

New Jersey Supreme Court Affirms DEP’s Discretion to Rescind Remediation In Progress Waivers, Underscoring Environmental Transaction Risks

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In a unanimous decision issued on April 7, 2025 in *In re Appeal of the N.J. Dep’t of Environmental Protection’s Denial of Request for Adjudicatory Hearing*, the New Jersey Supreme Court held that the Department of Environmental Protection’s (“DEP”) issuance of a Remediation in Progress Waiver (“RIP Waiver”) does not create a constitutionally protected property interest. The ruling establishes that such waivers may be rescinded at the DEP’s discretion, and without notice or a hearing, where a site is no longer in compliance with remediation requirements under the New Jersey Industrial Site Recovery Act (“ISRA”).

ISRA is New Jersey’s transaction-trigger remediation statute that requires owners and operators of certain industrial establishments to investigate and remediate environmental contamination before the closing of operations or transferring ownership of the industrial establishment. A RIP Waiver permits the transfer or cessation of operations at an industrial establishment without the responsible party first completing the ISRA process of environmental investigation and remediation, if remediation of the site is already underway. The RIP waiver is commonly used in transactions to facilitate closure of industrial operations or sale of an industrial establishment before final cleanup is complete, with the expectation that the party undertaking the remediation will in compliance with ISRA’s obligations continue the work to completion and have in place the required remediation funding source. The Court’s decision underscores that RIP Waivers are conditional and do not provide procedural protections once the site is no longer in compliance with the ISRA obligations, i.e. ongoing remediation and a funding source in place.

The case arose from a 2007 RIP Waiver granted to Clarios, LLC (“Clarios”), a corporate successor to a battery manufacturing entity that had ceased operations at a New Brunswick, NJ industrial site. The waiver allowed Clarios to transfer the property without first completing the site remediation, relying instead on ongoing cleanup efforts that were funded by a remediation trust originally established by a prior owner.

Clarios sold the property in 2011 to DeNovo New Brunswick, LLC, and thereafter transferred the site to 760 New Brunswick Urban Renewal, LLC. In 2013, DeNovo formally assumed the ongoing ISRA remediation obligations at the site which included the remaining funds in the trust fund that had been established as the remediation funding source for the site. By 2019, the remediation trust was underfunded, the required DEP submissions were incomplete, and key deadlines had been missed. In April 2022, the DEP formally rescinded Clarios’s RIP Waiver, citing noncompliance with ISRA deadlines, a depleted funding source, and lack of progress in remediation.

Clarios sought an adjudicatory hearing, claiming that rescission of the waiver without notice violated its due process rights. The DEP denied the request, and both the Appellate Division and Supreme Court upheld the agency's decision.

The Court held that Clarios had no constitutionally protected property interest in the continued viability of the RIP Waiver. The opinion emphasized that “[t]he DEP’s initial grant of the waiver did not create a property interest in the continued suspension of Clarios’s remediation obligations.” In its analysis, the Court emphasized that neither ISRA nor its implementing regulations limited the DEP’s discretion to rescind a waiver, particularly once a site falls out of ISRA compliance.

The Court noted that a protected property interest requires a “legitimate claim of entitlement,” which may arise from “statutes, regulations, nor a mutually explicit understanding.” None were present here. The RIP Waiver itself, and the relevant regulations, expressly reserved the DEP’s right to enforce remediation obligations in the future. The Court dismissed Clarios’s argument that the DEP’s longstanding silence or inaction created an implied entitlement.

The ruling makes clear that RIP Waivers do not insulate past owners or operators from enforcement if there is not continued ISRA compliance. While RIP Waivers remain a valuable tool to facilitate industrial property closures and transfers when a remediation is already in progress, this ruling is a wakeup call that such waivers may not provide long-term protection from future enforcement. Once a site falls out of compliance, the DEP retains broad discretion to rescind the waiver and pursue enforcement against past owners or operators.

Transactional parties need to carefully evaluate how they assess and allocate environmental liabilities where a RIP Waiver is in place. The Supreme Court’s decision clarifies the limited legal effect of RIP Waivers, and reinforces that stakeholders in industrial property transactions must take a more proactive approach in monitoring the ongoing ISRA compliance through its completion and closure regardless of the extent of time passage. Further, they must insure that in the event the RIP Waiver is terminated, they are adequately protected via escrows or other means so as to enable them to step in and complete the ISRA compliance. The decision is a reminder that regulatory waivers are inherently conditional, and silence from the agency should not be mistaken for safe harbor.

If you have questions about how this decision may impact your pending transactions or environmental compliance strategies, please contact Randi Schillinger, Esq. or Geri Albin, Esq.