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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	:	SUPREME COURT OF NEW JERSEY Docket No. 089182 On Petition for Certification from the Superior Court of New Jersey, Appellate Division 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 ON BEHALF OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PRELIMINARY STATEMENT

This case asks whether the Industrial Site Recovery Act ("ISRA") and DEP regulations create a property interest that allows responsible parties to avoid their statutory remediation obligations. As the Appellate Division correctly found below, they do not.

ISRA's provisions and its subsidiary regulations, particularly N.J.S.A. 13:1K-11.5(a) and N.J.A.C. 7:26B-1.8(a)(3), impose responsibilities on the owners and operators of industrial establishments to remediate pollution. ISRA usually requires that owners and operators either fully remediate the site or develop a plan to do so before they can cease operations or transfer the property. But a "remediation in progress waiver," or "RIP waiver," creates an exception: so long as prior owners or operators of that property are engaged in the process of remediation and satisfying all applicable requirements, the current owner or operator seeking to unload the property need not themselves take on those same, duplicative responsibilities. As a result, the RIP waiver "authorize[s]" a party "to transfer ownership or operations of [the] industrial establishment" without otherwise meeting ISRA's requirements to ensure that the site was contamination-free or that Clarios itself was cleaning up that contamination. N.J.A.C. 7:26B-1.8(a)(3). In other words, a RIP waiver just authorizes a holder to cease operations or transfer property while the remediation is underway. It

does "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).

Petitioner, Clarios LLC, used to own a contaminated industrial property in New Brunswick. In 2007, it applied to DEP for, and received, a RIP waiver—since the property was, at the time, being remediated by a prior owner. Clarios then sold the industrial property. Years later, the remediation of the property fell outside compliance, and on April 20, 2022, DEP rescinded Clarios's RIP waiver—its first step in a longer process of holding the remaining responsible parties to account for their statutory remediation obligations. That rescission simply reinitiates the process of requiring remediation by those the law makes responsible; it does not undo Clarios's prior sale of the property.

Clarios errs in claiming that DEP has violated its due process rights here. Clarios argues that a RIP waiver grants a recipient an "indefinite[] suspen[sion]" of the "holder's obligation to further comply with ISRA," and that because DEP lacks discretion over whether and when to grant or revoke a RIP waiver, Clarios has a right not to further remediate that cannot be revoked without procedural due process. And Clarios dedicates almost its entire supplemental brief to that second point—whether DEP has discretion. But it entirely ignores the first step:

what interest a RIP waiver actually confers in the first place, the bedrock of any due process inquiry. That initial inquiry dooms its claim, just as the Appellate Division held below. A RIP waiver, as explained just above, relates to a holder's ability to cease operations or transfer the property, which Clarios already did, and which DEP is not trying to undo. It does not grant Clarios any legal right to indefinitely pause compliance with ISRA obligations. Because all that will follow from the revocation of a RIP waiver in this case is that DEP will reinitiate a remediation process (with all the attendant process that follows), Clarios does not have any affected property interests, and warrants no process.

The question in any due process case is what property rights a state law actually conveys. ISRA and the relevant regulations, together with surrounding provisions and historical context, make clear that the Legislature never intended RIP waivers to insulate recipients from their ISRA obligations by conferring a constitutional entitlement. Rather, those provisions illustrate that the limited purpose of the RIP waiver is to more easily facilitate the transfer of industrial property—which is precisely how Clarios used its waiver here. As a result, no procedural due process claim can prevail here, and this Court need not analyze what process, if any, Clarios was owed.

This Court should affirm.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

A. Legal Background

As this Court observed over thirty years ago, "[d]ecades of industrial activity have left this state with a legacy of hazardous waste. That legacy now threatens the state's public health and ecology." In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 446 (1992). To address that problem, in 1976 the Legislature enacted the Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:10-23.11 through -23.24, which at the time "constituted 'a pioneering effort by government to provide monies for a swift and sure response to environmental contamination.'" Morristown Assocs. v. Grant Oil Co., 220 N.J. 360, 364 (2015) (citation omitted). The "Spill Act explicitly gives DEP two options regarding a hazardous discharge: (1) cleanup the discharge and bring an action to recover the costs, or (2) direct the discharger to cleanup or arrange for the cleanup." New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 399 (App. Div. 2007). The Act "impose[s]" liability "on the discharger," the actor responsible for releasing contaminants into the environment. Id. at 406.

[1] Because the procedural history and facts are closely related, they are combined to avoid repetition and for the Court's convenience.

However, the Legislature came to learn that the Spill Act's design resulted in "inordinate time and money spent in determining fault and apportioning liability for the dumping of toxic wastes," and in "delay[s] of cleanup efforts." Adoption of N.J.A.C. 7:26B, 128 N.J. at 446, 456-57. Recognizing "the need for a more expeditious administrative response" to legacy contamination, in 1983 the Legislature pursued course correction through the enactment of the Environmental Cleanup Responsibility Act ("ECRA"). See (PSCa2-3).[2] The purpose of ECRA was twofold: "to prevent the abandonment of contaminated industrial sites," and to "place the financial responsibility for remediation on the owners and operators" of contaminated sites. Ibid. By "singling out owners and operators"—rather than dischargers—ECRA sought to "prevent[] protracted investigation or litigation to identify the responsible party." Adoption of N.J.A.C. 7:26B, 128 N.J. at 442. It also had the effect of shifting the "financial responsibility for remediation" from taxpayers, who had often shouldered costs under the Spill Act, onto "owners and operators." (PSCa3). To effectuate its goals, the Legislature required that before the owner or operator of an industrial establishment could sell or transfer its property, the property had to "be in an environmentally appropriate condition." Adoption of N.J.A.C. 7:26B at 447.

[2] "PSCa" refers to the Appendix submitted with the Petition for Certification; "PSb" refers to Clario's Supreme Court supplemental brief; "Pb" refers to Clarios's Petition; "Pa" refers to Clarios's Appellate Division appendix.

To "satisfy th[at] precondition," owners and operators could "submit[] either a negative declaration or a cleanup plan," to show either that contamination had already been redressed or that there was a plan in place to remediate. Ibid.

Yet the Legislature found shortcomings under the ECRA regime as well, and significantly amended the statute in 1993, a decade after ECRA became law, via ISRA. The Legislature acted on the "criticism that," among other things, ECRA's complexity "had stagnated the transfer of contaminated property," and made transfers of industrial properties more difficult. In re Adoption of N.J.A.C. 7:26E-1.13, 377 N.J. Super. 78, 89 (App. Div. 2005), aff'd, 186 N.J. 81 (2006). And the Legislature recognized it was "in the interest of [both] the environment and the State's economic health to promote certainty in the regulatory process . . . to create a more efficient regulatory structure and to allow greater privatization of th[e] [remediation] process where it is possible to do so without incurring unnecessary risks to the public health or the environment." N.J.S.A. 13:1K-7 (ISRA's legislative findings); see Assemb. Policy and Rules Comm. Amendments to the S. Comm. Statement to S. 1070 at 2 (L. 1993, c. 139) (Jun. 3, 1993) (explaining that ISRA is designed to eliminate, to the greatest extent possible, the unnecessary time-consuming procedures and bewildering maze of regulations that created much uncertainty and unpredictability for the business community under . . . ECRA"); (PSCa3) (noting

that the Legislature intended ISRA to "streamline, and promote greater certainty in, the regulatory process").

Specifically, as one legislative committee involved in ISRA's passage put it, although the "original intent of ECRA" was to "compel[] the owner or operator to perform the cleanup no matter who caused the contamination," and thus ensure that "cleanups would occur without lengthy litigation to determine responsibility," ECRA did not play out in the real-world as originally envisioned. Sponsor's Statement to S. 1070 at 35 (L. 1993, c. 139). Instead, "property transfers and stock transactions were delayed while all parties wrangled with a vague and cumbersome law." Ibid.

Thus, while ECRA's basic purposes remain unchanged under ISRA, the new law sought to balance the goals of environmental health and safety with, among other things, facilitating the transfer of "property in a timely fashion." Id. at 36. As relevant here, ISRA "established new summary procedures for compliance" to "greatly . . . simplify the ISRA process for the applicant where a site, or a part of a site, has previously undergone a remediation." Senate Env't Comm. Statement to Senate Comm. Substitute for S. 1070 4 (L. 1993, c. 139). As was the case under ECRA, the owner or operator of an industrial establishment becomes subject to ISRA, and incurs the obligation to remediate, when it ceases operations or transfers the industrial establishment. N.J.S.A.

13:1K-9(a), (b). As noted, under ECRA an owner or operator had to obtain DEP approval before closing operations or transferring ownership or operations, which it could obtain either by furnishing a remedial action workplan or a negative declaration. See supra at 5-6.

ISRA, however, added that applicants may also gain approval by entering into a remediation agreement. N.J.S.A. 13:1K-9(c). And especially important here, ISRA further provided that an owner or operator "may apply to the Department to close operations or transfer ownership or operations . . . if the industrial establishment is already in the process of a remediation pursuant to [N.J.S.A. 13:1K-9]." N.J.S.A. 13:1K-11.5(a). That is, if a private owner or operator of the site is already conducting remediation pursuant to a previously executed remediation agreement and in accordance with applicable law, the current owner or operator may obtain approval to close or transfer the property.

The regulations that DEP promulgated under ISRA accordingly identify certain circumstances under which an owner or operator "is authorized to transfer ownership or operations" without itself having remediated the site, or obtaining what the regulations term "a final remediation document." N.J.A.C. 7:26B-1.8(a). One such limited alternative is obtaining a RIP waiver pursuant to N.J.A.C. 7:26B-5.4. See N.J.A.C. 7:26B-1.8(a)(3). "To apply for a [RIP] waiver, the [applicant] shall submit," among other things, "[e]vidence that

establishes that the property . . . is being remediated by a prior owner or operator pursuant to ISRA, the [Spill Act] . . . or other applicable state laws and regulations, or [that] the industrial establishment is currently in the process of an equivalent remediation pursuant to" certain federal laws. N.J.A.C. 7:26B-5.4(c)(3). The RIP waiver application must also include a "certification" that a "remediation funding source for the cost of the remediation . . . has been established." N.J.A.C. 7:26B-5.4(c)(4). "[U]pon . . . the Department's written approval of the . . . application," the applicant "[m]ay close operations or transfer ownership or operation." N.J.A.C. 7:26B-5.4(d)(1). But "if the Department disapproves" of the RIP waiver application, the applicant "[s]hall remediate" the industrial establishment. N.J.A.C. 7:26B-5.4(d)(2).

The numerous factors governing whether remediation is in progress at a particular site are established pursuant to extensive statutes and regulations. See generally, e.g., Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.3 through -31; Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-1.1 through -16.3; Technical Requirements for Site Remediation, N.J.A.C. 7:26E-1.1 through -5.8. Relevant here, the requirements include "establish[ing] a remediation funding source[,] if a remediation funding source is required" under N.J.S.A. 58:10B-3. N.J.S.A. 58:10B-1.3(b)(4). A remediation funding source ("RFS") is simply a fund or

account "in the amount necessary to pay the estimated cost of the required remediation," as determined through certain statutorily-specified procedures. N.J.S.A. 58:10B-1.3(a). In addition, remediation requires the responsible party to meet certain "mandatory remediation timeframes . . . established by the department pursuant to [N.J.S.A. 58:10C-28]." N.J.S.A. 58:10B-1.3(b)(8).

In sum, the RIP waiver effectuates ISRA's express authorization of sales or transfers of ownership or operation where remediation is already "in . . . process." N.J.S.A. 13:1K-11.5(a). Importantly, however, ISRA nowhere states that in obtaining a RIP waiver, a recipient permanently sheds their ISRA obligations. Accordingly, DEP regulations clearly provide that the issuance of 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).

B. This Case

In early 2007, Clarios LLC (formerly "Johnson Controls Battery Group, Inc.")[3] announced its plan to cease operations at the industrial establishment located at 760 Jersey Avenue, New Brunswick City, Middlesex County—also

[3] As Clarios has done, this brief generally refers to the two entities as "Clarios," unless otherwise necessary to distinguish between the two.

known as Block 598, Lot 3.03 on the New Brunswick City tax maps ("Property" or "Site")—and applied for a RIP waiver. (Pa3). DEP assigned ISRA case number E20070027 to Clarios's termination of operations at the industrial establishment, and granted the RIP waiver because, at the time, another ISRA responsible party—Delphi Automotive Systems, LLC ("Delphi")—was already conducting remediation of the Property. (Pa2-3). Delphi's remediation was assigned ISRA case number E20060211. Ibid. Delphi's remediation was proceeding apace; among other things, Delphia had a suitably funded RFS in place. (Pa3).

The Property subsequently changed hands multiple times. On August 5, 2011, Clarios conveyed the Property to DeNovo New Brunswick, LLC ("DeNovo"). (Pa3). Thereafter, DeNovo conveyed the Property to Intervenor and current owner of the Property, 760 New Brunswick Urban Renewal LLC[4] on December 22, 2011. (Pa3). However, since at least 2019, Delphi ISRA case number E20060211 fell out compliance with the applicable remediation requirements. (Pa2-4). Accordingly, on April 20, 2022, DEP rescinded Clarios's RIP waiver after determining that the Property was out of compliance due to: 1) "failure to submit the remedial investigation report" required under a certain "regulatory timeframe"; 2) "failure to complete the remedial action"

[4] At the time of the transfer, Intervenor was known as 760 New Brunswick LLC.

required by a certain "regulatory timeframe"; and 3) "failure to . . . maintain" a properly funded RFS, as the amount of money in the RFS had fallen all the way to zero. (Pa3). On May 12, 2022, Clarios requested an administrative hearing on DEP's rescission of the RIP waiver, contending that it was owed a hearing as a matter of procedural due process. (Pa5-12). On September 6, 2022, DEP denied Clarios's request for a hearing, (Pa33-34). Clarios appealed.

On February 5, 2024, in a published opinion, the Appellate Division affirmed DEP's decision to deny Clarios's request for a hearing, holding that Clarios lacked a constitutionally-protected interest necessary to sustain a due process claim. In re Appeal of the New Jersey Dep't of Env'tl Protection's September 6, 2022 Denial of Request For Adjudicatory Hearing Under N.J.A.C. 7:26C-9.10, 477 N.J. Super. 618, 621 (App. Div. 2024); see (Pa1-14). Relying on ISRA's text, the panel concluded that the only "benefit conferred by the RIP waiver is that the owner or operator may effect [the] close of operations or transfer of ownership prior to 'obtaining departmental approval of a remedial action workplan or a negative declaration or without the approval of a remediation agreement'" pursuant to N.J.S.A. 13:1K-11.5(a). (Pa11). So "[o]nce that closure or transfer is complete," the court explained, "the recipient of the RIP waiver has received the benefit of that waiver." Ibid. That was precisely what happened here. RIP waiver in hand, Clarios ceased operations

and later conveyed the Property to DeNovo in 2011. While the RIP waiver made possible that transaction, it did not "relieve [its] recipient of 'the obligation to remediate the industrial establishment pursuant to ISRA . . . and any other applicable law.'" (Pa12) (quoting N.J.A.C. 7:26B-1.8(b)).

The Appellate Division rejected Clarios's argument that its mere reliance on the RIP waiver could elevate the waiver to a constitutionally-protected entitlement when the enabling statutes and regulations say otherwise. The court explained that "[a]lthough Clarios relied for upwards of fifteen years upon the suspension of their remediation obligation, this reliance has only been based on their unilateral expectation that the prior remediation agreement would remain compliant. It has not been based on any regulatory or statutory provisions." (Pa12). Ultimately, the Appellate Division held that "Clarios has no legitimate grounds for relying on any further benefit—namely, the continued delay of their responsibility for remediation of the industrial establishment. Without lawful grounds for reliance on a benefit, Clarios has neither a legitimate claim to entitlement nor a property interest associated with that benefit." (Pa13).

Clarios's petition for certification followed. On July 1, 2024, this Court granted the Petition and allowed for supplemental briefing.

ARGUMENT

THE APPELLATE DIVISION CORRECTLY HELD THAT THERE WAS NO DUE PROCESS VIOLATION BECAUSE CLARIOS LACKED A PROPERTY INTEREST.

The Appellate Division properly held that Clarios has no due process right to a hearing regarding the rescission of the RIP waiver because the rescission did not implicate any property interest. That determination was well-grounded in constitutional principles and the statutes and regulations at issue here.

This Court has long held, in line with U.S. Supreme Court precedent, that the first step in every procedural due process analysis is determining whether the challenged governmental action implicates a liberty or property interest. New Brunswick Sav. Bank v. Markouski, 123 N.J. 402, 410–11 (1991) ("Before determining whether a particular procedure satisfies the requirements of due process, we first consider whether [the interest at issue] is the type of interest that falls within due-process guarantees."). That follows directly from the text of the Fourteenth Amendment to the U.S. Constitution, which "provides that no state shall deprive any person of 'property' without due process of law." Id. at 411. "Similarly, the New Jersey Constitution deems the acquisition, possession, and protection of 'property' a 'natural and unalienable right,' subject to due-process requirements." Ibid. (quoting N.J. Const. art. I, ¶ 1). That threshold requirement for pressing a procedural due process claim is unyielding: a

claimant cannot "invoke the due process shield" without first establishing the requisite underlying interest. Nicoletta v. N. Jersey Dist. Water Supply Com., 77 N.J. 145, 154 (1978) (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)); see Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748, 771 (2005) (Souter, J., concurring) ("[P]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.") (quoting Olim v. Wakinekona, 461 U.S. 238, 250 (1983)).

Case law establishes clear guidelines for analyzing whether a claimed interest rises to the level of a constitutionally protected property interest for purposes of procedural due process. Property interests "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." Town of Castle Rock, 545 U.S. at 756 (quoting Paul v. Davis, 424 U.S. 693, 709 (1976)). Relevant sources of state law include "a state or local statute, ordinance, or regulatory scheme." Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 185 (App. Div. 2023), cert. denied, 256 N.J. 436 (2024); accord Tundo v. County of Passaic, 923 F.3d 283, 287 (3d Cir. 2019).

Case law also establishes the sorts of promises a state law can make that qualify as property interests for due process. While constitutionally protected

property interests may take various forms "over and above the ownership of tangible property," Nicoletta, 77 N.J. at 154, neither the U.S. nor New Jersey Due Process Clauses "protect everything that might be described as a 'benefit,'" Town of Castle Rock, 545 U.S. at 756. Instead, it is well settled that "'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Ibid. (quoting Roth, 408 U.S. at 577); accord Nicoletta, 77 N.J. at 154-55. That means a "reasonable expectation of the benefit is not enough." Tundo, 923 F.3d at 287. Put another way, "[a]ny understanding must be mutual: the government and the [claimant] must both clearly expect that the [claimant] has some entitlement to the benefit." Ibid. (emphasis in original).

Clarios's claim fails at this initial step. Clarios focuses its supplemental brief almost entirely on its argument regarding DEP's discretion over the RIP Waiver process generally. See (PSb4-8, 10-11). And in many cases, the property-interest analysis indeed involves consideration of whether "government officials may grant or deny" the benefit "in their discretion." Town of Castle Rock, 545 U.S. at 756. But Clarios overlooks another crucial consideration in evaluating whether the government's action impacts a property right: a careful evaluation of "the contours of the right conferred by the" state

"statutes and regulation" at issue, O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 786 (1980), to assess whether they can support a "mutually explicit understanding" that the particular claimed benefit was actually conferred and would continue, Tundo, 923 F.3d at 287. In other words, it does not matter how much discretion the agency has if the legal interest a recipient claims was never given. That describes this case perfectly. The RIP waiver enables the holder to transfer property, which Clarios has already done. All that revoking the waiver does is return to a remediation process. And because the RIP waiver never conferred a right not to remediate, Clarios is not entitled to a hearing first. That is especially clear here, where Clarios would be entitled to additional process before further remediation actually occurs.[5]

[5] To be clear, DEP is not conceding it necessarily lacks discretion when it comes to RIP waivers. By way of example, one of the criteria for determining whether remediation is in progress is whether the responsible party has met timeframes spelled out in statute and regulation. But if a party seeks an extension of those timeframes, DEP has statutory discretion to grant or deny the request. See, e.g., N.J.S.A. 58:10C-28(d) ("The department may grant an extension to a mandatory remediation timeframe on a case-by case basis as a result of," among other things, "other site-specific circumstances that may warrant an extension as determined by the department."); N.J.A.C. 7:26C-3.5(d) (similar). Thus, under certain circumstances, whether a responsible party is meeting the requirements that remediation entails, including timeframes, can turn on DEP's exercises of discretion. That may matter to a future case. But here, the discretion question is irrelevant because Clarios runs aground of a clearer defect—namely, that the statutes do not entitle it to the particular interests it claims.

The ISRA provisions and subsidiary regulations on which Clarios relies make patently clear that they do not objectively confer the property interest that Clarios claims. Clarios contends that the laws relevant to RIP waivers confer a property interest in the "indefinite[] suspen[sion]" of the "holder's obligation to further comply with ISRA." (Pb5). In other words, Clarios says that because DEP lacks "any discretion . . . in whether to issue a waiver once the requirements are satisfied," issuing a RIP waiver gives rise to an "indefinite[]" and constitutionally protected entitlement to evade compliance obligations. Ibid. But the relevant statutory and regulatory provisions creating the RIP waiver say otherwise. ISRA specifically provided a way for DEP to approve the closure or transfer of ownership or operation of an industrial establishment that was "in the process of a remediation." N.J.S.A. 13:1K-11.5(a); see supra at 1, 8-10. To effectuate that goal, the Legislature created RIP waivers as a mechanism to facilitate the "transfer [of] ownership or operations of an industrial establishment . . . without, or prior to the issuance of, a final remediation document." N.J.A.C. 7:26B-1.8(a). But as the ISRA regulations state, a RIP waiver "may not relieve" its recipient "of the obligations to remediate . . . pursuant to ISRA." N.J.A.C. 7:26B-1.8(b); see supra at 1-2, 10. The text evinces an ability to transfer property, but does not reflect a "mutually explicit understanding" that there is a property right not to remediate further—and

instead says the opposite. Leis v. Flynt, 439 U.S. 438, 442 (1979) (per curiam); see Tundo, 923 F.3d at 287.

Common sense helps explain why the Legislature would not have intended for RIP waivers to confer a property interest in relief from further remediation obligations. ISRA liability extends to each owner or operator of an industrial establishment for each closure of operations or each transfer of ownership or operations that triggers compliance with ISRA. See N.J.S.A. 13:1K-9; see also, e.g., N.J.S.A. 13:1K-8 (definitional section). But it does not require concurrent and duplicative remediation efforts. When one responsible party is actively engaged in remediation, there is no need to hold another responsible party to account for the exact same obligations at the same time. So while the RIP waiver provisions create a mechanism for facilitating the sale or transfer of industrial property, N.J.A.C. 7:26B-1.8(b) reminds regulated entities that the transfer does not necessarily remove them from the queue of responsible parties that might have to "conduct[] . . . remediation" if the site falls out of the "process of . . . remediation," N.J.S.A. 13:1K-11.5(a). If Clarios "was given" the "entitlement" it claims, courts would not only "expect to see some indication of that in the statute [or regulation] itself," Town of Castle Rock, 545 U.S. at 765, but also to find some reason for that entitlement discernible from the text, context, and structure of the relevant laws. No such logic is discernible here.

ISRA's legislative history confirms that the Legislature never intended the issuance of a RIP waiver to create a constitutionally protected entitlement to avoid remediation obligations. Tellingly, the Senate Environment Committee noted in a statement that the provision codified at N.J.S.A. 13:1K-11.5 "authorizes an owner or operator to transfer ownership or operations or close operations if the site is undergoing an ISRA review or any other full site remediation," but it nowhere mentioned that the provision altogether exempts a recipient from other ISRA's obligations. Senate Env't Comm. Statement to Senate Comm. Substitute for S. 1070 at 5; see also Sponsor's Statement to S. 1070 at 36 ("This bill provides that the owner or operator of an industrial establishment previously subject to an ECRA or similar full site remediation can close or transfer the industrial establishment without going through the ECRA process by submitting a certification.").

The administrative record of the agency charged with enforcing ISRA is in accord and reinforces this point. See, e.g., Matturri v. Bd. of Trustees of Jud. Ret. Sys., 173 N.J. 368, 381 (2002) ("Our '[c]ourts generally give substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing.'" (citation and internal quotation marks omitted)). DEP's rulemaking record describes the function of RIP waivers in similar terms. See, e.g., 29 N.J.R. 4913(a), 4929 (Nov. 17, 1997) ("The intent of N.J.AC.

7:26B-5.4 is to allow owners or operators who have purchased an industrial establishment which is being remediated by a former owner or operator to complete a subsequent ISRA subject transaction without having to fully comply with ISRA."); 34 N.J.R. 2407(a) (July 15, 2002) ("Expedited Compliance Options (such as the RIP Waiver), describes the alternatives to the standard ISRA compliance procedure by which an owner or operator of an industrial establishment may obtain a no further action letter or receive authorization to close operations or transfer ownership or operations of the industrial establishment."); 43 N.J.R. 1935(a), 1941 (Aug. 15, 2011) (noting that DEP's approval of a RIP Waiver application "allowed a transaction to proceed prior to the completion of remediation of the industrial establishment"). And DEP has reaffirmed the RIP waiver regulations are not "inconsistent with the affirmative obligation to remediate." 43 N.J.R. 1935(a) at 1942. Again, if Clarios were correct, one would "expect to see some indication" of its view in the legislative and rulemaking history. Town of Castle Rock, 545 U.S. at 765. Otherwise, Clarios's claimed entitlement remains nothing more than an "abstract need or desire." Tundo, 923 F.3d at 287 (quoting Roth, 408 U.S. at 577).

The Appellate Division therefore correctly held that DEP's rescission of Clarios's RIP waiver did not implicate any constitutionally protected property interest in relief from remediation obligations, and thus did not warrant analysis

of whether Clarios received the process it was due. See (PSCa10-14). In line with its obligation "to give proper weight to the contours of the right conferred by the statutes and regulations," O'Bannon, 447 U.S. at 786, the court explained that the RIP waiver "waives only the requirement to provide for remediation before the close of operations or the transfer of ownership," (PSCa11-12). As a result, the court added, "[o]nce that closure or transfer is complete, the recipient of the RIP waiver has received the benefit of that waiver." (PSCa11-12). And that happened here: Clarios "realized th[at] benefit" when it ceased operations in 2007 and then transferred operations in 2011, (PSCa13); see supra at 12-13, 17. No such property interest still exists today, as Clarios is no longer an owner or operator. The "RIP waiver's rescission . . . does not pose any apparent threat to the continuing viability of the sales transaction from 2011," over a decade before the rescission at issue here, (PSCa14), and DEP has not expressly or impliedly attempted to undo the prior and long-ago-complete transfer of property.

Because the RIP waiver does not even plausibly confer any other rights, Clarios was entitled to no hearing before it was revoked. As the Appellate Division succinctly put the point, consistent with the text, context, legislative history, and regulatory history described above, a RIP waiver "does not" objectively excuse a party from its remediation obligations altogether.

(PSCa12). Just the opposite: it permits the party to merely suspend its remedial activities, but only so long as the remediation in progress will be completed by another ISRA responsible party. See supra at 8-10, 12-13. Because DEP's decision to revoke the RIP Waiver in this case does not impact any close of operations or transfer of ownership, the decision (merely a step towards ultimately demanding additional remediation from responsible parties) does not require any additional due process. Courts must "give proper weight to the contours of the right conferred by the statutes and regulations," O'Bannon, 447 U.S. at 786. Here, Clarios's underlying assumption that its RIP waiver absolved it of its remediation obligations attempts to invent a new property interest through a misreading of the relevant laws that, ultimately, undermines ISRA's overriding public interest in addressing the "legacy of contaminated industrial property in this State" and "the potential costs to the State to clean up abandoned contaminated sites." N.J.S.A. 13:1K-7; see State v. Crawley, 187 N.J. 440, 452 (2006) ("In construing a statute, we attempt to capture the essence of the law—its logic, sense, and spirit—to achieve a result contemplated by the Legislature.").

Additionally, it is especially obvious that Clarios is not entitled to any due process before the revocation of a RIP waiver on these facts, because Clarios will still receive further process before DEP affirmatively compels Clarios to

comply with its remediation obligations. The rescission of the RIP waiver here essentially informed Clarios of where it stood in the queue of ISRA responsible parties next in line to remediate the Property, but did not create any new, self-executing legal obligations. Consistent with its general practice, if and when DEP seeks to hold Clarios to account on its remediation obligations, it will first issue a self-executing administrative order. See N.J.S.A. 13:1K-13.1(a)(1) (authorizing DEP to issue an order to person that has violated ISRA); N.J.A.C. 7:26C-9.3(a)(3) (providing that DEP "may issue an administrative order" to a responsible party that "[r]equires compliance with [applicable] provision[s]"); see also, e.g., In re R.R. Realty Assocs., 313 N.J. Super. 225, 235 (App. Div. 1998) (noting that ISRA is a strict liability statute, such that any responsible party "must remedy environmental contamination found on the site," regardless of fault); N.J.A.C. 7:26B-1.10 (same). And under N.J.A.C. 7:26C-9.10(a)(4), Clarios, as the recipient of an administrative order, would be entitled to request an adjudicatory hearing before DEP. So even without a hearing on the mere rescission of the RIP waiver, Clarios will be entitled to a hearing before it actually undertakes the work of remediating the Site itself.

The cases Clarios relies on do not help its cause. DEP v. Atlantic States Cast Iron Pipe Co., 241 N.J. Super. 591 (App. Div. 1990), is inapposite. See (PSb9-10). There, the Appellate Division held that DEP's grant of a ninety-day

"temporary operating certificate" to a foundry under the Air Pollution Control Act, which DEP affirmatively renewed every ninety days without fail for three consecutive years, effectively granted the foundry an operational license, or a "full," rather than temporary, "operating certificate." See id. at 602-03. So when DEP decided, after three years and approximately a dozen prior renewals, not to renew the ninety-day certificate, that decision implicated "more than a simple expectation alone" and thus warranted a hearing. Id. at 603.

But those facts are plainly distinguishable. In Atlantic States, there was little question about the what the temporary operating certificate was; the court easily concluded that "under DEP's own regulations," the "temporary operating certificate" amounted to a type of operating license, and the only real question then was whether that license conferred a property interest. Id. at 602; see id. at 603. Here, however, the dispute is more fundamental, and turns instead on an interpretive question about what if any entitlement the RIP waiver conferred. For all the reasons discussed, the RIP waiver did not objectively create the entitlement Clarios claims. See supra at 12-13, 18-22. That is fatal.

Clarios fares no better by relying on unpublished lower court decisions. To start with the obvious, they are not precedential. R. 1:36-3. They are also inapt. Morgan Stanley Services Co. v. DEP, did not involve the constitutional question at issue here at all. See No. A-5703-08T1, 2011 WL 222178 (N.J.

Super. Ct. App. Div. Jan. 26, 2011); (PSb12-13) (discussing Morgan Stanley). Rather, Morgan Stanley is a run-of-the-mill administrative law case that turned on the familiar question of whether DEP had "adequately articulated . . . the basis for its" decision. Id. at *6. That DEP did not adequately explain the basis for its action there says nothing about whether the ISRA provisions governing RIP waivers here create a "mutually explicit understanding" to support Clarios's due process claim. Leis, 439 U.S. at 442; see Tundo, 923 F.3d at 287.

Nor does Frederick Gumm Chemical Company v. DEP get Clarios further. No. A-1056-05T2, 2007 WL 1574304 (N.J. Super. Ct. App. Div. June 1, 2007). In Frederick Gumm, the Appellate Division summarily asserted that the "rescission action" at issue there was "[m]anifestly . . . a threat to petitioner's property interests," without engaging in any analysis of the threshold procedural due process question, and without even citing any case law addressing that legal issue. Id. at *5. That unsupported conclusion from an unpublished decision offers no guidance to this Court in resolving the question before it.[6]

[6] In its petition, Clarios urges this Court to consider Frederick Gumm because it has been "cited by . . . NJDEP." (Pb10 n.7). But the lone citation it provides is to a litigation document in another case in which DEP cited Frederick Gumm for a separate and entirely unrelated legal proposition. See id. (citing NJDEP v. Monsanto Co., et al., No. GLO-L-000800-22 (N.J. Super. Ct.), NJDEP brief in opposition to motion to dismiss, 2023 WL 9420346, at *25).

Finally, if this Court disagrees with DEP as to this threshold due process question, and determines that rescission of the RIP waiver did in fact implicate a constitutionally protected property interest even though it has no bearing in this case on the closure of operations or transfer of property, this Court should remand to DEP to consider what process Clarios is owed and whether a post-deprivation hearing is warranted. See, e.g., Nicoletta, 77 N.J. at 164 (discussing the factors governing the process due, and citing Mathews v. Eldridge, 424 U.S. 319 (1976)). As DEP has argued throughout this litigation, due process did not warrant a hearing under the circumstances, where no material facts concerning the RIP waiver's rescission are in dispute. But that would be a question for the agency to address, and then the Appellate Division to review, in the first place. See, e.g., In re Corbo, 238 N.J. 246, 254 (2019) (noting "preferred remedy to rectify procedural errors below at the administrative level is a remand," and emphasizing that this Court typically does not address issues that have not yet been adjudicated by the court or agency below).

In sum, the pertinent provisions of ISRA and DEP's regulations do not evince any legitimate and objective entitlement to ongoing and indefinite relief from the obligation to remediate. At most, the RIP Waiver conferred on Clarios an entitlement to cease operations and transfer the property, but because Clarios already realized or received that benefit, any such interest is extinguished—and

in any event, has no bearing on whether Clarios has a constitutionally protected entitlement in relief from its compliance obligations under ISRA. Accordingly, Clarios's challenge fails at the threshold due process step.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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