “transaction” continues post-closing, including in the ongoing relationship of the parties. Here, Clarios and the buyer of the property continue to negotiate the terms of its remediation, and rescission of Clarios’ RIP waiver “manifestly” affects Clarios’ rights in its former property, even now.

**IV. *In re NJDEP* is bad public policy.**

Despite NJDEP’s insistence that the Appellate Division “correctly applied settled principles” (NJDEP opposition at 8) or Urban Renewal’s argument that this decision is inconsequential for the real estate market (Urban Renewal at opposition at 16), the abrupt and impulsive rescission of a RIP Waiver is huge deterrent to the real estate community to purchase any property with a history of contamination that is potentially subject to ISRA. The overall legislative purpose of ISRA is to encourage both remediation and economic vitality; *In re NJDEP* flies in the face of logic and undermines the legislative scheme of ISRA.

The Appellate Court's decision in *In re NJDEP* sets a dangerous precedent that threatens the remediation of sites in New Jersey; if an RIP waiver can be rescinded on partial information without notice to its holder, then there is a huge disincentive for parties to engage in any transaction involving a site governed by ISRA. Clarios' case is a cautionary tale to the regulated community: even when a party complies with ISRA, successfully obtains a RIP waiver, contributes significant funding for the remediation of the site, and contracts with a new party who becomes liable to NJDEP, the waiver may still be ripped away without any notice, opportunity to be heard, or any due process from the agency whatsoever. This encourages other parties to the transaction to engineer a failure of the remediation and leave the recipient of the RIP waiver holding the bag to fund the site's remediation.

### CONCLUSION

For the reasons set forth above and in its petition, Clarios urges the Court to grant its petition for certification and reverse the Appellate Division's decision in this case. Both the New Jersey and U.S. Constitutions guarantee the right to due process, and in this case, Clarios has been deprived of the very most basic elements of procedural due process in front of a government agency.

Dated: May 2, 2024

By: /s/ Roy Prather III  
Roy Prather III