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# Supreme Court of New Jersey

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Docket No. 089182

IN RE APPEAL OF THE NEW	:	CIVIL ACTION
JERSEY DEPARTMENT OF	:	
ENVIRONMENTAL	:	ON GRANT OF 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.

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## SUPPLEMENTAL BRIEF OF APPELLANT

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Date Submitted: August 15, 2024

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## **SUPPLEMENTAL BRIEF OF PETITIONER CLARIOS, LLC**

Petitioner Clarios, LLC (“Clarios”) submits this supplemental brief in support of the briefs filed in its petition for certification. The New Jersey Department of Environmental Protection (“NJDEP”) deprived Clarios of procedural due process when it rescinded Clarios’ Remediation in Progress Waiver (“RIP waiver”) without any form of notice or hearing opportunity to Clarios. This supplemental brief addresses in greater detail how the Industrial Site Recovery Act (“ISRA”) creates a constitutionally protected property interest in a RIP waiver. NJDEP’s disregard of its due process obligation threatens to disrupt the use and development of properties used for dozens of industries. The Court should hold that NJDEP’s rescission of Clarios’ RIP waiver violated Clarios’ due process rights under both the New Jersey and the U.S. Constitutions.

### **I. Constitutional due process protections extend to benefits that create property interests.**

Under the New Jersey Constitution, individuals may not be deprived of liberty or property without procedural due process. *See Doe v. Poritz*, 142 N.J. 1, 99 (1995) (holding the principle of procedural due process in the federal Constitution exists in the State Constitution); N.J. Const. art. I, § 1. These property interests are not limited to tangible property. *Rivera v. Bd. of Rev.*, *N.J. Dep’t of Lab.*, 127 N.J. 578, 584 (1992) (holding that intangible benefits

like licenses and memberships are no less valuable than traditional forms of property). Instead, property interests take a variety of forms and are conveyed when a party has a legitimate claim of entitlement to a benefit under state law. *Id.*; *Nicoletta v. N.J. Dist. Water Supply Comm’n*, 77 N.J. 145, 154 (1978).

Similarly, the Fourteenth Amendment of the U.S. Constitution protects interests a person has in a “benefit” that they have already acquired. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972). The property interests those benefits create “may take many forms.” *Id.* The U.S. Supreme Court’s decision in *Roth* defines clearly the contours of these property interests. In *Roth*, the Court held that property interests protected by procedural due process “extend well beyond actual ownership of real estate, chattels, or money.” 408 U.S. 564, 571-572 (1972). In reaching this holding, the Court explained that

[t]o 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. ... 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.

*Id.* at 576-77; 32 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8137 (2d ed.) (noting property interests are created when “a

state actor indicates that, if a person satisfies some set of conditions, they are entitled to a benefit”). Courts applying *Roth* to determine whether property interests exist have extended those interests broadly to include licenses, social security benefits, government jobs, ordinances, contracts, and permits.<sup>1</sup>

The Constitution protects property interests in benefits that “are a matter of statutory entitlement for persons qualified to receive them.” *Goldberg v. Kelly*, 397 U.S. 254, 262, 264 (1970) (protecting notice prior to deprivation of guaranteed welfare benefits). If the statute specifies grounds on which the benefit may be lost, the *Goldberg* Court found that a government actor must afford the holder proper procedure before terminating or revoking the benefit. *Id.* at 262. Following that principle, the Supreme Court has held that where a state law guaranteed free education to all persons between the ages of five and twenty-one, the state could not rescind that benefit on the basis of misconduct without prior notice and fair procedures to determine whether the misconduct

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<sup>1</sup> See e.g., *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009) (holding government-issued licenses contain property interests and government must have “good cause” to revoke); *Flatford v. Chater*, 93 F.3d 1296, 1304 (6th Cir.1996) (adopting other courts’ assumption that a mere claim to guaranteed social security benefits confers property interests); *Hamby v. Neel*, 368 F.3d 549, 559 (6th Cir. 2004) (health insurance applicants held property interest where insurance was owed to all eligible parties); *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir.1992) (holding permits and licenses create property rights when issuing authority “lacks all discretion to deny issuance of the permit or to withhold its approval”).



actually occurred. *Goss v. Lopez*, 419 U.S. 565, 574-75, 579 (1975); *see also Barry v. Barchi*, 443 U.S. 55, 64 (1979) (horse trainer’s license conveyed property interest where suspension of license depended on specific showings).

**II. Clarios has a legitimate claim of entitlement in the RIP waiver.**

Where a statute requires an agency to confer a right on any person who satisfies specific criteria, the New Jersey and U.S. Constitutions guarantee due process before that right may be rescinded. *See* U.S. Const. amend. V; N.J. Const. art. I, § 1. A property interest may also be created by “rules or understandings” conferring a benefit. *See Roth*, 408 U.S. at 577. ISRA requires NJDEP to approve a Remediation in Progress waiver for any person who satisfies the statutory criteria, (*see* N.J. Stat. Ann. § 13:1K-11.5(b)), and NJDEP and Clarios demonstrated a clear understanding that the benefit in this case would be honored. NJDEP should have given Clarios reasonable notice and an opportunity to be heard before it rescinded the RIP waiver it had previously granted.

**A. ISRA creates a substantive property interest in a RIP waiver.**

The ISRA statute and regulations require NJDEP to approve a RIP waiver if an application is complete and accurate. *See* N.J. Stat. Ann. § 13:1K-11.5(b); N.J. Admin. Code § 7:26B-5.4(c), (d). NJDEP does not dispute that it approved Clarios’ application in accordance with its duty under ISRA. The

RIP waiver is a statutory entitlement and therefore a protected property interest.

Under ISRA, a RIP waiver allows an owner or operator of an industrial establishment to transfer ownership without “obtaining departmental approval of a remedial action workplan or a negative declaration or without the approval of a remediation agreement,” so long as remediation is in progress. N.J. Stat. Ann. § 13:1K-11.5(a). The waiver thus indefinitely suspends the holder’s obligation to further comply with ISRA. *See* Clarios’ Pet. for Certification (“Petitioner’s Br.”) § I.B at 13-14.

The statute expressly states that NJDEP “shall authorize” an application for a RIP waiver upon a finding that the information submitted is accurate and the application is complete. N.J. Stat. Ann. § 13:1K-11.5(b).<sup>2</sup> NJDEP’s regulations specify the application requirements for a RIP waiver but do not purport to create any discretion on the part of NJDEP in whether to issue a waiver once the requirements are satisfied. N.J. Admin. Code § 7:26B-5.4(c), (d).

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<sup>2</sup> This language was added to address vague provisions of the Environmental Cleanup Responsibility Act (ECRA), which was the precursor to ISRA, and these provisions were largely uncontested in the state legislature. *Industrial Site Recovery Act—Amends ECRA*, Pub. L. No. 93-139, S. No.1070 (N. J. 1993), N.J. State Library, <https://repo.njstatelib.org/bitstreams/999ba5fc-9d78-4de1-ac8c-40a84bad75e5/download> [<http://hdl.handle.net/10929.1/9425>].

Nothing in either the statute or the regulations limits the duration of a RIP waiver. As the Respondent in this appeal, NJDEP does not argue that it had or exercised any discretion in approving the RIP waiver issued to Clarios. *See* NJDEP. Letter Br. in Opp’n to Clarios’ Pet. for Certification (“NJDEP Opp’n”) at 4 (“Because remediation ... was active at the time, and with a [remediation funding source] in place, DEP approved Clarios’s RIP waiver ... pursuant to N.J.S.A. 13:1K-11.5.”)

This lack of agency discretion is the hallmark of an entitlement that creates a property interest in a RIP waiver issuance. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (explaining a benefit is a protected entitlement if officials do not have discretion to grant or deny it). New Jersey courts have aligned with the Supreme Court’s finding that a lack of agency discretion is evidence that there is a legitimate claim of entitlement to the benefit. *Woodwind Estates, Ltd. v Gretkowski*, 205 F.3d 118 (3rd. Cir. 2000), offers helpful analysis on this issue. In that case, the Third Circuit considered whether a developer had a protected property interest in the approval of its development plans. *Gretkowski*, 205 F.3d at 123.<sup>3</sup> The

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<sup>3</sup> The Third Circuit has disagreed on the effect of *Woodwind Estates* as to questions of substantive due process, which does not apply here, but that disagreement does not affect the *Woodwind Estates* court’s analysis of property interests. *See United Artists Theatre Cir., Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 400 (3d Cir. 2003).

Township’s subdivision ordinance read, in pertinent part: “... the Commission shall determine the extent to which the [subdivision] plan complies with the Ordinance and shall recommend to the Board of Supervisors that the plan be approved entirely, that it be conditionally approved, or that it be disapproved.”

*Id.* The court held that the developer had a protected property interest protected by due process because the plan “satisfied all of the requirements for approval under the ordinance, and because the ordinance substantially limits the Township's discretion regarding approval.” *Id.*; *see also Thomas Makuch, LLC v. Twp. of Jackson*, 476 N.J. Super. 169, 185 (App. Div. 2023) (holding property interest determined by degree of government discretion).

ISRA’s non-discretionary direction that NJDEP “shall approve” a complete and accurate application for a RIP waiver is analogous to the property interest in *Gretkowski* and should be treated similarly here to protect the due process rights of Clarios and the regulated community. RIP waivers are “a matter of statutory entitlement for persons qualified to receive them,” *Goldberg*, 397 at 262, and they create a constitutionally protected property interest.

As discussed in Clarios’ petition, the Appellate Division erred in relying on a reservation of rights under NJDEP’s regulations. *See* Petitioner’s Br. § I.B at 15. The regulation states that NJDEP’s approval of any of three types of

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. Admin. Code § 7:26B-1.8(b). As explained in Clarios’ petition, when read in the context of ISRA, this provision can only be read to limit the effect of the waiver to its actual holder, and to recognize, as the Appellate Division did, that the waiver suspends the holder’s ISRA obligations. More importantly, even if the regulation could be construed as an attempt to evade pre-deprivation notice, an agency cannot use a regulation or putative “claw-back” clauses to curtail the due process protections enshrined by the Constitution. *See Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (J. Powell, concurring).

**B. NJDEP’s conduct in this case demonstrated an understanding of the parties that secured the RIP waiver’s benefits.**

In addition to the statutory entitlement that ISRA creates in a RIP waiver, the Supreme Court has recognized that a property interest may be created by “rules or understandings.” *Roth*, 408 U.S. at 577. NJDEP’s conduct in this matter—prior to its surprise rescission—demonstrated its understanding that the RIP waiver was a secure benefit to Clarios.

After obtaining the RIP Waiver and operating under its benefits for years, Clarios at no time received any indication from NJDEP that the waiver

could be rescinded without notice or an opportunity to be heard. According to NJDEP, the potential bases for its rescission could have existed as early as 2019. NJDEP Opp'n at 5. In January 2021, NJDEP first wrote to counsel for Clarios that "if" the remediation in progress failed to comply with regulatory requirements, "then the RIP Waiver may no longer be considered in effect." 13a. Yet NJDEP did not begin its consideration of whether to rescind the RIP Waiver until July 29, 2021 at the earliest. Clarios' Reply Br. (Super. Ct. App. Div. Mar. 15, 2023) at 3; Clarios' Br. (Super. Ct. App. Div. Jan. 30, 2023) at 7; 3a. And even once that consideration began, NJDEP relied solely on an *ex parte* request, invisible and unchallengeable by Clarios. *See* 5a-12a. This sequence of events and communications raises significant concerns regarding the propriety of the process, or lack thereof, leading to the rescission of the RIP waiver, and shows that both NJDEP and Clarios understood that the RIP waiver continued to suspend Clarios' ISRA obligations notwithstanding events outside Clarios' control. Throughout these events, Clarios reasonably continued to rely on that suspension as a property interest.

Clarios' understanding and reliance comports with decisions in prior cases involving NJDEP revoking conferred benefits without due process. For example, in *N.J. Dep't of Env't Prot. v. Atl. States Cast Iron Pipe Co.*, NJDEP issued a temporary operating certificate to an operator to install pollution

control equipment. 241 N.J. Super. 591, 592 (App. Div. 1990) (“*Atlantic States*”). NJDEP renewed the certificate, without requiring resubmittal, for three years prior to denying renewal and refusing to grant a hearing on the decision. *Id.* at 594, 596. When the operator challenged the denial, NJDEP argued that the operator could not establish a property interest in a temporary operating certificate since there is no right to renewal. *Id.* at 602-03. The court disagreed, concluding that the continuous renewal required a hearing prior to revocation. *Id.* at 603 (“[w]e cannot ignore the reality of the situation . . . [d]ue to the passage of time, [operator] no doubt came to rely on these certificates as if they were the actual operating certificate/license”). The court acknowledged that even in the absence of a statutory entitlement creating a property interest, “in these circumstances clearly there was more than a simple expectation alone.” *Id.* at 603.

NJDEP’s non-discretionary approval of the RIP waiver and its silence toward Clarios in the ensuing years embodied the parties’ understanding that NJDEP would honor the suspension of Clarios’ ISRA responsibility without arbitrary termination. Like the certificate in *Atlantic States* (*see supra* 9-10), the RIP waiver’s effectiveness over *seventeen years*, even for several years when NJDEP was questioning the viability of the underlying remediation, showed the parties’ understanding that Clarios could continue to rely on the

waiver, and that its suspension would not terminate without NJDEP providing some form of due process. *See Roth*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (noting property interest may be secured by the “existing rules or understandings”). To issue a rescission of the RIP waiver without due process would, in the words of the *Atlantic States* court, “ignore the reality of the situation”—that NJDEP instilled a reasonable expectation in Clarios that the RIP waiver would not be revoked without due process—and flout the concerns expressed by the court in *Atlantic States*. *See* 241 N.J. Super. at 603. Clarios relied on the RIP waiver by entering into agreements to pay for remediation, to transfer property, and later in litigation involving the site after Clarios’ payments were siphoned out. All of these actions were done with the expectation and understanding that Clarios’ right in the RIP waiver was protected by due process. Here, the funds Clarios provided for remediation were dissipated with no accountability or any evidence the funds were used to remediate the property, an issue that was overlooked or ignored when the RIP waiver was suddenly revoked without notice or process.

If RIP waivers can be rescinded without any form of due process, then the purpose of the protections offered by the RIP waiver are undermined: innocent property buyers and developers would have little incentive—and indeed strong disincentives—to invest in the redevelopment of a contaminated



site, and primary responsible parties could simply abandon their remediation responsibilities and any prior arrangements with redevelopers.

**C. Benefits issued by NJDEP similar to RIP waivers have been held to confer interests requiring due process.**

Other NJDEP-issued assurances, like a No Further Action (NFA) letter,<sup>4</sup> have been held to create protected interests for their holder. *See, e.g., Morgan Stanley Servs. Co., Inc. v. N.J. Dep't of Env't Prot.*, No. A-5703-08T1, 2011 WL 222178, at \*5 (N.J. Super. Ct. App. Div. Jan. 26, 2011). In *Morgan Stanley*, the court held that NJDEP could not rescind an NFA letter without first engaging in a process to make findings of fact. *Id.* at \*7. In its analysis, the court characterized the NFA letter as creating an “expectation of repose” and held that it could not be rescinded without the referenced process. *Id.* at \*5, 7. The court found NJDEP’s failure to engage in this process before rescinding the NFA “all the more glaring” given, among other things, “the passage of so much time since granting the NFA approval [eleven years prior].” *Id.* at 7.

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<sup>4</sup> An NFA letter is a letter issued by NJDEP formally determining that no contamination requiring remediation exists at a site and discharging the NFA letter’s holder from further remediation responsibilities. *See Morgan Stanley Servs. Co., Inc. v. N.J. Dep't of Env't Prot.*, No. A-5703-08T1, 2011 WL 222178, at \*4 (N.J. Super. Ct. App. Div. Jan. 26, 2011).

The deprivation of rights at the heart of Clarios' appeal largely mirrors that of the appellant in *Morgan Stanley*. NJDEP's decision to rescind the RIP waiver rested on the grounds that the primary remediation had "fallen out of compliance," though Clarios had no opportunity to review the record of NJDEP's decision, nor to supply additional information to ensure the agency's record was accurate and complete. NJDEP Opp'n at 5; *see also* 4a; 17a-18a; 7a-8a; 2a-4a. NJDEP had admitted in communications excluding Clarios that its record was incomplete. Petitioner's Br. at 4 n.2. Moreover, Clarios was denied a hearing before NJDEP. 33a. Clarios should have been accorded due process to ensure that the record before NJDEP was complete before it acted. *See supra* Section I. NJDEP's failure to do so was a violation of Clarios' due process rights under the U.S. and New Jersey Constitutions. *See* U.S. Const. amend. V; N.J. Const. art. I, § 1.

## CONCLUSION

For the reasons set forth above and in its petition briefing, Clarios urges the Court to reverse the Appellate Division's decision in this case. Because ISRA creates a statutory entitlement in the RIP Waiver and thereby creates a protected property interest, Clarios was entitled to procedural due process under the New Jersey and U.S. Constitutions.

Respectfully submitted,

Dated: August 15, 2024

By: /s/ Roy Prather III

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 III

Roy Prather III

Dated: August 15, 2024